



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kitco, Inc.
File: B-241868
Date: March 1, 1991

Randall Finley for the protester.
John P. Patkus, Esq., Defense Logistics Agency, for the agency.
C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency's failure to act in a timely manner on protester's request for source approval, as a supplier of an alternate product, denies protester a reasonable opportunity to qualify as a source and to compete for award.

DECISION

Kitco, Inc. protests any award under request for proposals (RFP) No. DLA500-90-R-A173, issued by the Defense Industrial Supply Center, for thrust washers, which are a component of the 54H60 propeller pitch control assembly.^{1/} The protester alleges that the agency has unreasonably delayed and denied approval of the protester as a source for the part.

We sustain the protest.

On February 15, 1989, the agency issued RFP No. DLA500-89-R-A019, for a quantity of Hamilton Standards thrust washers P/N 537190. That RFP identified three acceptable sources for the washer and included a Products Offered clause, which set forth procedures for offerors who could supply neither the Hamilton Standards part nor a part manufactured for Hamilton Standards. The solicitation required that acceptable sources meet the latest revision of the original equipment manufacturer (OEM) drawing.

^{1/} The 54H60 propeller is used in C-130 and P-3 aircraft. The thrust washer is considered a critical component for proper propeller functioning.

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On March 8, 1989, the protester submitted a proposal in response to the RFP along with a request for approval as a source for manufacture of an alternate part, based primarily on its status as an approved source for four similar washers. At the agency's request, the protester furnished information concerning the earlier source approval on April 13. On May 9, the agency advised the protester by letter that the cognizant engineering support activity would require a minimum of 180 days to process and evaluate the protester's request, too long a period for the agency to delay award. The agency assured the protester that it would however continue evaluation of the protester's request for future procurements, and notify Kitco of the outcome.

The agency subsequently requested additional dimensional data, which the protester supplied by letter dated June 22. The agency also advised the protester that before forwarding Kitco's request, the engineering activity would require a certification of Kitco's right to use the data supplied with its source approval request. Kitco provided the certification on July 25, 1989.

During the next year, the protester made several calls to the agency, inquiring as to the status of its source approval request; the agency informed Kitco that there was a long waiting list for requests and that the engineering activity had not yet taken action. On June 8, 1990, the agency initiated action for another procurement of the washers; agency technical personnel recommended that the contracting officer use other than full and open competition, on the basis that the data necessary for a competitive purchase was not available.

On July 20, 1990, the contracting officer executed a justification and approval for the use of other than full and open competition as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (1988). The J&A authorized the acquisition of 645 thrust washers, Hamilton Standard P/N 537190, from a limited number of sources, specifically the three previously approved sources whom the agency had identified as acceptable in RFP No. DLA500-89-R-A019, citing the authority of 10 U.S.C. § 2304(c) (1), which allows the head of a military agency to use other than competitive procedures when property or services needed by an agency are available only from a limited number of responsible sources. The J&A stated that the agency did not possess complete unrestricted data for the item and could not develop the data needed for full and open competition; regarding the actions taken to enhance competition, the contracting officer noted that the agency had requested data from the manufacturer and the using activities.

In July 1990, Kitco learned of the agency's plans to issue a new solicitation for the washers and subsequently contacted the agency orally and in writing to urge that its source approval request receive a higher priority. On August 8, the agency issued RFP No. DLA500-90-R-A173, setting September 8 as the date for receipt of initial proposals; on August 14, the protester asked the agency to extend the due date for receipt of proposals until it could complete evaluation of Kitco's source approval request. On September 6, Kitco filed a protest with the contracting officer concerning the agency's failure to act promptly either to approve the protester as a source or to provide the reasons why it could not approve Kitco's request.

On October 15, the contracting officer advised Kitco of the engineering support activity's conclusion that the protester's data was inadequate for evaluation because it lacked information on the protester's major subvendors, its processes and operations, and its quality program, as well as a sample part, "if available." The contracting officer denied Kitco's request to delay award until the agency completed the evaluation process, and Kitco filed this protest with our Office.

The agency argues that the Products Offered clause included in the RFP establishes clear procedures for an offeror proposing an alternate product to follow, requiring such offerors to furnish drawings, specifications and other data necessary to establish the characteristics of the alternate product, including design, materials, performance, function, interchangeability, inspection, and testing criteria. That clause specifically warns offerors that their failure to furnish complete data prior to award will result in rejection of their proposals as technically unacceptable. Even where the agency rejects a proposal for a specific award, the clause provides for a continued evaluation and consideration of the alternate product for future awards. The agency argues that these procedures satisfy CICA requirements for full and open competition by allowing potential offerors to propose alternate products, provided only that they meet the requirements of the clause for evaluation of that product. The agency argues that its rejection of Kitco's offer was proper.

