



United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** National Aerospace Group, Inc.

**File:** B-282843

**Date:** August 30, 1999

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Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.

John Arrastia, Jr., Esq., Ruden, McClosky, Smith, Schuster & Russell, for Specialized Metals, an intervenor.

Jeffery B. Greer, Esq., and Walter R. Pierce, Esq., Defense Logistics Agency, for the agency.

Christina Sklarew, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Agency's justification for sole-source procurement is inadequate where the documentation does not reasonably show that only this exact product will satisfy the agency's needs, and does not show that the agency's need for the item is of unusual and compelling urgency that was not created by a lack of advance planning.
2. Protest is sustained where agency did not provide protester with a reasonable opportunity to demonstrate the acceptability of its alternate product prior to, or in conjunction with, procurement restricted to a sole source, and where rejection of alternate item is based entirely on agency's unsupported assertion that it cannot evaluate alternate without the original equipment manufacturer's technical data.

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### DECISION

National Aerospace Group, Inc. protests its exclusion from competition under request for proposals (RFP) No. SPO740-99-R-3210, issued by the Defense Supply Center Columbus (DSCC), Defense Logistics Agency, for a quantity of metallic tubing identified as an approved product, listing its original manufacturer's part number and national stock number (NSN). National contends that the agency's failure to allow the firm to have its own alternate item evaluated deprived National of a reasonable opportunity to compete under the solicitation.

We sustain the protest.

In October 1998, National submitted its own technical data and drawing for this tubing to DSCC and requested its approval as an alternate, in anticipation of future requirements for the product. Protest at 1. On December 18, National resubmitted its drawing to DSCC's technical staff and again requested approval. Protest, exh. 3 at 1. On March 29, 1999, DSCC announced its intention in the Commerce Business Daily (CBD) to procure the item on a sole-source basis from the original equipment manufacturer (OEM), Specialized Metals, as the only approved source. Agency Report, Tab 5. In the notice, DSCC invoked 10 U.S.C. § 2304(c)(1) (1994), which permits the use of other than competitive procedures when the property or services needed by the agency are available from only one responsible source, and no other property or services will satisfy the agency's needs. On April 1, DSCC issued request for quotations (RFQ) No. SPO740-99-Z-4044 for 219 feet of the tubing. As a result of an increase in the amount of material required, the contracting officer later canceled the RFQ and, on May 4, again announced the agency's intention in the CBD to solicit and contract "with only approved sources," stating that "specifications, plans or drawings are not available," now citing 10 U.S.C. § 2304(c)(2). Agency Report, Tab 6. Under this authority, an agency may use other than competitive procedures to procure property or services where the agency's requirements are of such an unusual and compelling urgency that the government would be seriously injured if the agency was not permitted to limit the number of sources from which it seeks bids or proposals. On May 5, DSCC issued the RFP at issue here, SPO740-99-R-3210, which, as amended, calls for 541 feet of the tubing. The RFP required that offers be submitted by May 11.

A purchase item description (PID) associated with the NSN 014250937 states that the metal tubes are 12-inch pieces of round, seamless tubing, 1-inch in diameter, made of cobalt alloy L-605, with walls that are .049 inches thick. There is no physical description in the solicitation of the tubing, nor does the RFP describe the use to which the tubes will be put. During conference calls conducted by our Office among the protester's counsel, DSCC counsel, and DSCC technical personnel, agency counsel described the tubes' purpose as "use in a variety of welding projects," and DSCC technical personnel stated that the four military services that currently require the tubes use them for "certifying welders," adding that "they may also be used for other purposes," but admitting that DSCC staff did not know what those uses might be. Specialized Metals, which filed comments as an intervenor in the protest, states only that the tubing is "used by the military services for a variety of purposes." Intervenor's Comments at 2.

The solicitation at section B, "Part Number," advised offerors as follows:

This requirement is in accordance with manufacturer's part number and the part number(s) listed in Section B – Item Description are the only approved items as of the date of this solicitation. THERE ARE NO DRAWINGS AVAILABLE AT THIS CENTER FOR THIS REQUIREMENT.

RFP § B, at 4.

The RFP included, in section L30, DLA's "products offered" clause,<sup>1</sup> which requires offerors to specify whether they are offering an "exact product" as listed in the item description, or an "alternate product."<sup>2</sup> RFP § L30(b), (c). Regarding the submission of alternate products, the clause instructs offerors to submit legible copies of all drawings, specifications or other data necessary to describe clearly the characteristics and features of the product being offered, as well as drawings and other data covering the design, materials, etc., of the exact product, to enable the government to determine whether the offeror's product is equal to the product cited in the PID. The clause states that firms may offer alternate products that are either "identical to or physically, mechanically, electronically and functionally interchangeable with" the named product, and cautions offerors that the failure to furnish the complete data necessary to establish acceptability of the product offered might preclude consideration of the offer. Id. § L30(a), (g).

