

Ms. Coles



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Arrow Gear Company

File: B-238936

Date: July 12, 1990

Pat Morgan, for the protester.
Millard F. Pippin, Department of the Air Force, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where protester challenges the agency's award of a contract to an approved source rather than the solicitation's omission of the protester as an approved source, the protest does not involve an allegation of a solicitation impropriety and, therefore, need not be filed before the closing date for receipt of proposals.
2. Where the agency's and the protester's versions conflict concerning when the protester was notified that its proposal would not be considered for award, the General Accounting Office will resolve doubt over whether the protest was filed within 10 days of that notification in the protester's favor.
3. Contracting agency's decision to award contract to the only approved source that submitted a proposal is proper where, in view of unexpected deterioration of supply stock, the approved source is the only firm that can meet the agency's urgent need for the item.

DECISION

Arrow Gear Company protests the award of a contract to Aircraft Gear Corporation under request for proposals (RFP) No. F41608-89-2923, issued by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas, for 326 gear shaft axes for J85 aircraft engines.

We deny the protest.

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The Air Force considers the gear shaft axis called for by the RFP to be a critical part; if it does not work properly, it can cause extensive secondary damage and loss of the weapon system as well as loss of life. The RFP states that since the agency lacks a complete data package and the ability to provide facilities, testing, or materials, offers from firms not previously identified as sources would be considered only if it could be determined prior to award, on the basis of data supplied by the firm, that the proposed item would meet the agency's requirements. In this regard, the RFP listed Aircraft Gear Corporation and two divisions of General Electric Company as approved sources.

On the June 5, 1989, closing date, six offerors, including Arrow Gear and Aircraft Gear, responded to the solicitation. Although Arrow Gear submitted a letter dated March 13, 1986, which stated that Arrow Gear had been granted source approval for the item, the agency discovered that Arrow Gear had lost its status as an approved source when the agency established new qualification requirements on November 5, 1988; however, the Air Force had never advised Arrow Gear that it was no longer an approved source. The agency then concluded that Aircraft Gear was the only approved source that submitted an offer.

By memo dated July 14, the division chief at Kelly Air Force Base urged the buyer to award the contract to an approved source, due to the urgency of the requirement and the lengthy process of qualifying another source. The memo stated that, due to backorders, the monthly demand rate, and the 6-month production leadtime, the agency should award the contract to Aircraft Gear, the only approved source which had submitted an offer, to avoid delays that would result in the grounding of the T38 aircraft and degradation of the Air Training Command Mission.

On February 16, 1990, the Air Force awarded the contract to Aircraft Gear. Arrow Gear then protested to our Office on March 14, challenging the agency's rejection of its lower-priced offer and failure to notify Arrow Gear that it was not an approved source.

The Air Force concedes that it failed to notify Arrow Gear that it had been removed from the approved source list; however, the agency argues that the protest nevertheless is untimely. The Air Force contends that given Arrow Gear's belief that it was an approved source and the solicitation's omission of the firm from the approved sources listed in the RFP, Arrow Gear's protest concerns an alleged solicitation defect and thus should have been filed before the closing

date for receipt of proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990). We disagree.

The record indicates that prior to the issuance of the solicitation, Arrow Gear had not been listed as an approved source in similar solicitations, even when the firm was, in fact, an approved source. Moreover, the contracting agency furnished Arrow Gear with a copy of the solicitation after Arrow Gear sent a telex to the agency requesting a copy and stating that Arrow Gear was an approved source for the item. As a result, Arrow Gear had no reason to object to the omission of its name as an approved source until it received the rejection letter from the agency, which was the agency's first notification to Arrow Gear that it was not an approved source.

Alternatively, the Air Force contends that Arrow Gear's protest is untimely because the rejection letter, sent to Arrow Gear on February 16, informed Arrow Gear that since it was not an approved source for the item, the agency did not consider its offer for award. The Air Force argues that notwithstanding its uncertainty concerning the actual date that Arrow Gear received the rejection letter, since Arrow Gear's protest was not filed until March 14, more than 10 working days after Arrow Gear should have received the agency's February 16 letter, it is untimely under our Regulations, which require that protests be filed within 10 working days after the basis of the protest is known or should have been known. 4 C.F.R. § 21(a)(2).

