

DECISION

24981
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-211231**DATE:** April 22, 1983**MATTER OF:** Educational Technology & Services, Inc.**DIGEST:**

1. Protest alleging that agency used confidential and proprietary information in developing specifications for first-step solicitation of a two-step procurement is untimely when filed more than 4 months after the first-step closing date for receipt of proposals.
2. In general, GAO will not review a protest that an agency should procure an item from a particular firm on a sole-source basis. Further, the decision whether a particular procurement should be set aside for small business essentially is one within the discretion of the contracting agency.
3. Protest challenging capability of awardee to perform contract relates to matter of responsibility which will not be reviewed absent a showing that the contracting officer acted fraudulently or in bad faith.
4. The mere fact that awardee may have submitted a below-cost bid does not constitute a legal basis for precluding a contract award.

Educational Technology & Services, Inc. (ETS), protests the award under invitation for bids (IFB) No. 1339-83-B-0014 to Technology, Inc., for a computer assisted Morse code training system. The solicitation was issued by the Naval Training and Equipment Center (NTEC), Orlando, Florida.

We dismiss in part and deny in part the protest.

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The initial request for technical proposals (RFTP), for step one of this two-step procurement, was issued on June 2, 1982, as a 100-percent small business set-aside. On September 24, 1982, the small business set-aside was dissolved and the solicitation was reissued on an unrestricted basis. The closing date for receipt of proposals was November 12, 1982.

On the basis of technical proposals submitted, both ETS and Technology, Inc., were invited to participate in the second step and submit bids. Bids from both firms were received and were opened on February 28, 1983. Technology, Inc., was determined to be the low bidder and the contract was awarded to that firm on March 23, 1983.

ETS, in its protest to our Office, raises several questions concerning the procurement process. Initially, ETS alleges that NTEC used confidential and proprietary information in developing the specifications for the Morse code training methodology. ETS claims that in response to a solicitation issued by the Army in 1980 to identify companies qualified in the area of Morse code training, ETS submitted a proposal which described its unique method. Through subsequent contacts with both the Army and the Navy, ETS provided additional information concerning its program; but ETS claims that at all times it made clear that it considered its information proprietary and restricted. ETS alleges that the technical specifications describing the required training methodology issued by NTEC were almost a verbatim recitation of the training method set forth by ETS in its original proposal and described to the Army during onsite demonstrations.

Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), require that protests based upon alleged improprieties in any type of solicitation which are apparent prior to the closing date for receipt of initial proposals shall be filed prior to that closing date. We have held that improprieties in the first step of a two-step procurement must be protested prior to the first-step closing date for receipt of proposals. Julie Research Laboratories, Inc., November 16, 1982, 82-2 CPD 446. ETS's allegations concern specification improprieties contained in the first-step

solicitation and, as such, should have been filed no later than November 12, 1982. Since the protest by ETS was not filed with our Office until March 23, 1983, more than 4 months after the closing date for receipt of proposals under the first step, we find this protest ground untimely.

ETS also claims that NTEC should have awarded the contract on a sole-source basis since only ETS possessed the unique technology which was essential in developing the RFTP specifications. The objective of the General Accounting Office bid protest function is to insure full and free competition for Government contracts. As a general matter, our Office does not review a protest that an agency should procure an item from a particular firm on a sole-source basis. Ingersoll-Rand Company, B-209778, December 15, 1982, 82-2 CPD 536.

Further, ETS questions the decision by NTEC to reissue the solicitation on an unrestricted basis rather than set aside the procurement for small business. It is well recognized that, with certain exceptions not relevant here, there is nothing in the Small Business Act, 15 U.S.C. § 644 (Supp. IV, 1980), or the procurement regulations which make it mandatory that any particular procurement be set aside for small business. While it is the Government's policy that a fair proportion of purchases be placed with small business concerns, the decision whether a particular procurement should be set aside for small business essentially is one within the discretion of the contracting activity. Cushman Electronics, Inc., B-207972, August 5, 1982, 82-2 CPD 110.

Finally, ETS challenges the capabilities of Technology, Inc., to perform the contract and also alleges that the bid submitted by Technology, Inc., is a deliberate buy-in attempt. A protest challenging the capability of an awardee to perform the contract relates to responsibility which will not be reviewed by our Office absent a showing that the contracting officer acted fraudulently or in bad faith. Hooper Holmes, Inc., B-209193.2, December 22, 1982, 82-2 CPD 568. ETS does not allege that either exception is present here and, accordingly, we have no basis for reviewing this matter. With respect to the allegation that Technology, Inc.'s, bid was a deliberate buy-in attempt, we have held

that the mere fact that a bidder may have submitted a below cost bid does not constitute a legal basis for precluding a contract award. Ellsworth Street Associates, B-207292, B-207293, June 2, 1982, 82-1 CPD 528.

The protest is dismissed in part and denied in part.

for *Harry D. Chu Cleve*
Comptroller General
of the United States