



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Keco Industries, Inc.
File: B-238301
Date: May 21, 1990

Lawrence M. Farrell, Esq., McKenna, Conner & Cuneo, for the protester.
Robert T. Ebert, Esq., Crowell & Moring, for Engineered Air Systems, Inc., an interested party.
Millard F. Pippin, Department of the Air Force, for the agency.
Sabina K. Cooper, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where Commerce Business Daily (CBD) notice announcing agency's plan to make a sole-source award gives other potential sources an opportunity to submit expressions of interest showing their capability to perform, potential offeror must, as a prerequisite to filing a protest challenging the sole-source decision, submit a timely expression of interest in response to the CBD notice.
2. General Accounting Office (GAO) will not consider the merits of an untimely protest by invoking the significant issue exception in GAO's Bid Protest Regulations, where the protest does not raise an issue of first impression that would be of widespread interest to the procurement community.

DECISION

Keco Industries, Inc., protests the award of a sole-source contract to Engineered Air Systems, Inc. (EASI), under request for proposals (RFP) No. F09603-89-R-40205, issued by Robins Air Force Base (AFB), Georgia, for the modification of approximately 750 Sanator lightweight decontamination units from a Sanator II configuration to a Sanator III configuration. Keco asserts that a 1987 license agreement between the Department of the Army and EASI for the Sanator authorized the use of a technical data package (TDP)

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sufficient to acquire modernized Sanator III units through competitive procedures.

We dismiss the protest.

A synopsis of the proposed sole-source award to EASI was published in the Commerce Business Daily (CBD) on November 9, 1988. According to the Air Force, the decision to proceed with a sole-source award was based on the Air Force's belief that it did not possess the technical data rights necessary to conduct a competitive procurement. A footnote referenced in the CBD notice indicated offerors had 45 days to identify their interest and capability to respond to the requirement. Keco did not submit evidence of its interest and capability within that time. The RFP, issued February 17, 1989, and synopsized in the CBD, again identified EASI as the sole-source for the requirement. The closing date for receipt of proposals was July 11.

Keco submitted an unsolicited late proposal to the Air Force on September 12, which was rejected on October 23, according to the Air Force, because it was submitted after the July 11 closing date. By letters of October 26 and December 29, Keco expressed its concern to the Air Force as to the continuance of the procurement on a sole-source basis, noting that the 1987 license agreement between EASI and the Army gave full proprietary data rights in the Sanator to the government as of September 24, 1987. Nevertheless, the Air Force awarded a sole-source contract to EASI on December 22. Keco received notification of award on December 29, and protested to our Office on January 11, 1990.

The publication of a proposed sole-source procurement in the CBD constitutes constructive notice to potential offerors of a solicitation and its contents. S.T. Research Corp., B-232751, Oct. 11, 1988, 88-2 CPD ¶ 342. Our cases have differed in the timeframe applied for filing of a timely protest challenging the sole-source nature of the procurement where, as here, the CBD notice gives offerors the opportunity to identify their interest and capability to respond to the requirement within 45 days. In some cases we have required a potential offeror to file a protest by the closing date for written expressions of interest to the CBD notice. See Pro-Tem, B-231087, Apr. 29, 1988, 88-1 CPD ¶ 427. In other cases, we have required a potential offeror to file a protest by the 10th working day after the publication of the CBD notice. See S.T. Research Corp., B-232751, supra. Also, at one time it had been our view that where a CBD synopsis of a sole-source solicitation contains a closing date, any protest of that decision had to

be filed prior to that date. See Detroit Broach and Machine--Reconsideration, B-213643.2, July 12, 1984, 84-2 CPD ¶ 43.

The Competition in Contracting Act requires agencies to achieve full and open competition through the use of competitive procedures. 10 U.S.C. §§ 2301, 2304(a)(1) (1988). The law requires agencies, prior to making a sole-source acquisition, to publicize their intention to do so in order to provide those who believe they can satisfy agency requirements the opportunity to demonstrate to the agency that they can do so and that a sole-source procurement is not warranted. 10 U.S.C. §§ 2304(c)(1),(f); Federal Acquisition Regulation § 6.302-1; see WSI Corp., B-220025, Dec. 4, 1985, 85-2 CPD ¶ 626.

In light of this statutory scheme, we believe it appropriate to require the protester to submit a timely expression of interest in fulfilling the potentially sole-source requirement in response to the CBD notice as a prerequisite to filing a protest; if the agency rejects the protester and proceeds with its sole-source approach, the protester then must file its protest within 10 days after it knows or should have known of the rejection. See Mine Safety Appliances Co., B-233052, Feb. 8, 1989, 89-1 CPD ¶ 127. This rule gives the agency an opportunity to consider an offeror's preliminary proposal in order to decide whether to open a procurement to competition, while allowing only serious potential offerors to challenge the agency's sole-source decision.^{1/}

Applying this rule, Keco's protest is not for consideration because Keco did not submit its expression of interest in the procurement until September 12, 1989, substantially more than 45 days after publication of the CBD notice on November 9, 1988. Moreover, Keco's protest is untimely under any of the theories enunciated in our previous cases as well, since it was not filed until January 11, 1990, well beyond 10 days after the November 9, 1988 CBD notice; the 45-day period for expressions of interest established by the CBD notice; and the July 11, 1989 closing date for receipt of proposals under the RFP.

^{1/} We recognize that there may be cases where it is clear that an agency is firmly committed to a sole-source procurement, and that filing an expression of interest would be futile. In those cases, a protest filed within 10 days of the CBD notice would be timely, without regard to whether the protester first filed an expression of interest with the agency.

Keco argues that we nevertheless should consider its protest under section 21.2(b) of our Bid Protest Regulations, which sets out an exception to our timeliness rules for issues that are significant to the procurement community. We disagree.

In order to prevent the timeliness requirements from becoming meaningless, we strictly construe and seldom use the significant issue exception, limiting it to protests that raise issues of widespread interest to the procurement community and which have not been considered on the merits in a previous decision. Delaware Eastwind, Inc., B-228533, Nov. 18, 1987, 87-2 CPD ¶ 494. In our view, the issue of whether a particular purchase should have been made by competitive procurement rather than through a sole-source award is not of sufficient interest to the procurement community to invoke that exception. Detroit Broach and Machine, B-213643, Jan. 5, 1984, 84-1 CPD ¶ 55. Further, we have numerous decisions setting forth the basic principles governing sole-source procurements. See, e.g., C&S Antennas, Inc., 66 Comp. Gen. 254 (1987), 87-1 CPD ¶ 161. Similarly, we do not think the specific issue raised in the protest--interpretation of the terms of a particular license agreement--is of widespread interest to the procurement community. Thus, while we recognize the importance of the matter to the protester, we do not regard the propriety of this sole-source procurement as a significant issue under our Bid Protest Regulations. See S.T. Research Corp.--Request for Recon., B-232751.3, Feb. 24, 1989, 89-1 CPD ¶ 202.

On April 4, 1990, the Air Force informed our Office that as a result of further discussion with the Army, the Air Force has concluded that the license agreement in fact does authorize use of the Sanator TDP for a competitive procurement to acquire modernized Sanator III units, with Sanator II units provided to contractors as government-furnished property. Accordingly, the Air Force has instructed Robins AFB to acquire only the minimum quantity of Sanator III units consistent with Air Force requirements under the contract at issue, and to plan to compete the option quantities and any further requirements.

Under the circumstances, the agency's actions appear appropriate and provide the protester with substantial relief.

The protest is dismissed.

for Robert P. Murphy
James F. Hinchman
General Counsel