GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-220743.3

April 20, 1988

The Honorable Jim Sasser
United States Senate

Dear Senator Sasser:

This is in response to your letter dated April 7, 1988, received April 14, in which you ask us to review a protest of a constituent, Technology for Energy Corporation (TEC) of Knoxville, Tennessee. For the reasons stated below, this matter is not appropriate for our consideration.

Your correspondence concerns the acquisition by Hill Air Force Base (AFB), Utah, of an X-ray residual stress analyzer. Our records show that around September 30, 1985, Hill AFB awarded a contract to TEC for the supply of this equipment. This award was protested to our Office by Denver X-Ray Instruments, Inc., which claimed, in general terms, that TEC could not meet the specification requirements unless those requirements had in some way been relaxed without notice to the protester. We dismissed Denver X-Ray's protest by decision of October 18, 1985, on the basis that it in effect was a challenge to the contracting officer's determination that TEC was a responsible prospective contractor. Under our Bid Protest Regulations, we do not review such determinations absent certain circumstances which did not appear applicable to Denver X-Ray's protest.

Denver X-Ray subsequently asked us to reconsider our dismisal of its protest. In its request for reconsideration, Denver X-Ray identified seven specification requirements which it alleged TEC could not meet and also stated that Hill AFB had terminated TEC's contract for the convenience of the government. The Air Force confirmed that it had terminated TEC's contract and, because it deemed the initial solicitation specifications unduly restrictive of competition, advised us that it would resolicit for this equipment under revised specifications. On the basis of this information, we closed the file as academic in January, 1986, and declined to reconsider Denver X-Ray's protest.

Your correspondence is the first we have received concerning the Hill AFB procurement since we closed this file in January, 1986. Specifically, we note that TEC did not

protest to our Office either the Air Force's termination of its contract on the basis that the award involved a procurement deficiency--i.e., unduly restrictive specifications--or the subsequent award of a contract to Denver X-Ray under the resolicitation.

Attached to your letter was a recent "protest" by TEC to Hill AFB and the latter's "denial" thereof. It appears from this correspondence that Denver X-Ray had not produced satisfactory equipment even though the delivery schedule had been extended, although in the Air Force's opinion substantial progress had been made and Denver X-Ray would be able to fulfill its contractual requirements. The subject of TEC's protest was the Air Force's decision to grant a further, 90-day extension in the delivery schedule under Denver X-Ray's contract. TEC maintained that Denver X-Ray was so delinquent in performance that its contract should be terminated for default and the equipment purchased from TEC. In your letter, you state that TEC has raised "a number of valid points," primarily (1) that TEC's contract was unfairly terminated; (2) that TEC's equipment is superior to Denver X-Ray's; and (3) that Hill AFB supplied Denver X-Ray with certain information proprietary to TEC.

Any protest to our Office at this point by TEC concerning the termination of its contract or the subsequent award to Denver X-Ray is untimely under our Bid Protest Regulations. Those regulations, both as of today and when those procurement actions occurred, provide in relevant part that protests shall be filed not later than 10 working days after the basis for protest is known, or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1988). To the extent that TEC is objecting to the termination of its contract or to the award to Denver X-Ray as improper, it should have filed a protest when those events occurred in 1985 or 1986. In the absence of any indication that it did so, its protest now clearly is untimely and not for consideration.

In addition, we note that the subject of TEC's "protest" to Hill AFB was the latter's extension of the delivery schedule under Denver X-Ray's contract. The decision of whether to terminate a delinquent contract for default or to grant the contractor an extension of time in which to perform is a matter of contract administration which we do not review pursuant our bid protest function. 4 C.F.R. § 21.3(m)(1).

Finally, although you refer to an allegation that Hill AFB disclosed to Denver X-Ray certain information proprietary to TEC, this subject is not mentioned in the correspondence attached to your letter. In the absence of any detailed statement as to in what regard, how or when this alleged

improper disclosure occurred, we have no basis on which to open a file. 4 C.F.R. § 21.1(a)(4).

Consideration of TEC's allegations would require us to review contract award decisions made approximately 2 years ago, a result which we think is precluded by our regulations governing the timely filing of protests. Our regulations regarding timeliness apply regardless of the source of the protest, including those referred to our Office by Members of Congress. The bid protest process is more meaningful and effective when matters are timely brought to our attention. Moreover, if our Office were to consider an untimely protest on the merits when submitted by a Member of Congress, this would suggest to the procurement community that the timeliness provisions of our regulations could be circumvented by submitting the protest through a Member of Congress. We therefore cannot consider this protest on the merits.

Robert M. Strong
Deputy Associate
General Counsel