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Matter of: Lavi Systems, Inc.

File: B-282295

Date: June 24, 1999

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Maj. Cynthia M. Mabry, Jeffrey I. Kessler, Esq., and Capt. Jeff M. Neurauter, Department of the Army, for the agency.
Adam Vodraska, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency reasonably considered the awardee an approved source for a solicited helicopter part, notwithstanding that the awardee was not listed in the solicitation as an approved source, where the helicopter's prime manufacturer had approved the awardee's predecessor as a source for the part 20 years ago; the awardee or its predecessors had since continually manufactured the solicited item for the prime manufacturer and other approved sources of the part; and the approved source that currently owns the drawings to the part authorized the awardee to submit an offer directly in response to the solicitation and addressed the agency's concerns about the qualification of the awardee.
2. Contracting agency was not required to reevaluate the qualification of the awardee, or retest its part, where, in substituting the awardee for another approved source, there was no change of location or ownership of the plant where the part which met the qualification requirement was manufactured, or change in location or ownership of a previously qualified manufacturer or source. Even if the agency had conducted a reevaluation of the qualification of the awardee's predecessors following earlier ownership changes and relocation of the awardee's manufacturing facility, the protester has not shown why removal of the awardee or its predecessors from the approved source list was warranted or that retesting of the awardee's part was required.

3. Protest allegation that the awardee's part does not comply with the specification, based on the protester's prior repairs to the awardee's part, is denied where the contracting agency has previously found that the awardee's part meets the specification; the awardee's first article test results submitted with its offer demonstrate compliance with the specification; and there is no evidence that the contracting agency has relaxed the specification for the awardee.

DECISION

Lavi Systems, Inc. protests the award of a contract to Teledyne Electronics Technology (TET), Lewisburg (Tennessee) Facility, by the United States Army Aviation and Missile Command, Redstone Arsenal, Alabama, under request for proposals (RFP) No. DAAH23-99-R-0025, for a production quantity of 21 Caution Advisory Panels, National Stock No. 1680-01-225-5629, for the Army's UH-60 "Black Hawk" helicopter.¹

We deny the protest.

BACKGROUND

The RFP contemplated the award of a fixed-price supply contract to the responsible offeror whose technically acceptable offer represents the lowest overall cost to the government. See RFP §§ L-6, M-1. The RFP restricted competition to three listed approved sources (Sikorsky Aircraft Corp., Litton Systems, Inc. and the protester) and to sources other than those listed that are approved prior to award.² Id. §§ B, at 6; L-16. The RFP provided that a prospective offeror wishing to become an approved source must submit a Source Approval Request that complies with the requirements of the Competition Advocate's Shopping List, a paperwork qualification process established by agency procedures. Id. § L-16.

The RFP incorporated the standard Qualification Requirements clause, Federal Acquisition Regulation (FAR) § 52.209-1. Id. § I-68. That clause requires the offeror to have demonstrated that it or its product meets the standards prescribed for qualification prior to award of the contract and provides a space for the offeror to indicate whether it or its product has already met the qualification standards specified.

¹ The panels are electronic devices that display various indicator lights that alert a pilot to certain conditions or malfunctions in the helicopter's systems.

² The RFP provided the recent procurement history for the solicited panel, listing contracts from 1998 with Lavi and Litton, along with unit prices and quantities. RFP § A-3.

The RFP contained a technical data package that included the original specification for the panel (as revised) from Sikorsky, the helicopter's prime manufacturer. Id. § J, attach. 2; Contracting Officer's Statement ¶ 3. The RFP required first article inspection and contractor testing of the solicited item. RFP §§ B, at 6-7; C-1; I-69. However, the RFP provided that if the offeror has previously furnished identical or similar supplies to those solicited which have been accepted by the government, the contracting officer may waive the requirement for first article approval. Id. § L-15. Such offerors were also encouraged to submit an offer based on exclusion of the requirement for first article approval as long as they furnished test reports or other evidence showing that the first article or production equipment they manufactured and delivered under any prior government contract has been approved or accepted by the government prior to the RFP's closing date. Id. § B, at 7; L-15.

When the contracting agency issued the RFP on November 5, 1998, it sent copies to the three approved sources for the item listed in the RFP (Sikorsky, Litton and Lavi). Agency Report, Tab Q, Prenegotiation Memorandum ¶ 3. Sikorsky did not submit an offer. Contracting Officer's Statement ¶ 2. In a letter dated December 7, Litton informed the agency that it was authorizing TET, its subcontractor on another Army contract for the panels, to submit an offer directly in its own name in response to the solicitation, in advance of an executed royalty/license agreement. Agency Report, Tabs I, J.

