



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rotair Industries
File: B-239503; B-239503.2
Date: August 24, 1990

Jacob B. Pompan, Esq., Pompan, Ruffner & Bass, for the protester.
Harry D. Boonin, Esq., Department of the Navy, for the agency.
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DIGEST

1. Protest that agency delay during its source approval process improperly precluded protester from competing is denied where, even if the protester had received source approval, it would not have been eligible for waiver of first article testing; since the agency's urgent need for the contract item, a flight-critical part, could only be met by an approved source that was not subject to the delays involved in first article testing, the protester would not have been eligible for award of a contract to meet the agency's urgent requirement in any event.
2. Allegation that agency's urgent requirement for a flight-critical part was brought about by lack of acquisition planning by the agency is rejected, where the record shows that the agency was aware of and had taken measures to meet shortages of the item, but deferred actual procurement of the item primarily in order to qualify additional sources.

DECISION

Rotair Industries protests the award of a delivery order to any firm under request for quotations (RFQ) No. N00383-88-X-N505, issued by the Department of the Navy for helicopter gear shafts. According to the protester, the Navy improperly denied Rotair the opportunity to compete under the solicitation by failing promptly to consider Rotair's

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request for approval as a qualified source for the gear shaft.

We deny the protest.

BACKGROUND

The contract item is a flight-critical component of the tail rotor gear box assembly of the Navy's H-3 helicopter; its classification as flight-critical limits its procurement to qualified sources. The record indicates that the Navy developed a critical need for gear shafts in November 1988, when the supply was depleted and the agency had to begin obtaining the item by removing it from the gear boxes of which it was a component part. In May 1989 the Navy took steps to meet the critical need for new gear shafts by placing the item on a hotline system which required bi-weekly telephone conference calls to update the status of efforts to supply items in a critical-need status, and synopsising in the Commerce Business Daily (CBD) a proposed sole-source acquisition of the gear shaft from the only approved source for the item, the Sikorsky Aircraft Division of United Technologies Corporation, the manufacturer of the H-3 helicopter.

In response to the CBD synopsis, Agusta Aerospace Corporation, Fenn Manufacturing Company, and Rotair submitted unsolicited offers for the item, together with requests for source approval. In an effort to qualify additional sources for the item, the Navy deferred its procurement of the gear shaft pending review of these source approval requests. In September 1989, however, the Navy determined that its needs were so urgent that it would have to solicit the item only from firms already approved as sources--at that time, only Sikorsky and Agusta--which were not subject to first article testing (FAT) because they had previously manufactured the identical item. On March 9, 1990, the Navy awarded the delivery order to Agusta that led to Rotair's protest.

ANALYSIS

Delay in Source Approval Process

Rotair objects that, because the Navy neither approved the firm's longstanding request for source approval nor advised Rotair of any deficiencies in the data package that Rotair submitted to the Navy in conjunction with that request, as required by the Federal Acquisition Regulation (FAR), the agency improperly precluded Rotair from being approved as a

source for the item and therefore, in effect, prevented it from competing under the solicitation.

As provided by 10 U.S.C. § 2319(b)(6)(1988), an agency imposing a qualification requirement--that is, a requirement for testing or other quality assurance demonstration that must be satisfied by a prospective offeror or its product in order to become qualified for an award--must ensure that an offeror seeking qualification is promptly informed as to whether qualification has been obtained and, if not, promptly furnished specific information as to why qualification was not attained. See Rotair Indus., Inc., B-224332.2, B-225049, Mar. 3, 1987, 87-1 CPD ¶ 238. This statutory provision is mirrored in FAR § 9.202(a)(4).

The Navy concedes that it did not meet this standard here. Rotair submitted a request for source approval on June 23, 1989 and supplemented the request on October 4 by providing the Navy with the required process/operation sheets from its machining source, Westland, Inc.^{1/} There is no indication, however, that the agency reviewed Rotair's package at all until April 1990--that is, until after the award to Agusta--when the Navy forwarded the request for final engineering review. The Navy explains that, once the determination was made in September 1989 to limit the competition to the then approved sources, Sikorsky and Agusta, Rotair's source approval request "lost its priority status," and "active review of its request was no longer performed." The agency acknowledges, however, that it should have continued to review Rotair's request in the interest of qualifying the firm and increasing competition with respect to longer-term, non-urgent procurements of the gear shaft. See Rotair Indus., Inc., B-224332.2, B-225049, supra.

