Van Schaik - PL

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Honeycomb Company of America

File: B-225685

Date: June 8, 1987

DIGEST

1. Protest against agency's failure to solicit past supplier of aircraft wing tips is denied where agency's requirement was of an unusual and compelling urgency such that limiting competition to firms qualifying for first article waiver was essential to meeting the required delivery schedule and the protester was not eligible for waiver.

2. Protest that urgent situation requiring other than competitive procedures was a result of a lack of agency advance planning is denied where agency engaged in planning by attempting to award contracts to fill its requirements but agency plans did not yield the expected results.

3. An agency's decision not to waive a first article testing requirement is reasonable where firm has not produced the item in over 2 years and first articles produced for previous contract were not approved by agency. Further, decision to grant waiver to another firm is reasonable where the firm recently obtained conditional approval of a first article under another contract.

DECISION

Honeycomb Company of America protests any award of a contract under request for proposals (RFP) No. F41608-87-R-2617, issued by the Department of the Air Force for 312 right wing tips and 306 left wing tips for the T-38 aircraft. The Air Force limited competition to Bonded Technology, Inc. and Northrop Corporation--the original manufacturer of the T-38 aircraft--based on a determination that an unusual and compelling urgency for the wing tips existed and only those two sources could supply the wing tips without undue delay.1/ The protester, a previous

1/ Under the Competition in Contracting Act of 1984, an agency may use other than competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be

contractor that provided the wing tips, principally argues that the agency improperly excluded it as an available source. We deny the protest.

BACKGROUND

The T-38 aircraft has replaceable wing tips which are made of an aluminum alloy sheet with a honeycomb metal core. Since Honeycomb produced replacement wing tips for the Air Force in 1982, the agency has made a number of attempts to resupply its depleted stocks. On September 28, 1984, for instance, the Air Force awarded to Honeycomb a "kit contract," for spare parts which included left and right hand wing tips. The Air Force rejected seven first articles delivered by Honeycomb and terminated the contract for the convenience of the government in March 1986. Honeycomb is currently pursuing a claim against the Air Force under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1982), regarding the termination.

The Air Force awarded a contract on May 6, 1985, to Bonded Technology for wing tips, but encountered delays in obtaining an acceptable first article, approved in December 1986. The Air Force has subsequently obtained 101 right wing tips and 107 left wing tips under the contract, but according to the Air Force, the quantities under the contract are not sufficient to accomplish the needed replacements for the T-38 fleet which consists of 890 aircraft.

The Air Force also attempted in 1985 to procure composite-design wing tips using a complicated graphite fiber overlay in the wing tip construction. Contracting officials only solicited the Northrop Corporation for this requirement since Northrop was the only source that could perform the composite process. This attempt was unsuccessful because the Air Force considered Northrop's price excessive and also expected unacceptable delays in converting to the new process. The agency nevertheless renewed its efforts in June 1986, but finally abandoned the composite design in December 1986, again due to Northrop's price.

In December 1986, contracting officials received an emergency purchase request for the 312 right wing tips and 306 left wing tips involved here, with delivery to begin in June 1987. The request listed Bonded Technology as the only source since Northrop apparently had expressed a lack of

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seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2) (Supp. III 1985).

interest in supplying the parts. As required by 10 U.S.C. § 2304(f)(1) (Supp. III 1985), a justification was issued on January 13, 1987, for the procurement by other than full and open competitive procedures due to an unusual and compelling urgency.

The justification lists only Bonded Technology and Northrop as approved sources to provide the wing tips on an urgent basis. The justification explains that the T-38 fleet currently is equipped with wing tips which are, for the most part, original equipment that has exceeded the manufacturer's projected useful life. In addition, some of the wing tips previously provided by Honeycomb are considered defective and in need of replacement. According to the justification, these factors, combined with the unavailability of suitable replacement parts since 1982, have compromised aircraft safety. The justification states that the lack of replacement parts has forced the agency to push the repair of wing tips to the safety limit and further states that replacement wing tips are needed for grounded and soon to be grounded aircraft. Pointing out that the Headquarters for the using activity has ordered the entire fleet be retrofitted with replacement wing tips, the justification concludes that the need for complete replacement now is critical.

The RFP was issued to Bonded and Northrop on January 15, and required the delivery of 6 right wing tips by June 30, 1987, plus 18 right and left wing tips each at the end of every successive month through November 30, 1988.

