Westfall

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aero Technology Company

File: B-227374

Date: September 25, 1987

DIGEST

1. Protest is sustained where the protester was precluded from becoming qualified in time to compete for a procurement by the Air Force's failure to advise it at the time it applied for source approval that the protester would need to obtain source approval from the Navy.

2. Protest is sustained where the protester was denied an opportunity to compete because the agency failed to inform the contracting officer prior to the date of a sole-source award that the protester had been approved as an alternate source.

3. Claim for reimbursement of costs incurred in obtaining source approval is denied since Bid Protest Regulations do not provide for the recovery of such costs.

4. Claim for punitive damages is denied since Bid Protest Regulations do not provide for such awards.

5. Protester is entitled to reasonable costs of filing and pursuing its protest where agency's actions precluded it from competing for significant portions of the awards.

DECISION

Aero Technology Company protests the Air Force's issuance of four orders, Nos. F41608-85-D-A007-0539, 1248, 1116, and 1265, for three types of seals used in the T56 aircraft engine under a requirements contract with the Allison Gas Turbine Division, General Motors Corporation. Aero argues that the sole-source procurements from Allison were improper since Aero had been approved as an alternate source for each of the three items prior to placement of the orders. We sustain the protest.

The four orders issued in 1986 are summarized in the following table. We have identified the three types of seals as items 1, 2, and 3.

	Order No.	Date Order Issued	Qty.	Date of source approval by the Air Force
Item 1	0539	Nov. 5	100	Sept. 2
	1248	Nov. 17	645	
Item 2	1116	Aug. 4	437	July 7
Item 3	1265	Dec. 12	535	Oct. 24

Item 1 Discussion

Item 1 is managed by the Navy, which means that the Navy is responsible for procuring required quantities on behalf of the other branches of the Department of Defense and for the technical quality of the item, including the approval of alternate sources. The Navy, in the case of the two purchase orders here, authorized the Air Force to make a one-time procurement of 745 seals on its own behalf because the Air Force had a critical need for the item. The Air Force contracting officer placed the orders with Allison, relying on documentation which indicated that Allison was the only approved source for the item.

Aero learned of order No. 1248 in early December 1986 after it was synopsized in the Commerce Business Daily, and complained to the Air Force that it should have been permitted to compete for the requirement since it was an approved source for the item. It was at this point that the contracting officer learned that the Air Force had, based on its evaluation of samples submitted by Aero, granted that firm source approval for the item on September 2, 1986. She responded by taking steps to terminate the order placed with Allison, but was informed when she forwarded her request for termination for approval that the Air Force's qualification of Aero as a source for the item was invalid since only the Navy had the authority to approve alternate sources. The Air Force notified Aero on January 14, 1987, that in order to compete for the item it would need to obtain source approval from the Navy.

Aero followed this instruction, submitting a request for source approval to the Navy on January 22. The Air Force reports that although it has attempted to convince the Navy to accept the results of its testing, the Navy is conducting its own evaluation. The Navy's evaluation has not yet been

completed. Aero contends that the Navy should be required to approve it as a source based on the testing performed by the Air Force.

Agencies may limit competition for the supply of parts if necessary to assure the safe, dependable, and effective operation of government equipment. B.H. Aircraft Co., Inc., B-222565 et al., Aug. 4, 1986, 86-2 CPD ¶ 143. In such cases, parts should generally be procured only from sources that have satisfactorily manufactured or furnished them in the past unless fully adequate data, test results, and quality assurance procedures are available. Id. Where a prospective contractor such as Aero desires to qualify to manufacture a technically restricted part, it is up to the responsible government engineering activity to define a suitable test procedure. We will not disturb an agency's determination as to the appropriate testing procedure unless it is shown to be unreasonable. See Pacific Sky Supply, Inc., 64 Comp. Gen. 194 (1985), 85-1 CPD ¶ 53.

It nevertheless appears that Aero was precluded from obtaining source approval in time to compete for the awards of item 1 by the Air Force's failure to advise it at the time it initially applied for source approval that it would need to seek such approval from the Navy. Aero applied to the Air Force for qualification on March 26, 1986, and that agency, for about 6 months, put Aero's item through a qualification testing procedure. The Air Force did not inform Aero that it would need to seek source approval from the Navy until mid-January 1987, 4 months after the Air Force had erroneously approved Aero's seal and nearly 3 months after the orders were issued to Allison. Since it took the Air Force about 6 months to qualify Aero for this item it appears that had the Air Force directed Aero to the Navy when it applied for qualification, the Navy's evaluation of Aero as a source could likely have been accomplished within the period of more than 7 months that elapsed between the date of Aero's source approval request to the Air Force and the dates of the awards to Allison.

