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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nasco Engineering, Inc.

File: B-224292

Date: January 14, 1987

DIGEST

Allegation that 10 U.S.C. § 2319 (Supp. III 1985), enacted by Congress to encourage competition for qualified items, requires the agency to afford protester the opportunity to prequalify its product and bear the cost of testing and evaluation is without merit since 10 U.S.C. § 2319 applies only to those situations where the agency has imposed a preaward qualification requirement which limits competition not to situations, where, as here, protester can compete but is subjected to a first article test requirement.

DECISION

Nasco Engineering Incorporated (Nasco) protests the first article test requirement contained in request for proposals (RFP) No. N00383-86-R-5554 issued by the Department of the Navy for brake components for the Navy's F-4 aircraft. The aircraft is manufactured by the McDonnell Douglas Corporation and all of the aircraft's brake components previously have been procured on a sole-source basis from Auto Specialities Manufacturing Co., the original equipment manufacturer. Nasco, a small business, is attempting to qualify as an approved supplier for these items and argues that the RFP's first article requirement is inconsistent with the requirements of 10 U.S.C. § 2319 (Supp. III 1985) which was enacted by Congress to encourage competition for qualified items.

We deny the protest.

Background

Nasco is a supplier of spare and replacement brake parts for the Navy's A-4 aircraft and in 1984, Nasco requested the Navy's assistance in becoming an approved source for brake components for the Navy's F-4 aircraft. Although no manufacturing drawings are available, Nasco indicated to the Navy that it could successfully reverse-engineer these components. The Navy states that it advised Nasco at that time

that the F-4 was a declining program and that the procurement of substantial quantities of F-4 brake components was not foreseen. However, in response to Nasco's request, the Navy provided Nasco with the brake components manufactured by Auto Specialties, as well as the performance specification and indicated that it would include Nasco in future solicitations for these components if its efforts were successful.

Between 1984 and 1986, Nasco met with Navy officials on several occasions to discuss, among other things, the Navy's testing requirements and whether the Navy or Nasco would bear the cost for that testing. In addition, Nasco contends that the Navy's actions during this period led the firm to believe that it would be required to qualify its brake components prior to being allowed to submit an offer on this contract. Nasco states that there was never any indication that the Navy would instead rely on a first article test and, as a result, subject the firm to the significantly greater business risk of paying reprocurement costs if its brake components were not found acceptable.

The Navy acknowledges that it did discuss with Nasco the possibility of conducting a precontractual qualification test during this period, but argues that Nasco was never told that this was the procedure which would in fact be followed. The Navy indicates that instead it directed its efforts towards generating an acquisition of sufficient magnitude so that even with the addition of government testing costs to Nasco's offer, Nasco would still have a reasonable chance of winning the competition.

The current RFP was issued by the Navy on July 15 restricted to Auto Specialties and Nasco and encompasses all the Navy's known requirements for these components through 1993; the projected life of the F-4 aircraft. The RFP contains a first article test requirement and indicates that $225,520 will be added to the proposed price of any offeror whose product requires testing. Based on the last unit price paid, the Navy's estimate for the cost of this acquisition is approximately $1 million. Although Nasco submitted an offer, the offer has been withdrawn because Nasco is unwilling to accept the potential business risk imposed by the first article requirement.

Applicability of 10 U.S.C. § 2319

The provisions of 10 U.S.C. § 2319, as added by section 1216 of the Department of Defense Authorization Act, 1985, were enacted by Congress to encourage competition for qualified items and were specifically directed towards those acquisitions in which the contracting agency has established a

testing requirement or other quality assurance demonstration which must be completed prior to award. The statute contains provisions concerning prequalification, testing, and other quality assurance procedures. Generally, any qualification requirement must be justified and standards which a potential offeror must satisfy in order to be qualified must be specified. Potential offerors are to be provided an opportunity to demonstrate their ability to provide an acceptable product and an agency must promptly advise offerors whether qualification was attained and if not, why not. In addition, 10 U.S.C. § 2319(d)(1)(B) provides that the contracting agency shall bear the cost of testing and evaluating the product of a small business concern under appropriate circumstances. See Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2.

Nasco argues that 10 U.S.C. § 2319 is directly applicable to this procurement and that under section 2319(d), the Navy is required to prequalify Nasco and bear the associated testing and evaluation costs. Nasco contends that the underlying Congressional intent of this statute is to increase competition for spare parts and that under these circumstances, the Navy should be required to apply the statutory procedures set forth in section 2319 which include payment of the cost incurred in qualifying Nasco for this procurement.

