

DOCUMENT RESUME

03304 - [A2313443]

[Reconsideration of Untimely Protest against Allegedly Improper Restrictive Nature of Invitation for Bids]. B-189146. August 17, 1977. 3 pp.

Decision re: Kinetic Systems, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).
Organization Concerned: Department of the Army: Army Missile
Material Readiness Command.
Authority: 4 C.F.R. 20.2. 4 C.F.R. 20.1(b)(2). 41 Comp. Gen.
503. 27 Comp. Gen. 524. 37 Comp. Gen. 527. A.S.P.R.
2-301(a).

The protester requested reconsideration of a decision which held that their protest against the allegedly improper restrictive nature of an invitation for bids was untimely. The firm was advised by the buyer that after bid opening the firm could attempt to demonstrate to the low bidder the equivalency of their product to that of the designated sole source. Reliance on such erroneous advice was unreasonable, since the contract clearly could not be awarded on any basis other than that prescribed in the solicitation. The protest, filed after bid opening, was untimely and not for consideration. (Author/SC)

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DECISION



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

P.L.I.
Cohen

FILE: B-189146 **DATE:** August 17, 1977
MATTER OF: Kinetic Systems, Inc.--reconsideration

DIGEST:

Firm protesting sole-source restriction in IFB was advised by buyer that after bid opening firm could attempt to demonstrate to low bidder equivalency of its product to that of designated sole source. Reliance on such erroneous advice was unreasonable, since contract clearly could not be awarded on basis other than that prescribed in solicitation. Therefore, protest after bid opening is untimely and not for consideration.

Kinetic Systems, Inc. (KSI), requests reconsideration of our decision in Kinetic Systems, Inc., B-189146, July 1, 1977, in which we held untimely KSI's protest against the allegedly improper restrictive nature of invitation for bids (IFB) No. DAAHC3-77-B-0012, issued by the United States Army Missile Materiel Readiness Command for the construction of a laser radar measurement facility (LSMFT). In that decision we also denied KSI's protest against the use of a large business as a supplier in the procurement, which was set aside for small business participation.

The IFB designated Barry-Wright (Barry) vibration isolation mounts as the only acceptable items for use by the prime contractor in the LSMFT. On April 13, after learning of that restriction and that bid opening was to be on April 15, KSI expressed its objection to the restriction to the buyer on the basis that its vibration isolation mounts were, allegedly, technically equivalent to the Barry items. However, KSI states that the buyer advised that after bid opening KSI could attempt to demonstrate to the low bidder the equivalency of its product. Bids were opened as scheduled, and on April 22, after the low bidder would not commit itself to use of the KSI item, KSI filed a protest with the contracting officer. The protest was denied on May 12, and on May 23 KSI protested both that matter and the matter of large business (Barry) participation in the procurement to our Office.

We considered KSI's protest against the restriction as untimely since KSI knew of the alleged impropriety in the IFB before the April 15 bid opening and the protest was not filed prior to that date, as required by section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures). We further stated that even if KSI's April 13 objection to the restriction was considered a "protest," the opening of bids on April 15 without removing or modifying the restriction constituted "adverse agency action" within the meaning of section 20.2(a) of our Procedures. Accordingly, the May 23 protest to our Office, filed more than 10 working days after bid opening, could not be considered on that basis either.

Concerning Barry's status as a supplier under the IFB, we stated that since there was no evidence that the contractual end item would not be manufactured or produced by a small business, and since all bidders were advised of the subject restriction, there was no basis to object to Barry's participation.

In its request for reconsideration, KSI argues:

"It appears now that perhaps due to an overzealous desire to complete a procurement action the buyer's advice to KSI * * * improperly cut off KSI's right to protest the procurement sole source specification * * * KSI's formal protest to the * * * Contracting Officer, was submitted April 21, 4 working days after the IFB due date of April 15. KSI's protest is in effect lodged at the buyer's improper procurement agency response to our verbal 'objection' as well as the sole source restriction. Accordingly, the protest filing time provision of Section 20.1(b)(2) should be applicable, namely---10 working days after the basis for protest is known or should have been known----."

KSI further contends that its protest to our Office, filed within 10 working days after the contracting officer's denial of its initial protest, was timely filed under section 20.2(a) of our Procedures.

It is well established that the award of a contract pursuant to the advertising statutes must be made on the same terms offered to all bidders. See 41 Comp. Gen. 593 (1962); 37 *id.* 524, 527 (1958); Armed Services Procurement Regulation § 2-301(a) (1976 ed.). Therefore, we do not consider KSI's reliance on the buyer's advice to the effect

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that a contract could be awarded on a basis other than that prescribed in the solicitation reasonable. It follows that we also cannot accept KSI's implication that the buyer, by giving such advice, in effect extended the time period for KSI to timely protest the restriction under our Procedures. Since the subject restriction was never formally removed from the IFB, it was clearly incumbent upon KSI to protest its inclusion prior to bid opening. Moreover, as we held in the alternative in our decision, even if KSI's objection to the buyer is considered a protest to the contracting agency, the protest to our Office more than 10 working days after the initial adverse agency action, i.e., the opening of bids without removing the restriction, renders the subsequent protest untimely under section 20.2(a) of our Procedures.

Concerning Barry's participation in this small business set-aside, KSI now states that it raised the matter only as background material for use in our consideration of KSI's protest against the restriction, and not as another ground of protest. Nevertheless, KSI also argues that the Barry vibration isolation mounts will almost certainly not be manufactured for Barry by a small business. However, as we stated in our July 1 decision, it is the contractual end item, not a subcontract item, that must be manufactured or produced by small business.

Accordingly, our decision in Kinetic Systems, Inc., supra, is affirmed.

R. J. Ketter
Deputy Comptroller General
of the United States