Nonetheless, the Navy asserts that Rotair was not prejudiced by any failure to proceed with the active review of Rotair's request for source approval because, as a new manufacturer of the item, Rotair would have been subject to a requirement for FAT even had it been promptly approved. According to the agency, the time required for a new manufacturer such as Rotair to submit first article samples, successfully complete FAT, and manufacture production quantities of the gear shaft for delivery, would total approximately 730 days.

^{1/} Initially, Rotair asserted that the agency's delay should be dated from 1985, when it first filed a request for source approval. The record clearly shows, however, that Rotair did not provide the required process/operation sheets to support that request, despite several requests from the Navy to do so.

The Navy explains that it could not have waited that long for the urgently needed gear shafts. Further, the agency states that it could not take the risk that a new manufacturer of the item would not even pass a FAT; since failure to complete FAT would have caused deliveries of the flight-critical gear shaft to be delayed even further, beyond the best-case 730-day period, the Navy states that it could not have awarded a contract for its urgent requirement to any firm that was not already eligible for waiver of FAT. Consequently, according to the agency, since Rotair had not actually manufactured the item, and the time required for FAT would make it impossible for Rotair to meet the urgent delivery schedule, Rotair would not have been eligible for award under this procurement even if it had received prompt source approval.

In addition, the agency states that it has taken corrective action to enable Rotair to compete for the non-urgent portion of the Navy's gear shaft requirement. In April 1990, when the Navy determined that a portion of its requirement for gear shafts did not need to be met on an urgent basis, it took steps to expedite the source approval process for Rotair; on May 18, Rotair was tentatively approved as a source for the gear shaft, subject to Rotair's successful completion of FAT. Thus, according to the Navy, in effect it has taken corrective action to enable Rotair to compete for the only portion of its requirement for which Rotair could have competed had it received prompt source approval--that is, the agency's non-urgent requirement.^{2/}

Rotair does not agree that it was not prejudiced by the delay in the approval process. First, Rotair argues that the urgency of the Navy's requirement has not been substantiated. Second, the firm argues that, even if the Navy did have an urgent requirement, Rotair could have met that requirement by producing the first article and the production units concurrently, at its own risk, thereby eliminating the leadtime the Navy states would have been necessary for completion of FAT. Finally, Rotair argues that, even if the Navy's 730-day estimate is correct, it is so close to the actual delivery schedule incorporated in the contract awarded to Agusta (692 days) that Rotair arguably could have met the schedule.

^{2/} With respect to this non-urgent requirement, the Navy issued a solicitation to all five firms which had either been approved as sources or, in the Navy's view, were about to be approved. Although Rotair was among the firms solicited, it did not submit an offer.

We reject Rotair's assertion that the Navy has not demonstrated the urgency of its requirement. The record shows that the Navy made a formal determination of urgency, and found that the procurement of gear shafts should proceed notwithstanding the protest filed by Rotair. This determination incorporates and explicitly references the agency's earlier findings of an urgent need for the critical item in 1988 and 1989, as discussed above.^{3/} Further, this document and the record as a whole make it clear that the finding of urgency was based on the thorough depletion of the Navy's stock of spare gear shafts, and the fact that helicopters would be grounded unless new parts could be obtained promptly. Rotair has provided no evidence to the contrary.

