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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Protest of Procurement Procedures Used By Navy]

FILE: B-198464 DATE: April 9, 1981

MATTER OF: Algonquin Parts, Inc.

DIGEST:

1. Procuring agency's letter to protester requesting "budgetary cost quote" did not amount to formal solicitation or RFQ where letter did not advise protester of such essential Government requirements as time for delivery of procured items or cut-off date for submission of proposals and letter itself stated twice that it was merely request for "budgetary proposal" or "budgetary cost quote."

2. Failure of procuring agency to institute formal qualification procedure for known potential supplier, or to act in conjunction with Air Force in its qualification process of same supplier for similar parts for Air Force, contravened DAR § 3-101(d), which requires contracting officers to take action to avoid noncompetitive procurements.

Algonquin Parts, Inc. (Algonquin), protests the procurement procedures used by the Department of the Navy, Naval Air Systems Command (NAVAIR), in awarding an order for certain parts for the F-4 aircraft, to the McDonnell Douglas Corporation (McDonnell), under Basic Ordering Agreement (BOA) No. N00019-78-G-0471.

The BOA with McDonnell was negotiated under the authority of 10 U.S.C. § 2304(a)(10) (1976), and the Determination and Findings of the Navy, dated July 20, 1979, wherein the Navy concluded that only certain designers, developers and sole manufacturers of various aircraft possessed the requisite knowledge of the design, production and assembly to perform the necessary work on the aircraft within the requisite

timeframe. Accordingly, it was concluded that orders for certain parts, including aircraft retrofit change kits, could be placed with only specified contractors and without formal advertising since competition was impracticable. The Determination and Findings further provided that McDonnell was the approved supplier for the F-4 aircraft.

Algonquin contends that it is capable of producing part IV of the retrofit change kits and, therefore, protests the Navy's sole-source procurement of part IV for 91 AFC No. 598 retrofit change kits for the F-4 aircraft. Algonquin states that the Navy solicited a bid from it and then refused to award it the order even though it submitted the low-responsive offer. Algonquin argues further that the Navy was fully aware at the time it placed its order that Algonquin was capable of producing part IV for the retrofit change kits but nevertheless improperly disqualified Algonquin as a supplier on the ground that Algonquin had not successfully produced part IV on a continuous basis. Algonquin argues in essence that the Navy's determination not to consider Algonquin a qualified supplier constituted a prequalification of Algonquin which was unduly restrictive of competition and violative of our decision in Tymshare Inc., B-190663, April 26, 1978, 78-1 CPD 322; and Defense Acquisition Regulations (DAR) §§ 3-210(i) and 3-410.2 (c)(2)(i) (1976 ed.).

By way of background, the record indicates that in March of 1979, NAVAIR received a proposal from Algonquin, indicating that Algonquin was a potential supplier of part IV of the F-4 No. 598 retrofit change kits. NAVAIR's supplier of these kits in the past had been McDonnell. In June of 1979, NAVAIR requested a budgetary pricing proposal from McDonnell for procurement of the F-4 retrofit change kits. In November of 1979, McDonnell responded to NAVAIR's request, offering to supply 54 kits for a price of $2,430,000, and offering to deliver part IV of the kit in 19 months. Apparently, due to the long lead time for delivery of the retrofit change kits, NAVAIR began to take steps to consider Algonquin as a potential supplier. In December of 1979, Navy officials inspected Algonquin's production facilities and were informed by Algonquin

that the Air Force had conducted a preaward survey on Algonquin which qualified Algonquin to produce a part substantially similar to part IV of the AFC No. 598 retrofit change kits the Navy required. By letter dated January 21, 1980, the Navy asked Algonquin to submit a budgetary proposal for production and delivery of part IV of the retrofit change kits, which Algonquin submitted by letter dated January 25, 1980, followed up by a letter dated February 4, 1980, stating that the budgetary proposal was an estimate which would be finalized at the time the Navy was prepared to process an order. Thereafter, Algonquin informed the Navy that it had received an Air Force contract to produce a part almost identical to the one Algonquin proposed to supply to the Navy. The Navy, however, on March 20, 1980, placed a sole-source order with McDonnell for the procurement of 91 F-4 AFC No. 598 retrofit change kits, including part IV. The order was placed with McDonnell for delivery in 12 months notwithstanding the fact that the Navy had been previously advised that McDonnell was unable to meet the Navy's specified delivery schedule.