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 award--must insure that an offeror seeking qualification is promptly informed as to whether qualification has been obtained and, if not, promptly furnish specific information why qualification was

not attained. 10 U.S.C. § 2319; Federal Acquisition Regulation (FAR) § 9.202(a)(4); Rotair Indus., B-239503 et al., Aug. 24, 1990, 69 Comp. Gen. ____, 90-2 CPD ¶ 154. Similarly, when a contracting agency restricts a contract award to an approved source, it must give nonapproved sources a reasonable opportunity to qualify. Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2. The failure to act, within a reasonable period of time, upon requests for approval as a source deprives a protester of a reasonable chance to compete and is inconsistent with the CICA mandate that agencies obtain "full and open" competition through the use of competitive procedures. Rotair Indus., Inc., B-224332.2 et al., Mar. 3, 1987, 87-1 CPD ¶ 238.

Supplement No. 6 to the Department of Defense (DOD) Supplement to the FAR (DFARS), issued November 25, 1988, sets out policy and procedures for management and conduct of the DOD spare parts breakout program. Where, as here, an acquisition carries a restrictive acquisition management code, the supplement prescribes that the government should make a vigorous effort to evaluate and furnish, within a reasonable time, a decision to firms attempting to demonstrate their ability to satisfy the government's requirements. The supplement sets a standard of 60 days for resolving such requests or otherwise advising offerors of the status of their requests and providing a good faith estimate of the time needed to complete evaluation. DFARS § S6-104(d). On May 11, 1990, the U.S. Navy Aviation Supply Office, which provides the engineering technical evaluation support for the washers, issued a source approval information brochure, which prescribes the information that firms must supply, whether they are intending to gain approval as a previous supplier to the OEM (category 1), as a manufacturer of a similar item (category 2) or as the supplier of a new item, that is, alternate product (category 3). The brochure reflects the standards established by DFARS Supplement 6, setting a goal of 60 days for the initial screening of requests, to establish whether an offeror has provided enough information for the agency to make a determination and a report every 90 days thereafter on the status of each request.

The agency argues that it acted within a reasonable time since it advised the protester of the results of the engineering activity's review on October 15, 3 weeks after receiving the engineering activity's report, dated September 28. We disagree that the agency acted reasonably in handling Kitco's source approval request.

The record shows that by letter of March 7, 1989, Kitco submitted its source approval request for the washer in connection with a prior solicitation for the item. The record also contains a request for engineering support, prepared by

the procuring activity with a date of August 1, 1989; there is doubt however whether the procuring agency actually forwarded this request to the engineering activity, since the record shows that on August 15, 1990, technical personnel believed that Kitco had never provided the certification that had been provided a year earlier. In any event, whether the agency neglected to forward the request to the engineering activity or whether that activity delayed the screening of Kitco's request for 14 months (a year beyond the standard set by DFARS Supplement 6), we find that the agency failed to act within a reasonable time and that its failure to act was inconsistent with the CICA mandate that agencies obtain "full and open" competition through the use of competitive procedures.

On October 15, the agency identified certain data that the protester had to submit before the agency could further evaluate Kitco's source approval request. The protester has now responded to that letter, and the agency has identified dimensional, magnetic particle inspection, and cleaning, preservation and handling differences between the Kitco drawing and revision L of the OEM drawing. It remains unclear whether there are any substantive deficiencies in the protester's submissions, but we believe that the agency was and is obligated to identify promptly any data that remains necessary to evaluate the protester's request for source approval and within a reasonable time provide the protester with the results of that evaluation, including any reasons why its request cannot be granted.2/

The protest is sustained.3/

2/ We note that one of the reasons for rejecting the protester's original package was its failure to provide revision L of the OEM drawing. The agency acknowledges that revision L contains no substantive changes from revision K and the protester notes that manufacturers frequently issue revisions adding sources and applications that do not affect item functionality. While the contracting agency has primary responsibility for determining its actual needs, including the amount of testing and data necessary to insure product compliance with specifications, such determinations must be reasonably based. Constantine N. Polites & Co., B-233935.3, May 25, 1989, 89-1 CPD ¶ 506. There is no evidence to support a denial of source approval based on what appears to be a nonmaterial drawing revision.

3/ Kitco also alleges that the RFP requirement for first article approval, in addition to source approval, exceeds minimum requirements in a manner that unduly restricts competition. We note that the protester did not raise this

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By separate letter of today, we are recommending to the Director of the Defense Logistics Agency that, since there is no apparent urgency to this acquisition, the agency should refrain from awarding a contract under the protested solicitation until such time as it has identified the data necessary for evaluation of Kitco's source approval request, has evaluated that data and has furnished the protester with a decision on its source approval request and, if not granted, specific reasons therefor. If Kitco's product is found acceptable, award should be made to Kitco, as the low priced offeror, if otherwise appropriate. Since we sustain the protest, we find the protester is entitled to its cost of pursuing this protest. The protester should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

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3/(...continued)

Issue in its agency-level protest. Since this issue relates to an alleged impropriety that was apparent prior to the time set for receipt of initial proposals, it is untimely, as such protests must be raised prior to the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1)(3) (1990). Kitco's protest filed on October 29, nearly 8 weeks after the date set for receipt of initial proposals, is clearly untimely.