

01641

DECISION



Cohen
Proc I
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

FILE: B-187849

DATE: March 28, 1977

MATTER OF: Irvin Industries, Inc.

DIGEST:

1. Protester contends that former employee breached consulting agreement with protester by participating in procurement of parachute recovery systems as competitor's representative. However, our Office is not in position to adjudicate rights of protester against another private party, and until those rights are established in proper forum, there is no justification for disturbing ongoing procurement program.
2. Protest that contracting agency should have procured required items by use of Government design or performance specification rather than proposers' part numbers is untimely, since it was filed after closing date for receipt of initial proposals.
3. Protest that competitor's product is not suitable for Government's requirements, filed more than 10 working days after protester knew of competitor's participation in procurement, is untimely.
4. Protest against affirmative determination of responsibility will not be considered.

Irvin Industries, Inc. (Irvin), protests the award of a contract to Syndex Recovery Systems, Inc. (Syndex), under solicitation No. N00123-76-R-2110, issued by the United States Navy.

The solicitation involved an urgently required quantity of parachute recovery systems. The requisition forwarded to the contracting officer by the requiring activity cited part numbers for Irvin and Syndex products, which were considered technically equivalent.

On October 5, 1976, Irvin and Syndex were contacted by the Navy by telephone and each was requested to submit a proposal on its respective system, identified by part number, by October 7. Syndex was the low offeror. On October 18, Irvin orally protested to the Navy against the proposed award to Syndex, arguing that a Syndex employee, who had previously been employed by Irvin, was in breach of a consulting agreement with Irvin by virtue of his participation in the procurement as a Syndex representative.

B-187849

The Navy denied Irvin's protest by letter of November 8, pointing out that "[N]o Government complicity is involved in the allegedly improper actions," and that the Syndex employee had denied Irvin's allegations. The Navy further stated:

"It would be wholly inappropriate for us to attempt to judge the merits of your conflict with your competitor in this matter. Accordingly, we must deny your protest as inappropriate to the contracting process."

Award was made to Syndex on the same day.

On November 19, Irvin filed a protest in our Office against the Navy's denial of its initial protest, adding its view that by requesting proposals from only Irvin and Syndex on a part number basis rather than using a Government design or performance specification permitting competitive designs, the Government contributed to the alleged breach of the consulting agreement in issue. In addition, Irvin argues that Syndex's parachute recovery system is not technically suitable for the Government's needs, and that Syndex is not capable of supplying the required items.

In regard to the matter of the consulting agreement, our Office is not in a position to adjudicate the rights of a protester against another private party, and until those rights are established in a proper forum we have no justification for disturbing an ongoing procurement program. See York Industries, Inc., B-186958, November 29, 1976, 76-2 CPD 483; Garrett Corporation, B-182991, B-182903, January 13, 1976, 76-1 CPD 20.

Concerning the Navy's use of Irvin's and Syndex's part numbers in requesting proposals from those two firms, section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1976) (Procedures), provides in pertinent part:

"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 * * * the closing date for receipt of initial proposals. * * *"

Since Irvin knew that the procurement was being conducted on a part number basis upon receipt of the October 5 telephone call requesting it to submit a proposal, its protest involving that matter should have been filed by October 7, when its initial proposal was due. Accordingly, that issue is untimely and will not be considered.

B-187849

In regard to the suitability of Syndex's parachute recovery system for the Government's requirements, Irvin had a basis for a protest on that matter in October 1976, when it became aware of Syndex's participation in the procurement. Section 20.2(b)(2) of our Procedures provides:

"In cases other than those covered in subparagraph (1) bid 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."

The matter was first raised by Irvin in a letter to our Office dated February 16, 1977, and received on February 22, commenting on the Navy's report on Irvin's November 19, 1976, protest. Therefore, that issue is also untimely and will not be considered on its merits.

Concerning Irvin's final argument, the Navy has determined Syndex to be a responsible concern. This Office does not review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Although we will consider protests against determinations of nonresponsibility to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform.

In view of the above, the protest will not be considered.


Paul G. Dembling
General Counsel