



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Marc Avenue Corporation

**File:** B-261968.2

**Date:** January 11, 1996

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Dennis A. Adelson, Esq., and Amy L. Freeman, Esq., Verner, Liipfert, Bernhard, McPherson and Hand, for the protester.

Albert C. Ruehmann III, Esq., for BF Goodrich Aerospace, an interested party.

Richard P. Castiglia, Jr., Esq., and Curtis D. Elton, Esq., Department of the Air Force, for the agency.

John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest against agency decision to reject proposal is denied where protester had not met qualification requirements for solicited wheel and brake assembly and failed to demonstrate that it could become qualified in time for award.

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## DECISION

Marc Avenue Corporation protests the rejection of its proposal under request for proposals (RFP) No. F42630-95-R-22041, issued by the Department of the Air Force for improved wheel and brake assemblies for certain F-16 aircraft.

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

The F-16 C/D fleet consists of two blocks, or types, of aircraft, block 40/42 and block 50/52. The wheel and brake assemblies sought under the RFP are a part of the main landing gear for the aircraft. They are considered flight critical items because a failure of the wheel and brake assembly during operation of the aircraft could significantly affect flight safety. The prime contractor for the F-16 fleet, General Dynamics Corporation, Fort Worth Division, equipped the block 40/42 aircraft with a wheel and brake assembly manufactured by Aircraft Braking Systems Corporation (ABSC), and the block 50/52 aircraft with a wheel and brake assembly manufactured by BF Goodrich Aerospace (BFG). The ABSC 40/42 assembly and the BFG 50/52 assembly were each qualified to the same design specification. ABSC and BFG were the sole source suppliers of replenishment spares, ABSC for the 40/42 block and BFG for the 50/52 block.

As a result of a critical shortage of 40/42 assembly spares and reliability and maintenance problems associated with the ABSC assembly, in January 1994, the Air Force decided that it was in the agency's best interest to replace the existing ABSC 40/42 assembly with the BFG assembly, which had previously been qualified for use on the 40/42 aircraft and had a documented performance rate of 767 landings, which was closer to the design objective of 1,000 landings. On June 10, 1994, the Air Force published a notice in the Commerce Business Daily (CBD) stating its intent to issue a sole source contract to BFG for a quantity of 40/42 assemblies. The proposed sole source award was canceled on September 16, as the agency realized that it could not justify a sole source acquisition since there were two qualified sources, ABSC and BFG.

On January 12, 1995, the Air Force published a synopsis in the CBD to identify interested sources with the capabilities to produce a replacement wheel and brake assembly for the block 40/42 F-16 aircraft. The synopsis advised that the replacement system should provide a wheel design that can accommodate both a bias ply and a radial ply tire, and a brake design that can provide a minimum of 750 landings before repair or replacement. The synopsis also stated that the replacement wheel and brake must fit within the present envelope of the 40/42 wheel well fitting and be compatible with existing aircraft/landing gear in form, fit, and function. The agency received eight expressions of interest in response to the notice. On April 17, the Air Force synopsised the RFP in the CBD; that notice restated the requirements set forth in the January 12 synopsis.

The RFP was issued on June 16 and, as amended, established the closing date for receipt of proposals as July 31. The RFP stated that the acquisition was subject to a qualification requirement, that "THIS IS AN EXTREMELY URGENT REQUIREMENT," and that contract award would not be delayed to give an offeror an opportunity to meet the standards specified for qualification "unless determined to be in the best interest of the government."

Marc submitted a proposal, which, after discussions were conducted, the Air Force rejected by an August 21 letter which stated:

"This is to inform you that based on the information you submitted for review, you do not meet the qualification requirements. Your proposal outlines a design, development effort. The RFP specifically states that a design, development effort is not acceptable. Also, due to the fact [that] you have not completed your design and development effort, you do not have the necessary documentation for our review. Consequently, your proposal is not responsive and cannot be considered."

In addition, the letter informed Marc that it could continue to seek qualification but stated that "due to the urgency of the requirements the Air Force will not delay contract award pending your qualification. We anticipate a contract will be awarded by 15 Oct 95."

In its principal allegation, Marc complains that, although it could not meet the qualification requirements when it submitted its proposal, under the RFP those requirements only had to be met by the time of award. Marc notes that the RFP stated that the "acquisition will not be delayed to allow a contractor to become a qualified source unless determined to be in the best interest of the government," and argues that due to its low price and superior technical approach, it was in the government's "best interest" to delay the award to allow Marc to qualify. As a result, Marc argues that it was unreasonable to reject its proposal.

The RFP permitted firms, such as Marc, that had not previously supplied the required items to qualify by manufacturing a qualification article and submitting it to the Air Force for inspection and testing. The RFP also stated:

"The burden of proof regarding the [qualification] requirements rests with the contractor. Authenticity verification will not be pursued by the responsible procuring activity. If the proposal does not include all the required information, it may be determined nonresponsive and not considered for award."

