

Office of the General Counsel

B-229517.2

February 9, 1988

The Honorable Max Baucus
United States Senator
102 Missoula Bank of Montana Building
Missoula, Montana 59802

Dear Senator Baucus:

This is in response to your letter dated January 11, 1988, received on January 22, forwarding a copy of a letter addressed to you by counsel to Greg Bain and Company of Kalispell, Montana, concerning the rejection of Mr. Bain's bid for constructing certain improvements at the Kicking Horse Job Corps Center at Ronan, Montana. You have requested our views on counsel's letter. Although we have informally discussed this matter with your staff in the past, after reviewing our file on the matter and in view of Mr. Bain's continuing inquiries, we thought it best to explain our position by letter.

Generally speaking, a bidder such as Mr. Bain who objects to the manner in which a federal agency is awarding a contract has the alternative of challenging that action through the filing of a bid protest either with the contracting agency or with our Office. Our records show that Mr. Bain has availed himself of each of these alternatives during the past year in two bid protests which have been the subject of inquiries by your office.

First, by letter dated August 7, 1987, and properly addressed to the General Accounting Office, Mr. Bain objected to the rejection as nonresponsive of a bid which he had submitted for certain construction work to be performed at Malmstrom Air Force Base, Montana. This letter is the only one which Mr. Bain ever has addressed directly to our Office. We docketed that protest as file No. B-227998.2 and requested of the Air Force a report on the matter. Upon reviewing the case, the Air Force advised us that it had determined Mr. Bain's bid to be responsive and that the bid would be considered for award. Because the contracting agency had granted the relief Mr. Bain requested, we dismissed the protest as academic by notice dated September 22, 1987, of which your office was advised. The Malmstrom

protest is an example of one filed directly with our Office challenging the actions of a federal agency.

Second, by letter dated September 16, 1987, addressed to the contracting officer at the Department of Labor (DOL), Mr. Bain objected to the rejection as nonresponsive of his bid for the construction of certain improvements at the Kicking Horse Job Corps Center at Ronan, Montana, and petitioned the DOL for relief. We gather from this correspondence that Mr. Bain's bid was rejected as nonresponsive because in it he had agreed to hold the bid open for acceptance for only 30 days after bid opening instead of the 60 days required by the DOL's solicitation. Mr. Bain argued to the DOL that any such defect in his bid had been waived because an employee of what we assume is an architect-engineer firm which received bids on behalf of the DOL orally authorized Mr. Bain to begin work immediately in advance of any written notification of award. As a result, Mr. Bain alleges, he incurred costs in preparation for performance before he was advised by the DOL that his bid was not for acceptance as nonresponsive. We understand Mr. Bain to seek from the DOL either the award of the contract or an amount representing the costs he allegedly incurred and the profit he would have made on the contract.

In contrast to the Malmstrom bid protest, which was filed with our Office, the bid protest concerning the Kicking Horse project is an agency-level protest filed with the DOL. That protest was addressed to the contracting officer at that agency and specifically petitioned that agency for relief. Mr. Bain never has addressed a letter to our Office requesting that we rule on the matter and we have never opened a file for the purpose of deciding the protest on the merits. Our file No. B-229517 was opened for the purpose of responding to a congressional inquiry prompted by Mr. Bain's claim that in these two federal projects in Montana, his bids had been rejected for "technical grounds." A different file number was assigned to this correspondence than to the earlier Malmstrom protest in order to differentiate the two contracts for case tracking purposes. The merits of this case, however, have never been before us for decision since Mr. Bain had chosen the alternative of presenting it to the DOL for resolution.

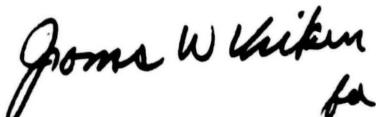
Although counsel to Mr. Bain suggests that the DOL has an obligation to keep our Office advised of developments in his agency-level protest, that understanding is incorrect. The resolution of that protest is solely a matter between Mr. Bain and the DOL and is one with which our Office is not involved.

Our Bid Protest Regulations do permit one who has initially filed a protest with the contracting agency to subsequently file one with our Office, provided (1) the initial protest to the contracting agency was timely filed as defined by our regulations and (2) the protest is filed within 10 working days of formal notification of or actual or constructive knowledge of initial adverse contracting agency action on the protest which was before it. 4 C.F.R. § 21.2(a)(3) (1987).

We will assume Mr. Bain's protest to the DOL on the Kicking Horse project was timely filed with that agency. Mr. Bain has advised that the DOL denied his agency-level protest by letter of November 3, 1987. Assuming that the DOL's denial was the initial adverse action to Mr. Bain's protest, under our regulations Mr. Bain then had 10 working days from receipt of that denial to file a protest addressed to our Office. He did not do so, instead electing to request the DOL to reconsider its denial because of alleged deficiencies in both the form and substance of its decision. In this regard, we have consistently held that the fact that a firm decides to pursue the matter with the contracting agency does not extend the time for protesting to our Office. Therefore, it appears that the 10 working day period for filing any subsequent protest with our Office has long expired.

We trust this response serves the purpose of your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Wilkin" with a small "fa" written below it.

Robert M. Strong
Deputy Associate
General Counsel