The Navy states that its determination to place the order with McDonnell was predicated on the fact that, at the time it placed its order for the retrofit change kits, it was still unsure of Algonquin's ability to produce a technically acceptable part for the F-4 aircraft. The Navy indicates that if Algonquin had been successfully producing these parts for the Air Force on a continuous basis at the time this order was placed, this would have sufficiently demonstrated Algonquin's capability, and if time permitted, a solicitation would have been issued. The Navy states, however, that it was unable to wait until Algonquin commenced production of the parts due to the need for the retrofit change kits.

Algonquin protests the Navy's use of the BOA to place its order with McDonnell alleging initially that the Navy, by letter dated January 21, 1980, solicited a bid from Algonquin which Algonquin responded to with the low-responsive offer. Algonquin argues that the Navy's letter contained sufficient information to inform it of the Government's needs and to allow Algonquin to compete on an equal basis with others and, therefore, it amounted to a formal solicitation. See,

e.g., Servrite International, Ltd., B-187197, October 8, 1976, 76-2 CPD 325; American Chain and Cable Company, Inc., B-188749, August 19, 1977, 77-2 CPD 129. Furthermore, Algonquin asserts that the letter contained far more information than required by DAR § 16-102.1/DD Form 1707 and, therefore, the letter amounted to a request for quotation (RFQ). Accordingly, Algonquin concludes that its letter of January 25, 1980, was a responsive offer which bound the Navy to place the order with Algonquin. Algonquin further contends that the F-4 weapons system manager who issued the letter had the requisite authority to issue a solicitation.

The Navy argues on the other hand that its letter was issued to Algonquin merely for budgetary planning purposes in the event that Algonquin was awarded the order after a properly conducted competition. The Navy contends that the letter contained insufficient information to enable it to be characterized as a solicitation.

A fundamental precept of Federal procurement law is the requirement that a written solicitation contain sufficient information with respect to the procurement to assure that all offerors are fully informed of the Government's needs so that they are able to compete on an equal basis. This requirement exists for the protection of both the offerors and the Government. Tymshare, Inc., supra. With regard to an RFQ, DAR § 3-501(b)(2) states that these requests should be prepared on Standard Form 18 (see DAR § 16-102.1), or on forms prescribed by departmental regulations. DAR § 16-102.1(a) provides that DD Form 1707 is authorized for obtaining price, cost, delivery, and related information from suppliers. The body of DD Form 1707 sets out such detailed information as the solicitation number, whether the procurement is a negotiated or an advertised one, and the date and local time for bid opening or receipt of proposals.

When viewed against these standards, we conclude that the Navy's letter of January 21, 1980, did not amount to either a solicitation for a bid or an RFQ as Algonquin suggests. Because the Navy's letter did not advise Algonquin of such essential Government requirements as the time for the delivery of the procured parts or the cut-off date for the submission of proposals, it was inadequate as a formal solicitation. See Complete Irrigation, Inc., B-187423, November 21,

1977, 77-2 CPD 387; DAR § 1-305.2(a). Furthermore, the letter was not an RFQ or a request for price/delivery information since DAR § 16-201.1 specifically states that such requests will be made using either Standard Form 18 or DD Form 1707, and neither form was utilized in this instance. Additionally, the letter was not the informational equivalent of an RFQ as Algonquin contends since DD Form 1707 sets out, among other things, whether the procurement is a negotiated or advertised one, and the solicitation number for the procurement. The Navy's letter, on the other hand, contained none of this information and in no manner indicated that it was a solicitation or a request for an offer. To the contrary, the Navy's letter specifically stated in paragraph one and two that it was merely a request for a "budgetary cost quote" or "budgetary proposal." In our opinion, the phrase "budgetary proposal" in the letter was adequate to place Algonquin on notice that the Government did not intend to award a contract to it based solely upon this request. It appears that Algonquin understood this to be the case as Algonquin stated in its follow-up letter of February 4, 1980, that its budgetary proposal was an estimate which would be finalized at the time the Navy was prepared to process an order. In view of our conclusion that the Navy's request for a budgetary proposal was not a solicitation, we find it unnecessary to address the question of the F-4 Weapon System Manager's authority to issue a solicitation.