Rotair's contention that it could have met the Navy's urgent delivery schedule by conducting production and FAT simultaneously would not eliminate the FAT leadtime problems. Even where an offeror argues that it can reduce the leadtime required for FAT--for example, by beginning production while the item is undergoing first article evaluation--an agency is not obligated to take the risk that the offeror will not pass FAT and thus further delay delivery. See Howmet Corp., B-232421, Nov. 28, 1988, 88-2 CPD ¶ 520. Here, we find the Navy's statement that it would not have been willing to take such a risk to be entirely reasonable in light of the agency's urgent need for the item.^{4/}

Finally, we are not persuaded by Rotair's argument that it could have met delivery schedule, even if it had been required to pass FAT prior to production of the gear shaft. First, while the difference between Rotair's projected delivery time (730 days) and the originally required (692

^{3/} It also references a justification for other than full and open competition executed by the Navy in March 1990 to support the agency's determination to limit competition to Sikorsky and Agusta.

^{4/} Under similar circumstances, we have held that an agency has acted reasonably in considering only those approved sources for which FAT or other tests may be waived, based on their prior manufacture of the identical item. For example, in Donlee Precision, B-235782, Sept. 21, 1989, 89-2 CPD ¶ 262, we approved of the agency's sole-source award of a contract to the prior manufacturer of an urgently needed flight-critical item; even though two other firms had recently received source approval for the item, only the manufacturer had produced the identical item and would therefore not be subject to the delays involved in production lot sampling.

days) delivery schedules may have been relatively small, Rotair does not explain how it could have made up the difference and actually complied with the delivery schedule. Second, the record clearly shows that the Navy's estimate of 730 days for delivery by Rotair is a best-case scenario which does not allow for delays at any stage of the process, including delays that might occur if Rotair did not complete FAT successfully or on schedule; as noted above, the agency was not required to assume the risk of such failure and the delay that would have resulted. Finally, even if Rotair could have met the original 692-day delivery schedule in Agusta's contract, the Navy has shortened the delivery period by more than half, to 330 days after award, due to urgency.^{5/} Rotair does not claim that it could have met this revised schedule, and there is nothing in the record to indicate that it could have. Since it is the revised schedule which accurately reflects what the agency requires to meet its minimum needs--that is, its urgent requirement--we find that Rotair has not shown that it would have been eligible for the award intended to meet that requirement. Consequently, we find that Rotair was not prejudiced with respect to the Navy's urgent requirement for gear shafts by the agency's failure to review promptly its request for source approval.

Acquisition Planning

Rotair argues that any urgency in this procurement was improperly brought about by the Navy's failure to conduct acquisition planning, and that the urgency of the requirement is no justification for exclusion of Rotair from the competition.

Rotair is correct that, under the Competition in Contracting Act (CICA), 10 U.S.C. § 2304(f)(5)(A), award of a contract using other than competitive procedures may not be made where the requirement has been brought about by a lack of advance planning by contracting officials. See Donlee Precision, B-235782, supra. However, there is no indication of an improper lack of planning here. The record is clear that the continued shortage of gear shafts was due, not to poor planning or inaction by the Navy, but primarily to delays in the procurement process caused by the agency's

^{5/} The Navy issued a new solicitation to all firms eligible for waiver of FAT on June 21; on July 17, the Navy awarded a new contract to Fenn, which had provided the identical item to Sikorsky, that called for delivery 330 days after award, and terminated for the convenience of the government the original contract with Agusta.

efforts to qualify additional sources for the item. For example, as noted above, rather than proceed with its proposed sole-source award to Sikorsky in the spring of 1989, which had been initiated in response to the shortage of gear shafts that was known to the agency by that time, the Navy deferred the acquisition of gear shafts until March 1990 in an effort to qualify additional sources. As noted above, moreover, the effort was largely successful, and resulted in awards to firms (Agusta and Fenn) other than the originally proposed sole-source offeror. Several other additional sources or potential sources, moreover--including Rotair--were solicited by the Navy for the remainder (the non-urgent portion) of the requirement for gear shafts. Under the circumstances, we find no basis for Rotair's allegations. See Nebraska Aluminum Castings, Inc., B-234144.2, June 8, 1989, 89-1 CPD ¶ 534 (allegation of lack of advance planning rejected where record showed that agency's urgent requirement was due, not to deliberate action or to inaction, but to efforts to encourage the development of additional sources).

The protest is denied.



for James F. Hinchman
General Counsel