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DECISION

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

[Protest of Solicitations Issued by Defense Logistics Agency]

FILE: B-198105

DATE: October 21, 1980

MATTER OF: Fil-Coil Company, Inc.

DIGEST:

Agency may restrict procurement of replacement parts for critical military equipment to successor firm of original manufacturer where firm apparently has necessary technical data to produce items and Government does not have data rights adequate to conduct competitive procurement.

Fil-Coil Company, Inc. (Fil-Coil) has protested several solicitations for radio frequency interference filters issued by the Defense Logistics Agency, Defense Electronics Supply Center (DESC), Dayton, Ohio. While Fil-Coil refers to solicitations Nos. DLA900-79-B-2813, DLA900-79-R-3854, YPE80045001377, and YPE79336002000, the protest is really to the agency's general practice in purchasing certain filters. DESC has also asked us to decide the questions raised, even though this protest is untimely, and therefore ordinarily not for consideration on the merits. Since the issue raised is a recurring one, we believe it is of sufficient significance to warrant a decision on the merits. See Electrospace Systems, Inc., 58 Comp. Gen. 415 (1979), 79-1 CPD 264; Southwest Forms Management Services, 56 Comp. Gen. 953 (1977), 77-2 CPD 183.

In solicitations for certain radio frequency interference filters that are used as spares for various military end item applications, DESC lists Filtron Manufacturing Co., Inc. (Filtron) filters, by part numbers, as approved items. However, Fil-Coil and other firms offering alternative filters must submit for evaluation with their bids samples and a technical data package. The protester alleges this practice of automatically approving its competitor's filters gives that firm an unfair competitive advantage.

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By way of background, the agency reports, for the most part, the Government has either no technical data whatsoever for the filters, or only limited data which is inadequate for a competitive procurement. In those instances, the approved Filtron part number is the only description available and offerors other than Filtron proposing alternative items are required to show that their products are either identical or functionally, physically, mechanically and electrically interchangeable with the specified Filtron part number. While DESC's solicitations provide for compatibility testing of alternative items, they also indicate that current demands may require award only to Filtron because of the time needed for evaluation.

DESC reports further that many of the filters are used in critical radar and weapons systems applications and have been designated "source controlled" under Defense Acquisition Regulation § 1-313(c) (1976 ed.). This section authorizes procurement of replacement parts, other than those of a standard configuration, "only from sources that have satisfactorily manufactured or furnished such parts in the past, unless fully adequate data * * * test results, and quality assurance procedures, are available with the right to use for procurement purposes * * *."

DESC uses this approved source procedure for filters that were initially furnished to design and original manufacturer's specifications by Filtron Co., Inc. (Filtron I), now a bankrupt firm. We have previously recognized the appropriateness of such a procedure where the Government does not have enough data to draft specifications to serve as the basis for a competitive procurement. See 52 Comp. Gen. 546 (1973); Metal Art, Inc., B-194180, B-194181, July 11, 1979, 79-2 CPD 25; Mercer Products & Manufacturing Co., B-188541, July 25, 1977, 77-2 CPD 25, aff'd on reconsideration, B-188541, October 4, 1977, 77-2 CPD 260.

Fil-Coil does not object to the approved source system; it contends that Filtron does not qualify as an approved source. On the other hand, the Government's position is that Filtron is the successor in interest to Filtron I's technical know-how and data, and therefore is a qualified source.

In support of its position, DESC advises that Filtron I was founded in 1946, that one of its principals

was Dr. Leonard Milton, and that this firm had an established reputation in the industry for furnishing high quality filters. In 1972 Filtron I went into bankruptcy and its assets, including the technical data for its proprietary items, were sold and then resold several times as a result of the bankruptcies of successor companies. Each of the successor firms, however, was recognized as an approved source by having acquired the technical data for Filtron I's proprietary items.

DESC also advises that in 1977 Dr. Milton acquired the technical data and proprietary items of Filtron I and formed Filtron. Filtron, the agency states, has access to all the drawings, blueprints, tools, dies and machinery as well as the rights to the patents, copyrights and trademarks of Filtron I. On this basis, DESC states it recognizes Filtron as the successor to Filtron I, and thus as a qualified source.