The procurement statutes and regulations require agencies to obtain maximum competition consistent with the nature and extent of the services or items being procured. Department of Agriculture's use of master agreements, 56 Comp. Gen. 78, 80 (1976), 76-2 CPD 390; Department of Agriculture's use of master agreements, 54 Comp. Gen. 606, 608 (1976), 76-1 CPD 40. The procurement method of placing orders under a BOA is a procedure predicated on a prequalification of competitors and is appropriate under the same circumstances where a sole-source procurement would have been justified. Rotair Industries, et al., 58 Comp. Gen. 149 (1978), 78-2 CPD 410; RAM Enterprises, Inc., B-198681, October 14, 1980, 80-2 CPD 274. As a general matter, any system of prequalification of competitors to some degree is in derogation of maximum competition in the procurement system. However, it is well accepted

that procuring agencies are nonetheless vested with a reasonable degree of discretion to determine the extent of competition which may be required consistent with the needs of the agency and nature of the item to be procured. Id. at 608; Department of Agriculture's use of master agreements, supra, at 80. Even though procedures which prequalify potential offerors prior to bid opening limit competition to a certain degree, this Office has approved with reservation special agency procedures which limit competition where it is demonstrated that such limitations serve a bona fide need of the Government. 50 Comp. Gen. 542 (1971); Department of Agriculture's use of master agreements, supra, at 608, 609; Department of Health, Education and Welfare's use of basic ordering agreement procedure, 54 Comp. Gen. 1096, 1097 (1975), 75-1 CPD 392; see Rotair Industries et al., supra. Where, however, the governmental interests cited to support such prequalification procedures do not in fact advance bona fide interests of the Government, or they do so in an overly restrictive manner, the general rule that such prequalification procedures are an undue restriction on competition is applicable. 54 Id. at 608, 609.

The Navy's report indicates that this order was placed with McDonnell on the basis of the Navy's Determinations and Findings which concluded that competition was impracticable because the highly complex and technical nature of the aircraft's replacement components made it necessary that suppliers have a thorough knowledge of the aircraft's design and assembly in order to assure timely delivery of orders, and this knowledge was possessed solely by the manufacturer of the F-4 aircraft, McDonnell. It appears, therefore, that one of the Navy's principal justifications for placing the order for the parts with McDonnell was its concern with respect to McDonnell's capability to produce parts which would prove to be safe, reliable, and technically acceptable when installed in the F-4 aircraft. The Navy's position is supported by DAR § 1-313 which provides that any:

> "* * * part, subassembly, or component * * * for military equipment to be used for replenishment of stock, repair, or replacement, must be procured so as to

assure the requisite safe, dependable, and effective operation of the equipment."

This provision further states that where is it feasible to do so without impairing the above-mentioned interests, "parts should be procured on a competitive basis." In those cases where competition is not feasible, § 1-313(a) also states that parts should be procured from the original manufacturer of the equipment or his supplier.

With regard to the Navy's argument that the procurement of these parts under its BOA with McDonnell was proper since Algonquin was not a qualified supplier at the time it placed its order and, therefore, competition was not feasible or practicable at that time, we do not believe this to be the dispositive inquiry in this case. In our view, the Navy's position that competition was not feasible or practicable at the time the order was placed is a separate question, the disposition of which is dependent upon the validity of the Navy's action prior to that time when it became aware that Algonquin was potentially an alternative supplier.

