

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

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FILE: B-212537**DATE:** February 22, 1984**MATTER OF:** Kearflex Engineering Company**DIGEST:**

1. GAO's Bid Protest Procedures require that protests alleging improprieties in an invitation for bids be filed with either the contracting agency or GAO prior to bid opening.
2. While the word "protest" need not be used in a communication, there must be an expression of dissatisfaction in the communication and a request for corrective action if the communication is to be considered an agency protest.
3. GAO will not invoke its "significant issues" exception to its filing requirements where the untimely protest does not raise issues of first impression which would have widespread significance to the procurement community.
4. Total small business set-aside is properly withdrawn without referral to Small Business Administration representative where solicitation is amended to require item on Qualified Products List (QPL) since total set-aside is not generally authorized for use when the product of a large business is on the QPL.
5. Where the only evidence supporting an allegation that the awardee altered its bid prices after opening is effectively refuted by the agency's explanation, the protester has failed to meet its burden of proving that the alleged alteration in fact occurred.
6. The use of formal advertising procedures is not appropriate where only one firm is listed

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on a QPL since in the absence of competition the Navy would require data only available in negotiated procedures upon which to evaluate the reasonableness of the prices offered.

Kearflex Engineering Company protests the award of a contract for mach airspeed indicators to Clifton Precision Instruments under invitation for bids (IFB) No. N00383-82-B-1025 issued by the Aviation Supply Office, Department of the Navy. Kearflex complains that the Navy, by issuing Amendment 0003 to the IFB, improperly included a requirement that the offered item be included on Qualified Products List (QPL) 23671-1 and, in addition, improperly withdrew the total small business set-aside restriction from the procurement. Further, Kearflex alleges that Clifton Precision altered its bid prices after bids were opened. We dismiss the protest in part and deny it in part.

The IFB was issued on September 21, 1982 as a total small business set-aside, and included the requirement that three units of the offered item be subject to First Article testing in accordance with Defense Acquisition Regulation (DAR) § 1-1902 (1976 ed.). Amendment 0002 to the IFB postponed bid opening indefinitely. Amendment 0003, issued on February 10, 1983, incorporated a requirement that the offered item be included on QPL 23671-1, withdrew the total small business set-aside restriction, and established a bid opening date of February 28.

The Navy states that the establishment of QPL 23671-1 resulted from a 1977 Navy directive to establish and maintain a QPL for mach airspeed indicators built in accordance with Military Specification MIL-I-23671A(AS). According to the Navy, Clifton Precision (then Bendix Corporation) and Kearflex submitted test samples for qualification. In August 1981, Kearflex withdrew its product from the qualification program after initial test failures. In December 1982, Clifton Precision successfully completed QPL qualification testing, and QPL 23671-1 was then issued on January 11, 1983, with Clifton Precision as the only qualified source.

The Navy states that the contracting officer then realized that Kearflex, a current supplier of the item, was not included on the QPL, and that he therefore successively extended the opening of bids by issuing Amendments 0004, 0005 and 0006, pending his review of the circumstances surrounding the inclusion of only Clifton Precision on the QPL. According to the Navy, after the contracting officer was assured that the QPL had been appropriately issued and Clifton Precision properly included as the only qualified source for the item, and that Kearflex had earlier withdrawn from the qualification program, he issued Amendment 0007 which finalized bid opening as April 12, 1983. At opening, the two bids received, from Kearflex and Clifton Precision, contained alternate offers based upon waiver of First Article testing. Kearflex's substantially lower bid, however, was rejected as nonresponsive because its offered item had not been approved for inclusion on QPL 23671-1 as required by Amendment 0003 to the IFB, and award was accordingly made to Clifton Precision.

(1) Timeliness of Protest

Under our Bid Protest Procedures, protests alleging improprieties in an IFB which are apparent prior to bid opening must be filed with either the contracting agency or this Office prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1983). Here, the alleged improprieties were included in Amendment 0003 issued on February 10, 1983 and thus were apparent to Kearflex well before the April 12 bid opening. The protest to this Office, filed almost 4 months later, is clearly untimely. See Gichner Mobile Systems, B-211664, May 19, 1983, 83-1 CPD 538.

Kearflex, however, further attempts to have these issues considered by asserting that it timely protested to the agency by telegram dated March 4. The March 4 exchange stated:

"Please advise what Kearflex must do to be included on QPL-23671 dated January 14, 1983.

"Urgent we comply as soon as possible or next procurement will be limited to 1 source

which we believe will not be in the best interest of the government.

"You will note, we have been the prime supplier of this unit since 1973."

The contracting officer responded by advising Kearflex that the Naval Avionics Center, Indianapolis, would provide the necessary information. From the record, it appears that there was no further communication from Kearflex until July 14 at which time Kearflex advised the contracting officer that it was "preparing a protest."

While the word "protest" need not be used in a communication, there must be an expression of dissatisfaction in the communication and a request for corrective action if the communication is to be considered an agency protest. See Monarch Enterprises, Inc., B-208631, May 23, 1983, 83-1 CPD 548. In our view, the March 4 message was neither an expression of dissatisfaction with the QPL procedures nor a request for any corrective action. The message was a request for information and was treated as such.