Arrow Gear denies that it failed to file the protest within 10 working days after it received the agency rejection letter. According to the protester, it received an undated rejection letter on March 7. In this regard, Arrow Gear has submitted a copy of the letter bearing the following date stamp: "received March 7, 1990."

We find the protest to be timely. It is our practice, for timeliness purposes, to resolve doubts over when a protester first becomes aware of its basis for protest in the protester's favor. Med-Nat'l, Inc., B-232646, Jan. 12, 1989, 89-1 CPD ¶ 32. Because the agency does not know the actual date that the protester received the February 16 rejection letter and the protester states that it did not receive the letter until March 7, we consider the March 14 protest to be timely filed within 10 working days after the protester became aware of its basis for protest.

With regard to the merits of the protest, the Air Force maintains that while it failed to notify Arrow Gear in November 1988 that it had established new qualification

requirements, the agency nevertheless properly awarded the contract to the only approved source at the time which had submitted an offer, Aircraft Gear. The Air Force contends that even if Arrow Gear had been made aware of the new requirements instituted in late 1988, due to the length of the approval process, Arrow Gear still would not have been an approved source by mid-July 1989, when the Air Force was ready to make award, and, thus, would have been ineligible for award in any event.

An agency may limit competition for the supply of parts if doing so is necessary to assure the safe, dependable, and effective operation of military equipment, B.H. Aircraft Co. Inc., B-222565; B-222566, Aug. 4, 1986, 86-2 CPD ¶ 143, and if nonapproved sources are given a reasonable opportunity to qualify. Pacific Sky Supply, Inc., 64 Comp. Gen. 194 (1985), 85-1 CPD ¶ 53. In such cases, contracting agencies are required to advise potential offerors of all the requirements they must satisfy to become qualified; afford them a prompt opportunity to demonstrate their ability to meet the qualification standards; and promptly inform potential offerors whether qualification has been attained. Federal Acquisition Regulation (FAR) §§ 9.202(a)(2) and 9.202(a)(4).

By failing to advise Arrow Gear that it was no longer an approved source after the adoption of new qualification requirements in November 1988, and thereby failing to give Arrow Gear an opportunity to become qualified under the new requirements, the Air Force clearly violated the FAR provisions for notice to potential offerors of the agency's qualification requirements and a prompt opportunity to demonstrate their ability to comply with the requirements. Nevertheless, we find that Arrow Gear was not prejudiced by the Air Force's error, since Arrow Gear would not have been eligible for the award, even if it had been aware of the November 1988 qualification requirements when they were instituted.

According to the Air Force, the November 1988 qualification requirements called for contractors that are first-time manufacturers to substantiate their manufacturing capability by submitting three pre-contract award samples. In this regard, the Air Force states that the manufacturing of the samples could have taken up to 36 weeks to produce a forging and 16 weeks for machining and finishing processes. Moreover, it would have taken the agency approximately 8 weeks to evaluate a source approval request. Arrow Gear does not dispute the agency's estimate of the time required to process an approval request under the November 1988 qualifications.

Given the fact that under these qualification requirements, the agency anticipated the pre-contract award qualification process to take approximately 52 weeks or 1 year (36 weeks for forging and 16 weeks for machining and finishing processes) and the source approval process to take an additional 8 weeks, Arrow Gear clearly would not have been eligible for award as an approved source by July 1989, when the Air Force was ready to make award. We recognize that, while the Air Force was prepared to make award in July 1989, it did not in fact do so until February 1990, because of lengthy price negotiations with the awardee. Whether Arrow Gear was prejudiced by the Air Force's failure to notify it that it was no longer an approved source as of November 1988 must be determined, however, by reference to the circumstances as of July 1989, when the Air Force planned to make award in order to meet its urgent needs. The subsequent unforeseen delay in actual award until February 1990 does not change the fact that as of July 1989, when the Air Force was ready to make award, Arrow Gear could not have completed the then-current qualification process in time to be eligible for award.

Finally, we note that the Air Force corrected its failure to notify Arrow Gear that it had lost its approved status by advising the firm about the current requirements, adopted in March 1990, and giving Arrow Gear an opportunity to become qualified. The current approval requirements eliminated the need for manufacturing pre-contract award samples called for under the November 1988 requirements, thereby substantially reducing the time needed to process an approval request. Arrow Gear submitted a source approval package on or around April 20, and was approved on May 21; as a result, the firm is eligible to participate in future competitive procurements for the part.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel