



United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** Hawker Eternacell, Inc.

**File:** B-283586

**Date:** November 23, 1999

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Norman A. Steiger, Esq., Goldberg & Connolly, for the protester.  
Maj. Cynthia M. Mabry, and John J. Reynolds, Esq., Department of the Army, for the agency.  
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### DIGEST

1. Protest allegation that an award under a solicitation would breach the protester's existing contract concerns a matter of contract administration, which is outside the scope of the General Accounting Office's bid protest jurisdiction.
2. Agency properly determined to exclude protester from the competition for award of batteries, where the protester currently held a contract for the same batteries and the agency reasonably found that another source was necessary to ensure the batteries' continuous availability, to satisfy projected needs, to provide for future competition, and to satisfy national defense interests.

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### DECISION

Hawker Eternacell, Inc. protests the terms of request for proposals (RFP) No. DAAB07-99-R-A273, issued by the U.S. Army Communications-Electronics Command for a quantity of BA-X590A/U non-rechargeable, high performance lithium batteries. Hawker, which currently has a contract to supply the Army with these batteries, challenges its exclusion from the competition for award.

We deny the protest.

The high performance lithium battery family, of which the BA-X590A/U is a part, is the main power source for most of the Army's portable, combat communications and electronic equipment. The BA-5590 battery configuration, of which the BA-X590A/U is an updated version, is extensively used and has one of the highest monthly

demands of any of the military-unique batteries managed by the Army. The agency states that this battery configuration is used in over 50 items, ranging from radio equipment to artillery fire control and surveillance systems. Accordingly, the BA-5590 battery configuration and the other members of this battery family have been identified as critical items. Agency Report, Tab A, Contracting Officer's Statement, at 1-2.

In September 1996, after a competition that contemplated multiple awards, the Army awarded Hawker the sole contract to supply the BA-5590A/U battery (which the protester and agency agree is the equivalent of the battery sought by the RFP) for a 5-year contract period. Protest at 2; Contracting Officer's Statement at 2. The agency states that the specifications of that contract require Hawker to provide the BA-5590A/U with a state of charge indicator (SOCi), which is also a requirement of the BA-X590A/U.<sup>1</sup> Contracting Officer's Statement at 2-3. The agency also states that it has not yet received from Hawker any of the BA-5590A/U batteries with the SOCi feature because of Hawker's difficulty in passing first article testing for this battery with this feature. Instead, the Army has allowed Hawker to provide the battery without the SOCi feature. Id. at 3.

The Army determined that it would seek a second source for the BA-X590A/U battery. Specifically, the agency found that although the use of rechargeable batteries has increased in recent years, it has not resulted in a corresponding decrease, as expected, in non-rechargeable batteries, such as BA-X590A/U. The Army found as follows:

As a result of [the] problems faced by Hawker, peacetime inventory levels have dropped dangerously low. Hawker lacks the technical and production resources to deliver sufficient quantities of batteries in a timely manner to allow for rebuilding of assets to acceptable levels. Even if Hawker was able to produce at full capacity, there is no remaining capacity for rebuilding war reserve battery inventories to the required levels or for the potential surging of production if a deployment should occur.

Agency Report, Tab 3, Determination and Findings (D&F), Authority to Exclude Sources for Supplies Being Acquired, June 11, 1999, at 2. In addition, the agency concluded that obtaining a second source for the battery would increase future competition that would benefit the agency. Id., Justification for D&F, at 2.

Hawker was informed that it would not be allowed to compete for award under the RFP and of the reasons for its exclusion. Contracting Officer's Statement at 5, Agency Report, Tab 11, Letter from Contracting Officer to Hawker 1-2 (July 12, 1999). This protest followed.

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<sup>1</sup> Prior versions of this battery did not include the SOCi feature.

Hawker essentially complains that the Army has no reasonable basis to exclude it from competition for award under the RFP or in fact to issue the RFP at all.<sup>2</sup> In this regard, Hawker argues that award of a contract under the RFP would violate the terms of its current contract, which Hawker asserts is a requirements contract. Protest at 7-8, Comments at 1.

The Army disagrees that Hawker's current contract is a requirements contract and that an award to another firm under the RFP would constitute a breach of Hawker's contract. Rather, the agency contends, Hawker has an indefinite-delivery, indefinite-quantity contract, under which the agency has already ordered the contract's minimum quantity. Citing our Bid Protest Regulations, 4 C.F.R. § 21.5(a) (1999), the agency asks that we dismiss Hawker's breach of contract claims as matters of contract administration. Agency Request for Partial Summary Dismissal at 1-2.

