

Murphy
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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pacific Sky Supply, Inc.

File: B-225513

Date: March 30, 1987

DIGEST

Where contracting agency fails to comply with statutory and regulatory provisions calling for prompt qualification procedures, so that offeror of an alternate product does not have a reasonable opportunity to compete and the agency does not obtain full and open competition, the General Accounting Office sustains the protest. In this context, a delay of 3-1/2 months between the protester's request for source approval and the agency's referral to user agencies for evaluation is not prompt.

DECISION

Pacific Sky Supply, Inc. protests the cancellation of request for proposals (RFP) No. DLA500-86-R-0654 by the Defense Industrial Supply Center, Defense Logistics Agency (DLA). The firm also protests the agency's procurement of the items covered by the RFP under a basic ordering agreement with the Allison Gas Turbine Division, General Motors Corporation. Pacific Sky contends that the sole source procurement from Allison resulted from DLA's failure to comply with statutory requirements to encourage new competitors and to achieve full and open competition.

We sustain the protest.

BACKGROUND

On March 4, 1986, DLA issued the solicitation for 285 bolts used to connect the T-56 aircraft engine to its reduction gear housing. The RFP identified the bolt by the original manufacturer's (Allison's) part number and contained a "Products Offered (MAR 1983)" clause that described informational requirements for offers of bolts not manufactured by Allison. The clause stated that an alternate product must be physically, mechanically, electrically and functionally interchangeable with the original manufacturer's product, and that the government might have insufficient data to evaluate the technical acceptability of alternate products. Offerors

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therefore were required to submit all information to establish clearly the design, materials, performance, function, interchangeability, inspection and/or testing criteria of any alternate product they proposed.

The agency received two offers by the April 3 closing date. Pacific Sky's offer consisted of a one-page "letter bid" that listed the part number, quantity and price. DLA discussed with Pacific Sky the information that would be necessary to evaluate the firm's product, and on April 14, Pacific Sky submitted an offer in the format required by the RFP. On June 26, the firm applied for source approval to manufacture the bolts, submitting an engineering drawing from Allison, a manufacturing plan and other technical information.

On July 22, DLA contracting officials asked agency technical evaluators to review Pacific Sky's technical data package. About the same time, DLA amended the RFP to require engineering source approval for forging and for the finished part and gave offerors until August 18 to submit revised proposals.

DLA's technical personnel at this time considered Pacific Sky's application for source approval to be unacceptable because they learned that Allison had developed a revision "M" to its engineering drawing for the bolt, while Pacific Sky had submitted the latest version it could obtain, revision "L." DLA did not have revision "M" or know whether it represented a significant change from the earlier drawing. By letter dated August 1, following a discussion with Pacific Sky's attorney, the agency rescinded its finding of unacceptability and told Pacific Sky that it would reconsider the application for source approval. According to DLA, at the same time it became concerned that the need for the bolts was critical. The agency states that it decided to determine the significance of the difference between drawings "M" and "L" and to award to the low-priced, technically acceptable offeror within 3 weeks after the August 18 closing date. Pacific Sky was the only firm that submitted a revised proposal by the new closing date.

The record, however, indicates that it was not until October 6 that DLA procurement officials requested agency technical evaluators to obtain revision "M" to the Allison drawing and to reevaluate the Pacific Sky technical data package. In addition, it appears that at some later time the agency lost Pacific Sky's data, and it was not discovered as missing until late November. On November 4, DLA issued a purchase order for the bolts to Allison under a basic ordering agreement. The purchase order price is more than twice Pacific Sky's price for the bolts, and provides for a longer delivery schedule than Pacific Sky offered. On

November 6, DLA received a copy of revision "M" of the Allison drawing and found that the changes from revision "L" were insignificant. The agency has now referred the protester's technical data package to the agencies using the bolts, the Air Force and Navy, to be evaluated for purposes of future requirements.

Pacific Sky argues that DLA's delay in undertaking an evaluation of its request to be approved as a source for the bolts not only violated the law and regulations governing the qualification of new sources, but also, by effectively precluding Pacific Sky from competing, is inconsistent with the mandate of the Competition in Contracting Act of 1984 (CICA) that agencies obtain "full and open" competition in their procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1) (Supp. III 1985).

ANALYSIS

The Defense Procurement Reform Act of 1984, 10 U.S.C. § 2319(b), provides that a potential offeror may not be denied the opportunity to submit an offer (or quotation) and have it considered for a contract solely because the potential offeror has not met a prequalification requirement, if the offeror can demonstrate to the satisfaction of the contracting officer that its product meets the standards established for qualification or can meet such standards before the date specified for award. Thus, an offeror may not be excluded from consideration merely because it is not an approved source. In this regard, the RFP here provided that any responsible source could compete, subject to the requirement for a preaward determination that the source's product was acceptable.

