



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ABA Industries, Inc.

File: B-250186

Date: January 13, 1993

Robert Allen Evers, Esq., Schnader, Harrison, Segal & Lewis, for the protester.
David B. Dempsey, Esq., and Sheila C. Stark, Esq., Akin, Gump, Hauer & Feld, for Dexter Tool Co., an interested party.
Joseph Goldstein, Esq., Department of the Air Force, for the agency.
Stephen J. Gary, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where, in procurement limited to approved sources, agency proceeded with award of divisible, non-urgent quantity of required item before approval of significantly lower priced alternate source, due to erroneous determination that the quantity in fact was urgently needed.

DECISION

ABA Industries, Inc. protests the Department of Air Force's award of a contract to Dexter Tool Co., under request for proposals (RFP) No. F34601-92-R-60249, for aircraft engine diffuser cases. ABA argues that the Air Force improperly imposed a source approval requirement without prior notice, unreasonably delayed its source approval review, and improperly awarded the contract before ABA could be qualified as a source.

We sustain the protest.

In September 1989, the Air Force published in the Commerce Business Daily (CBD) notice that it had established source approval requirements for the diffuser case assemblies, the main structural component of the TF30-P111 gas turbine engine used in the F-111F aircraft. The notice advised prospective offerors that the source approval requirements would be imposed in subsequent procurements and instructed them as to how to obtain further, specific information on the requirements. On April 1, 1992, the Air Force

synopsized in the CBL a proposed acquisition of 43 units of the item; the synopsis advised that source approval was a prerequisite to award. The RFP, issued on April 22, required first article-testing (FAT) and stated that the item was engineering critical; it called for the submission of proposals by May 22. On that date, ABA submitted a detailed source approval request for the item, based on its manufacture of a similar part.

On May 20, the Air Force issued amendment No. 0001, which extended the closing date, upgraded the requirement to urgent, and shortened the required delivery schedule. Specifically, amendment No. 0001 reduced the time for submission of FAT units from 270 days after receipt of order to 60 days and the commencement of production deliveries from 60 days after FAT approval to 30 days. On June 17, the Air Force determined that 16 additional diffuser cases were urgently required. On June 23, the Air Force issued amendment No. 0002 (misnumbered 0003), which provided for prompt delivery of the 16 additional units, but extended the delivery schedule for the original 43 units. Amendment No. 0003 required delivery of the 16 additional units commencing 30 days after FAT approval, but delayed the required commencement of delivery of the original 43 units until 18 months after FAT approval (or January 1995 without a FAT). The closing date was extended to July 13.

Subsequently, on June 24, the Air Force executed a justification and approval (J&A) limiting competition for the additional 16 diffuser cases to approved sources based on unusual and compelling urgency, pursuant to 10 U.S.C. § 2304(c)(2) (1988) and Federal Acquisition Regulation (FAR) § 6.302-2. The J&A explained that overstressing of the F-111F engines had resulted in a shortened life for engine components and created an urgent requirement for additional diffuser cases; it indicated that this requirement could only be met by a qualified source because the specialized manufacturing and inspection processes required in manufacturing necessitated the prequalification of alternate sources. On August 1, the Air Force executed a similar J&A for limiting competition for the original 43 units to approved sources on the basis of urgency.

Two of the three approved sources, Dexter and Delta Industries, Inc., and two unapproved sources, Electro Methods, Inc. (EMI) and ABA, submitted proposals in response to the RFP. The agency began its review of ABA's source approval request 4 days after it was submitted on May 22; subsequently, the contracting officer made several inquiries concerning the status of the review, noting that, if ABA could be approved as a source, its low price--\$43,850 per unit, as compared to Dexter's unit price of \$52,750 and Delta's price of \$54,052--would be advantageous to the

government. On August 24, the contracting officer again inquired as to the status of ABA's evaluation. (EMI's source approval request had been disapproved.) Although the competition advocate stated that the evaluation had not been completed and that no firm completion date could be given, he indicated that the engineering personnel performing the evaluation had again stated, as they had 2 weeks previously, that they needed only "a couple of days" more to complete the review. According to the Air Force, however, given the uncertainty as to when the source approval review would be completed, the contracting officer determined the award should not be further delayed. On August 24, the Air Force awarded the contract to Dexter, the approved source offering the low price. ABA's protest followed. Shortly thereafter, on September 1, ABA was approved as a source for the diffuser cases.

NOTICE OF SOURCE APPROVAL

ABA asserts that the Air Force improperly imposed a qualification requirement not set forth in the solicitation. ABA notes that, although the RFP indicated the procurement was "restricted," it did not include the standard FAR clause, "Qualification Requirements," FAR § 52-209-1, advising offerors of a qualification requirement.

