



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

**Matter Of:** Burnall Facilities Group, Inc.  
**File No.:** B-259582  
**Date:** February 3, 1995

## DECISION

Burnall Facilities Group, Inc. protests the Department of the Army's actions in connection with solicitation No. DABT51-94-R-0023. Burnall alleges that the solicitation contained numerous defects, that it was not provided with proper notice of its exclusion from competition, that it never received further amendments after its exclusion and that the award is improper because the awardee cannot perform at the prices offered.

We dismiss the protest.

Burnall's challenge to the solicitation is untimely. Under our Bid Protest Regulations, protests based on alleged improprieties in a solicitation must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. In this case, the closing date for receipt of proposals was July 29, 1994. The instant protest was not filed until December 5, 1994. Therefore, this aspect of the protest is untimely and will not be considered.

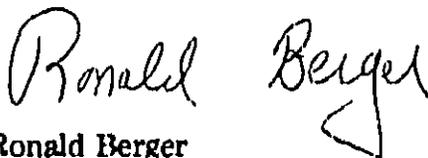
Burnall's primary challenge is to the Army's failure to properly notify it of the exclusion of its proposal from the competitive range. Burnall asserts that because it was not timely notified at the time of rejection, it is appropriate to reasonably infer that it remained a "viable" offeror and as such was entitled to receive subsequent solicitation amendments. Federal Acquisition Regulation (FAR) § 15.609(c) does require agencies to notify offerors "at the earliest practical time" when their proposals are excluded from the competitive range. An agency's failure to do so, however, does not provide an independent basis for sustaining a protest. Rather, it is regarded as a procedural defect not affecting the legality of the contract ultimately awarded. See Drytech, Inc., B-246152.2, Feb. 24, 1992, 92-1 CPD ¶ 217. Accordingly, Burnall is not correct in inferring that it remained a viable offeror. Once its proposal had been rejected, Burnall was no longer in the competition and was not entitled to participate in discussions or receive any solicitation amendments.

(Burnall also complains that the agency did not provide it with a proper post-award notice pursuant to FAR § 15.1001(c). Again, this involves only a procedural defect and itself is not a basis to object to an award. See Flexsteel Indus. Inc., B-254771; B-254771.2, Jan. 18, 1994, 94-1 CPD ¶ 21.)

Finally, Burnall asserts that either the awardee's price is "unreasonably low" or the agency is accepting an item "which may not serve its needs." A protester's claim that an offeror submitted an unreasonably low price—or even that the price is below the cost of performance—is not a valid basis for protest. An offeror, in its business judgment, properly may decide to submit a price that is extremely low, Diemaster Tool, Inc., B-238877, Apr. 5, 1990, 90-1 CPD ¶ 375, and it is up to the agency to decide if the bidder can perform the contract at the offered price. See JWK Int'l Corp., B-237527, Feb. 21, 1990, 90-1 CPD ¶ 198. By awarding the contract, the agency necessarily determined that the awardee was a responsible contractor. A determination that an offeror is responsible is based, in large measure, on subjective judgments which generally are not susceptible to reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. There is no such showing here.

As for whether the item accepted will meet the agency's need, that is a matter for the agency to determine. In the absence of a showing that the agency accepted a proposal that deviated from the specification, this issue also provides no basis for protest.

The protest is dismissed.



Ronald Berger  
Associate General Counsel