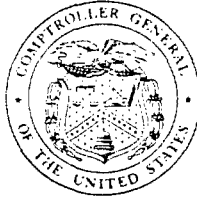


Proc. II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

9366

FILE: B-193942

DATE: March 7, 1979

MATTER OF: Mars Signal Light Company

CNG01965

DIGEST:

[Protest of Two Contract Awards By Defense Logistics Agency]

1. Protest based on matters of agency's affirmative determination of responsibility is not reviewed by GAO absent evidence of fraud or other circumstances not applicable here. However, mere allegation of fraud, without more, is not sufficient to justify review under Bid Protest Procedures.
2. Allegation of anti-trust violation is matter for consideration by Department of Justice, not GAO.
3. Below-cost ("buy-in") bid, acceptance of which is not legally objectionable, is factor to be considered by procuring agency in responsibility determination, but is not reviewable under Bid Protest Procedures. Agency is responsible for preventing recoupment of possible "buy-in" losses.
4. Repurchase award to defaulted contractor may be made at price not exceeding that of terminated contract. Default is only one factor to be considered in responsibility determination.
5. Where initial protest correspondence raises issues not reviewable by GAO, no useful purpose is served by further development under Bid Protest Procedures, and dismissal is in order.

Mars Signal Light Company protests the Defense Logistics Agency's (DLA) award of two contracts (DLA-400-79-C-0988 and DLA 400-79-C-0989) to the Julian A. McDermott Corporation. Mars alleges that the awardee

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is not responsible; has submitted below-cost prices; and has practiced anti-trust violations. As the following discussion will indicate, we do not consider these issues under our Bid Protest Procedures.

Mars alleges that McDermott has a poor performance record on previous Government contracts for similar requirements and that it is unable to manufacture a product which meets contract specifications. These allegations involve DLA's determination that McDermott is responsible. Even though these allegations may be valid, we do not review them under our protest procedures except where fraud by procuring officials is shown, or in other circumstances not applicable here. Semco, B-192623, October 16, 1978, 78-2 CPD 28 and decisions cited therein. The protester has made a vague reference to "fraud in procurement", requesting our investigation of the matter. However, it is not our practice to conduct investigations under our bid protest function for the purpose of establishing the validity of a protester's speculative statements. Peter Rosen Productions, Inc., B-192481, September 28, 1978, 78-2 CPD 243. Mars presents no evidence of fraud by procuring officials and thus offers no basis for our considering the matter as a protest. See JBS Construction Company, B-187574, January 31, 1977, 77-1 CPD 79.

Mars further contends that McDermott bid "so far below the market that [it] is interfering with free enterprise" in violation of "Sec. 2 of the Anti-Trust Act." The appropriate agency for consideration of alleged anti-trust activities is the Department of Justice, and not the General Accounting Office. Clifton Precision Division of Litton Systems, Inc.-Reconsideration, B-190081, June 22, 1978, 78-1 CPD 451.

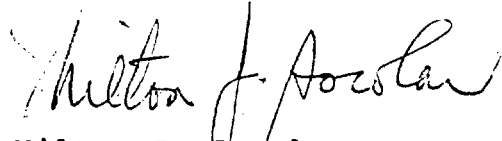
The protester also argues that McDermott will not satisfactorily perform the contracts because it has "bought in" below cost. The "buy-in" allegation constitutes another challenge to DLA's affirmative determination of responsibility which, for the reasons discussed supra, we will not review. Although "buying-in" is discouraged, the practice is not illegal and the Government may accept a below-cost bid. See Defense Acquisition Regulation § 1-311 (1976 ed.) and

Allied Technology, Inc., B-185866, July 12, 1976, 76-2 CPD 34. Thus, the fact that a low bidder may incur a loss at its bid price does not justify rejecting an otherwise acceptable bid. Inter-Con Security Systems, Inc., B-189165, June 15, 1977, 77-1 CPD 434.

Finally, Mars objects because one of these contracts resulted from a reprocurement action to fulfill the requirements of a previous McDermott contract which DLA had terminated for default. However, default is only one factor to be considered by the procuring activity in determining responsibility. See B-165884, May 28, 1969, and decisions cited therein. Award may be made to a defaulted contractor on the repurchase contract in appropriate circumstances. See R. H. Pines Corporation, 54 Comp. Gen. 853 (1975), 75-1 CPD 224.

In view of the fact that the protest correspondence raises issues which we do not review, no useful purpose would be served by further developing this case under our Bid Protest Procedures, 4 C.F.R. Part 20 (1978).

The protest is dismissed.


Milton J. Sogolar
General Counsel