On January 30, the closing date for submission of proposals, counsel for Honeycomb telephonically requested a copy of the solicitation from the contracting officer's representative and asked why the firm was not solicited. The representative explained that this was an emergency procurement and Honeycomb was not solicited because competition was limited to suppliers of recently-accepted wing tips since there was insufficient time for testing and approval of first articles as would be required from Honeycomb. The representative also explained that since Honeycomb could not possibly receive the solicitation and submit a proposal in time for the closing, no practical purpose would be served by sending it a copy of the RFP. Honeycomb filed its protest here on the same day.

PROTEST GROUNDS

Honeycomb initially complains that the Air Force's refusal to provide a copy of the solicitation violated 15 U.S.C. § 637b (1982), which requires contracting agencies to provide solicitations to small businesses that request them.

Regarding its exclusion from competition, Honeycomb alleges that there was no bona fide urgency that reasonably supported restricting competition to Bonded Technology and Northrop, or that if there was urgency it was caused by a lack of advance planning which cannot provide a basis for the use of noncompetitive procurement procedures. 10 U.S.C. § 2304(f)(5)(A).

The protester also argues that the Air Force lacked a reasonable basis for determining Honeycomb, a previous supplier of wing tips, was not an available source under this procurement. The protester alleges unfair and disparate treatment in that the Air Force determined Honeycomb would have to undergo first article testing while waiving such tests for Bonded Technology since Bonded Technology had failed to produce an entirely acceptable first article wing tip at the time the determination was made. Also regarding first article testing, Honeycomb argues that if source approval for this procurement was conditioned upon having recently submitted an acceptable first article, then the basis for approval violated 10 U.S.C. § 2319, which requires that an offeror cannot be excluded from a procurement based on a prequalification requirement without being afforded the opportunity to satisfy the prequalification standard.

Lastly, Honeycomb argues that its exclusion amounted to a de facto debarment of the firm for reasons relating to the firm's responsibility which should have been referred to the Small Business Administration (SBA) under the Certificate of Competency (COC) procedures.

FAILURE TO PROVIDE COPY OF RFP

The Air Force concedes that contracting officials failed to provide Honeycomb with a copy of the solicitation in violation of 15 U.S.C. § 637b, and have advised the contracting activity to take action to preclude such a problem in the future. The Air Force maintains that the firm was not prejudiced by the failure to provide it a copy, however, since Honeycomb properly was determined not to be a source capable of meeting the agency's urgent requirements. We note that the agency's failure to provide Honeycomb a copy of the RFP did not prevent the protester from filing a protest prior to the closing date. Further, because, as discussed herein, we find Honeycomb properly was viewed as not eligible to compete, the agency's failure to provide it with a copy of the RFP was a procedural defect that did not affect the validity of the procurement.

BONA FIDE URGENCY

When citing an unusual and compelling urgency for use of other than competitive procedures, the agency is required to request offers from "as many potential sources as is practicable under the circumstances." 10 U.S.C. § 2304(e). An agency therefore has the authority to limit the procurement to only those firms it reasonably believes can properly perform the work within the available time. Arthur Young & Co., B-221879, June 9, 1986, 86-1 CPD ¶ 536. We will object to the agency's determination to limit competition based on an unusual and compelling urgency, or its determination of the number of available sources, only when the agency's decision lacks a reasonable basis. See AT&T Information Services, Inc., B-223914, Oct. 23, 1986, 66 Comp. Gen. ___, 86-2 CPD ¶ 447.

Honeycomb attacks virtually every aspect of the Air Force's justification for limiting competition to Bonded Technology and Northrop. The protester, however, does not dispute the justification's findings that many wing tips in use have exceeded their projected useful lives, the agency lacks replacement parts, and the using activity has pushed repair to the safety limit. We believe these factors alone justify a determination of unusual and compelling urgency. In this regard, we have recognized that a military agency's assertion that there is a critical need for certain supplies carries considerable weight and the protester's burden to show unreasonableness is particularly heavy. Dynamic Instruments, Inc., B-220092 et al., Nov. 25, 1985, 85-2 CPD ¶ 596. Honeycomb has not met its burden.

Regarding the reasonableness of limiting the sources to those qualifying for waiver of first article testing, we have not objected to noncompetitive awards to offerors qualifying for waiver where, as here, waiver was essential to the fulfillment of the required delivery schedule. Lunn Industries, Inc., B-210747, Oct. 25, 1983, 83-2 CPD ¶ 491. The record indicates that due to the complexity of the wing tips the Air Force has experienced delay and quality control problems under previous contracts, both with respect to first articles and production items. While the protester contends that requiring production testing of any contractor would be an alternative to the delays occasioned by required first article testing, the agency would then run the risk of obtaining unacceptable articles without sufficient time to reprocure them. The agency is not required to impose that risk on itself.