On May 4, the contracting officer executed a justification and approval (J&A) for the acquisition of 416 feet of the tubing on a sole-source basis. The J&A consists of a pre-printed form on which the contracting officer checked various boxes to indicate that the statutory authority for the sole-source procurement is "10 U.S.C. 2304(c)(2) – Urgency"; that the use of the authority cited is based on "[n]o technical data on item and data cannot be obtained economically"; that "[e]fforts to ensure that offers are solicited from as many sources as practicable" consisted of "[t]he acquisition will be synopsized"; and, in a section for "[a]dditional facts supporting other than full and

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<sup>1</sup>Although entitled "Conditions for Evaluation and Acceptance of Offers for Part Numbered Items," the agency refers to the clause as its "products offered clause."

<sup>2</sup>The products offered clause defines "exact product" as the identical product cited in the RFP's PID, manufactured either by the manufacturer cited in the PID, or by a firm which manufactures the product for the manufacturer. An "alternate product" is defined as any other product even if manufactured in accordance with the drawings and specifications of the manufacturer listed in the PID.

open competition,” a box is checked stating:

As stated in the attached certification by the requiring activity, the Military Services will be seriously injured if contract award is delayed. The extent and nature of harm are detailed in the attached certification.

Agency Report, Tab 7, Justification for Other Than Full and Open Competition, at 1-3.

The final paragraph of the form states:

In addition to the specific actions being taken by Technical Support Personnel to overcome barriers to competition before any subsequent acquisitions or recertification of class determination are made, this item is subject to the following methods of locating additional sources:

The solicitation contains the provision entitled Conditions for Evaluation and Acceptance of Offers for Part Numbered Items.

Id. at 3.

No additional information was included in the J&A, nor was any certification attached to the J&A.

On May 10, the agency prepared a written summary of its technical evaluation of National’s alternate part, rejecting it as unacceptable. The technician notes on the form that the agency does not have OEM specifications against which it could evaluate alternate offers; that National has not provided “documentation to show and prove the methodology used to come up with their offered part,” and that without such documentation to substantiate that the proposed National part is equal to or better than the OEM part, the review of the alternate offer cannot proceed. Agency Report, Tab 11. The technician also criticizes National’s drawing for showing “a part that is 12 inches to 180 inches in length which is non-definitive. The drawing must reflect the length of the part being offered.” Id.

Also on May 10, National filed a protest against the RFP with the agency, alleging that it had submitted its technical drawing in December 1998 and that despite its repeated inquiries about the status of its request for approval, had not received any response.

By the May 11 date for submission of offers, the agency received offers only from Specialized Metals, offering the exact item listed, and from National, offering to supply its own part at a lower price. On May 20, the contracting officer denied National’s agency-level protest, stating that the protester had failed to submit sufficient data for the agency to perform a thorough evaluation of its alternate item,

and that DSCC does not possess the specifications that the agency would need in order to evaluate an alternate. On May 27, the contracting officer awarded the contract to Specialized Metals. National filed its protest in our Office on May 28, arguing essentially that DSCC's failure to consider National's request for approval for its alternate part improperly excluded the firm from competing for the award, and that the sole-source procurement was improper. National's protest was filed within 10 days of the award; however, DSCC executed a determination and findings (D&F) to authorize performance of the contract notwithstanding the protest on the basis that it had an urgent need for the item.

While the overriding mandate of CICA is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA does permit noncompetitive acquisitions in seven specified circumstances. 10 U.S.C. § 2304(c). When an agency uses noncompetitive procedures such as 10 U.S.C. § 2304(c)(1) or (c)(2), cited here by DSCC, it is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority. See 10 U.S.C. § 2304(f)(1)(A), (B); Federal Acquisition Regulation (FAR) §§ 6.302-1(d)(1), 6.302-2(c), 6.303, 6.304. Our review of the agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth a reasonable justification for the agency's actions, we will not object to the award. Marconi Dynamics, Inc., B-252318, June 21, 1993, 93-1 CPD ¶ 475 at 5; Dayton-Granger, Inc., B-245450, Jan. 8, 1992, 92-1 CPD ¶ 37 at 4. However, noncompetitive procedures may not properly be used where the agency created the urgent need through a lack of advance planning. 10 U.S.C. § 2304(f)(5)(A); New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6.

As explained below, here the agency failed to reasonably justify its urgency determination and also failed to provide National a reasonable opportunity to obtain approval of its proposed alternate product.

