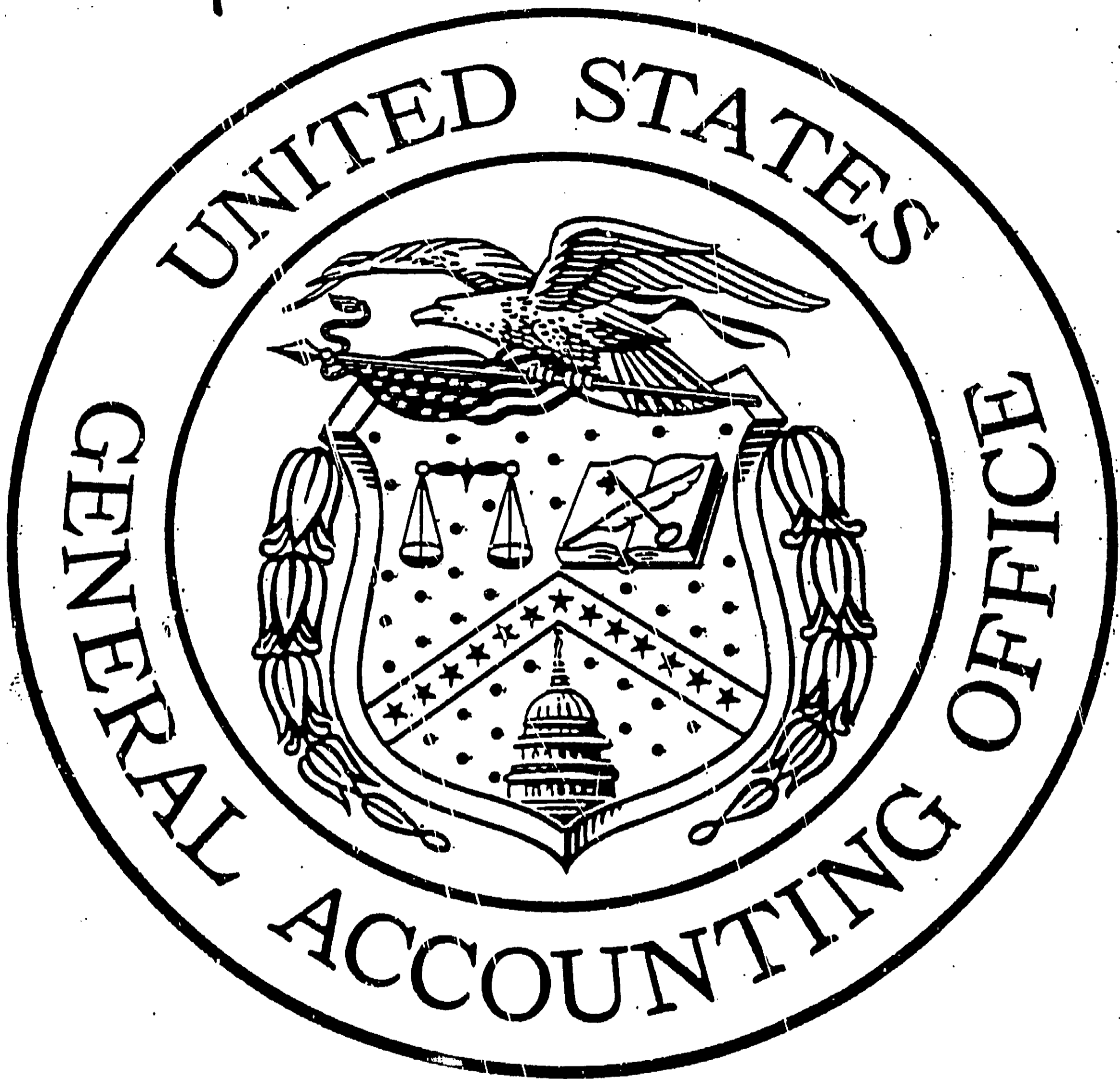


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**DECISION**



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

FILE: B-204253

DATE: February 2, 1982

MATTER OF: E.C. Campbell, Inc.

**DIGEST:**

1. Where the solicitation required successful commercial operation of equipment of "approximately the same type and design" as that offered and where the contracting officer considered all relevant evidence before determining that the low bidder complied with the requirement, GAO has no basis to conclude that the contracting agency abused its discretion in determining that the low bidder satisfied the requirement.
2. Protester's contention--that the low bidder cannot perform at the low bid price and in the time required--concerns the low bidder's general capability to perform. GAO does not review that type of protest against an affirmative determination of responsibility.
3. GAO does not consider, under the bid protest function, allegations concerning possible criminal violations because consideration of such matters is charged to the Department of Justice.

E.C. Campbell, Inc. (Campbell), protests the award of a contract to Uniwrap Systems, Inc. (Uniwrap), by the Defense Logistics Agency (DLA) under invitation for bids (IFB) No. DLA400-81-B-4374 for pallet shrink wrap systems. Campbell contends that the low bidder, Uniwrap, was not eligible for award because Uniwrap did not satisfy the IFB's definitive responsibility requirement for successful commercial operation and because the contracting officer should not have determined Uniwrap to be responsible. We conclude that the definitive responsibility aspect of the protest is without merit and we dismiss the other aspect of the protest without considering the merits.

The IFB called for supplying and installing three pallet shrink wrap tunnel systems with powered conveyors. DLA uses these devices to package goods on a pallet; a pallet of items, enclosed in polyethylene wrap, is placed on a powered conveyor moving the pallet into a tunnel, which is also an electric convection oven. While the pallet is in the tunnel, the oven's heat shrinks the polyethylene around the items on the pallet; then the conveyor moves the pallet out of the oven. This system is known as the straight-through type.

The IFB's Successful Commercial Operation Clause provided that "equipment of approximately the same type and design as that offered shall have operated successfully in a commercial institution for at least 1 year."

First, Campbell contends that Uniwrap did not satisfy this requirement because Uniwrap's equipment is not normally the straight-through type and Uniwrap's system uses liquid propane or natural gas instead of electricity, which involves a completely different design. Campbell notes, based on drawings of its electric and gas equipment, that electric and gas systems are completely different; electric equipment requires many more components than gas equipment and the design problems associated with electric equipment take about 2 years to overcome even when a manufacturer has gas equipment in successful operation. Campbell also states that Uniwrap's commercial literature does not mention the straight-through-type systems indicating that Uniwrap does not routinely offer the straight-through-type system.

DLA reports, relying on a letter from a commercial firm, that Uniwrap has had a gas-heated, shrink tunnel system in successful commercial operation for over 1 year. Uniwrap states that its basic modular design is adaptable as a straight-through-type and as an electric-convection-type system. Based on the view of DLA's technical staff, the unit in operation is approximately the same type and design as the equipment specified in the IFB; thus, Uniwrap satisfied the IFB's successful commercial operation requirement.

In our view, the IFB's successful commercial operation provision is merely part of the general specifications concerning performance and it does

not establish a precondition to award. See, e.g., Johnson Controls, Inc., B-200466, February 20, 1981, 81-1 CPD 120. Protests, like this one, alleging that the awardee will not deliver equipment in conformance with the contract requirements concern matters of contract administration, which are the responsibility of the contracting agency and which are not considered under our bid protest function. Maxton Lock Company, Inc., B-200469, February 4, 1981, 81-1 CPD 66. Protests, like this one, alleging that the awardee cannot deliver equipment in conformance with the contract requirements concern the bidder's responsibility and are not reviewed by our Office in these circumstances. Id.

In the view of the parties, however, the IFB's requirement for successful commercial operation constitutes a definitive responsibility criterion--a specific and objective factor, which must be satisfied before a bidder is eligible for award. Assuming that the requirement established a definitive responsibility criterion, we have considered definitive responsibility protests similar to this one. In Mosler Airmatic Systems Division, B-187586, January 21, 1977, 77-1 CPD 42, the solicitation required the successful offeror to provide "proof of successful installations similar in nature;" in Continental Service Company, B-187700, January 25, 1977, 77-1 CPD 53, the solicitation required bidders to furnish evidence of having performed firefighting services "of the type required;" in Johnson Controls, Inc., B-191262, April 27, 1978, 78-1 CPD 442, the solicitation required that each bidder have a successful working system in operation for at least 2 years using "software routines functionally similar to those outlined in these specifications." In each of these decisions, we limited the scope of our review to ascertaining whether evidence of compliance had been considered because the sufficiency of the evidence is a matter reserved to the subjective judgment of the contracting agency.