Key to the effectiveness of this statutory requirement to encourage new competitors is the obligation that agencies "promptly" provide opportunities to meet standards for qualification and "promptly" notify prospective offerors of their qualification or specific reasons for their failure to qualify. 10 U.S.C. § 2319(b)(6); S. Rep. 523, 98th Cong., 2d Sess. 24-5 (1984) (delay is an "especially difficult hurdle" in overcoming a prequalification obstacle)^{1/}; Rotair Industries, Inc., B-224332.2, et al., Mar. 3, 1987, 87-1 CPD
" _____."

^{1/} Report accompanying S. 2489, adopted as the provision of the Defense Procurement Reform Act of 1984 governing prequalification requirements. 130 Cong. Rec. S7159 (daily ed. June 13, 1984) (statement of Senator Levin); S. Rep. No. 500, 98th Cong., 2d Sess. 252 (1984).

A November 11 memo by DLA technical evaluators, agreeing to forward Pacific Sky's application to the user agencies for evaluation, states that the approximate time for Air Force and Navy consideration is 6 months. Consequently, the agency argues that Pacific Sky would not have had an opportunity to qualify for this procurement unless it had filed its technical data package by the closing date for initial proposals in April, which it did not. According to DLA, since the contract was awarded 4-1/2 months after the protester's submission of the technical data, even if the agency had promptly referred the application to the Air Force and Navy for evaluation, there probably would have been too little time for source approval.

The protester has submitted to our Office documents obtained under the Freedom of Information Act indicating that in 1984, the Naval Sea Systems Command and the Air Force's Air Logistics Center, San Antonio, Texas, had approved Pacific Sky as a source for the bolt and had recommended a competitive procurement. One other user organization, the Navy's Aviation Supply Office, Philadelphia, Pennsylvania, had recommended continued restriction to Allison. We conclude from this prior evaluation that consideration of Pacific Sky's application might well have taken less than the 6 months estimated by DLA.

The record establishes that DLA did not initially refer Pacific Sky's June 26 application for source approval to the agency's own technical evaluators until July 22. The application was rejected within a day because Allison had developed a later drawing revision than the one submitted by the protester. We question the reasonableness of rejecting the application without any apparent effort to find out the significance of revision "M." DLA appears to have reached the same conclusion, since it rescinded the rejection within a week and told Pacific Sky that its application would be reevaluated. Nevertheless, DLA did not even ask its technical evaluators to obtain revision "M" and reevaluate Pacific Sky's application for another 9 weeks (August 1 to October 6). In view of the 3-1/2 month period between Pacific Sky's submission of its application for source approval and DLA's initial effort in October to evaluate the application by requesting the latest Allison drawing, we cannot say that Pacific Sky was not prejudiced by DLA's delays.

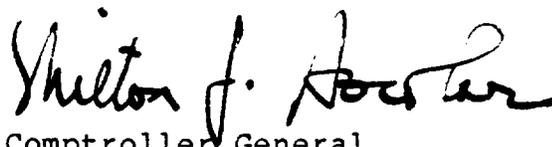
DLA also contends that it could have rejected Pacific Sky's initial proposal for failing to supply the information necessary to establish the equivalency of its alternate product with the Allison bolt. The agency argues that

decision not to do so establishes its intent to conduct a competitive procurement. The agency further points out that compliance with statutory restrictions on prequalification requirements has caused a backlog in considering new sources, and that the Defense Procurement Reform Act of 1984 specifically provides that agencies need not delay proposed procurements while new sources are qualified. 10 U.S.C. § 2319(c)(5).

We have recognized that agencies sometimes must make awards before qualifying alternative sources, Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2, although we have sustained protests where agencies unreasonably delayed such qualifications. Freund Precision, Inc., B-223613, Nov. 10, 1986, 66 Comp. Gen. _____, 86-2 CPD ¶ 543; TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700. Here, DLA did not even refer Pacific Sky's data for a reevaluation until 9 weeks after writing Pacific Sky that it would do so. Under these circumstances, we find that DLA deprived Pacific Sky of a reasonable opportunity to compete. The agency's delay was inconsistent with its statutory obligation to provide potential offerors with a prompt opportunity to meet a qualification requirement. Thus, the agency violated the CICA mandate to obtain full and open competition.

By letter of today to the Director, Defense Logistics Agency, we are recommending that if Pacific Sky is approved as a source for the bolts by the user agencies and can provide some or all of the bolts by the scheduled delivery date at a lower price than Allison, DLA should purchase such bolts from Pacific Sky. In view of the fact that the order to Allison was placed over 4 months ago and it is unlikely that the protester will be approved in time to supply all of the required bolts, we find that Pacific Sky is entitled to its costs of filing and pursuing this protest, including reasonable attorney's fees. 4 C.F.R. § 21.6(e) (1986). Pacific Sky should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(f).

We sustain the protest.

for 
Comptroller General
of the United States