After reviewing the record, we conclude that the J&A here, invoking 10 U.S.C. § 2304(c)(2), does not reasonably establish such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. The DSCC J&A is completely inadequate, consisting only of check marks entered on statements on a pre-existing form. There is no explanation or justification to support the check marks entered. The J&A does not even include the certification of the requiring activity on which the J&A purports to rely to establish serious injury that would result from contract award delay and the extent and the nature of the harm. Although the agency report alludes to purchase orders that were placed and then canceled because of a vendor's substitution of a nonapproved part and cites its current lack of inventory as the basis for its determination that the requirement is urgent, DSCC never specifically demonstrates how such lack of inventory for this item adversely affects the requiring agency. Rather than factually establishing the

adverse impact and, thus, the critical need, DSCC merely relies on minimal conclusory statements.

The agency also suggests in its conflicting statements regarding the usage of the item that no advance planning was undertaken.<sup>3</sup> The protester's attempts to gain approval of its alternate part are also important in the context of advance procurement planning. An agency's failure to allow alternate sources to have their products evaluated and approved perpetuates the circumstance in which a sole-source procurement is necessary and amounts to a failure to engage in advance planning. Cf. Freund Precision, Inc., B-223613, Nov. 10, 1986, 86-2 CPD ¶ 543 at 3-4. See generally Rotair Indus., Inc., B-224332.2, B-225049, Mar. 3, 1987, 87-1 CPD ¶ 238; Sturm, Ruger & Co., Inc., B-235938, Oct. 25, 1989, 89-2 CPD ¶ 375.

Even more troubling is the agency's repeated reliance (in the CBD notices, the J&A, the agency report and in conference calls conducted in connection with the protest) on the absence of technical data and drawings proprietary to Specialized Metals as a basis to justify the sole-source acquisition. The agency's assertion that it does not possess the technical data is un rebutted. However, we question why this data is necessary, since the record does not show why DSCC needs this particular product, and DSCC technical personnel, when questioned directly, admitted that they did not know the product's exact use or characteristics. DSCC is essentially accepting at face value the requiring activities' assertion that this particular product is the only one that will meet their needs, and there also appears to be unquestioning acceptance--by DSCC, the requiring activities, or both--of the OEM's apparent insistence that its product is unique in ways that are essential to its function but cannot be revealed.

There is no evidence in the record that the contracting officer ever questioned why this exact item was needed, or what information was necessary that could only be obtained from the OEM. On this record, DSCC cannot explain how the tubing is used, or what specific needs are met by this part. In conference calls held in connection with the protest, DSCC counsel explained that military services have used the tubing in the past and therefore know that it satisfies their need, but have neither specified what that need is or how it can be satisfied by only this part, nor

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<sup>3</sup>The report refers to the tubing as "infrequently requisitioned," noting that no contracts were awarded for the item between August 1997 and August 1998, and that the "next few awards" were for only 173 feet of the tubing. Agency Rebuttal at 4. However, in the D&F executed to override the statutory stay of Specialized Metal's contract pending resolution of the protest, DSCC states that the agency currently has requisitions of 397 feet of the material, with no stock on hand and a forecast of "an estimated quarterly usage of 107 feet." Agency Report, Tab 15, D&F, at 2.

can they describe the performance characteristics of this part.<sup>4</sup> Thus, without any knowledge of how the part functions, DSCC is requiring absolute adherence to unknown parameters which may or may not be necessary to satisfy the government's actual need. It has not shown, for example, that the part must be interchangeable with other parts or must function in conjunction with other components in a larger system; in those circumstances, the assertion that the agency needed a particular part but could not state with precision how that part was configured could be reasonable. Cf. Navistar Marine Instrument Corp., B-262221, Nov. 20, 1995, 95-2 CPD ¶ 232 at 2-3 (sole source procurement of part is reasonable where it performs critical function in testing aircraft engines and must fit into pre-existing opening on instrument panel); TSI Microelectronics Corp., B-243889, Aug. 20, 1991, 91-2 CPD ¶ 172 at 5 (agency's lack of technical data and agency's compatibility concerns regarding critical microcircuit replacement part reasonably supported sole-source acquisition). DSCC has offered no explanation at all of its need here, beyond vague references to "a variety of uses" and stating without elaboration that the tubing is used "to certify welders."

Accordingly, on this record, DSCC has not reasonably justified its use of noncompetitive procedures, and we also question whether National was afforded a reasonable opportunity to have its alternate product evaluated for approval. Even had the agency appropriately justified its decision to solicit the product on a sole-source basis, it would still have been required to provide the protester that opportunity. CICA, with certain limited exceptions, requires contracting officers to "promote and provide for full and open competition in soliciting offers and awarding contracts." FAR § 6.101(a). When an agency restricts a procurement to approved products, 10 U.S.C. § 2319(b) requires the agency to give offerors proposing alternate products a reasonable opportunity to demonstrate that their products can qualify. BWC Techs., Inc., B-242734, May 16, 1991, 91-1 CPD ¶ 474 at 4.