Finally, Kearflex urges us to consider its complaint, even if untimely raised, under our "significant issues" exception to our filing requirements. See 4 C.F.R. § 21.2 (c). Under that exception, however, we will only consider untimely protests when the issue or issues raised are of widespread significance to the procurement community and have not been previously considered. See Sequoia Pacific Corporation, B-199583, January 7, 1981, 81-1 CPD 13. In order to prevent the timeliness requirements from becoming meaningless, this exception is strictly construed and seldom used. See Ensign Aircraft Company, B-207898.3, April 1, 1983, 83-1 CPD 340. Kearflex's protest issues concerning the QPL qualification requirement and the withdrawal of the set-aside are not issues of first impression (see, e.g., Torrington Company, a division of Ingersoll-Rand Company, B-210877; B-210877.2, September 2, 1983, 83-2 CPD 298; Marine Industries Northwest Inc.; Marine Power and Equipment Company, 62 Comp. Gen. 205 (1983), 83-1 CPD 159, nor do they apparently involve questions whose resolution would benefit parties other than Kearflex. See Universal Design Systems, Inc.--Reconsideration, B-211547.3, August 16, 1983, 83-2 CPD 220. The exception, therefore, will not be invoked here.

In Kearflex's latest submission to this Office commenting on the Navy's administrative report, the firm has newly alleged that the total small business set-aside was improperly withdrawn because the contracting officer had not given the proper written notice to the Small Business Administration (SBA) liaison representative as required by DAR § 1-706.3(a). The issue is academic.

DAR § 1-706.1(j)(iii) provides that a total set-aside shall not be authorized when the products of one or more large businesses are on the QPL unless it has been confirmed that none of the large businesses desires to participate in the acquisition. Therefore, since continuation of the set-aside would have been improper under the circumstances here, we think the Navy acted correctly in withdrawing the set-aside without first referring the matter to the SBA liaison representative.

(2) Alleged Alteration of Clifton Precision's Bid

Kearflex has also alleged that Clifton Precision altered its bid prices after bid opening by inserting an alternate offer based upon waiver of First Article testing. Kearflex's charge is founded upon the assertion that the firm's reporting service did not observe and record any alternate prices in Clifton Precision's bid at the April 12 opening. The Navy has stated that Kearflex's reporting service did not see Clifton Precision's alternate offer because it was not included with the prices offered without waiver of First Article testing as shown on page 2 of the bid, but rather was included on a continuation sheet, page 22A, inserted between pages 22 and 23 of the bid.

We have examined a copy of Clifton Precision's bid, and we have no reason to doubt the Navy's explanation. On page 2 of the bid are Clifton Precision's prices without waiver of First Article testing, and admittedly there is no indication of any alternate offer. However, on page 22, following clause L-1252, "ALTERNATE OFFERS - WAIVER OF FIRST ARTICLE APPROVAL REQUIREMENTS", there is the type-written insertion: "See attached page 22A." Page 22A,

which immediately follows page 22, is identified as a continuation sheet, specifically refers to clause L-1252, and provides Clifton Precision's alternate offer based upon waiver of First Article testing. Although these prices are, as Kearflex points out, substantially lower than the prices without waiver, there is no indication that this continuation sheet was inserted into the bid, or that the reference to this sheet was made on page 22, after bid opening. In that regard, it is more likely than not that Kearflex's reporting service simply failed to notice the continuation sheet or the reference to it on page 22 when recording the bid. Clearly, with no other evidence to support its allegation, Kearflex has failed to meet its burden of proof, and we therefore deny this issue of its protest. See Willis Baldwin Music Center, B-211707, August 23, 1983, 83-2 CPD 240.

We point out, however, that we have observed certain deficiencies in this procurement. First, the continued use here of formal advertising procedures was inappropriate once the Navy determined that there was only one qualified source. See DAR § 3-210.2(i). By continuing to use formal advertising rather than negotiation procedures, the Navy, in our view, could not have adequately assured itself that Clifton Precision's prices were reasonable. (In this connection we note that Clifton Precision's prices were, with and without First Article testing, 116 and 37 percent higher than Kearflex's respective prices.) We think the Navy should have canceled the invitation and reissued the requirement as a negotiated procurement so that it could obtain the data, available only in a negotiated procurement, necessary for evaluation of the reasonableness of the price to be offered by the only firm on the QPL. See generally DAR § 3-807. We cannot see any prejudice to Kearflex occasioned by this error, but we are advising the Secretary of our concern so that this situation will not recur in the future.

Second, the requirement for First Article testing should have been deleted from the IFB when the Navy, by issuing Amendment 0003, incorporated the QPL qualification requirement. DAR § 1-1902(b)(ii) provides that, except in unusual procurements, seemingly not the case here, First Article testing shall not be required in contracts where a QPL has been established for the item. However, we find no

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evidence that the failure to delete the First Article testing requirement in any way prejudiced either bidder. There is no reason to believe that prices offered absent the requirement would have been different from those alternate prices offered on the basis of the requirement being waived.

Accordingly, the protest is dismissed in part and denied in part. However, by separate letter of today, we are informing the Secretary of the Navy of our concerns as expressed in this decision.

A handwritten signature in black ink, reading "Milton J. Jordan". The signature is written in a cursive style with a large initial "M".

Acting Comptroller General
of the United States