While we do not question the bona fide need of the Navy to obtain parts for the F-4 aircraft which meet the level of quality and reliability assurances necessary to insure the safe and efficient operation of this aircraft, or the need to prequalify potential suppliers of parts of a critical nature to achieve these assurances, these considerations do not serve as a justification for the procuring agency's failure to qualify a potential competitor who informs the procuring agency that it is a potential supplier who may demonstrate that it has the capability to supply the agency's requirements in a satisfactory manner. As we noted in Rotair Industries, supra, at pages 153 and 154, DAR § 1-313 does not prohibit a procuring agency from receiving and considering proposals from previously unapproved sources who could otherwise qualify under applicable regulations. To the contrary, this Office has recognized that requiring an offeror to furnish data and samples for examination and testing as a prequisite to the qualification of the offeror was consistent with that regulation and the needs of the agency to obtain assurances that such offerors would

be capable of supplying parts which would be reliable and interchangeable. Id. at 154. We recommended for example, in 50 Comp. Gen. 184 (1970), that notwithstanding the applicability of DAR § 1-313 to the procurement of aircraft combustion chamber clamps, the Air Force should institute a qualification test program to determine the feasibility of procuring the subject clamps from a source other than the original manufacturer. Id. at 191.

In our decision in D. Moody & Company, Inc., 56 Comp. Gen. 1005 (1977), 77-2 CPD 233, we stated that the use of a BOA to place orders was restrictive of competition in violation of procurement statutes and regulations where an alternative source offers a surplus item and the Government disqualifies that supplier for purposes of future competitive procurements without adequate cause. Although the procuring agency in that case also had legitimate concerns over the quality and conformance of the parts offered by the alternative source, as the Navy does here, we determined that such concerns did not preclude a competitive procurement where adequate procedures were available to determine the quality of the parts offered by the alternative source. Id. at 1007, 1008.

Although we do not dispute the Navy's assertion that, at the time the order for the kits was placed, a competitive procurement may not have been feasible or practicable due to the urgent need for the aircraft parts, it is manifest from the record that the Navy knew that Algonquin was a potential supplier of the part as early as March of 1979, at which time Algonquin submitted a proposal for the part IV item involved here. In this connection, there is uncontroverted evidence in the record that the Navy was aware of Algonquin's potential as a supplier both before and after the March 1979 proposal. Nevertheless, there is nothing in the record to indicate that the Navy took any steps to begin qualifying Algonquin. Although the Navy began in December of 1979 a process to determine the feasibility of procuring the parts from Algonquin on a competitive basis, the import of the Navy's action in not instituting action before that time to formally qualify Algonquin for its upcoming fiscal year 1980 procurement contravened DAR § 3-101(d), which requires contracting officers

to take such action as is necessary to foster competitive conditions for future procurements, including the breakout of parts.

Further, while the Navy advised Algonquin in early December 1979 that it would "study the possibility of considering Algonquin a qualified producer of Part IV" based upon Air Force qualification, and Algonquin furnished the Navy a copy of the Air Force approval by letter of December 8, 1979, the record fails to indicate what, if any, consideration was given to the fact that Algonquin's part had received Air Force approval. The only statement, without explanation, provided by the Navy for not considering Algonquin qualified is that the Navy "still had doubts about Algonquin's ability" and "successful continuous production of Air Force parts would have sufficed as a qualification criteria." In our view, it was incumbent upon the Navy to institute its own qualification program in March 1979 when it was informed that this potential supplier existed or, in the alternative, to have acted in conjunction with the Air Force's qualification process when it learned that Algonquin was being qualified to produce a similar part for the Air Force.

In sum, we conclude that the sole-source award of this order to McDonnell was improper in that the Navy failed to follow available qualification procedures in derogation of the procurement and regulations which require negotiated procurements to be made on a competitive basis to the maximum extent possible and which require contracting officers to avoid noncompetitive procurements whenever possible by reviewing the reasonableness of delivery requirements and considering the possibility of breaking out components of an item for a competitive procurement. See, e.g., 10 U.S.C. § 2304(a); DAR § 1-300.1; DAR § 3-101(a)(b)(d). Therefore, Algonquin's protest is sustained.

Algonquin contends that the Navy's part IV procurement from McDonnell must be terminated because it was improper and void ab inito. In Algonquin's view, the Navy intentionally contravened existing law and regulations requiring competition and that failure on the part of our Office to recommend termination here will result in the perpetuation of an illegal contract.