We do not think the agency's actions were reasonable here. In response to National's assertion in its agency-level protest that DSCC had failed to comply with the requirements of 10 U.S.C. § 2319 and FAR § 9.206, the contracting officer asserted that "there is no qualification requirement for this item. As such, the statute and implementing regulation you reference is inapplicable to this acquisition." Agency Report, Tab 14, Letter from Contracting Officer to National at 1 (May 20, 1999). In that the solicitation specifies an approved product, the contracting officer is incorrect in the view that 10 U.S.C. § 2319(c)(3) is inapplicable. The contracting

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<sup>4</sup>We note, for example, that in its D&F, DSCC refers to "[a]n interservice agreement among the Army, Air Force, and Navy" that "require[s] that manufacturers welding this type of item meet stringent certification requirements," Agency Report, Tab 15, D&F at 1, but, when asked to produce the agreement, DSCC replied that it does not have a copy of the agreement, referring the protester to the services. Letter from DSCC to GAO at 1 (June 28, 1999). DSCC did not rebut the protester's assertion that the seamless tubing is, in fact, not welded in the manufacturing process.

officer also disregarded the solicitation requirement that nonapproved sources would be given a reasonable opportunity to gain approval for their alternate items. RFP § L30(g).

In response to the protester's submissions of its technical drawing in October and December 1998, the agency did not prepare a written evaluation of the submission until May 1999. When it did respond, its evaluation did not specifically respond to National's submission but relies instead on the agency's conclusion that an alternate part can only be approved if its offeror provides the technical data that is proprietary to the OEM.<sup>5</sup> At no time did DSCC inform National of the specific information that its submission is lacking, beyond its insistence that only the OEM's technical data will do.

DSCC has not rebutted the protester's assertion that the unique feature of the tubing is the alloy from which it is made and that the chemical composition and properties of the alloy are in the public domain. Although the agency cites the requirement in the products offered clause that an alternate item must be "physically, mechanically, electrically and functionally interchangeable with the product cited in PID," RFP § L30(a), it does not rebut the protester's assertion that the tubing has neither moving parts nor electrical features, and that its physical or chemical properties are set forth in the specifications for the cobalt alloy. Protester's Surrebuttal at 3. As the protester points out, the agency has failed to identify a single functional characteristic that National's part does not satisfy. *Id.* As discussed above, and by the agency's own admission, it has not done so because it does not know either the functional characteristics of the Specialized Metals part or the functional requirements that must be met.

Contracting officials have a duty to promote and provide for competition and to obtain the most advantageous contract for the government. Precision Logistics, Inc., B-271429, July 18, 1996, 96-2 CPD ¶ 24 at 5. In other words, contracting officials must act affirmatively to obtain and safeguard competition; they cannot take a docile approach and remain in a sole-source situation when they could reasonably take steps to enhance competition. *Id.* In the circumstances presented here, where the agency does not have technical data describing an item and does not know the actual needs upon which the requirement for the item is based, the agency cannot blindly rely on its ignorance to justify a blanket rejection of any alternate part submitted without the OEM's technical data. We think that, at a minimum, the contracting officials were required to consider whether the OEM's data was reasonably necessary for a thorough evaluation. See Camar Corp., B-258794, B-258794.2,

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<sup>5</sup>Although the contract specialist alleges that National was informed by telephone in March 1999 that its alternate was unacceptable, the agency and protester disagree as to what information was given during that phone conversation, and the record does not suggest that the agency provided any more specific basis for its rejection by phone than it did in writing.



Feb. 14, 1995, 95-1 CPD ¶ 85 at 3 (process used here by DSCC upheld where OEM data shown to be vital). This would, of course, require the agency to analyze the government's actual needs.

Under these circumstances, the Agency's sole reliance on OEM data for approval of alternate products was unreasonable. National was not afforded a reasonable opportunity to demonstrate that its product could qualify.

#### RECOMMENDATION

We recommend that the agency determine whether its need for the tubing is, in fact, urgent; if so, it should execute a properly reasoned justification and approval document for the minimum quantity required. While performance of the contract has begun and it does not appear to be practicable to terminate Specialized Metal's contract, we recommend, because this item is procured on a recurring basis, that the agency reassess its actual need and determine whether this exact item is the only one that can meet that need; if not, the agency should take appropriate action to obtain competition for future acquisitions. If the agency determines that the sole-source is necessary to meet its needs, the agency should execute a properly reasoned justification and approval for limiting competition, and provide the protester a reasonable opportunity to qualify its alternate product.

We recommend that the protester be reimbursed for the expenses it incurred in filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1999). In accordance with section 21.8(f)(1) of our Regulations, National's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General  
of the United States