



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: JGB Enterprises, Inc.  
File: B-225713  
Date: May 6, 1987

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### DIGEST

Agency's refusal to approve protester's alternate product for critical submarine part is not unreasonable where protester failed to provide required original equipment manufacturer's drawings in a sufficiently timely manner to permit the agency to evaluate protester's product and still make an award in time to maintain an adequate spare parts inventory of the product.

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### DECISION

JGB Enterprises, Inc. protests the award of a contract for air manifolds, a source approval item, to Aerocustoms, Inc., one of three listed approved sources, under request for proposals (RFP) No. DLA700-86-R-2522, issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency (DLA). JGB asserts that DCSC unreasonably delayed the processing of JGB's application for approval of its alternate product, resulting in the rejection of JGB's offer as technically unacceptable.

We find the protest without merit.

The solicitation provided that only the products listed by manufacturer's name and part number in the RFP description were acceptable. If an alternate product was offered, the offeror was required to furnish with its offer legible copies of all drawings, specifications or other data necessary to clearly describe the characteristics and features of the product being offered. The solicitation also provided that the agency did not have available on file original equipment manufacturer (OEM) drawings needed to evaluate the acceptability of the alternate product. The offeror was requested to furnish drawings and other data covering the design, materials, and other listed aspects of the cited source

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approved product in order to enable the agency to determine that the offeror's product is equal.

JGB's initial offer of an alternate product, which JGB had reverse engineered from a Mine Safety Appliance product (one of the listed approved products), was received by DCSC on June 10, 1986. DCSC states that on July 9, its buyer consulted with the DCSC Technical Services Division (TSD), which advised that while JGB's drawings appeared adequate, detailed OEM drawings were needed to evaluate the offer because DCSC-TSD only had available assembly drawings from the OEM. Further, since the parts are a critical application item on the Trident submarine, approval by the Engineering Support Activity (ESA) was required, which normally involves a 60-90 day reply time from ESA. DCSC states, and memoranda in the agency report confirm, that on August 21, the buyer telephoned JGB and advised that detailed OEM drawings were required, in response to which JGB stated that it could not provide these drawings, but could supply a sample of the OEM part.

The buyer consulted with TSD again and learned that final approval by the Navy would be required, and that more detailed drawings were needed for this purpose. The buyer was advised that JGB's drawings were inadequate because they were based on only one OEM sample, while they were required to be based on two samples. On August 29, the buyer telephoned JGB and provided it with this information. On September 9, DCSC received a telex from JGB, referring to the "recent" telephone call, and stating that JGB understood that DCSC would contact JGB if DCSC required any further action to aid in the evaluation of JGB's alternate product.

On November 6, JGB delivered one sample of the OEM part in question to DCSC. The DCSC buyer sent this sample part to TSD. On November 20, an amendment to the RFP was issued, calling for best and final offers on December 4. Best and final offers were received from JGB and Aerocustoms.

On December 9, the DCSC buyer again telephoned JGB to advise that OEM drawings were still required, and that JGB's drawings were unacceptable because they were based on only one OEM sample. On December 17, JGB delivered new drawings to the buyer, which he forwarded to DCSC-TSD, but which apparently were never received by TSD. However, this package still did not contain the OEM drawings. On January 6, 1987, JGB advised DCSC that it was in the process of obtaining the required OEM drawings and requested that DCSC delay award. On January 15, RGB submitted these OEM drawings to DCSC. On January 27, DCSC made an award to Aerocustoms on the basis of

the supply status of the part, namely that it was back-ordered, and there was a projected requirement of 729 items before delivery was due under this contract.

JGB disputes that it was advised on August 21, 1986, or on August 29, that additional drawings were required, claiming that it was not until December 29 that it was first so advised. JGB contends that this establishes that DCSC unreasonably delayed evaluation of JGB's product, because DCSC did not even begin the process until 6 months after the receipt of initial offers. JGB argues that its September 9 telex supports its position that it did not receive notice from DCSC that additional drawings were required until December 29.

