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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: BWC Technologies, Inc.

File: B-242734.2

Date: October 29, 1991

Leo Castiglioni for the protester.
Ronald M. Pettit, Esq., and Deborah M. Yoon, 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 reasonably determined that the government would not absorb the costs of source approval testing for a small business where possible savings resulting from the increased competition would not be amortized over a reasonable period of time because the costs of testing may exceed $100,000, while the potential annual savings from increased competition is reasonably estimated to be less than $9,000.

DECISION

BWC Technologies, Inc. protests that the Defense Logistics Agency (DLA) improperly conditioned source approval testing of its product in response to our Office's recommendation for corrective action in BWC Technologies, Inc., B-242734, May 16, 1991, 91-1 CPD ¶ 474. The procurement at issue is for 84 labyrinth seal ring assemblies, national stock number (NSN) 2825-00-620-7419, described as Elliot part number 44B352i-269C, or equal, under request for proposals (RFP) No. DLA700-90-R-2378. BWC alleges that the agency is improperly requiring BWC to bear the expenses of source approval for its alternative units.

We dismiss the protest in part and deny it in part.

In our earlier decision, we found that DLA failed to provide BWC with a reasonable opportunity to compete because BWC was not promptly informed as to whether its product had been qualified or promptly furnished specific information why qualification was not obtained. See 10 U.S.C. § 2319(b)(6)(1988); Federal Acquisition Regulation (FAR) § 9.202(a)(4). Specifically, we found that the DLA's actions with respect to approving alternate products was inconsistent with the

statutory and regulatory provisions calling for "prompt" qualification procedures to obtain full and open competition, where the agency failed to act on approval requests submitted and pursued by BWC for almost 2 years.

We recommended that the requisite tests be completed on the alternate products, and if BWC's or another low-priced offeror's product successfully completed those tests, then the contract of the awardee, Elliot, should be terminated for the convenience of the government and award made to the low-priced, technically acceptable offeror.

In response to our decision, DLA sent a letter to BWC advising the protester of the steps that BWC needed to take in order to have its alternative product tested. In addition to explaining the procedural requirements, the letter provided in relevant part:

> "Once your test plan has been approved, you will need to conduct the actual testing at the authorized facility. All costs applicable to preparing for the tests and the testing itself will be the responsibility of BWC." (Emphasis added.)

The letter also indicated that the agency had testing facilities which were available to BWC, and that regardless of which testing facility was used, BWC would be responsible for all of the associated costs.

BWC protests the agency's determination that BWC should be responsible for the costs of testing, arguing that as a small business it is entitled to have the government bear the costs of conducting the specified testing and evaluation, particularly where the agency did so for the original equipment manufacturer, Elliot. The protester argues that testing will cost about $100,000 and that it cannot possibly recover such a sum.[1]

Under 10 U.S.C. § 2319 and its implementing regulations, potential offerors, in order to become qualified, generally bear the cost of testing and evaluation. See 10 U.S.C. § 2319(b)(4); FAR § 9.202(a)(1)(ii). The law also provides

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[1]BWC also appears to be challenging the agency's requirement that BWC's part be subject to qualification testing at all, arguing that other activities have accepted BWC's units. We dismiss this allegation as untimely since it is an alleged solicitation impropriety which was not raised prior to receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991).

that, under certain circumstances, an agency may bear the cost of qualification testing for small business concerns where the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize, within a reasonable period of time, the costs incurred by the agency, considering the duration and dollar value of future requirements. 10 U.S.C. § 2319(d)(1)(B); FAR § 9.204(a)(2).

BWC indicated that qualification testing will cost at least $100,000, a figure which DLA believes to be conservative. The agency considered that BWC's offered price for the unit was $33 less than Elliot's offer, representing a savings of $2,772 for the entire procurement. The estimated yearly demand is 260 units, representing a potential annual savings at the current offeror's prices of $8,580. Therefore, DLA estimated that it would take approximately 11 years for the potential savings to amortize the costs of testing, which the agency reasonably determined did not warrant the government bearing the costs of source approval. See Castoleum Corp., 69 Comp. Gen. 130 (1989), 89-2 CPD ¶ 543.

The agency also notes that it has no knowledge of the source of payment for the testing of the Elliot product, which DLA states was qualified more than 35 years ago during testing for the end item of which the product is a part. Further, even if the agency did bear the expenses of testing that end product, it would not require that the government bear BWC's testing expenses now, since this determination is regulated by 10 U.S.C. § 2319(d)(1)(B), which, as noted above, does not mandate such action.

To the extent that BWC speculates that the agency's actions are in "retaliation" for BWC's sustained protest, and thus constitute bad faith, we dismiss the protest. A protesting party must present convincing evidence that government officials had a specific and malicious intent to injure the protester, and we will not attribute unfair or prejudicial motives to the contracting agency where, as here, they are based on a protester's inference or supposition. Designe Tech, B-240290, Nov. 2, 1990, 91-1 CPD ¶ 69.

The protest is denied in part and dismissed in part.

for James F. Hinchman
General Counsel