An agency may limit competition for the supply of parts if doing so is necessary to assure the safe, dependable, and effective operation of military equipment, Arrow Gear Co., B-238936, July 12, 1990, 90-2 CPD ¶ 28, and if nonapproved sources are given a reasonable opportunity to qualify. Pacific Sky Supply, Inc., 64 Comp. Gen. 194 (1985), 85-1 CPD ¶ 53; see Florida Ordnance Corp., B-247363; B-247363.4, Aug. 31, 1992, 92-2 CPD ¶ 138. Specifically, where an agency limits competition by imposing a source approval requirement, the agency is required to advise potential offerors of all the requirements they must satisfy to become qualified, promptly afford them an opportunity to demonstrate their ability to meet the qualification standards, and promptly inform them whether approval has been attained. Arrow Gear Co., supra.

We find that the absence of the FAR clause from the RFP did not deprive ABA of a reasonable opportunity to qualify, since the record shows ABA was on notice of the source approval requirement. First, the 1989 CBD notice put all offerors on constructive notice of the requirement for this item. See Herndon & Thompson, B-240748, Oct. 24, 1990, 90-2 CPD ¶ 327 (protesters are charged with constructive notice of contents of CBD procurement synopsis since CBD is the official public medium for identifying proposed contract actions). The April 1992 CBD synopsis of this procurement provided similar notice, specifically providing that

"sources must be qualified prior to being considered for award."

Further, it is clear from the record that ABA had actual notice of the requirement. As noted above, ABA submitted a detailed source approval request to the agency prior to the solicitation closing date. ABA included with its source approval request a copy of the solicitation, stating that it had "selected the qualified, approved subcontractors identified in the solicitation," and asked the Air Force to contact the firm "if further information is needed to complete your evaluation." The agency acknowledged receipt of the source approval request by letter of June 6, stating that "our engineering group is reviewing your request." By submitting the request with specific reference to the solicitation and to the agency's evaluation of its product, ABA demonstrated an understanding that submission of a source approval request was required by the solicitation. Indeed, we note that ABA itself concedes that the term "restricted" in the RFP typically designates a procurement in which source approval is required. Since ABA was on actual and constructive notice of the source approval requirement, it was not prejudiced by the omission of the standard FAR clause. See Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710.

DELAY IN REVIEWING SOURCE APPROVAL REQUEST

ABA asserts that the Air Force unduly delayed ABA's source approval review. ABA notes that, although its approval request was assigned "priority 1" (30-day review) status due to the urgency of the procurement, the Air Force in fact took 109 days to approve ABA. That this was an unreasonable amount of time, ABA states, was confirmed by memoranda from the contracting officer to the technical evaluators stating that their completed review of ABA's request was overdue. In contrast, ABA notes, when Dexter submitted its source approval request for the item in September 1991, it was approved in a month.

Implicit in the requirement that a potential offeror be afforded a reasonable opportunity to demonstrate that its product meets or can meet source approval standards prior to award is an obligation to conduct the review in a reasonably prompt manner. See Pacific Sky Supply, Inc., 66 Comp. Gen. 370 (1987), 87-1 CPD ¶ 358.

We find that the Air Force acted promptly here. As explained by the Air Force, the diffuser cases are complex, critical, flight safety items essential to the proper functioning of the F-111F aircraft engines. The diffuser cases are complex items composed of numerous individual components manufactured from nickel alloy using a variety of

manufacturing processes, including welding; the nickel alloy makes the necessary welding very difficult. Any resulting cracks in a diffuser case would result in loss of efficiency and could lead to loss of the aircraft engine, and the consequent loss of the aircraft and possibly of life. The Air Force maintains, and ABA does not dispute, that given the critical, complex nature of the diffuser cases, it was necessary to undertake a thorough, in-depth review of ABA's capability to manufacture the cases, including its in-house capability, quality assurance procedures, quality deficiency records and prior performance.

Although source approval was granted to Dexter in 1991 within a month, this fact alone does not render the 109 days required to approve ABA in 1992 unreasonable. First, while both Dexter and ABA requested source approval based upon the manufacture of similar parts, Dexter's part afforded the agency the assurance of quality attendant upon the fact that it had been used in aircraft; in contrast, ABA's part had been used only in less demanding, less critical ground-based applications. Further, at the same time that agency technical personnel were considering ABA's source approval request in 1992, they were also considering EMI's request and numerous source approval requests for other items. These factors--particularly the fact that ABA had not previously manufactured a similar part for aircraft--reasonably accounted for the additional time required for ABA's evaluation.

Furthermore, it is clear that ABA itself contributed to the delay in obtaining source approval. While the source approval requirement for this item was synopsised in 1989 and again on April 1, 1992, ABA did not submit a source approval request until May 22. Contractors generally should seek qualification in advance and independently of any specific acquisition. Radalab, Inc., B-225662.2, May 15, 1987, 87-1 CPD ¶ 519. By failing to seek qualification earlier, ABA contributed to its failure to obtain source approval in time for the award. See Texstar, Inc., B-239905, Oct. 9, 1990, 90-2 CPD ¶ 273; Kitco, Inc., B-232363, Dec. 5, 1988, 88-2 CPD ¶ 559.