ADVANCE PLANNING

Honeycomb argues that the wing tip are a staple part of the T-38 aircraft so the agency should have forecast its needs in time to issue a competitive solicitation and to allow for first article testing. In this respect, 10 U.S.C. § 2304(f)(5)(A) prohibits award of a contract using other than competitive procedures as a result of a lack of advance planning by contracting officials.

Honeycomb has submitted a number of internal Air Force memoranda which it contends show that there was a critical shortage of wing tips in 1985, so that contracting officials should have begun a competitive procurement at that time. The protester points out that agency officials took from September 1985, when the requirement was identified by the using activity as an emergency, until December 3, 1986, to abandon attempts at procuring composite-design wing tips from Northrop and to initiate the current procurement. During that time, the agency also issued two show cause orders to Bonded Technology. According to the protester, the agency therefore should have known that its source of supply for its previous requirements was in doubt and made earlier arrangements for a competitive solicitation.

We do not agree with the protester that the urgent situation was caused by a lack of advance planning. Rather, in our view, the facts cited by the protester show that the Air Force planned to fill its needs by means of contracts with Northrop using the new preferred composite design, and with Honeycomb and Bonded Technology. These efforts were unsuccessful or only partially successful. Although CICA requires advance procurement planning, it does not require that the planning be successful. North American Automated Systems Co., Inc., GSBCA No. 8157-P.R., Mar. 3, 1986, 86-2 BCA ¶ 18,819.

The record here is in contrast to that in Freund Precision, Inc., B-223613, Nov. 10, 1986, 86-2 CPD ¶ 543, and TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700, cases in which we found a lack of advance planning by procurement officials. In Freund Precision, Inc., for instance, during a 16-month evaluation period the agency failed to evaluate the protester's alternate product although there was time to do so, and the agency was aware that there was only a single source of supply. Also, in TeQcom, Inc., although the agency knew there was only one previously qualified source for a telecommunications system, the agency failed to publish notices of the required qualification procedure in the Commerce Business Daily or to take other steps to allow potential offerors to qualify when there was time to do so. Here, unlike in Freund and TeQcom, the agency did not fail

to engage in advance procurement planning; its plans simply failed to achieve the expected results.

FIRST ARTICLE TESTING AND APPROVAL

The Air Force states that Honeycomb could not be considered an available source because Honeycomb (or any source aside from Bonded Technology and Northrop) would have had to obtain first article approval and that insufficient time was available to perform the necessary testing and evaluation before production. Honeycomb maintains that the first article requirement was unfairly applied since it was waived for Bonded and Northrop but not Honeycomb and that the agency's use of the first article requirement excluded Honeycomb as an approved source in violation of 10 U.S.C. § 2319. Honeycomb alleges that when the solicitation was issued it was the only known supplier of flightworthy wing tips since it delivered 1,158 wing tips between 1976 and 1982.

Honeycomb also argues that Northrop's being the manufacturer of the T-38 aircraft should not justify waiver of the first article requirement because the wing tip design has changed since that firm last produced the item, and that Bonded Technology should not have qualified for a waiver based on first article approval under its 1985 contract since that approval was only conditional. In this last regard, the protester asserts that the agency did not perform all required tests and that the approved item had a number of flaws which the contractor agreed to correct. Finally, the protester argues that the only support for the agency's decision not to waive the requirement for Honeycomb was an opinion from an Air Force engineer whom Honeycomb contends is biased against it.

We have consistently held that an agency's decision to waive or not to waive first article testing for a particular offeror is subject to question only where it is shown to be unreasonable. Airline Instruments, Inc., B-223742, Nov. 17, 1986, 86-2 CPD ¶ 564. In the absence of a showing that the agency lacked a reasonable basis, we will not substitute our judgment. Id.; Lunn Industries, Inc., B-210747, supra. Further, where a first article requirement reasonably is imposed, there is no right to waiver of the requirement, and the protester has a heavy burden to show the agency's denial of waiver was unreasonable and thus improper. Airline Instruments, Inc., B-223742, supra.

In our view, the decision not to waive the requirement for Honeycomb was justified by the fact that Honeycomb has not produced the item since 1982, and by the firm's failure to

produce an acceptable first article under its 1984 contract. Under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.303(b) (1986), first article testing may be imposed when a prior producer has discontinued production for an extended period of time. Further, Honeycomb failed in seven attempts to produce an acceptable first article wing tip under its terminated contract. While Honeycomb is contesting the rejection of those first articles, that dispute is a matter of contract administration for resolution under the Disputes Clause of Honeycomb's terminated contract and not by our Office. 4 C.F.R. § 21.3(f)(1). The firm's self-serving denial of defects under its previous contract does not provide a basis for concluding that the agency acted improperly in refusing to grant a waiver of first article testing in the procurement now in issue. Amplitronics, Inc., B-209339, Mar. 1, 1983, 83-1 CPD ¶ 210.