Although Hawker has presented its contract claim allegations as bearing upon the reasonableness of the agency's decision to issue the RFP, we agree with the Army that resolving the parties' dispute concerning the interpretation of Hawker's existing contract and whether the agency's conduct constitutes a breach of that contract are matters of contract administration. Under the Competition in Contracting Act of 1984, as amended, our authority to resolve bid protests extends to resolving disputes concerning the alleged violation of procurement laws and regulations in connection with the award of contracts by federal agencies. 31 U.S.C. §§ 3551-3552 (1994). In exercising this authority, we generally do not review matters of contract administration, which are within the discretion of the contracting agency and are, under the Contract Disputes Act of 1978, for review by a cognizant board of contract appeals or the Court of Federal Claims.<sup>3</sup> 4 C.F.R. § 21.5(a); GSX Gov't Servs., Inc., B-239549, July 5, 1990, 90-2 CPD ¶ 14; McDermott Shipyards, Div. of McDermott, Inc., B-237049, Jan. 29, 1990, 90-1 CPD ¶ 121 at 5-6. Thus, we will not review the parties' dispute concerning the nature of Hawker's existing contract and whether the agency's actions constitute a breach of that contract.

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<sup>2</sup>Hawker also complained that, if it were excluded from the competition, the 5-year contract period contemplated by the RFP would result in Hawker being unable to compete for the Army's battery requirements for 1 year when its current contract expired. Protest at 7. Prior to the filing of the agency report, the Army agreed with this complaint and took corrective action by amending the RFP to provide for a 4-year contract period.

<sup>3</sup>The few exceptions to this rule include such situations as where it is alleged that a contract modification improperly exceeds the scope of the contract and therefore should have been the subject of a new procurement, CAD Language Sys., Inc., B-233756, Apr. 10, 1989, 89-1 CPD ¶ 364 at 4; where a protest alleges that the exercise of a contractor's option is contrary to applicable regulations, Alice Roofing & Sheet  
(continued...)

The protester also challenges each of the agency's findings regarding the Army's need to obtain a second source for the BA-X590A/U battery. Specifically, Hawker disputes the agency's determination that Hawker lacks the technical and production capability to timely provide sufficient quantities of the BA-X590A/U battery. The protester, however, does not deny that it has been unable to pass first article testing for the BA-X590A/U battery with the SOCI feature or that it has not delivered any of these batteries with the SOCI feature. Rather, Hawker argues that its failure to deliver is justifiable because the BA-X590A/U battery with the SOCI feature is a "developmental item" and argues that, in any event, the agency has no real need for the SOCI feature. Comments at 2-4. In Hawker's view, all of the agency's needs can be met by Hawker supplying the older version of the battery (without the SOCI feature) under its existing contract.

The Army disagrees with the protester's allegations that these batteries with the SOCI feature are a developmental item and that the agency has no real need for batteries with this feature. In this respect, the agency states the SOCI feature will contribute to field readiness of soldiers using equipment powered by these batteries because soldiers can better assess the remaining battery life, and will reduce related operating and support costs. Contracting Officer's Statement at 2.

Military agencies are given specific authority to conduct limited competitions, by excluding a particular source, in order to establish or maintain an alternative source or sources of supply. An agency head must determine that an alternate source is necessary to, inter alia, increase or maintain competition, ensure continuous availability of a reliable source of supply, satisfy projected needs for high demand supplies or services, or satisfy national defense interests in having a producer, manufacturer or other supplier available in case of national emergency or industrial mobilization. 10 U.S.C. § 2304(b)(1) (1994). Given the discretion accorded agencies in making these judgments, we will disturb an agency's determination to exclude a particular source only when the agency's judgment is shown to be unreasonable. See Propper Int'l, Inc., B-229888, B-229889, Mar. 22, 1988, 88-1 CPD ¶ 296 at 2-3.

Here, the record shows that the Army reasonably determined that it needed to establish a second source from which the agency could obtain these batteries. Although Hawker disagrees with the agency's judgment regarding the Army's needs and Hawker's ability to satisfy these needs, Hawker does not show that the agency's judgment is unreasonable. To the contrary, Hawker's arguments against the agency's

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Metal Works, Inc., B-283153, Oct. 13, 1999, 99-2 CPD ¶ \_\_\_\_; and where an agency's basis for contract termination is that the contract was improperly awarded. Condotels, Inc.; Chester L. and Harvelene Lewis, B-225791, B-225791.2, June 30, 1987, 87-1 CPD ¶ 644 at 2.

needs for the SOCI feature are belied by its own 1996 contract, under which Hawker agreed to provide this battery with the SOCI feature. Given Hawker's inability to provide batteries with this feature, we think the Army justified in determining that it needed to develop a second source (in addition to Hawker) to satisfy its needs.<sup>4</sup> Specifically, we find that the agency reasonably determined that developing another source for these batteries was necessary to ensure their continuous availability, that there was a national defense interest in having another source available to furnish the batteries in the event of an emergency, that another source was necessary to satisfy the agency's projected needs, and that another source would provide for future increased competition, which would result in a lower costs to the government. These circumstances satisfy the statutory and regulatory requirements for excluding a particular source in a procurement in order to establish an alternative source or sources of supply. See 10 U.S.C. § 2304(b)(1); Federal Acquisition Regulation § 6.202(a).

The protest is denied.

Comptroller General  
of the United States

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<sup>4</sup>In this regard, Hawker's argument that this battery with the SOCI feature is a developmental item (which the Army denies) does not rebut the agency's determination that a second source is necessary, given Hawker's inability to successfully pass first article testing for a battery with the SOCI feature as required by its contract.