Perry
143985

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: BWC Technologies, Inc.

File: B-242734

Date: May 16, 1991

Leo Castiglioni for the protester.
Klaus P. Fischer, Esq., for Elliott Company, an interested party.
Deborah Yoon, Esq., and Thomas M. Hillin, Esq., Defense Logistics Agency, for the agency.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency process to approve alternate products for labyrinth ring assemblies is inconsistent with the statutory and regulatory provisions calling for "prompt" qualification procedures to obtain full and open competition, where protester was deprived of a reasonable opportunity to compete by the agency's failure to act on approval requests submitted and pursued by the protester for almost 2 years.

DECISION

BWC Technologies, Inc. protests the award of a contract to Elliott Company under request for proposals (RFP) No. DLA700-90-R-2378, issued by the Defense Logistics Agency (DLA) for 84 labyrinth seal ring assemblies, national stock number (NSN) 2825-00-620-7419, described as Elliott part number 44B3521-269C, or equal. BWC objects to the agency's failure to complete source approval on BWC's ring assemblies during a period of approximately 2 years in which the agency has been requested to perform the necessary tests. As a result of the protest, performance has been stayed pending our decision.

We sustain the protest.

Elliott is the original equipment manufacturer of the ring assemblies. Apparently, Elliott's ring assemblies are the only approved product, and Elliott has received various contracts over the past 3 years on essentially a sole-source basis.

BWC has been actively competing for ring assembly contracts since at least as early as April 1989. On April 24, 1989, in response to the agency's request under RFP No. DLA-700-89-R-0768, a procurement for identical items, BWC submitted a sample of its ring assembly to the agency for evaluation. On May 14, 1989, BWC was notified that award had been made to Elliott, but that BWC's sample was being evaluated so that it would be eligible for later contract awards.1/

BWC sent follow-up letters to the agency on April 11, 1990, June 20 and 22, and September 1 and 26 to check on the status of the testing. During this time, BWC submitted an offer under RFP No. DLA700-90-R-1585 for the same ring assemblies. BWC was informed that award was made to Elliott under this solicitation as the only approved source, since the user activity could not wait for the testing on BWC's alternate product to be completed.

On October 9, 1990, BWC submitted an offer under the RFP at issue here, No. DLA700-90-R-2378. On November 27, BWC received a letter from the agency which stated that the evaluation on BWC's sample would be completed by December 1990. On January 14, 1991, BWC was informed that award was made to Elliott at a higher price than offered by BWC, because Elliott offered the only approved product. The agency explained that testing on BWC's sample was still incomplete. On January 24, BWC protested this award on the basis that the agency has unnecessarily delayed approving its ring assemblies. Essentially, BWC argues that the agency's delay in completing the testing on its sample violates the applicable procurement statutes and regulations governing the qualification of new sources and, by effectively precluding BWC's right to compete, is inconsistent with the mandate of the Competition in Contracting Act of 1984 (CICA) that an agency obtain "full and open" competition in its procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (1988). We agree.

1/ Elliott received the award under this RFP, despite the fact that it was not the low offeror, because the user activity was running out of stock and Elliott's ring assembly was the only approved product. The lowest offeror, whose price, like BWC's, was also lower than Elliott's, proposed an alternate product but, according to the agency, it was not possible to complete evaluation of the alternate product within the necessary time period.

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 why qualification was not attained. 10 U.S.C. § 2319(b)(6); Federal Acquisition Regulation (FAR) § 9.202(a)(4).

BWC alleges that the agency's product approval process has not been prompt within the meaning of the statute and implementing regulation, and that the consequence has been to deny BWC any meaningful opportunity to compete. The record shows that BWC has been actively seeking product qualification for almost 2 years, the agency has failed to "complete" the requisite testing, and the agency is making ongoing contract awards to the original equipment manufacturer, Elliott, under what are essentially sole-source procurements. In fact, it appears that the agency did not begin testing BWC's alternative product until after award was made under this solicitation.

The only justification offered by the agency for its delay in qualifying BWC's ring assemblies is that it had a heavy work load in 1989, and to conserve resources it was the agency's policy to delay testing of second low-priced alternative offers until after evaluation of the low offeror was complete.2/ The contracting agency argues that although it was "remiss" in not forwarding BWC's alternative offer for testing in April 1989, "it sought to rectify this by promptly forwarding BWC's alternative offer to the Navy [the testing activity] once Solicitation DLA700-90-R-2378 closed. Moreover, the contracting officer delayed making an award [under RFP No. 2378] until it became apparent the Navy could not complete the evaluation of alternative offers prior to when award had to be made to prevent a no-stock condition." The agency stresses that it could not award a contract for an alternative ring assembly without the requisite testing because the Navy has experienced problems with some similar alternative products in the past.

In large part, the agency's argument is that it was not unreasonable to award the contract to the original equipment manufacturer where the agency has not completed the requisite testing on alternative products. While we agree with this as a general proposition, it is not the relevant issue. BWC does not argue that the agency must award the contract for an unapproved product. Rather, the protester correctly contends

---

2/ We note that under each of these procurements BWC proposed ring assemblies at a lower price than did Elliott.

that the agency's qualification process, as it has been applied to BWC, is unreasonably long.

When a contracting agency restricts a contract to an approved product, it must give offerors proposing alternative products a reasonable opportunity to qualify. Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2; Kitco, Inc., B-241868, Mar. 1, 1991, 91-1 CPD ¶ ___; Rotair Industries, Inc., B-224332.2; B-225049, Mar. 3, 1987, 87-1 CPD ¶ 238. While we recognize the administrative burdens on agencies of having to perform testing on alternative products, this is an insufficient justification for failing to even submit BWC's sample for testing for almost 2 years, while at the same time leading BWC to believe that its sample was being tested, and making what appear to be essentially sole-source awards to Elliott. The other asserted justification, that the user activity could not wait because its stock was running out, does not demonstrate the reasonableness of the agency's actions in this regard. It is precisely this lack of advance planning by the agency which repeatedly has resulted in its having insufficient time to complete testing on these alternative ring assemblies.

Agencies must use advance procurement planning and market research to open the procurement process to all capable contractors. CICA specifically prohibits agencies from justifying the use of noncompetitive procedures on the basis of a lack of advance planning. 10 U.S.C. §§ 2304(f)(5) and 2305(a)(1)(A); TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700. While agencies need not delay procurements to provide potential offerors with an opportunity to demonstrate their ability, 10 U.S.C. § 2319(c)(5), this provision presupposes that the agency has made reasonable, good faith efforts to encourage competition. TeQcom, Inc., B-224664, supra.

Accordingly, we find that the agency's failure to test BWC's sample ring assembly for almost 2 years is inconsistent with the statutory and regulatory provisions calling for "prompt" qualification procedures and full and open competition, the result of which was to deprive BWC of a reasonable opportunity to compete, and on this basis we sustain the protest. We recommend that the requisite tests be completed on the alternate products, and if BWC's or another lower-priced offeror's product successfully completes these tests, then

Elliott's contract should be terminated for the convenience of the government and award made to the low-priced, technically acceptable offeror. In addition, BWC is entitled to recover its bid protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1991).

The protest is sustained.

Milton J. Socolar

Acting Comptroller General
of the United States