



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: B-225534; B-225535

File: Swedlow, Inc.

Date: March 30, 1987

DIGEST

There is no merit to a protester's contention that by incorporating an aircraft prime contractor's process specification into solicitations for canopies for the aircraft the contracting agency established preaward approval by the prime contractor as a precondition to any contract award where the solicitations provided for offerors to propose on the basis of first article approval by the government and provided that such provisions would prevail over any conflicting provisions contained in other solicitation documents.

DECISION

Swedlow, Inc., protests the award of two contracts to Perkins Plastics, Inc. under request for proposals (RFP) Nos. F09603-86-R-7445 and F09603-86-R-7808, issued by Warner Robins Air Logistics Center, Robins Air Force Base, Georgia. RFP 7445 is for forward canopies for the F-15 aircraft and RFP 7808 is for F-15 aft canopies. Swedlow contends that Perkins had not received preaward approval to manufacture the canopies from the manufacturer of the F-15, as Swedlow argues the solicitations required, and that the firm is not capable of producing the canopies. We deny the protest in part and dismiss it in part.

The prime contractor for the F-15 is McDonnell Douglas Corporation. The agency reports that it acquired from McDonnell Douglas the technical data necessary to procure F-15 spare parts. The solicitations for the forward and aft canopies referenced this and various other technical data and advised potential offerors how to obtain copies of this material. One of these documents was McDonnell Douglas Process Specification (P.S.) 14034, which provides general procedures for the fabrication of reinforced plastic laminates.^{1/}

^{1/} A laminate is a product consisting of layers of material, in this case stretched acrylic, pressed together to form thin sheets.

Paragraph 5.2 of P.S. 14034, entitled "Fabricator Qualification," discusses the procedures for determining whether particular fabricators are capable of complying with the process specification. It provides, in part: "All fabricating facilities shall have been qualified prior to the receipt of any contracts." Paragraph 5.3.7 requires the first production part to be approved by either of two McDonnell Douglas companies.

Both solicitations provided for award to that responsible offeror whose offer conforming to the solicitation would be most advantageous to the government, price and other factors considered. Perkins was the lowest offeror under both solicitations. Swedlow was the third lowest offeror under the RFP for the forward canopies and was second lowest with respect to the aft canopies.^{2/} Swedlow contends that Perkins was not eligible for award under either solicitation because it had not received preaward approval from McDonnell Douglas to produce the canopies. In addition, Swedlow alleges that Perkins does not have the facilities to conduct the testing required to obtain such approval.

Further, Swedlow contends that the preaward survey conducted by the Air Force in this case could not substitute for approval by McDonnell Douglas because the agency's preaward survey team was not experienced in assessing the capabilities of manufacturers of transparencies. In this connection, Swedlow notes that Hill Air Force Base, whose personnel Swedlow says are more experienced in procurements of transparencies than Robins', has never approved Perkins as a qualified source. Finally, according to the protester,

^{2/} The Air Force contends that Swedlow is not an interested party for purposes of objecting to the award to Perkins for the forward canopies because, as third lowest offeror, Swedlow would not be in line for award even if we were to agree that the award to Perkins was improper. Swedlow responds by noting that the second lowest offeror also has not qualified to produce the canopies, an allegation the Air Force contends was not timely raised. We consider it unnecessary to resolve the interested party issue since Swedlow's objections concerning the award to Perkins for the forward canopies are the same as its objections concerning the contract for the aft canopies, and Swedlow's status as an interested party with respect to the aft canopy procurement is not in dispute.

Perkins failed a preaward survey in a procurement of forward canopies for the F-4 aircraft, and the firm's first article in a procurement of F-4 fairing windows has been rejected. For these reasons, Swedlow contends that the decisions to award the contracts to Perkins here were arbitrary and capricious.

The protester's contention regarding required preaward approval is without merit. Both solicitations allowed offerors to propose supplying the canopies either with or without first article approval. The solicitations' schedules provided that, when required, the government would perform the first article tests, and did not provide for any involvement by McDonnell Douglas in this process. In our view, it would not be reasonable to read the solicitations as establishing preaward approval by McDonnell Douglas as a precondition to award if offerors could demonstrate their ability to produce canopies meeting solicitation requirements by supplying first articles acceptable to the government. In this regard, both solicitations contained numerous and prominent references to first article approval, in contrast to the single, undefined reference to preaward approval contained in a general process specification which was on a list of documents incorporated in the solicitations by reference. In fact, the agency states that it did not intend that McDonnell Douglas be involved in these procurements. According to the agency the references to that firm were inadvertently left in the voluminous P.S., which the agency purchased from McDonnell Douglas in order to "break out" the canopies for competition. The P.S. was incorporated to provide technical information to help first-time suppliers compete.

In any event, as the agency points out, any inconsistency between the solicitations' first article provisions and P.S. 14034 would be resolved under the solicitations' Order of Precedence clauses, which stated that "schedule" provisions (such as the first article provisions) would prevail over conflicting provisions in other solicitation document exhibits, attachments, or specifications.

Moreover, we note that the clause in paragraph 5.2 of P.S. 14034 relied upon by the protester provides that all fabricating facilities shall have been qualified prior to award, but does not specifically state that such approval must come from McDonnell Douglas. We recognize that paragraph 5.3.7 of P.S. 14034 did specifically provide for approval of first articles by McDonnell Douglas; first article provisions,

however, involve contract administration, not preaward approval. In any event, both provisions should have been deleted since they were inconsistent with the solicitations' controlling first article provisions. Nonetheless, we think that, when read in their entirety, the solicitations did not require an offeror to have been approved by McDonnell Douglas in order to be eligible for the awards.

Although Sedlow argues that it is not questioning the contracting officer's determination of Perkins' responsibility, the only relevance of Swedlow's remaining contentions regarding the qualifications of the agency's preaward survey team and Perkins' ability to produce other aircraft transparencies would be solely in regard to the issue of Perkins' responsibility. Our Bid Protest Regulations provide that we will not consider protests challenging a contracting officer's affirmative determination that a prospective contractor is responsible--that is, capable of performing the contract--absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(f)(5) (1986). The protester has made no showing of possible fraud or bad faith on the part of the agency and, as discussed above, the solicitations did not establish preaward approval as a definitive responsibility criterion.

The protest is denied in part and dismissed in part.

for *Seymour Efron*
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General Counsel