When it submitted its proposal, Marc had not met the RFP qualification requirements. As a result, during discussions, Marc was asked to provide evidence of compliance with those requirements and to provide "a definitized milestone schedule outlining your design and development effort and proposed delivery that complies to the RFP requirements."<sup>1</sup> In response, in an August 9 letter, Marc argued that, while it believed that its proposal was in the best interest of the government, it would need 10 months to qualify the firm's wheel and brake design. However, there generally is no requirement that an agency delay a procurement in order to provide a potential offeror an opportunity to demonstrate its ability to become qualified. 10 U.S.C. § 2319(c)(5) (1994). Under the terms of the RFP, Marc's

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<sup>1</sup>We do not agree with Marc's contention that by requesting a definitized milestone schedule, the agency improperly applied to Marc's proposal an evaluation criterion that was not set forth in the RFP. The request for a schedule did not amount to the application of an unannounced evaluation factor; the purpose of the schedule was simply for determining whether Marc could become qualified in time to be considered for award.

proposal was reasonably rejected because the firm failed to demonstrate that it could become qualified in time for award.<sup>2</sup>

Marc also challenges the agency's determination that there was an urgent need for the assemblies which prevented delay of the award and argues that BFG had an unfair competitive advantage under the RFP. According to Marc, the monthly usage rates for the F-16 Block 40/42 wheel and brake components indicate that adequate fleet support is available for 19 months, which would be sufficient time for Marc to perform the necessary qualification tests and deliver production items on its proposed schedule. Marc argues that the agency's determination of urgency was improperly based simply on a concern with the potential loss of funding and that, in any event, there is no urgent need for the quantity of assemblies solicited. Marc also argues that BFG, as evidenced by the June 10, 1994, CBD announcement of the proposed sole source contract to BFG for a quantity of 40/42 assemblies, was given source selection information and was unfairly permitted to perform qualification testing prior to issuance of the RFP--opportunities that Marc was not provided.<sup>3</sup>

These contentions are untimely. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of initial proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (1995); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

The RFP stated that this was an urgent procurement and required deliveries to start 9 months after award. In addition, in response to a pre-closing date request from Marc that the solicitation be amended to allow greater lead time before the start of delivery, the Air Force informed Marc that the schedule was

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<sup>2</sup>Marc also challenges the agency's decision, as stated in the August 21 letter, to reject Marc's proposal as a design, developmental effort since, as Marc notes, while the RFP stated that it "does not direct nor fund design and development of new wheel and brake systems," the RFP nonetheless did not state that a design, developmental effort would be unacceptable. We see no reason to consider this contention since we have concluded that the agency reasonably rejected Marc's proposal because the firm could not qualify in time for award.

<sup>3</sup>According to Marc, "[i]t is evident from the content of this official notice that [BFG] had been provided advance technical and procurement parameters which allowed them the opportunity to design, produce, and perform the necessary qualification tests for an improved F-16 Block 40/42 C/D aircraft wheel and brake to replace the system currently owned and operated by the Air Force."

"driven by the urgent need to correct R&M [reliability and maintenance] deficiencies and relieve critical Block 40/42 mission readiness impacts. A delay of this acquisition and purchase of additional spare parts to sustain the present system would further degrade the already critical support posture of the Block 40/42 aircraft and result in additional unnecessary costs to the [Air Force]."

Thus, Marc knew prior to submitting its proposal that the agency considered the requirement for brake assemblies to be urgent as a result of the "already critical support posture." Marc also knew the impact that the agency's position would have on its ability to compete since, in a May 22 letter to the Air Force, Marc stated that the RFP qualification requirement "limits the competition to only two possible sources. Anyone who does not have an existing brake on the aircraft cannot meet the qualification requirements."

Similarly, Marc's protest that BFG has an unfair competitive advantage under this RFP was premised on the June 10, 1994, CBD announcement. Indeed, in its May 22 questions concerning the draft RFP, Marc argued "any contractor that can meet [the RFP qualification requirements] and also meet the required delivery schedule must have been given advance procurement information on the requirements of the [statement of work]."

Therefore, Marc's protests of the urgency of the procurement and of BFG's asserted unfair competitive advantage in light of the qualification requirement are untimely, inasmuch as they were clear to Marc before it submitted its proposal.<sup>4</sup> 4 C.F.R. § 21.2(a)(1); Engelhard Corp., *supra*.

In its comments on the agency report, for the first time, Marc argued that the Air Force failed to comply with regulatory requirements to justify the qualification requirements and to give detailed public notice of those requirements. This issue also is untimely; the qualification requirements were set forth in the RFP, if Marc had any concerns about the justification for those requirements or about appropriate notice of those requirements, it should have protested prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

Also for the first time, in its comments, Marc argued that the Air Force improperly allowed BFG to conduct service testing of its products—an opportunity not offered to Marc and other prospective competitors. However, the Air Force's report in response to the protest stated that BFG had completed a field service evaluation of

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<sup>4</sup>We note that another protester timely protested BFG's asserted unfair competitive advantage prior to the closing date. Aircraft Braking Sys. Corp., B-261968, Nov. 16, 1995, 95-2 CPD ¶ 224 (denying the protest).

its assemblies. Marc received that report on October 6, yet did not raise this issue until its October 31 comments. This new and independent allegation is untimely since it was raised more than 10 days after the protester received the agency report, which placed the protester on notice of this ground for protest.<sup>5</sup> See Coulter Corp., et al., B-258713; B-258714, Feb. 13, 1995, 95-1 CPD ¶ 70.

The protest is dismissed in part and denied in part.

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<sup>5</sup>Although the protester received an extension of time for filing its comments, such an extension does not waive the timeliness requirements of our Bid Protest Regulations. CH2M Hill Southeast, Inc., B-244707; B-244707.2, Oct. 31, 1991, 91-2 CPD ¶ 413.