The Navy contends that Congress enacted section 2319 to deal with only those situations in which a qualification requirement is the sole restriction on full and open competition and that the statute does not apply to situations where, as here, there are inadequate specifications for the article being procured. The Navy indicates that complete specifications for these brake components are not available and that it is only through Nasco's reverse engineering efforts that any competition for these items is possible. Further, the Navy argues that contrary to Nasco's assertions, the Navy's actions have been designed to increase competition and afford Nasco an opportunity to compete for this requirement. The Navy indicates that it has been responsive in providing all information requested by Nasco concerning the brake components and that it has aggregated its requirements for these components to afford Nasco a greater opportunity to overcome the first article testing costs which would be added to its offer.

In addition, the Navy argues that testing costs for a small business are to be borne only where the projected savings from increased competition exceed the costs of qualfication and that the projected savings in this case are insufficient to justify such an expenditure. The Navy indicates that it

estimated its total requirements for these components through 1993 and multiplied those quantities by the last unit price paid for each item to arrive at a total estimated cost of $972,454 for the acquisition. The Navy assumed that it could save approximately 25 percent due to competition and based on this percentage, calculated an overall savings of $243,113. The estimated testing costs are $225,520 and, although this still produces a net savings of $27,593, the Navy indicates that there are additional administrative expenses, such as additional supply support cost and review of test reports, which make it likely that the projected costs would exceed the projected savings. Consequently, the Navy argues that, even if the statute was applicable, the agency would be under no obligation to pay for the testing and evaluation of Nasco's brake components.

In our view, 10 U.S.C. § 2319 is not applicable and does not require the Navy either to prequalify Nasco or to bear the cost of testing and evaluating Nasco's brake components for this procurement. Although the legislation 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 that have been previously listed on a qualified products list. In this regard, we note that 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." 10 U.S.C. § 2319(a). In addition, the procedures contained in section 2319 are designed to make it more difficult for an agency to establish a preaward qualification requirement and the legislation also contains provisions to ensure that interested firms are not precluded from competing solely because they have not been prequalified. See 10 U.S.C. §§ 2319(b)&(c)(3).

We believe that it is in this context that section 2319(d), concerning the payment of testing costs for small business, must be viewed. Basically, the provision states that where there are less than two qualified sources or qualified products available for competition, the head of the agency concerned shall solicit additional sources and bear the testing costs for small businesses that successfully qualify their products where the projected savings justify such action. However, 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. See 10 U.S.C. § 2319(a).

Consequently, we find the statute applicable only in those situations where the agency limits competition to prequalified sources or products and where there are less than two eligible firms or products available to compete. It is only under those circumstances that the head of the agency is directed to solicit additional sources or products and to consider whether the increase in competition will yield such savings so as to recover the costs of qualifying a small business. Here, although Nasco disagrees with the terms of the solicitation, no prequalification requirement has been established by the Navy nor has Nasco been precluded from submitting an offer for this requirement. Nasco has been afforded an opportunity to compete and we find nothing in the statute which requires the Navy to prequalify Nasco for this procurement much less pay for the cost of testing and evaluation under these circumstances.1/

Accordingly, we find that the Navy's actions are not inconsistent with the requirement of 10 U.S.C. § 2319, and the protest is denied.

We note, however, that Nasco initiated this effort prior to the enactment of 10 U.S.C. § 2319 with no basis to assume that the Navy would pay the cost of testing its components. While Nasco asserts that it was led to believe it would be allowed to prequalify, there is nothing in the record which

1/ Nasco alleges that such a reading of the statute places the firm in a worse situation than it would have been had Congress not enacted 10 U.S.C. § 2319. We find no merit to this assertion. First, we disagree that Congress contemplated that agencies bear the cost of testing and evaluation under these circumstances. Secondly, while Nasco asserts that a first article requirement subjects a small business to greater business risk and is therefore contrary to the statute, we note that this is not the case in all circumstances. To the contrary, the expense of producing a component for prequalification may itself be prohibitive for a small business since there is no assurance that the small business would receive any award under a future acquisition. Under a first article requirement, the small business is awarded the contract subject to providing a satisfactory product. While Nasco may find this risk too great, Congress was concerned with providing firms the opportunity to compete and there is nothing in the statute which suggests that Congress favored prequalification over first article testing as the preferred method for encouraging competition.

suggests that the Navy led Nasco to believe that the government would pay the associated testing costs. If Nasco remains interested in competing, we see no reason why the Navy should not provide Nasco an opportunity to qualify its components at its own expense. This will provide Nasco the opportunity that was available to the firm when it decided to reverse engineer these components. If Nasco were successful, the Navy would then have the benefit of a second competitor. Accordingly, we recommend that the Navy afford Nasco a reasonable opportunity to have its brake components tested at its own expense prior to going forward with this acquisition.

Harry R. Van Cleve
General Counsel