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Decision

Matter of: Sun Display Systems, LLC

File: B-411826

Date: November 2, 2015

Andrew J. Mohr, Esq., Daniel Strouse, Esq., and Gabriel E. Kennon, Esq., Cohen Mohr LLP, for the protester.

L. Diane Nelms, Esq., Defense Logistics Agency, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly permitted awardee to retain its qualification on qualified products list and that agency applied qualification requirements unequally is denied where record shows that agency administered qualification requirements reasonably, and that agency's management of awardee's and protester's qualification status was reasonably based on their different circumstances.

DECISION

Sun Display Systems, LLC, of Fairfield, New Jersey, a small business, protests the issuance of a purchase order to Airco Industries, Inc., of Fort Worth, Texas, by the Defense Logistics Agency (DLA) under request for quotations (RFQ) No. SPE4A6-15-Q-1972 for six integrally-illuminated indicating panels for use in night-vision systems in the HH-60 Black Hawk helicopter. Sun Display argues that Airco was not eligible for inclusion on the qualified products list (QPL) applicable to the requirement and was thus ineligible for award, and that the QPL requirements were applied unequally to Sun Display and Airco, which Sun Display argues unfairly favored the awardee.

We deny the protest.

BACKGROUND

DLA issued the RFQ on March 6, 2015, as a small business set-aside, seeking quotations from qualified suppliers to supply the panels.¹ RFQ at 1, 17. The RFQ informed interested firms that QPL standards identified as MIL-DTL-7788H were applicable, and that the product “must be qualified at the time of award.” RFQ at 8, 13.² The RFQ specified that quotations would be evaluated on the basis of price, past performance, and “other factors.” RFQ at 3. Award was to be made to the vendor whose quotation provided the best value, and the RFQ listed other factors that could be considered in making a tradeoff: item criticality and weapons system application; current inventory status; historical delivery or quality problems; concerns over limited supply sources and industrial base; and benefits from obtaining new sources. RFQ at 3. The RFQ also described quoted delivery as an equally-weighted evaluation factor; a quotation that proposed to deliver the panels later than specified in the RFQ would be evaluated less favorably. RFQ at 5.

DLA received quotations from five vendors. Two were rejected as unacceptable. Agency Report (AR) at 2. The DLA evaluated the quotations from the remaining three vendors, including those of Sun Display and Airco. Id. After considering the evaluation results, the contracting officer selected Airco’s quotation at a total price of \$5,496 over Sun Display’s quotation at \$5,970. Id.

On June 30, the contracting officer issued a purchase order to Airco. Sun Display filed a timely agency-level protest, arguing that Airco was not properly included on the QPL. The contracting officer denied Sun Display’s agency-level protest in a written decision on July 10; this protest followed.

ANALYSIS

Timeliness

Sun Display states that it did not receive the decision on its agency-level protest until July 16, and therefore its July 27 protest to our Office is timely. Protest at 2. DLA does not appear to dispute that aspect of the timeliness of Sun Display’s protest. However, the DLA argues that the protest is nevertheless untimely because Sun

¹ The panel is identified as national stock number 6150-01-471-6217.

² The RFQ actually identified “Aerospace Standard (AS) 7788.” RFQ at 8. The DLA explains that AS 7788 was superseded by MIL-DTL-7788G, which was subsequently updated to MIL-DTL-7788H, and that all vendors understood that the reference was to this standard. AR at 1 n.1. We note the discrepancy and that the protester does not appear to question the DLA’s explanation that the vendors understood the intended reference.

Display's challenge to the presence of Airco on the QPL is effectively an allegation of a solicitation defect. AR at 7. As a result, the DLA contends that in order to be timely, the issue had to be protested before the closing date for submission of quotations. Id.