Since the IFB's requirement here for equipment of "approximately the same type and design" as that offered is essentially the same as in the above decisions, we limit our review to ascertaining whether evidence was considered by the contracting officer in making the compliance determination. The sufficiency of the evidence is a matter reserved to the subjective judgment of the

contracting officer. The record shows that Uniwrap had a pallet shrink tunnel system in successful commercial operation for more than 1 year. The record also shows that the contracting officer had the benefit of the protester's views, Uniwrap's literature, and the advice of the agency's technical personnel before finally concluding that Uniwrap's system was approximately the same type and design as the equipment specified in the IFB. In our view, we have no basis to conclude that the agency abused its discretion in determining that Uniwrap satisfied the requirement. See Gould, Inc., and Fuji Electric Co., LTD., B-190969, August 4, 1978, 78-2 CPD 86. Thus, this aspect of Campbell's protest is without merit.

Second, Campbell contends that the contracting officer should not have determined that Uniwrap is responsible--capable of doing the work as required. In support, Campbell argues that Uniwrap cannot perform as required at the low bid price, which was 31 percent lower than the second low price submitted by Campbell and which was almost \$10,000 lower than Uniwrap's bid for the same equipment a year earlier (that solicitation was canceled). Campbell also argues that Uniwrap is not financially capable to perform and Uniwrap is currently under the protection of the bankruptcy laws. Campbell also notes that the time it takes to successfully convert gas systems to electric systems exceeds the time for delivery as required by the IFB.

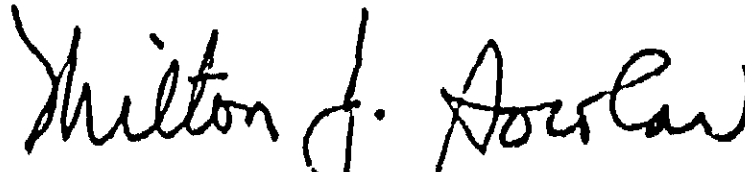
DLA reports that the Defense Contract Administration Services (DCAS) conducted a preaward survey and determined that Uniwrap was capable to perform except from a financial standpoint. Subsequently, Uniwrap obtained a line of credit, which satisfied the contracting officer that Uniwrap was capable of performing and award was made to Uniwrap.

This aspect of Campbell's protest concerns Uniwrap's general capability to perform at the bid price and in the time required, which is the type of affirmative determination of responsibility no longer reviewed by our Office. See, e.g., Environmental Laboratory of Fayetteville, Inc., B-205593, December 7, 1981, 81-2 CPD \_\_\_\_\_. Thus, this aspect of Campbell's protest is dismissed.

Third, Campbell contends that Uniwrap was not eligible for award because Uniwrap may have made material misrepresentations in connection with DLA's responsibility determination by leading DLA to believe that there was no current Dun and Bradstreet, Inc., report, there were no pending liens against the company, and Uniwrap was not currently under the protection of the bankruptcy laws. Uniwrap states that Campbell is wrong because DCAS and the contracting officer have all relevant documents concerning Uniwrap's ongoing bankruptcy matter. DLA reports that Campbell's allegations were referred to DLA's Fraud Counsel for investigation and referral, if warranted, to the Department of Justice.

Campbell's contention concerns possible violations of criminal law (18 U.S.C. § 1001 (1976)) and Campbell's contention is being investigated by the appropriate authorities. Such matters are outside the scope of our bid protest function. Gillette Industries, Inc., B-204232, August 13, 1981, 81-2 CPD 139. Accordingly, this aspect of Campbell's protest is dismissed.

The protest is denied in part and dismissed in part.



Acting Comptroller General  
of the United States