Fil-Coil contends that while there was a continuity of common engineering, technical and production personnel among Filtron I and several successor firms, this continuity ended in 1976 with the dissolution of one of Filtron I's successor firms. Fil-Coil contends that with the exception of Dr. Milton and one other person, there are no common personnel among Filtron and any firm relating to Filtron I. Fil-Coil also states that Filtron's plant, equipment and technical personnel are different from any successor firm of Filtron I, and that most of the assets which the Government believes Filtron owns are actually owned by other firms or are not proprietary.

Fil-Coil states that it has the "legal right" to certain filter drawings and will make them available to DESC "on the same basis as * * * Filtron." Further, the protester suggests that the agency require Filtron to provide the Government with drawings so that DESC can buy filters on a "brand name or equal basis." For the most part, Fil-Coil disagrees with the findings which lead DESC to conclude that Filtron is the successor to Filtron I.

DESC states that the major consideration in deciding that Filtron was an approved source was the determination that Filtron had bought the technical data for Filtron I items. This data, the agency states, is needed to manufacture items to the original specifications which are not available to the Government. To confirm Filtron's ownership (which Fil-Coil disputes) DESC initially verified that Filtron had possession of such data and on subsequent occasions the data has been reviewed by Government technical representatives to ensure that Filtron's items conform to Filtron I specifications. The Government has also confirmed in preaward surveys that Filtron has all the necessary tools, dies and machinery to manufacture the Filtron I filters. Moreover, DESC states that Filtron has satisfactorily furnished Filtron I items.

Each party has submitted documents to support its position. For example, the Government has submitted a letter from Filtron indicating that it has "everything necessary to furnish filters." Fil-Coil has furnished a general newspaper announcement of a bankruptcy sale of a Filtron I successor firm. The ad mentions some assets, but does not mention technical data. Fil-Coil contends that this ad indicates that the data was not available for Filtron to buy. Also, Fil-Coil has submitted part of a document entitled "Application for Allowance for Attorney for Trustee" which each party contends supports its position. However, in general, we find the documentary evidence either self-serving, unreliable or otherwise not useful for its intended purpose.

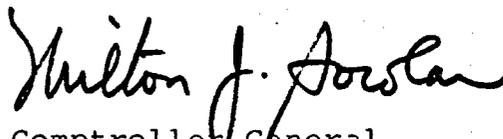
Essentially, the record before us on the question of ownership of Filtron I's technical data shows disputed facts, but that Filtron does have Filtron I data and is acceptably supplying Filtron I items. As the other "evidence" here substantially consists of only the contrary assertions of the protester and the contracting agency, and in view of Filtron's acceptable performance, we think the protester has not affirmatively supported its allegations. Aero-Dri Corporation, B-192274, October 26, 1978, 78-2 CPD 304. Thus, on the record before us, we cannot conclude that the approval of Filtron as a qualified source is unreasonable, or

that this preference afforded Filtron results an unfair competitive advantage. See Burns and Roe Tennessee, Inc., B-189462, July 21, 1978, 78-2 CPD 57, aff'd on reconsideration, B-189462, August 3, 1979, 79-2 CPD 77.

With regard to Fil-Coil's assertion that it has the "legal right" to certain Filtron I drawings, DESC states it has invited Fil-Coil to furnish such data, including a certification of the right to use the data, in order to be considered as an alternate source. Fil-Coil in its final submission to our Office indicates that it is prepared to furnish the drawings to DESC "on the same basis as * * * Filtron." While Fil-Coil's intentions are not entirely clear, it is clear that DESC is willing to consider Fil-Coil as an alternate source if the firm is qualified. Indeed, Fil-Coil was the successful bidder on one of the solicitations to which it has objected.

Finally, it does not appear feasible for the Government to solicit filters on a brand name or equal basis, as the protester has asked. While DESC has access to Filtron data, Filtron will not permit the agency to disclose the data and thus the Government does not have available enough information for a brand name or equal solicitation.

The protest is denied.


for the Comptroller General
of the United States