



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Automated Power Systems, Inc.  
**File:** B-224203  
**Date:** February 4, 1987

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### DIGEST

1. Protest alleging that product offered by bidder was not properly listed on the Qualified Products List need not have been filed before the agency notification of the award to that bidder since the grounds for protest do not arise until the protester has learned of the agency action or intended action adverse or inimical to the protester's position.
2. Whether a product should have been kept on the Qualified Products List (QPL) without being retested is a matter for the determination of the agency responsible for the QPL, and the General Accounting Office will not question the agency's judgment unless it is shown not to have a reasonable basis.
3. Allegation that awardee intends to furnish a nonqualified component in its qualified product will not be considered where bidder was not required to identify manufacturers of the components of the product in its bid and bid did not take any exceptions to the specifications. Allegation involves the bidder's affirmative responsibility which generally is not for consideration by the General Accounting Office.
4. Bidder certifying itself under the Walsh-Healey Act as a manufacturer is permitted to subcontract for the manufacturing effort; therefore, the fact that a subcontractor will actually perform the work does not mean that the certification was false.

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### DECISION

Automated Power Systems, Inc. (APS), protests the award of a contract to C-R Control Systems, Inc. (C-R), for CG-181 solid state flashers under United States Coast Guard (USCG) invitation for bids (IFB) No. DTCG36-86-B-00067. Bidders were required to offer only flashers that had been listed on the Qualified Products List (QPL) of flashers that had been

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previously tested and approved by the agency. Only APS and C-R had qualified flashers for listing on that QPL. APS basically contends that changes by C-R in its manufacturing locations and in the source of the germanium transistors used in its flashers were not properly reviewed by the USCG, and that C-R's CG-181 flasher should not have been listed on the QPL. Therefore, APS contends that the award was improperly made, and requests that the contract be terminated and the procurement be resolicited.

We deny the protest.

The protester alleges that the flashers originally tested and approved for the QPL were manufactured in Orlando, Florida, and that the 1986 QPL listing showed C-R's manufacturing location to be Altamonte, Florida, but that C-R's bid stated the manufacturing location to be the plant of Electronic Assembly Corporation (EAC) in Neenah, Wisconsin. APS maintains that, in view of the introduction by C-R of entirely new production facilities, new personnel, and new assembly equipment, the flashers should be retested.

Second, APS states that the C-R's previously-approved flashers used germanium transistors manufactured by Lansdale Transistor Company (Lansdale), and that Lansdale had since sold its germanium transistor business to Germanium Power Devices Corporation (Germanium). APS complains that the USCG failed to conduct testing or make an investigation of the Germanium transistor. Finally, APS alleges that C-R falsely certified in its bid that it is the manufacturer of the flashers and suggests that C-R may be acting as a broker for the actual manufacturer, EAC.

Initially, the contracting agency argues that the protest is untimely since APS should have known the bases of its protest at the time of bid opening when APS reviewed C-R's bid. A protest must be filed within 10 working days after the bases for protest are known or should have been known, whichever is earlier, 4 C.F.R. § 21.2(a)(2) (1986), and APS's protest was filed more than 10 working days after bid opening.

We conclude that the APS protest to our Office was timely. There is no basis for protest until the protester has actual or constructive notice of agency action or intended action which is inconsistent with the protester's interest. R.R. Gregory Corp., B-217251, Apr. 19, 1985, 85-1 CPD ¶ 449; Harnischfeger Corp., B-224371, Sept. 12, 1986, 86-2 CPD ¶ 296. APS had no knowledge that the agency considered C-R's bid to satisfy the qualified products requirement until it

learned of the award to C-R, and its protest was filed within 10 working days after learning of the award. We therefore will consider the protest's merits.

Whether to require retesting for the purposes of QPL listing is a discretionary matter, see Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.207(b) (1986), and we will not object to the agency's exercise of discretion absent a showing that it lacked a reasonable basis. See McIntyre Eng'g Co., B-190136, Aug. 29, 1978, 78-2 CPD ¶ 148. In this regard, the standard "Qualified Products--End Items" clause, FAR, 48 C.F.R. § 52.209-1(e) (1985) (required to be included in solicitations for qualified products, FAR, 48 C.F.R. § 9.206-2(a) (1986), and included in the IFB), refers only to reevaluation of the qualification upon any change in location or ownership of the manufacturing plant. It does not explicitly require retesting.

We note the protester cites FAR, 48 C.F.R. § 9.207(h), as requiring new testing and qualification if there are manufacturing changes; however, the cited provision was deleted in 1985. See Federal Acquisition Circular 84-11, Aug. 30, 1985. Furthermore, the superseded provision did not require new testing; it merely stated that manufacturing changes requiring new testing and qualification might merit removal of a product from the QPL.

With respect to the required reevaluation, the record shows that in August 1985, C-R requested reevaluation of its listing because it was subcontracting the assembly of the flashers to EAC in Neenah. The USCG conducted the reevaluation and noted that the material components of the previously-tested flashers had been assembled by EAC, and that C-R's own production and test equipment were used by EAC. Also, a USCG quality assurance representative, as the result of a production inspection of another product produced by EAC for C-R, found that EAC was fully capable of building flashers for C-R. Based on these factors, USCG retained C-R's flasher on the QPL without requiring retesting. We view these factors as providing a reasonable basis for USCG's determination.

Regarding the source of the germanium transistors, nothing in the IFB required bidders to identify the components of the qualified product, and C-R offered without exception to supply the flasher listed on the QPL. Whether C-R is capable of obtaining components necessary for its flashers goes to the question of a bidder's responsibility. McIntyre Eng'g Co., supra. We do not review a contracting officer's affirmative responsibility determination except under circumstances not presented here. Trail Blazer Servs., B-220724, Feb. 12, 1986, 86-1 CPD ¶ 275.

Finally, we believe that the questions raised by APS about C-R's certification that it is a manufacturer have no merit. C-R certified that it is a manufacturer for the purpose of the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982), which limits eligibility for public supply contracts to regular dealers or manufacturers. A bidder so certifying itself as a manufacturer nonetheless is permitted under the Walsh-Healey Act to subcontract part or all of the manufacturing effort. See Stellar Indus., Inc.--Request for Reconsideration, 64 Comp. Gen. 748 (1985), 85-2 CPD ¶ 127. Thus, the fact that EAC is assembling the flashers does not mean that C-R's certification was false.

Accordingly, the protest is denied.

  
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General Counsel