The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: MMC/PHT Company--Reconsideration

File: B-230599.2

Date: July 27, 1988

DIGEST

Though request for proposals (RFP) did not reference test requirements, agency could reasonably require testing before approval of the protester as a source for containers to transport nuclear critical electronic drawers, since RFP required protester to furnish evidence that its containers would meet requirements. Since the protester had never manufactured containers, and submitted drawings which did not reflect vibration and shock test requirements, the agency could require evidence, in the form of test results, to alleviate its concerns about latent weaknesses resulting from protester's manufacturing process.

DECISION

MMC/PHT Company (PHT) requests that we reconsider our decision, MMC/PHT Co., B-230599, May 17, 1988, 88-1 CPD ¶ 464, denying its protest of the Department of the Air Force's award of a noncompetitive contract, No. F42600-88-C-1304, to Texstar Incorporated, to supply electronic drawer containers. We affirm our prior decision.

PHT had protested that the Air Force failed to give its proposal fair consideration and lacked an adequate basis for the award to Texstar. We denied the protest, concluding that the agency properly proceeded on an urgent and compelling basis to award a noncompetitive contract to the only known firm capable of providing the containers within the required timeframe. The Air Force had determined that the 90 containers awarded to Texstar were urgently needed to prevent work stoppages that would result in extensive and costly missile retargeting. PHT did not appear to dispute the urgent need for the containers. The Air Force also determined that PHT would have to submit a first article for testing, but that there was insufficient time for such testing. The record failed to establish that the Air Force reasonably could have qualified PHT in time for award, given that delivery of the containers was due much sooner than the

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normal manufacturing lead time, and that extensive qualification testing was required. We found the Air Force reasonably concluded that the information PHT submitted to demonstrate the acceptability of its containers was insufficient, as the drawings did not reflect vibration and shock test requirements and PHT had never manufactured the specific container which would be used to transport expensive, nuclear critical, electronic drawers. Though we did not object to the award to Texstar, we noted that we anticipated that the Air Force would expeditiously develop the technical data and testing requirements for the containers so that future procurements could be conducted with more qualified sources. The Air Force has since issued a competitive solicitation for the remaining containers it needs.

In its request for reconsideration, PHT argues that the Air Force should not require that its containers be tested because the RFP did not reference any test requirements.

We disagree. Solicitation clause M.25, "Evaluation of Proposals Submitted Based Upon Data Not Provided In The Solicitation," provided that offers from firms, such as PHT, not previously identified as sources for the requirement, would be considered for award only if the offeror: 1) identified the source of the data the offeror would use to perform the contract, 2) provided a set of the data, and 3) provided evidence that the item proposed would meet the Air Force's requirement. The clause stated that the decision of the contracting officer as to the adequacy of the data was to be final.

Under this clause, the Air Force could reasonably require testing before approval of the protester as a source, even though neither the solicitation nor the drawings furnished by PHT referenced test requirements. As the clause indicated, the protester was required to furnish not only data (drawings), but also evidence that its containers would meet requirements. The containers, used to store expensive electronic system drawers for numerous missile weapon system sites, are subject to extremes of temperature and vibration while being transported by truck over rough terrain. Given that the drawings submitted by PHT did not reflect vibration and shock test requirements, and PHT had never manufactured the container which would be used to transport expensive, nuclear critical, electronic drawers, we think the Air Force reasonably could be concerned about such things as latent weaknesses resulting from the protester's manufacturing process, and could require evidence, in the form of test

results, to alleviate these concerns. Thus, the fact that testing was not specifically set forth as a requirement in the solicitation did not preclude the Air Force from requiring testing in these circumstances.

PHT also states, without any elaboration, that the digest of our decision conflicts with Federal Acquisition Regulation (FAR) § 6.301(c) (FAC 84-5), which provides that contracting without providing for full and open competition shall not be justified on the basis of a lack of advance planning by the requiring activity. The digest of our decision provides that an agency decision to limit competition to the only known qualified source is proper where the agency does not have sufficient time to qualify a new source.

We see no inconsistency between the FAR and our decision. While it is clear that where, through advance planning, an agency can devise prequalification requirements or first article testing requirements that will foster and permit competition, the agency must do so, it is entirely reasonable, depending on the circumstances, for an agency to delay developing such requirements until it actually receives a proposed alternate and the necessary technical data to evaluate it. See Kitco, Inc., B-228045, B-229609, Dec. 3, 1987, 67 Comp. Gen. _____, 87-2 CPD ¶ 540. Here the agency, believing there was only one source capable of furnishing the containers, issued a notice in the Commerce Business Daily of its intended noncompetitive procurement. When the Air Force learned of PHT's interest in supplying the containers from PHT's response to the restricted solicitation, the Air Force immediately proceeded to develop a complete procurement package, including data and testing requirements. It awarded only the minimum essential quantity to Texstar, and issued a competitive solicitation for the remaining containers on April 11, just 2 months after PHT submitted its proposal. We believe these actions are consistent with regulatory requirements for advance procurement planning and development of specifications so as to permit agencies to obtain full and open competition. Cf. Freund Precision, Inc.--Reconsideration, B-223613.2, May 4, 1987, 87-1 CPD 464.

PHT also complains that the Air Force is unjustly subjecting it to testing not required of Texstar. However, Texstar, a producer of the items as recently as 1986, had bought out the original designer and producer of the containers and was previously identified as a source and thus does not have to comply with the requirements of Clause M.25, which apply to those not previously identified as a source.

PHT also objects to our decision's reference to Texstar as a qualified source. Our decision noted that the purchase request for the containers and the justification for using other than full and open competitive procedures both stated that Texstar was the only qualified source that could meet the accelerated schedule for the containers. PHT maintains our discussion of the purchase request and justification document is a "harangue of nonfactual remarks." PHT has provided us with no evidence to question the validity of statements about Texstar in the Air Force's purchase request and justification. A protester has the burden of affirmatively proving its case and this burden is not met by general allegations of illegality or impropriety. See California Microwave, Inc., B-229489, Feb. 24, 1988, 88-1 CPD ¶ 189.

We affirm our prior decision.

James F. Hinchman
General Counsel