The agency received two offers--from TET and Lavi--by the RFP's extended closing date of December 14. Contracting Officer's Statement ¶ 2. TET's total price was \$286,671 (\$13,651 for each unit). Lavi's total price was \$350,394.45 (\$16,685.45 for each unit).

TET, in the cover letter to its offer, referenced the December 7 letter from Litton to the contracting officer authorizing TET to submit an offer directly. TET provided first article test approval data for the item with its offer and listed the prior Army contracts it has performed for supplying the item, including the recent contract with Litton listed in the RFP's procurement history. The offer also stated that a royalty, payable to Litton, is included in the price, and that TET and Litton are in the process of finalizing a licensing agreement for the item. TET's offer indicated that it already met the RFP's qualification standards.

Lavi's offered panel was based on its redesign of certain features of the original panel, for which it had been granted source approval.

On February 26, 1999, the contracting officer awarded the contract to TET as the lowest-priced, technically acceptable and qualified offeror. Contracting Officer's

Statement ¶ 13. Lavi's protest followed its notification that it was the unsuccessful offeror and that award had been made to TET, a source not listed in the RFP.³

ANALYSIS

Lavi objects to the Army's determination that TET is an approved source to supply the solicited panels. Specifically, the protester maintains that the Army failed to determine whether TET was properly qualified or approved before award.

The system of qualifying and approving products, which is generally used prior to, and independent of, individual procurements, is nevertheless an integral part of the system of procuring qualified and approved products. Apache Enters., Inc., B-275813.2, Apr. 23, 1997, 97-1 CPD ¶ 146 at 3. Where, as here, a solicitation requires that the source of the product procured be qualified or approved, it is improper for a contracting agency to include in the list of approved sources a source that has not been properly approved and whose product does not satisfy the applicable specifications. Id. Including such a source in the list may constitute a basis for sustaining a protest if the agency's action prejudices the protester. Id.

Here, the Army ultimately determined that TET should have been listed in the RFP as an approved source, Contracting Officer's Statement ¶ 9, and that it was unnecessary to "reapprove" a source (TET) that was already qualified and manufacturing the panels. Agency Report, Tabs M, N. Specifically, the record shows that in determining that TET was an approved source, the Army considered that Teledyne Controls, TET's predecessor, was first approved in 1978 by Sikorsky, the UH-60 helicopter's prime manufacturer, as the source for the panels. Contracting Officer's Statement ¶ 11. The Army also considered that Teledyne Controls remains listed as the source for the panels on Sikorsky's specification (including the latest revision) and that TET or its predecessors have always been, and continue to be, Sikorsky's source for the panels. Id. ¶¶ 9, 11. Because TET's predecessor had been approved by the prime manufacturer, the Army concluded that TET should have been listed in the RFP as an approved source pursuant to RFP § L-16, which provides that a source is to be listed in the RFP as an approved source if it has been "approved by the prime manufacturer or the Government" for supply of the item. (Emphasis added.)

The record also shows that the Army considered that since 1991 (when Teledyne Controls' panel manufacturing facility was relocated from California), the panels have been manufactured at TET's Lewisburg facility. Contracting Officer's Statement ¶ 6. This facility has continued to manufacture the panels for Litton, which bought the rights to the panel drawings and specifications from TET's predecessor, Teledyne Controls, and replaced Teledyne Controls on the approved

³ After concluding that TET was an approved source, the Army updated the approved source database for the item by replacing Litton with TET. Agency Report, Tab N.

source list for the part in 1995. Id. ¶¶ 6, 11. Specifically, TET's Lewisburg facility (which was not sold to Litton) functions as a subcontract build-to-print manufacturer and repair depot for the panel product line acquired by Litton from Teledyne Controls. Id. ¶ 6. The Army was mindful that TET had manufactured panels identical to the ones solicited under the Army's recent contract with Litton listed in the RFP's procurement history. Id. ¶ 9.

The record further shows that the Army took into account Litton's authorization to TET to submit an offer directly to the Army. Contracting Officer's Statement ¶ 6. Litton's authorization also responded to the Army's concerns that TET may provide a different product than Litton, may not meet all the quality requirements that Litton had on previous contracts, and may not be a qualified contractor. Agency Report, Tab I. Specifically, Litton informed the Army that "[f]rom a technical standpoint, the licensing of the product by Litton to [TET] is invisible to the Government." Id. Litton pointed out that "[i]t was, in fact, [TET] effort that qualified the product it now builds as an authorized vendor of Litton." Litton reiterated that TET's Lewisburg facility had been manufacturing the panels since 1992, and has been manufacturing them on behalf of Litton since January 1995. Litton noted that the panels supplied earlier in 1998 under the Litton contract listed in the RFP's procurement history were manufactured by TET and shipped directly from the Lewisburg facility to the government. Litton informed the Army that in the past, Litton has provided TET engineering and contract administration support as well as authorization to build to its drawings. Litton stated that, for the current procurement, Litton will provide TET authorization to build to Litton drawings and will continue to provide TET engineering support under the proposed royalty/licensing agreement with TET.

