

The Comptroller General
of the United States

Washington, D.C. 20548

89-1 CPD 442

PR

Decision

Matter of: Hydra Rig Cryogenics Incorporated
File: B-234029
Date: May 11, 1989

DIGEST

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements, the sole-source award of a contract under the authority of 10 U.S.C. § 2304(c)(1) is not objectionable where the agency reasonably determined that only one source could provide the required inspection and maintenance of liquid oxygen tanks since the contracting agency does not possess or have rights in the technical data necessary for a competitive procurement and the protester has not shown that performance could be accomplished without such data.

DECISION

Hydra Rig Cryogenics Incorporated protests the sole-source award of a contract to Cryogenic Energy Company under request for proposals (RFP) No. F41608-88-R-1920, issued by the Department of the Air Force for the inspection, maintenance, repair and calibration of liquid oxygen (LOX) tanks. The tanks are trailer mounted, self-contained, mobile liquid oxygen transport, storage and servicing units which are used to supply breathing oxygen to combat aircraft. Hydra Rig contends that it was unfairly excluded from the opportunity to compete for award.

We deny the protest.

The Air Force states that it does not possess sufficient technical data to approve any source other than Cryogenic, the original manufacturer. The RFP was synopsisized in the April 11, 1988 Commerce Business Daily (CBD), with a standard CBD note explaining that other potential sources might be considered if the source submitted either (1) evidence of having satisfactorily produced the part for the government or the prime equipment manufacturer, or (2) engineering data sufficient to demonstrate the acceptability of the offered part.

The contracting officer prepared a justification and approval for the procurement of the services on a sole-source basis, citing Federal Acquisition Regulation (FAR) § 5.302-1(b)(2) (FAC 84-28), which implements 10 U.S.C. § 2304(c)(1) (Supp. IV 1986). This statutory provision permits a noncompetitive award where only one known responsible source or a limited a number of responsible sources are available and no other type of property or services will satisfy the needs of the agency. The justification and approval also provided that unlimited data and drawing rights would be solicited from Cryogenic in this procurement. The action was approved by the requisite authority.^{1/}

The solicitation provided that the only approved source for the repair of tanks was Cryogenic, the original manufacturer, because the Air Force did not have the necessary technical data to develop qualification requirements to approve other interested offerors. Offerors were informed that pursuant to FAR § 9.202(b) (FAC 84-25) a waiver of qualification requirements had been approved by the Directorate of Special Fuels for a 2 year period, ending September 14, 1989.^{2/}

By the May 27 closing date, the Air Force received proposals from Cryogenic and Hydra Rig. The protester, by separate letter, also requested source approval to repair the LOX tanks on the basis that Hydra Rig was currently repairing similar cryogenic vessels for the Air Force and making similar cryogenic vessels for commercial customers. On December 2, 1988, the Air Force rejected Hydra Rig's offer and source approval application because the agency did not have the technical data necessary to evaluate and qualify Hydra Rig as an approved source for the repair of LOX tanks. This protest followed.

^{1/} The Air Force subsequently revised the justification and approval to provide that repair specifications would not be developed "for this or future repair procurements."

^{2/} FAR § 9.202(a) prescribes policies and procedures regarding qualification requirements, and requires, in part, that the contracting agency specify in writing and justify qualification requirements imposed, and provide potential offerors with an opportunity to demonstrate their ability to satisfy these requirements.

As a threshold issue, the Air Force argues that the protest is untimely because the protester knew from the face of the solicitation that the agency intended to conduct a sole-source procurement and the protest was not filed until after the closing date for receipt of initial proposals. Bid Protest Regulations, 4 C.F.R. §21.2(a)(1) (1988). We disagree. We do not believe that Hydra Rig's protest involves an apparent solicitation impropriety. While the RFP states that the only approved source for the award was Cryogenic and that the Air Force could not qualify other sources, the CBD synopsis informed potential offerors that they could seek source approval concurrent with the submission of a proposal. Furthermore, Hydra Rig was furnished with a copy of the solicitation and could reasonably assume that its offer and application for source approval would be considered. Hydra Rig did not have a reason to object to its exclusion as an approved source until it received the Air Force's December 2 letter informing the protester that its offer and application for source approval had been rejected. Hydra Rig received the letter on December 21 and protested to our Office on January 3, within 10 working days of receipt. We therefore will consider Hydra Rig's protest.

Because the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. §2304(a)(1)(A), our Office will closely scrutinize sole-source procurements under the exception to that mandate provided by 10 U.S.C. §2304(c)(1). Abbott Laboratories, B-230220, May 18, 1988, 88-1 CPD ¶ 468. Where, however, the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. §2304(f), calling for the written justification for and higher-level approval of the contemplated sole-source action and publication of the required CBD notice, we will not object to the sole-source award unless it can be shown that there is not a reasonable basis for the sole-source award. Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299.

Here, the Air Force has complied with the requirements of CICA at 10 U.S.C. §2304(f), calling for the written justification for and higher level approval of the contemplated sole-source action and publication of the requisite CBD notice. The propriety of the agency's decision therefore rests on whether or not it was reasonable to conclude that only one source was available. Johnson Engineering and Maintenance, B-228184, Dec. 3, 1987, 87-2 CPD ¶ 544. The Air Force contends that the requirement for the inspection, repair and maintenance of the tanks can only

be satisfied by Cryogenic, since this firm is the only one that has access to the proprietary drawings, tolerances and specifications which are indispensable to the proper inspection, overhaul and maintenance of the tanks.

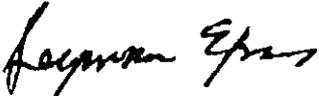
Hydra Rig argues that because it has successfully repaired similar cryogenic equipment for the Air Force and is certified by the American Society of Mechanical Engineers it has the capability to perform the solicited repair work. Hydra Rig does not contend that it has access to the manufacturer's proprietary data to repair the LOX tanks but apparently asserts that the data is not necessary and that it can satisfactorily repair the LOX tanks based upon its experience with similar cryogenic tanks. The Air Force contends that the cryogenic tanks repaired by Hydra Rig are dissimilar to the LOX tanks which are the subject of this procurement; that the cryogenic tanks Hydra Rig previously repaired were produced by a different manufacturer and perform in a different manner than the LOX tanks.

The record indicates that the LOX tanks are designed to store liquid oxygen for substantial periods of time and deliver clean, breathable oxygen to aircraft while the other cryogenic tanks are used to store liquid nitrogen for relatively short periods of time. In this regard, it seems apparent to us that the supply of breathing oxygen to aircraft raises safety considerations not present with the storage and supply of liquid nitrogen. We cannot conclude from the record before us that the agency was unreasonable in determining that Hydra Rig's experience repairing the liquid nitrogen tanks was insufficient to indicate that Hydra Rig could repair the LOX tanks without the proprietary data. Since the protester has not demonstrated that the proprietary data is unnecessary to satisfactorily perform the required repair services, we have no basis to question the agency's determination that the services could only be provided by one known source.

The protest is denied.

Despite our conclusion that the agency's sole-source procurement determination has a reasonable basis, the Air Force should attempt to develop or acquire, if feasible, a

sufficient technical data package to allow the competitive procurement of these repair services in the future. We have so advised the Acting Secretary of the Air Force by separate letter of this date.


James F. Hinchman
General Counsel

PROCUREMENT

Noncompetitive Negotiation

Contract awards

Sole sources

Propriety