

McArthur



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kitco, Inc.--Reconsideration

File: B-241868.2

Date: April 9, 1991

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

DIGEST

Request for reconsideration of decision sustaining protest against agency's failure to act in a timely manner on protester's request for source approval and finding that such failure denied protester a reasonable opportunity to qualify as a source and to compete for award is denied where agency expresses mere disagreement with decision and does not show that previous decision contained either errors of fact or law.

DECISION

The Defense Logistics Agency requests reconsideration of our decision in Kitco, Inc., B-241868, Mar. 1, 1991, 91-1 CPD ¶ ____, sustaining a protest against the agency's failure to consider the protester's offer for 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/} In that decision, we found that the agency had unreasonably delayed and denied approval of the protester as a source for the part.

We deny the request for reconsideration.

The record before us in the previous decision showed that in March 1989, in accordance with the agency's Products Offered

^{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.

051077/143596

clause under a prior RFP, the protester submitted a request for approval as a source for certain thrust washers, Hamilton Standards P/N 537190. The agency made several requests for additional information, some of which pertained to historical data on previous source approvals and some of which pertained to substantive areas, such as dimensional data. By July 1989, the protester had submitted the additional information requested.

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. In July 1990, Kitco learned of the agency's plans to issue a new solicitation for the washers and urged the agency orally and in writing for prompt action on its source approval request. When the agency failed to respond to the protester's request that it extend the September 8 due date for receipt of initial proposals under the new RFP, which is the subject of this protest and reconsideration request, 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 then filed its protest with our Office.

In our previous decision, we stated that 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 mandate of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (1988), 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. We found that agency regulations and guidance provided standards for handling source approval requests, standards that the agency's actions had not met, such as a standard of 60 days for screening requests and establishing whether an offeror has provided enough information for the agency to make a determination and periodic reporting on the status of requests. We found that the delay of 14 months in taking action on the protester's request, whether attributable to the procuring

activity or the engineering activity was unreasonable and deprived the protester of a reasonable opportunity to compete.

Two months after the record closed in the original protest, the agency submitted a handwritten memorandum, dated January 7, 1991, pertaining to an ongoing evaluation of Kitco's source approval request, which read in whole as follows:

"Kitco's alternate offer is not acceptable. Technical evaluation of Kitco's drawing 2382 Rev C found dimensional, magnetic particle inspection, and cleaning, preservation and handling difference between Kitco drawing 2382 Rev C and OEM drawing 537190 Rev L. (OEM) Hamilton Standards data is proprietary."

The agency also submitted a record of a January 9 telephone conversation, "informing Kitco of the technical referral results" and promising to continue to work to resolve the source approval request. On January 10, Kitco had provided material responding to these concerns, but the record contained no further information regarding the evaluation of Kitco's request. We therefore stated that our Office remained uncertain of whether there were any substantive deficiencies in the protester's submissions, and in sustaining the protest, recommended that if it were necessary to obtain other data to process Kitco's request, the agency do so. We then recommended that the agency either provide specific substantive reasons for disapproving Kitco's request or approve the request and if otherwise appropriate, award a contract to Kitco as the low-priced offeror.

The agency argues that the record did not support our previous decision and that there were substantive deficiencies in the protester's technical submissions. The agency argues further that the record, specifically the January 7 memorandum and the January 9 phone conversation showed that prior to our decision, it had already evaluated and rejected the protester's proposal and to the extent that proprietary restrictions on the OEM drawing allowed it to reveal the reasons for rejecting the protester's request, it had done so. The agency further argues that the protester was not prejudiced by the failure to act in a timely manner on the source approval request, since the protester cannot gain approval without obtaining the OEM drawing and that the Products Offered clause puts the burden on the protester to submit all information needed to process its request.

In our earlier decision, we found that the record was unclear as to whether the deficiencies noted in the January 7 memorandum were fatal to Kitco's request or whether Kitco's

January 10 response would satisfy the agency's concerns. As that decision stated, the record contained no evidence to support a denial of source approval, absent a showing that Kitco's submissions contained material omissions or deficiencies. See Constantine N. Polites & Co., B-233935.3, May 25, 1989, 89-1 CPD ¶ 506. While the agency states that there are cleaning, preservation and handling differences between the Kitco and OEM drawings, the agency has not identified those differences or provided any analysis to show that they are material.^{2/} In its request for reconsideration, the agency for the first time states that the OEM drawing contains "more stringent" magnetic particle inspection procedures but it has failed to elaborate on this assertion. While the agency expresses disagreement with our decision, such disagreement does not meet the standards of our Bid Protest Regulations for granting requests for reconsideration, which require that a party seeking reconsideration show that our prior decision contains either errors of fact or law that warrant reversal or modification of our decision. Sigma General Corp.--Recon., B-236870.2, Feb. 23, 1990, 90-1 CPD ¶ 210.

To the extent that the agency now argues that it has all the needed data and that there are material differences between the Kitco drawing and the OEM drawing, it should provide Kitco specific reasons explaining the differences, with details to the extent consistent with the proprietary nature of Hamilton Standards' data, as recommended in our previous decision.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel

^{2/} The record shows that the agency no longer asserts any dimensional concerns as identified in the January 7 DLA memorandum.