We disagree. We have consistently reviewed such challenges after award. Barnes Aerospace Group, B-298864, B-298864.2, Dec. 26, 2006, 2006 CPD ¶ 204 at 4 (sustaining post-award protest challenging awardee's QPL listing); Goodyear Tire & Rubber Co., B-247363.6, Oct. 23, 1992, 92-2 CPD ¶ 315 at 3 (protest arguing that competitor should not have been included on QPL was timely after agency awarded contract to that competitor, and had been dismissed when filed before award); Automated Power Sys., Inc., B-224203, Feb. 4, 1987, 87-1 CPD ¶ 109 at 2 (protest after award was timely).

The DLA cites two decisions in support of the argument that this protest is untimely. AR at 7 (citing International Sci. & Tech. Inst., Inc., B-259648, Jan. 12, 1995, 95-1 CPD ¶ 16); Supplemental AR at 6 (citing Caddell Constr. Co., B-401281, June 23, 2009, 2009 CPD ¶ 130). In International Science and Technology Institute, our Office dismissed as untimely a post-award protest arguing that the awardee was ineligible because the solicitation itself named the eventual awardee and, in essence, indicated that it was eligible, and the protester knew that the firm was participating in the procurement. International Sci. & Tech. Inst., Inc., supra, at 3. In Caddell Construction, our Office dismissed as untimely a post-award protest arguing that the awardee was ineligible because the agency had required interested firms to submit documentation and then the agency published a list of the firms that were eligible for award for that specific solicitation. Caddell Constr. Co., supra, at 2. Those decisions involved different circumstances than are present here.

In contrast to the cases cited by the DLA, the inclusion of a firm on a QPL is a listing that is valid for an extended period during which there may be multiple procurements of the item, and under which a listed firm may or may not compete in any specific procurement. The QPL listing is thus materially different, for purposes of timeliness, than a list of prequalified or eligible competitors specific to a solicitation, such as in International Science and Caddell Construction. The listings involved in those decisions were the result of a competitor's ongoing involvement in the specific procurement, or its submission of a prequalification application specific to the procurement, after which the agency provided notice of the specific firm's eligibility by name for that procurement. See also Abt Assocs., Inc., B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 at 2 (post-award protest dismissed as untimely where agency responded affirmatively to protester's pre-proposal inquiry about eligibility of specific firm that was later awarded contract). Since those factors are not present with respect to firms listed on a QPL, this protest is not a challenge to the terms of the solicitation. We will not dismiss it as untimely.

Airco Retention of Qualification Listing

Policy for the establishment and administration of QPLs is set forth in Department of Defense Manual (DODM) No. 4120.24. Among other things, the manual provides the process for establishing a QPL, for obtaining qualification of an item, for qualification listing to be ended, for requalification, and for retention of qualification. See generally, AR, Tab 13, Excerpt of DODM 4120.24.³ Sun Display does not object to the applicability or operation of the QPL other than to challenge whether retention of qualification is permitted under the applicable specification here, and thus whether the presence of Airco's product on the listing is valid.

Specifically, Sun Display argues that the specification for the panels here limits the qualification of a firm's product to a 2-year period, after which the firm must undergo a full requalification. Specifically, Sun Display points to the following language in the QPL specification:

4.1.1.3 Tests. Qualification tests shall consist of [etc.]
Qualification approval shall extend for a two year period, except that requalification may be required at any time the manufacturer undergoes a change in key personnel, moves their manufacturing plant to a new address, undergoes a major process change, or undergoes management changes at the manufacturing plant.

AR Tab 14, Detail Specification No. MIL-DTL-7788H, at 19.

The record reflects that Airco originally qualified its panel in 1997, and subsequently remained listed on the QPL based on retention of qualification at 2-year intervals. Sun Display argues that the above-quoted language of the specification precludes retention of qualification, and instead requires that a firm requalify its product for each 2-year qualification period. Comments at 3. Sun Display argues that Airco was not properly listed on the QPL because it never requalified, and therefore, the contract award here was improper. Protest at 2; Comments at 3-6.