Based on the above, and in view of the fact that the panel offered by TET apparently is identical to the panels it has supplied, and continues to supply, for Sikorsky and Litton, we find the agency had sufficient basis to consider TET an approved source and, as such, to conclude that TET should have been listed as an approved source in the RFP.⁴

⁴ We see no basis to conclude that Lavi was prejudiced by the agency's failure to list TET as an approved source in the RFP. Prejudice is an essential element of a viable protest, and where no prejudice is shown, or is otherwise evident, our Office will not disturb award, even if some technical deficiency in the procurement may have occurred. Apache Enters., Inc., supra, at 4. Here, to establish prejudice, Lavi would need to show that it could and would have displaced TET as the low offeror had Lavi known of TET's qualification as an approved source. Id. Lavi neither alleges it would have submitted a lower price had it known of TET's qualification nor that it would have sought to qualify its panel under the allegedly lesser standard applicable to TET's panel. There is simply no evidence in the record showing that Lavi could or would have altered its offer to its competitive advantage had it known that TET was an approved source for the panels.

The protester contends that the Army could not properly rely on the prior qualification of Teledyne Controls and Litton in treating TET as an approved source. According to the Lavi, changes in TET's ownership and production location required reevaluation of the qualification and retesting of the panel under FAR § 52.209-1(f) (RFP § I-68), which provides as follows:

Any change in location or ownership of the plant where a previously qualified product or service was manufactured or performed requires reevaluation of the qualification. Similarly, any change in location or ownership of a previously qualified manufacturer or source requires reevaluation of the qualification. The reevaluation must be accomplished before the date of award.

This provision obligates the agency to reevaluate the qualification, but not necessarily to retest the product, when ownership of the manufacturing facility or manufacturing location is changed. See Automated Power Sys., Inc., B-236545, Nov. 7, 1989, 89-2 CPD ¶ 439 at 2. Whether to require retesting for the purposes of an approved source listing is a discretionary matter, see FAR § 9.207(b), and we will not object to the agency's exercise of discretion absent a showing that it lacked a reasonable basis. Automated Power Sys., Inc., B-224203, Feb. 4, 1987, 87-1 CPD ¶ 109 at 3.

With respect to the Army's substitution of TET for Litton on the approved source list, we conclude that no reevaluation or retesting under FAR § 52.209-1(f) was required, because, as described above, Litton, an approved source, authorized TET, its manufacturer, to submit an offer directly to the Army in response to this RFP. There simply was no change of location or ownership of the Lewisburg plant, where the panel which met the qualification requirement was manufactured, or change in location or ownership of a previously qualified manufacturer or source, as a result of the substitution itself, which would trigger the reevaluation or retesting requirement of FAR § 52.209-1(f).

We agree with the Army that even if, based on TET's earlier ownership changes and the 1991 relocation of its manufacturing facility, the agency had conducted a reevaluation of the qualification of TET or its predecessors, the protester has not shown why removal of TET or its predecessors from the approved source list was warranted or that retesting of TET's panel was required. For example, the protester has failed to rebut the Army's reasonable position that since there has been no change to the design of the panel, the manufacturing process, or the manufacturing location since TET's predecessor Teledyne Controls was last listed on the approved source list, the Army reasonably relied on the prior qualification of Teledyne Controls in considering TET as an approved source. Although the manufacturing facility for the panel was relocated to Lewisburg in 1991, the protester has not described why this change in location itself reasonably should have resulted in the

removal of Teledyne Controls as an approved source, or why TET's removal is required now based on this 8-year old change in the location of its predecessor's manufacturing facility.

Finally, the protester contends that TET's panel, as currently designed and manufactured, does not meet the Sikorsky performance specification incorporated in the RFP.

The protester explains that in late 1995, in connection with a separate repair contract, it found that the panels manufactured by TET under prior contracts and submitted to Lavi by the Army for repair exhibited flickering of the panel lights and the potential for false malfunction indications. The protester states that the Army instructed it to return the repaired panels only after the units had been redesigned to meet the Sikorsky specification and to submit value engineering change proposals for the manufacture of the panels that would eliminate the problems identified. After Lavi submitted the requested value engineering change proposals to eliminate the deficiencies it identified, the Army required Lavi to test its redesigned panel to the satisfaction of the Army. As a result of Lavi's successful completion of these tests, the Army approved Lavi as a source for the manufacture of the panels.