The Defense Procurement Reform Act of 1984 requires that a potential offeror be provided, upon request, a prompt opportunity to meet prequalification standards. 10 U.S.C. § 2319(b) (Supp. III 1985). While we recognize that it was an inadvertent oversight on the agency's part, the Air Force's failure to promptly notify Aero that it must seek source approval from the Navy in effect denied Aero its right to an opportunity to meet the qualification requirements and thus deprived it of a reasonable opportunity to compete. Pacific Sky Supply, Inc., B-225513, Mar. 30, 1987, 66 Comp. Gen. ___ (1987), 87-1 CPD ¶ 358. Thus, we sustain Aero's protest. The Air Force, while appearing to recognize that

the procedures leading to the issuance of these orders were flawed, states that it cannot terminate order No. 0539 because, the items have already been delivered. As far as order No. 1248 is concerned, although the items have not yet been delivered, the Air Force does not intend to terminate the order because Aero has yet to be designated as an approved source by the Navy and the need for the item is such that a production stoppage would be damaging to the Air Force. Further, the Air Force notes that the Navy has suspended a current solicitation it has issued to permit the completion of the testing of Aero's item.

The protester recognizes that order No. 0539 cannot be terminated but argues that 50 percent of order No. 1248 should be terminated and resolicited.

In determining the appropriate corrective action where a protester has been improperly excluded from the competition, we will consider all of the circumstances surrounding the procurement, including the urgency of the requirement and the impact of the recommendation on the contracting agency's mission. Bid Protest Regulations, 4 C.F.R. § 21.6(b) (1987); Leland Limited, Inc.--Reconsideration, B-224175.2, Feb. 17, 1987, 87-1 CPD ¶ 168. Here, in view of the Air Force's position that its need for the items will not permit it to terminate order No. 1248 and wait for the Navy to approve Aero's item, we cannot recommend, as Aero urges, that 50 percent of the order be immediately terminated. Nevertheless, we do recommend that when and if the Navy approves Aero as an alternate source, the Air Force assess the feasibility of terminating order No. 1248 and recompeting the remainder of the requirement.

Items 2 and 3 Discussion

Regarding items 2 and 3, in both cases the Air Force approved Aero as a source prior to the issuance of the orders to Allison. The information concerning Aero's status was not, however, given to the contracting officer before placement of the orders.

The Air Force concedes with regard to these two items that its procedures were inadequate and resulted in its failure to solicit Aero despite the fact that Aero had been approved as an alternate source. The Air Force states that in order to avoid a recurrence of this problem, it is developing new procedures to assure that contracting personnel are promptly notified of a newly qualified source.

The Air Force reports that it will reduce the quantities of items 2 and 3 under the Allison orders to cover only its

minimum mission support needs. The Air Force states that for item 2, 122 of the 437 can be terminated and resolicited, and for item 3, 164 of the 535. We agree that the steps that the Air Force has taken are reasonable under the circumstances. We do not recommend that the orders be terminated in their entirety, as the protester requests, since the lead time for these items is apparently so long that a portion of the requirement could not be procured in time to meet the Air Force's needs.

Claim for Costs

Aero claims that in view of the Air Force's improper actions, it is entitled to (1) damages for lost profits, (2) its costs of pursuing the protests before the agency and our Office, and (3) the cost of its sample parts that were destroyed during the Air Force's testing for item 1. We agree that Aero is entitled to the costs of pursuing the protest before our Office. The remainder of the claim is denied.

A protester is entitled under our Regulations to the reasonable costs of filing and pursuing its protest where our Office determines that a solicitation, proposed award, or award does not comply with a statute or regulation. 4 C.F.R. § 21.6(d)(1). Since we have made such a determination with respect to each of the protested purchase orders, Aero is entitled to such costs as they relate to its protest to our Office. Aero is not entitled to the costs of pursuing its protest before the agency as we have authority only to award protest costs incurred pursuant to a protest filed with this Office. See 31 U.S.C. § 3554(c)(1) (Supp. III 1985). Nor is Aero entitled to any lost profits or costs incurred because of the testing since we do not permit the recovery of anticipated profits or of costs incurred in seeking source approval even in the presence of wrongful action. Sonic, Inc., B-225462.2, May 21, 1987, 87-1 CPD ¶ 531; Rotair Industries, Inc., B-224332.2 et al., Mar. 3, 1987, 87-1 CPD ¶ 238. Finally, to the extent Aero requests punitive damages, the request is denied as our regulations do not provide for such awards. 4 C.F.R. §§ 21.6(d)(e).

Aero should submit its claim for its protest costs, including substantiating documentation, directly to the agency. 4 C.F.R. § 21.6(f).

The protest is sustained.

for Harry R. Van Cleve
Comptroller General
of the United States