The DLA agrees that the specification states that qualification approval will extend for a 2-year period, but argues that requalification is not the only way for a firm to remain on the QPL. Instead of requalification, the DLA argues that a firm may be granted retention of qualification for an additional two years, based mainly on the firm's certification that its circumstances (plant location, management, conditions,

³ For example, in describing maintenance of a QPL, the manual provides that the manufacturer is required to "[c]omplete and submit, to the qualifying activity, a DD Form 1718 or equivalent information every 2 years. Submit retention of qualification data, or complete requalification testing as required in specification or by the qualifying activity." Id. at 91.

current testing, and product changes) have not changed from the information in the listing. See Supplemental AR, Tab B, Provisions Governing Qualification, at 16-17. The DLA argues that Airco properly retained its qualification status every two years, the firm was properly listed on the QPL, and the award to it was proper.

Agencies are required to conduct procurements fairly, which includes the agency's application of the standards for listing on the QPL applicable to the procurement. Federal Acquisition Regulation (FAR) § 1.102(b)(3). The specification language that Sun Display emphasizes ("Qualification approval shall extend for a two year period") neither requires nor prohibits the DLA from use of the retention of qualification process to continue to list a product on the QPL for additional 2-year periods. Accordingly, we have no basis to disagree with the DLA's interpretation of the QPL specification--as it⁴ has done since at least 1997--as permitting Airco's panel to remain listed based on retention of qualification at the end of each 2-year interval, rather than requiring requalification. Accordingly, we deny this ground of protest.⁵

Unequal Treatment

Sun Display argues in the alternative that if the specification permitted the DLA to allow Airco to retain qualification, rather than requiring requalification, the DLA treated Sun Display unequally by not allowing it to use the retention of qualification process, and requiring it to requalify starting in November 2013.

DLA argues that the circumstances that required Sun Display to requalify were not present for Airco, so the agency had a reasonable basis to treat the two firms differently. In particular, the DLA argues that due to lengthy delays in scheduling an audit⁶ of Sun Display's process--delays that were requested by Sun Display while it moved to a new location--DLA removed Sun Display's listing at the next update to the QPL. When Sun Display subsequently advised the DLA of the firm's interest in being audited (nearly two years after the initial request), its product was no longer

⁴ To be precise, in this instance we refer to the DLA's predecessor, the Navy because the Airco panel at issue qualified for listing in 1997, when the QPL was managed by the Navy. AR at 4 n.6. DLA Aviation assumed responsibility for this QPL in 2007. Supplemental AR at 3 n.3.

⁵ Because we conclude that Airco was properly listed on the QPL, we need not consider a point not raised by the parties: that an unlisted firm may not be denied the opportunity to submit an offer and be considered for award solely because a QPL applies. See 10 U.S.C. § 2319(c)(3) (2012); see also Scot, Inc., B-292580, Oct. 3, 2003, 2003 CPD ¶ 173 at 3-4 (agency properly awarded contract to firm that had not produced and tested a qualification article).

⁶ After taking responsibility for the QPL, DLA notified all listed firms that the agency had elected to audit each firm's quality management system.

listed on the QPL, and was to be produced on new machinery and equipment, and in a new location. AR at 7; Supplemental AR at 4-5. As a result, the DLA argues that Sun Display was properly required to undergo requalification. Id. In contrast, Airco was never removed from the QPL because DLA was able to audit Airco when requested. Since the circumstances of each firm's listing differ, DLA argues that it was proper to treat them differently--each according to its unique situation.

Sun Display argues that the contemporaneous record shows that the DLA required Sun Display to requalify in 2014 simply because it had changed locations, even though eight years earlier (in 2004, before DLA was responsible for this QPL), Airco was not similarly required to requalify when its manufacturing location changed. Comments at 6-7. As a result of this allegedly unequal treatment, Sun Display argues that Airco should now be found ineligible for award until it also completes requalification. Id.

When a contracting agency restricts a contract to an approved product or source, and uses a qualification requirement, it must give other offerors a reasonable opportunity to qualify, which includes ensuring that an offeror is promptly informed as to whether qualification has been attained and, if not, promptly furnishing specific information why qualification was not attained. Barnes Aerospace Group, supra, at 5. Correspondingly, an agency may not treat offerors unequally with respect to the application of the qualification requirements. Id. at 14. An agency may not waive qualification requirements for an awardee that were imposed on other similarly-situated offerors without giving all offerors notice of the waiver and an opportunity to satisfy the revised requirements. Goodyear Tire & Rubber Co., supra, at 6-7.