The protester argues that TET could not have properly qualified as an approved source unless it had access to the technical data developed by Lavi which details the design and engineering changes necessary for the TET-manufactured Litton panels to comply with the Sikorsky specification. Since the Army represented that the Army provided no other firm--including TET--access to this data,⁵ and Lavi's data was necessary to manufacture a compliant panel, the protester maintains that the Army must have improperly relaxed the Sikorsky specification to the benefit of TET. The protester suggests that the Army acted in bad faith by requiring Lavi to redesign the panel previously manufactured by TET to comply with the Sikorsky specification and then "knowingly accepting non-compliant [panel] units from TET." Comments at 6 n.6.

The Army maintains that the panels manufactured by TET have been acceptable, pointing out that only 3 percent of the panels have had to be removed from service due to the flickering light problem. Contracting Officer's Statement attach. 2 ¶ 3. In response to the protest, the Army reviewed Quality Deficiency Reports from Black Hawk helicopter activities for the past 7 years and found no reported deficiencies in the panels. The Army also checked the acceptance records from Sikorsky, the UH-60 manufacturer, dating back to 1982, and found no reported deficiencies of any substance. Further, according to the Army, reports to the Program Manager from

⁵ Lavi granted limited data rights to the government under a modification to its repair contract so that its design and testing data could be provided "to the OEM and/or Sikorsky Aircraft." Comments, Tab A, exh. 3, at 4.

the field and site visit records do not indicate any deficiency or problems with the panels manufactured by TET. Moreover, TET's first article test results (for panels it manufactured for Litton) submitted with its offer indicate that its panels demonstrate no flickering and were acceptable to the agency. Contracting Officer's Statement attach. 6; Agency Report, Tab K. Based on these results, the Army waived first article testing for the panel offered by TET in response to this RFP. Contracting Officer's Statement ¶ 4; Agency Report, Tabs T, U. Accordingly, we cannot agree with the protester that the agency improperly relaxed the Sikorsky specification in awarding the contract to TET based on its allegedly nonconforming panel.

Contrary to Lavi's assertion, TET was not required to manufacture a panel based on Lavi's redesign because the RFP did not require the offered panel to be designed to Lavi's drawings, but treated both the original Sikorsky and the Lavi panel designs as acceptable. Although the Army approved Lavi's design changes, the panels offered by TET in response to this solicitation are based on the original design specifications approved by Sikorsky, which are still acceptable to the Army and included in the RFP's technical data package. Contracting Officer's Statement ¶ 12; Army Supplemental Comments enclosures. Indeed, the Army points out that the panels manufactured by TET and its predecessors to the original specification have been in service for nearly 20 years and have successfully undergone a series of qualification tests both at the component and system level. Army Supplemental Comments enclosures. The Army states that the current unit design and performance is "operationally acceptable and safe for use in the UH-60 aircraft" and notes that Sikorsky is currently installing the panels manufactured by TET to the original specification on production aircraft without the Lavi design changes. *Id.* To the extent Lavi is protesting that the RFP's performance specification/technical data package is defective (*i.e.*, does not meet the minimum needs of the Army) because it did not require Lavi's design changes, Lavi's argument is an untimely protest of an apparent solicitation impropriety. 4 C.F.R. § 21.2(a)(1) (1999).

Finally, we find without merit the protester's allegation of bad faith. To show bad faith, a protester must submit convincing proof that the procuring agency directed its actions with the malicious and specific intent to injure the protester. Molly Maguires, B-278056, Dec. 22, 1997, 97-2 CPD ¶ 169 at 5. As discussed above, there is no basis in the record to conclude that the Army accepted panels from TET that failed to comply with the Sikorsky specification. We also see no reason to question the Army's good faith when it required rigorous testing of Lavi's proposed redesign. The TET-manufactured panels had already been in service for many years and were performing to the Army's satisfaction, and thus the Army reasonably scrutinized Lavi's proposed redesign. Moreover, in approving Lavi as a source for the panel, the Army encouraged a new competitor--hardly indicia of bad faith. As to Lavi's assertion that TET's product will not meet the agency's minimum needs because it was not subjected to more stringent testing than that provided for by the RFP, we will not consider a protest that a procurement should be subject to greater

restriction than an agency believes is necessary to meet its needs. Apache Enters., Inc., supra, at 2 n.2.

The protest is denied.

Comptroller General
of the United States