We have stated that the determination whether termination of an improperly awarded contract is in the best interest of the Government involves the consideration of several factors, besides the seriousness of the procurement deficiency. See System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159, and the cases cited therein. Among the other factors which we consider are the extent of performance, cost to the Government, the urgency of the procurement and the impact of a termination on the procuring agency's mission. System Development Corporation, supra. In view of the foregoing, it is clear that we cannot recommend termination here solely on the basis of the deficiencies noted above.

Algonquin also urges that once the Navy's procurement from McDonnell is terminated an immediate reprocurement should be made from Algonquin. Algonquin asserts that the overall cost to the Government for the part IV kits will be substantially less if procurement is made from it. In addition, Algonquin emphasizes that it can deliver the kits with as little as 5 months lead time so that there will be no stoppage in their supply to the Navy.

However, in furtherance of the objective of the procurement statutes and regulations in obtaining maximum competition, the most we could recommend would be termination and a competition between Algonquin and McDonnell for the part IV kits since obviously McDonnell is a qualified source.

The Navy asserts that termination for convenience is not appropriate in this case. According to the Navy, there has been considerable performance by McDonnell. In support of this, the Navy states that a good portion of the part IV kits are currently being machined by McDonnell and that any interruption in the machining process would have serious effects, leaving partially machined kits. Also by December 1980 McDonnell had received delivery of all forgings for machining of all of the part IV kits called for the Navy under its March 20, 1980, order. The Navy believes that if the forgings were transferred upon termination from McDonnell to Algonquin, a complete loss of material would occur because the partially machined McDonnell Kits would not be compatible with Algonquin's machines.

The Navy further contends that there will be substantial costs to the Government if termination is ordered. The Navy estimates that the termination costs at this time for the March 20, 1980, order to be almost the full value of the order (apparently meaning part IV), approximately $2,000,000. Moreover, the Navy believes that McDonnell would have to raise the price on the remaining parts covered by the order.

With regard to a competitive procurement between Algonquin and McDonnell following a termination of McDonnell's contract, the Navy indicates that such a procurement would require 9 months if no difficulties occur. According to the Navy, both companies would have to be provided a solicitation containing a competitive data package including drawings, specifications and details and each would then have to have time to respond to the solicitation, including the providing of a protype article for first article demonstration. The proposals submitted under the solicitation would then have to be evaluated to determine the company that should be selected for award.

In response, Algonquin asserts that the Navy has presented no evidence to show that any significant performance has been made by McDonnell under the March 20, 1980, order. More specifically, Algonquin asserts that: (1) the Navy has not provided our Office with any meaningful, documented status of the delivery order; (2) the Navy has not provided our Office with any determination or tabulation of termination costs which would accrue from the termination of the order; and, (3) the Navy has not provided our Office with any documented, credible impact that termination of the order would have on the Navy's mission. In this regard, Algonquin alleges that the Navy has not conducted any audit or on-site analysis at Algonquin or McDonnell to determine the status of the part IV kits, any purported termination costs, or Algonquin's actual machining capabilities.

Algonquin further contends that the Navy's statements with regard to deliveries to McDonnell for machining and actual machinings by McDonnell do not indicate which fiscal year part IV kits are involved. (Apparently McDonnell is providing the

same parts under a 1979 fiscal year contract as well as under the subject 1980 fiscal year contract.) Algonquin points to estimates by the Navy that the lead time to forge the kits to be machined is between 50 to 58 weeks. However, after receiving the March 20, 1980, order from the Navy, Algonquin alleges that McDonnell did not place an order with its subcontractor for the forged kits until late April 1980. Therefore, Algonquin argues that McDonnell could not have possibly received forgings for machining under the March 20, 1980, order by December 1980. Rather, Algonquin alleges that any delivery of forgings to McDonnell in December 1980 would have been pursuant to the Navy's fiscal year 1979 order for part IV kits.

In further support of the foregoing argument Algonquin has submitted copies of letters dated March 19, 1980, and April 4, 1980, from McDonnell to the Navy in which McDonnell states that while the March 20, 1980, order specifies that the delivery of part IV is to begin in March 1981 at a rate of seven a month, manufacturing and procurement lead time prohibit the delivery of the part until August 1982. Algonquin contends that the Navy has not rebutted its argument in this regard.