In our view, the September 9 telegram does not establish or support the assertion that DCSC failed to advise JGB that additional drawings were required. Further, DCSC's memoranda of the conversations show that JGB had indicated that JGB did not have the drawings available, and this is confirmed by JGB's January 6, 1987 correspondence. This was itself a sufficient basis to reject JGB's offer since a procuring agency reasonably may find an alternate product technically unacceptable where the offeror fails to provide sufficient information to establish the acceptability of the part as required by the RFP. Hosco, Inc., B-225127, Mar. 6, 1987, -- 87-1 C.P.D. ¶ \_\_\_\_\_. The "Products Offered" clause made clear that OEM drawings were considered necessary for the evaluation.

As a general matter, where there is a factual dispute between the protester and the contracting agency, and the conflicting statements of the two are the only evidence, the protester has not carried its burden of proving the case. Menasco, Inc., B-223970, Dec. 22, 1986, 86-2 C.P.D. ¶ 696. In this instance, DCSC's file memoranda specifically support its version of the facts, while the only evidence provided by JGB is a telex which does not establish the content as to the disputed conversations. At best, even if we consider this a factual dispute with conflicting statements, the protester has failed to prove its case.

Moreover, if JGB is correct that it was not advised until December 29 that additional drawings were required, its protest is untimely. JGB concedes that on January 6, 1987, it was advised that 60-90 days would be required for DCSC-ESA to evaluate its product, and JGB also concedes that it was aware that the item was back-ordered and was needed by the agency. The crux of JGB's protest is that the preceding 6-month delay was unreasonable. Thus, JGB knew its basis for

protest in this regard, at the latest, on January 6, but did not file its protest in our Office until February 9, more than 10 days later. Accordingly, under JGB's version of the facts, the protest would be untimely under our Bid Protest Regulations. 4 C.F.R. § 21.1(a)(2) (1986).

With respect to DCSC's general conduct of this procurement, under 10 U.S.C. § 2319(b)(6) (Supp. III 1985), as added by the Defense Procurement Reform Act of 1984, Pub. L. No. 98-525, Oct. 19, 1984, 98 Stat. 2593, an agency imposing a qualification requirement--that is a requirement for testing or other quality assurance demonstration that must be satisfied by a prospective offeror or its product in order to become qualified for an award--must ensure that an offeror seeking qualification is "promptly" informed as to whether qualification has been obtained and, if not, is "promptly" furnished specific information as to why qualification was not attained. This statutory qualification requirement is mirrored in the Federal Acquisition Regulation, 48 C.F.R. § 9.202(a)(4) (1986).

To the extent JGB argues that DCSC's source approval process has not been "prompt" within the meaning of the statute and implementing regulations, we disagree. While a contracting agency which restricts a contract award to an approved source must give nonapproved sources reasonable opportunity to qualify, Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 C.P.D. ¶ 2, a protester's mere allegation that the agency's procedure for approving alternate products or sources takes more time than the protester believes is necessary does not constitute a showing that the procedures fail to provide that reasonable competitive opportunity. Rotair Industries, Inc., B-224332; B-225049, Mar. 3, 1987, 87-1 C.P.D. ¶ \_\_\_\_; JGB Enterprises, Inc., B-218430, Apr. 26, 1985, 85-1 C.P.D. ¶ 479.

Here, we have reviewed the administrative record and, in view of the critical application of the part, we find no evidence of unreasonable delay. Similarly, in view of the contracting agency's considerable discretion in establishing qualification and testing procedures, JGB Enterprises, Inc., B-218430, supra, we do not find any showing that DCSC's actions lacked any reasonable basis. Notwithstanding JGB's assertions to the contrary, the written record establishes that DCSC consistently apprised JGB that additional drawings were required for the assessment by DCSC-ESA, and requested these drawings from JGB commencing at the end of August 1986. The solicitation advised that DCSC did not have these drawings available, and until January 6, 1987, JGB consistently indicated

that it was unable to provide these drawings. Under these circumstances, we find that DCSC's procedures did provide JGB with a reasonable opportunity to qualify as an alternate product source.

JGB also argues that by failing to commence evaluation of JGB's alternate part until after receipt of best and final offers, DCSC violated the statutory prohibition against acceptance of other than an initial proposal that represents the lowest overall cost to the government. JGB reasons that there was a reasonable chance that if DCSC had conducted further discussions, JGB's lower priced, technically unacceptable proposal eventually would have been found more advantageous to the government. JGB's point is inapposite, however, since award was not made on the basis of initial proposals.

The protest is denied, as are the claims for proposal preparation costs and the costs of filing and pursuing the protest.

*for Seymour Efron*  
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General Counsel