In our view, the record does not support Sun Display's claim that its situation was sufficiently similar to that of Airco that the DLA should not have required Sun Display to requalify; rather, each firm was treated according to its unique situation. Although both Sun Display and Airco each moved the locations of their manufacturing lines, the record shows that the similarity ends there.

In January 2009, the DLA asked each firm on the QPL to submit its quality manual and respond to a questionnaire about any changes to its listing. AR, Tab 15, Letter from DLA Chief of Engineering Division to Airco, Jan. 13, 2009, at 1. In its response and subsequent correspondence, Airco explained that its manufacturing line had moved 5 years earlier, and the move had improved the environmental conditions. AR, Tab 17, E-mails between DLA Engineer and Airco Quality Manager, at 1-2. In November 2010, the DLA notified all firms listed on the QPL of the need to complete an on-site qualification audit of company facilities. Supplemental AR, Tabs C & D, Letters from DLA Chief of Engineering & Technology Division to Airco/Sun Display, at 1. Airco responded with required information in March 2011, and was successfully audited in September 2011.

In contrast, Sun Display submitted a partial response to the DLA's November 2010 audit notice. Specifically, the response lacked information about the firm's testing and quality assurance processes. Supplemental AR at 4. The DLA requested the missing information in February 2011, so that the on-site audit could be performed. Supplemental AR, Tab H, E-mail from DLA Industrial Engineer to Sun Display, at 1. The DLA repeated the request in May 2011. Supplemental AR, Tab I, E-mails between DLA Auditor and Sun Display, at 2-3. Sun Display responded a day later, stating that the company had decided to seek qualification for all 28 types and classes of panels on the QPL (rather than the 10 types for which it had been qualified). Id. at 2. The DLA then attempted to schedule the on-site audit visit for September 2011, but Sun Display responded that an audit would not be possible and that the firm was moving. AR, Tab J, E-mails between DLA Auditor and Sun Display, at 2-3.

In October, the DLA asked Sun Display for new dates for the on-site audit. Id. at 2. Sun Display responded in January 2012, requesting the on-site visit, and asking to receive temporary inclusion on the QPL for the previously-qualified panel types. Id. at 1. The DLA responded that it would attempt to schedule the on-site audit, but that temporary qualification listing was not possible. Id. at 1. In March 2012, the general manager of Sun Display responded to a DLA scheduling inquiry to state that the firm was changing its quality system and would send the DLA an updated quality manual. Supplemental AR, Tab L, E-mails between Sun Display General Manager and DLA Industrial Engineer, at 1. In July 2012, the DLA industrial engineer sent an e-mail explaining that his contacts at Sun Display had not responded, and asked whether the firm was still interested in qualifying under the QPL. Id. at 1. Two weeks later, he repeated that request. AR, Tab M, E-mails from DLA Industrial Engineer, at 1-2. Ultimately, the DLA successfully completed the on-site audit of Sun Display in September 2012. AR, Tab N, Audit Report, at 1-6.

Sun Display then performed requalification production and testing from late 2013 to mid-2014, after which it submitted a qualification test report to the DLA in August 2014. AR, Tab 33, DLA Test Plan Approval for Sun Display (Nov. 18, 2013), at 1; AR, Tab 34, DLA Qualification Notice (Sept. 8, 2014), at 1.

In our view, the DLA had a reasonable basis to treat Sun Display differently from Airco. The drawn-out on-site audit process imposed by Sun Display--during which it made changes in its manufacturing location, equipment, and quality management system, and increased the panels for which it was seeking qualification--provided a reasonable basis for the DLA to treat Sun Display and Airco differently. In short, we

cannot find that Sun Display's circumstances were sufficiently similar to Airco's to sustain Sun Display's allegation of unequal treatment.

The protest is denied.

Susan A. Poling
General Counsel