Regarding the waiver of first article testing for Bonded, that decision was based on the first article approval under Bonded Technology's 1985 wing tip contract with the Air Force. The first article was in fact conditionally approved by the Air Force's engineering unit which listed a number of discrepancies required to be corrected in production items. There is no requirement that a first article conform exactly to specifications; the purposes of first article testing and approval is to ensure that the contractor can produce a conforming product. FAR, 48 C.F.R. § 9.302. Further, the decision whether to approve a first article also is a matter of contract administration that we do not review. 4 C.F.R. § 21.3(f)(1). The protester does not argue that the discrepancies are of the same or more critical nature than those for which its first articles were rejected, nor does it dispute that the discrepancies can be readily corrected during production. Thus, the protester has not shown the basis for waiver was unfair in relation to the agency's treatment of Honeycomb. The reasonableness of waiver for Northrop is academic since it is clear from the record that Northrop was not in line for award, and in fact, did not submit a proposal.

Further, we also reject the protester's contention that the Air Force's failure to solicit Honeycomb violated 10 U.S.C. § 2319, which concerns qualification requirements that must be completed as a condition for award. The statute provides that a prospective contractor cannot be denied an opportunity to compete if it can demonstrate that it or its product meets the standards established for prequalification before the date specified for award. The determination that a first article requirement must be applied, except in circumstances appropriate for waiver, does not involve a prequalification requirement and 10 U.S.C. § 2319 is not

applicable. See Nasco Engineering, Inc., B-224292, Jan. 14, 1987, 87-1 CPD ¶ 57. Honeycomb was precluded from competing, not because it failed to meet a qualification requirement that must be completed for award, but because there was insufficient time for conducting the first article testing that would be required of it.

Honeycomb also argues that the agency was biased against it, as evidenced by the agency's imposing the first article requirement only after Bonded Technology obtained first article approval under its 1985 contract. In addition, the protester alleges that an Air Force engineer who participated in the evaluation of both Bonded Technology and Honeycomb's first articles was biased against Honeycomb.

Where a protester alleges that procurement officials acted intentionally to preclude the protester from receiving an award, the protester must submit virtually irrefutable proof that the officials had a specific and malicious intent to harm the protester, since contracting officials otherwise are presumed to act in good faith. Rodgers--Cauthen Barton-Cureton, Inc., B-220722.2, Jan. 8, 1986, 86-1 CPD ¶ 19. The protester has not carried its burden of proof.

The issuance of the RFP shortly after Bonded Technology obtained first article approval under its prior contract does not itself suggest bias, but only that in planning how to meet its needs the agency considered the anticipated approval of a contractor's first article. There is nothing improper in that. Honeycomb bases its allegation of bias by the engineer on an alleged lack of support for his recommendations. Bias, however will not be attributed to agency officials on the basis of inference or supposition. Rodgers-Cauthen Barton-Cureton, Inc., B-220722.2, supra. Moreover, as previously explained, the decision that Honeycomb did not qualify for waiver was supported by the record.

DE FACTO DEBARMENT

We reject the protester's contention that the decision not to waive the first article requirement for Honeycomb amounted to a negative determination of the firm's responsibility and a de facto debarment on that basis without procedural due process. The denial of waiver of a first article requirement does not constitute a determination that a firm is nonresponsible and the COC procedures are not applicable. Aul Instruments, Inc., B-214517.2, Aug. 13, 1984, 84-2 CPD ¶ 163. Rather, it constitutes an administrative decision that even though the firm might possess the capabilities to perform the contract and therefore is responsible, the risk to the government of foregoing

first article tests is not worth the cost savings, and other less costly methods of ensuring the necessary quality are not reasonably available. See FAR, 48 C.F.R. §§ 9.302 and 9.303; Amplitronics Inc., B-209339, supra. Therefore, the exclusion of Honeycomb based on its ineligibility for waiver did not constitute an improper nonresponsibility determination tantamount to a de facto debarment.

CONCLUSION

As explained, the Air Force properly justified its decision to limit competition to sources qualifying for waiver of first article testing because of unusual and compelling urgency and the urgent situation was not caused by a lack of advance planning by agency officials. Further, the agency reasonably determined a first article requirement would be necessary for Honeycomb, but not for Bonded and Northrop, and therefore properly solicited them as the only available sources to meet the delivery schedule.

We deny the protest.

Harry R. Van Cleve
General Counsel