



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Harco Laboratories, Inc.

File: B-271809

Date: July 29, 1996

Charles A. Patrizia, Esq., and Sarah M. McWilliams, Esq., Paul, Hastings, Janofsky & Walker, for the protester.

Gwendolyn M. Hoover, Esq., Defense Logistics Agency, for the agency.

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DIGEST

Protest by small business concern that solicitation for military spare parts requiring contractor to either absorb or price the costs associated with post-award first article testing violates 10 U.S.C. § 2319(d) (1994) is denied where this section requires contracting agency to assume pre-award (not post-award) qualification testing costs for small businesses under certain circumstances.

DECISION

Harco Laboratories, Inc. protests certain terms of request for proposals (RFP) No. SPO750-95-R-0209, issued by the Defense Supply Center Columbus Region (DSCC), Defense Logistics Agency, for thermocouple assemblies. Harco contends that the requirement for first article testing (FAT) places Harco at a competitive disadvantage because the RFP requires the contractor to absorb or price the costs of the FAT in contravention of 10 U.S.C. § 2319(d) (1994) which was enacted by Congress to increase competition for military spare parts.

We deny the protest.

As issued on May 30, 1995, the RFP contemplates the award of a firm, fixed-price delivery contract or contracts for a quantity of spare thermocouple assemblies. The thermocouple assembly is a component of the Abrams AGT 1500 gas turbine engine which is used on the M1 Tank; as such, it must meet stringent design and performance specifications to assure field effectiveness and troop safety. This item is classified as a critical engine component and the acquisition is restricted to an approved source. The only approved source for this item is Semco Instruments, Inc., although an offer of assemblies from other manufacturers was permitted subject to source approval.

The amended solicitation, at paragraphs I43 and I43A, requires the contractor to conduct FAT and to provide the agency with an FAT report, although the FAT requirement was subject to waiver. The FAT requirement was set forth as a contract line item; the estimated cost for the FAT requirement was identified as \$166,000. Thus, while the solicitation provided that the contractor must pay all costs associated with the FAT, offerors could price the FAT line item as they chose.

Harco, a small business firm, contends that it must either price the FAT in its offer or absorb the FAT cost by offering it on a "no charge" basis, while Semco (which has successfully furnished the item) can obtain a waiver of the FAT requirement and thus would have a significant competitive advantage in the competition. Harco asserts that it should not have to bear the cost or evaluation disadvantage because section 2319(d)¹ requires the contracting agency to bear the cost of testing and evaluating the product of a small business concern where there are less than two qualified sources or products and the projected savings to the government through increased competition justify such action. DSCC disagrees with Harco's interpretation of section 2319(d), maintaining that this provision is applicable only where the specified testing and evaluation must be completed prior to award and not to FAT conducted after award. In this regard, the agency points out that its interpretation of the applicability of section 2319(d) only to pre-award qualification testing is consistent with our decision in Nasco Eng'g, Inc., B-224292, Jan. 14, 1987, 87-1 CPD ¶ 57.

¹In relevant part, section 2319(d) provides:

"(d)(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers . . . the head of the agency concerned shall--

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(B) bear the cost of conducting the specified testing and evaluation . . . for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition"

The agency correctly asserts that our decision in Nasco controls the resolution of this protest. In that case, Nasco, a small business concern, argued that the Navy was required to pay the cost for FAT under section 2319(d). We denied the firm's protest on the grounds that section 2319(d) does not require the contracting agency to assume the post-award FAT costs for a small business. In that decision, we stated:

" . . . Although the legislation [10 U.S.C. § 2319] was enacted to encourage competition, it appears clear that it was intended to deal with those situations in which the government has imposed a preaward qualification requirement and limited competition to only approved sources or products . . . the 'qualification requirement' encompassed by section 2319 is defined as ' . . . a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.'" [Emphasis added.]

We further stated that:

" . . . it is in this context that section 2319(d), concerning the payment of testing costs for small business must be viewed. . . . [that is] the 'less than two qualified sources or qualified products available' must be read in conjunction with the type of qualification requirement covered by section 2319; i.e. a preaward qualification requirement which prevents a potential offeror from competing. . . ." [Emphasis added.]

However, in its comments on the agency report, the protester urges us to reconsider our conclusion in Nasco that section 2319(d) does not require agencies to pay the cost of FAT for small business contractors. According to Harco, since section 2319(d) uses the term "specified testing and evaluation" rather than "qualification requirement," this subsection can reasonably be interpreted as encompassing all post-award testing requirements (such as FAT) that must be met by a contractor as a precondition to contract payment. Such an interpretation, the protester states, would be consistent with the Congressional objective to enhance competition for military spare parts by requiring contracting agencies to pay the costs of all government imposed testing for small businesses. Finally, Harco alleges that there is "no evidence that GAO . . . ever undertook any in-depth statutory construction or review of legislative history" in issuing the Nasco decision.

Contrary to the protester's arguments, and as Nasco makes clear, there is nothing in the language of the statute or legislative history which supports its view that Congress intended to broaden the scope of section 2319 to require contracting agencies to pay post-award FAT costs for small business concerns under subsection

(d). In Nasco, we construed section 2319(d) as authorizing contracting agencies to assume only pre-award testing costs for small businesses under appropriate circumstances; in doing so, we considered the context in which the legislation was passed and the primary statutory purpose, as disclosed in the legislative history. Since Harco advances the same or similar arguments as those asserted and considered in Nasco, we have no basis to interpret the statutory provision in the manner urged by the protester and we decline to reconsider our position based on these arguments.

Accordingly, the protest is denied.

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