

DOCUMENT RESUME

02341 - [A1332299]

[Protest against Alleged Impropriety in Solicitation Found
Untimely]. B-188411. May 5, 1977. 4 pp.

Decision re: Otis Elevator Co.; by Paul G. Dembling, General
Counsel.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel; Procurement Law I.
Budget Function: General Government: Other General Government
(806).

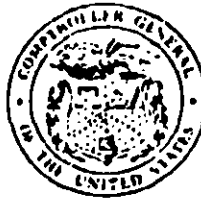
Organization Concerned: General Services Administration.

Authority: GSA Procurement Regulation 5802.202-79. 4 C.F.R.
20.2(b)(1). 4 C.F.R. 20.2(c). B-186594 (1976). B-184655
(1975).

A protest against a solicitation for installation of
escalators alleged that provisions for evaluating maintenance
options were improper. The protest was found to be untimely and
without significant issues related to procurement practices.
(HTW)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON D.C. 20548

Kozla Kowitz
P.L.L.

FILE: B-188411

DATE: May 5, 1977

MATTER OF: Otis Elevator Company

DIGEST:

Protest against alleged impropriety in IFB as to method of evaluating maintenance options not filed prior to bid opening is untimely and not for consideration; neither does protest raise issue significant to procurement practices or procedures to warrant consideration on merits.

On November 8, 1976, invitation for bids (IFB) No. GS-03B-78122 was issued by the General Services Administration (GSA) for installation of escalators at the Social Security Administration Headquarters, Baltimore, Maryland. The solicitation required bidders to submit a base bid for furnishing and installing the escalators and a bid for a 1-year escalator maintenance option.

Originally the IFB required a lump-sum bid for all work including the 1-year maintenance option. However, amendment No. 4 modified the basis for awards and provided the following:

"3. BIDS AND BASIS OF AWARD

"3.1 Two lump sum bids are required as follows:

Bid No. 1 for furnishing and installing elevators.
Bid No. 2 for furnishing and installing escalators.

"3.2 Lump sum bids on options for performing maintenance and adjustment as follows:

Bid No. 1A (Option) for adjusting and maintaining elevators as provided in Clause 9, Section 9.1.

Bid No. 2A (Option) for adjusting and maintaining escalators as provided in Clause 9, Section 9.1.

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"3.3 The Government reserves the right to accept or reject bids on the options. If a bid on an option is accepted, the amount will be added to the related Bid No. 1 or Bid No. 2, for purpose of determining the comparative standing of bidders. Each contract (with or without the option) will be awarded to the lowest responsive responsible bidder thereon."

The following bids were opened on February 8, 1977:

	<u>Base Bid</u>	<u>Maintenance Option</u>	<u>Total</u>
Westinghouse Elevator Co.	\$1,569,228	\$107,602	\$1,676,830
Otis Elevator Co.	1,607,000	63,500	1,670,500
Haughton Elevator Div.,			
Reliance Electric Co.	2,283,000	86,400	2,369,400

GSA intends to make an award on the basis of the lowest bid on the base bid only (construction), since the activity responsible for operation and maintenance of the escalators has not approved the option. The protest of Otis Elevator Co. (Otis) to this Office followed.

Essentially, Otis contends that evaluation of the bids in this instance is governed by GSA Procurement Regulation (GSPR) § 55-2.202-79 which reads in pertinent part as follows:

"(c) Whenever a separate bid on the maintenance option is required, the invitation for bids shall provide that, for purposes of determining the relative standing of the bidders in making award, the maintenance option bid will be added to the bid on the construction (and to such bids on alternates as may be accepted by the Government, if applicable). The contract shall also provide that the monthly payment for elevator maintenance shall be based upon the ratio which the number of elevators subject to maintenance in a given month bears to the total number of elevators to be maintained for twelve months each."

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Under GSPR § 5B-2.202-79(a) similar maintenance options may be included in the specifications for escalators. Otis argues that GSPR § 5B-2.202-79(c) requires that the maintenance option be added to the bid on construction for the purposes of determining the relative standing of the bidders in making award, notwithstanding the evaluation method contained in the IFB.

The proper time to protest a defective solicitation provision under our bid protest procedures is prior to bid opening. 4 C.F.R. § 20.2(b)(1) (1976). A timely protest of such a solicitation provision gives the procuring agency the opportunity to correct the solicitation by issuing amendments before bids are opened and prices revealed. Since the protest of Otis was not filed until after bid opening, it is untimely. Otis, however, argues that its protest was not untimely for three reasons.

Otis cites Lloyd Kessler, B-186594, September 3, 1976, 76-2 CPD 218, for the proposition that when the provisions of a solicitation conflict with an agency's mandatory procurement regulation for determining the relative standing of bidders, a protest alleging violations of the procurement regulations will be timely even if filed after bid opening. However, see Lloyd Kessler, B-186594, October 19, 1976, 76-2 CPD 344, where we recognized that the proper time to protest a defective solicitation provision is prior to bid opening.

Here, the evaluation criteria contained in the IFB clearly contradicted GSPR § 5B-2.202-79. It was not necessary to wait until bid opening to see whether a violation occurred. Accordingly, the protest must have been filed prior to bid opening to have been timely. Therefore, Kessler does not support Otis' contention that its protest is timely.

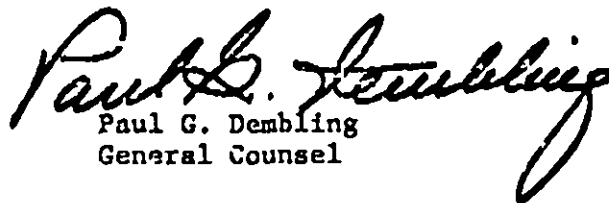
Second, Otis contends that even if it had protested prior to bid opening, the protest would have only informed GSA of the same impropriety already brought to GSA's attention by another party. The fact that another party might have raised concern over the Government's discretion in making the award does not affect the timeliness of Otis' protest, especially since GSA took no steps to cure the alleged defects.

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Third, Otis asserts that a protest by it prior to bid opening would have been premature. The inclusion of a provision in the IFB for the discretionary evaluation of bids with or without the option contradicts GSPR § 5B-2.202-79. The conflict exists in the solicitation even if GSA evaluated bids on the basis of a price for construction and the maintenance option because of the discretion afforded GSA. Here, the evaluation criteria were originally in conformity with GSA procurement regulations and subsequently amended so as to conflict. Therefore, a protest by Otis prior to bid opening would not have been premature.

Finally, Otis argues that the protest presents an issue "significant to procurement practices or procedures." 4 C.F.R. § 20.2(c). It is our view that the inclusion of evaluation criteria which may be in conflict with a GSA procurement regulation does not raise any issues significant to procurement practices or procedures. We have held that "issues significant to procurement practices or procedures" refers to the presence of a principle of widespread interest. Fairchild Industries, Inc., B-184655, October 30, 1975, 75-2 CPD 264.

Accordingly, the protest of Otis is untimely and not for consideration on the merits.


Paul G. Dembling
General Counsel