ABA points to memoranda in the record indicating that on two separate occasions, July 9 and August 3, the contracting officials asked the engineering personnel to expedite the review, reminding them that completion of ABA's evaluation was overdue. This, according to the protester, indicates that the contracting officials themselves thought the delay was unreasonable. We disagree. In our view, the notices merely indicate that the agency closely monitored and sought to expedite ABA's technical evaluation because, as it reports, it was interested in having ABA qualified as an

additional, lower-priced source. The memoranda do not alter our conclusion that the time required to evaluate ABA's source approval request was reasonable but, rather, evidence the agency's good faith in seeking to qualify ABA. See Lambda Signatics, Inc., B-238504, 69 Comp. Gen 495 (1990), 90-1 CPD ¶ 518.

FAILURE TO DELAY AWARD

In the alternative, ABA asserts that the Air Force should have delayed the award until ABA was qualified. ABA notes in this regard that its source approval request was approved only 8 days after award. We find that the Air Force properly proceeded with the award of the 16-unit quantity, but that the agency should not have awarded the 43-unit quantity at the same time.

Although potential offerors may not be denied an opportunity to submit and have considered an offer if the offeror can demonstrate that its product meets or can meet the approval standards before the date for award, an agency generally is not required to delay a procurement in order to provide a potential offeror an opportunity to become approved. Fiber Materials, Inc., B-246587, Mar. 18, 1992, 92-1 CPD ¶ 288; Texstar Inc., supra.

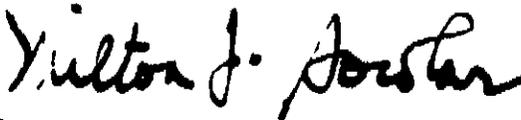
As documented in the June 24 J&A, at the time of award to Dexter, the Air Force had an urgent need for 16 diffuser cases as a result of a reduction in operation life beyond that otherwise expected for F-111F engine components. Furthermore, when the contracting officer inquired shortly before making the award as to the status of ABA's source evaluation review, the competition advocate was unable to provide him with a firm completion date since the agency engineering personnel undertaking the review could not specify a firm date. Although the competition advocate advised the contracting officer that the technical personnel were promising that the review would be completed "in a couple of days," this was the same answer received from the engineering personnel approximately two weeks earlier. Given the reasonably prompt manner in which the Air Force had conducted the review of ABA's source evaluation review, and the lack of either a firm date for completion of the review or assurance that ABA would receive source approval, we find no basis to question the contracting officer's determination to proceed with award for the 16 urgently required diffusers.

We find, on the other hand, that the contracting officer's determination to include the 43 additional diffuser cases in the contract award was unreasonable under the circumstances. While an agency need not delay a procurement to provide a potential offeror an opportunity to become approved, the

record here shows that the agency included the 43-unit quantity in the August 24 award on the basis of an erroneous determination that the entire quantity of 59 diffusers was urgently required. Although the Air Force executed a J&A supporting an urgent requirement for the 43 units, the agency had previously amended the solicitation to relax the delivery schedule for the 43 units, postponing commencement of delivery from 30 days after FAT approval to 18 months (or January 1995 without FAT), and it did not again accelerate delivery after issuing the J&A for the units. As a result, an interval of 1 year existed between delivery of the last of the initial 16 diffuser cases and delivery of the first of the additional 43 units 18 months after FAT approval. In other words, while the agency's requirement for the 16 units may have been urgent, the final, relaxed delivery schedule for the 43 units, in our view, shows that these units in fact were not urgently needed, contrary to the urgency determination set forth in the J&A for the 43 units.

Thus, while there was a need for the agency to proceed with award of the 16-unit quantity on August 24, there was no similar need to award the 43-unit quantity at that time; it appears that the only reason the agency did so was its erroneous belief that the 43-unit quantity was urgent. In this regard, the solicitation actually included separate contract line items for the 16-unit and 43-unit quantities, and provided for evaluation of offers on the basis of the advantages and disadvantages of making multiple awards. Had the Air Force not proceeded on an urgency basis for the divisible 43-unit quantity, there is every reason to believe that it would have awaited completion of ABA's source approval, since the record shows the agency considered ABA to be a desirable potential source due to its significantly lower price. By instead treating the units as urgently needed, the agency unreasonably deprived ABA of the opportunity to be considered for award of the non-urgent 43-unit quantity. This was improper. See Arrow Gear Co., 68 Comp. Gen. 612 (1989), 89-2 CPD ¶ 135; Ricoh Corp., 68 Comp. Gen. 531 (1989), 89-2 CPD ¶ 3; Factech Corp., B-225989, Mar. 26, 1987, 87-1 CPD ¶ 350.

We therefore recommend that Dexter's contract be modified to delete the separately-priced line item for the 43 units and that this quantity be resolicited. In addition, we find ABA entitled to recover its protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1992).


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