With respect to the Navy's statement that a partially machined part IV kit of McDonnell's would not be compatible with Algonquin's machines, Algonquin notes that it is currently producing part IV kits, for the Air Force and that there is no indication in the record that it has different machining capabilities and processes than McDonnell does. Algonquin further notes that the Navy has not to date conducted an on-site survey of its plant. Therefore, Algonquin argues that the Navy's statement regarding its machining capabilities and processes is completely unsupported and should not be considered by us.

As to the Navy's termination costs, Algonquin asserts that the Navy has provided us with alleged costs which might result from the termination of the entire March 20, 1980, order (parts I through V) and not the costs associated solely with the termination of the part IV kits. Algonquin argues that there is no indication in the record of the costs incurred to date by McDonnell for part IV alone. Moreover,

Algonquin questions whether McDonnell has any forgings under the March 20, 1980, order on hand for machining or that McDonnell has already been machining these forgings.

Finally, in response to the Navy's position that a competitive reprocurement would require nearly 9 months, Algonquin contends that is unfounded. Algonquin cites evidence in the record showing that the Navy issued the part IV data package in June 1978 and that both Algonquin and McDonnell received such data package, including engineering drawings, in 1979. Also, Algonquin argues that both it and McDonnell have previously had part IV first article prototypes approved within the Department of Defense and that both companies have been qualified part IV kits producers prior to November 1979.

Further, as pointed out previously, the Navy indicated in December 1979 that the Air Force's qualification of Algonquin would suffice for the Navy's purposes. After Algonquin was qualified by the Air Force, the Navy then required "successful continuous production of Air Force parts" without any explanation as to why this requirement was justified. It has now been more than a year of performance by Algonquin under the Air Force contract and the Navy has not questioned Algonquin's qualification.

From our review of the record we believe that Algonquin has raised sufficient doubt regarding the support for the Navy's arguments as to why termination for convenience would not be an appropriate remedy. We believe the record clearly shows that deliveries of the part IV kits will not begin in March 1981 as specified in the Navy's March 20, 1980, delivery order. The Navy admits that without its assistance McDonnell's deliveries of the 1980 part IV kits would likely have begun about November or December 1981. The Navy states though that in order to reduce delivery lead time, it borrowed forgings from the Air Force and turned them over to McDonnell. Hence, the Navy asserts that McDonnell will begin part IV deliveries under the March 20, 1980, order in May 1981.

However, the record reveals that the Navy's November or December 1981 estimate was based on a January 1980 message from McDonnell that delivery leadtime for part IV would be 19 months after receipt of the Navy's order. As pointed out by Algonquin, the record shows that after the Navy placed its order in March 20, 1980, McDonnell revised its delivery time from 19 months to 28 months. Therefore, even assuming that whatever number of borrowed forgings that the Navy turned over to McDonnell allowed the company to machine and deliver them in May 1981, we fail to understand how McDonnell will be able to machine and deliver by December 1981 the remaining part IV kits. Moreover, it appears from the record (a milestone chart) that at least 53 of the 91 part IV kits will not be needed until May 1982 for use by the Navy in fiscal years 1982 and 1983.

With regard to the part IV forgings borrowed from the Air Force, the Navy has failed to explain the nature and extent of its obligation for their return to the Air Force. Further, Algonquin believes that the Navy borrowed part IV kits in machined form from the Air Force and consequently machined parts corresponding to the number borrowed must be returned to the Air Force after May 1982.

In view of the foregoing, we recommend that the Navy reconsider the feasibility of terminating for convenience the portion March 20, 1980, order pertaining to part IV. Also, we think that the Navy should reconsider the time needed to conduct a competitive procurement between Algonquin and McDonnell in view of the fact there is evidence in the record to suggest that both companies have in the past undergone first article testing. Finally, we believe that there is some indication in the record that the Navy already has the basic technical data package including drawings around which a formal solicitation could be prepared.

Since this decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the

House Committee on Government Operations, Senate Committee on Governmental Affairs, and House and Senate Committees on Appropriations concerning the action taken with respect to our recommendation.

Milton J. Socolar

Acting Comptroller General
of the United States