



The Comptroller General
of the United States

Washington, D.C. 20548

Wiskopf - PL

Decision

Matter of: Kitco, Inc.
File: B-228045; B-229609
Date: December 3, 1987

DIGEST

1. Where the contracting agency's stock of certain aircraft spare parts was projected to be depleted during the procurement lead time and the agency lacked the technical data to develop competitive specifications or precise qualification requirements that the protester could have met in the short time available, the agency properly awarded a sole-source contract to the only available qualified source; the agency was not required to delay the procurement in order to develop and advise the protester of precise qualification requirements.

2. Where the contracting agency properly determined that only one qualified source could meet its needs within the required timeframe, the fact that the qualified source submitted a late quotation had no adverse effect on the protester, and acceptance of the quotation thus was unobjectionable, since the protester could not have received the award in any event.

DECISION

Kitco, Inc. protests the Department of the Air Force's award of a sole-source contract, No. F09603-87-C-1842, to Parker Hannifin Corporation, O-Seal Division, to supply spare seal plates for C-130 aircraft. The intended award was synopsized in the Commerce Business Daily (CBD), with a standard note explaining that other potential sources might be considered if, as pertains here, the source submitted either: 1) evidence of having satisfactorily produced the required part for the government or the prime equipment manufacturer; or 2) engineering data sufficient to demonstrate the acceptability of the part. Kitco submitted a quotation along with a data package, and contends that the Air Force failed to give its material fair consideration and lacked an adequate basis for the sole-source award to Parker Hannifin. Kitco also challenges a second solicitation covering part of this requirement. We deny the protests.

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The Warner Robins Air Logistics Center issued a purchase request for quantities of seal plates in 1986. The seal plates, according to Parker Hannifin (which manufactured them for the prime equipment manufacturer), provide a seal for certain propeller assemblies and align two sets of gear segments. The Air Force describes the seal plates as high intensity items for which the agency has a high monthly replacement rate. The purchase request limited sources to Parker Hannifin and the prime equipment manufacturer, Hamilton Standard, unless other sources could demonstrate the acceptability of their items. The justification for using noncompetitive procedures stated that there is only one responsible source and no other type of property will meet the agency's needs. See 10 U.S.C. § 2304(c)(1) (Supp. III 1985). The justification explained that the design data for the seal plates is proprietary to Hamilton Standard.

The Air Force issued the current solicitation request to Hamilton Standard and Parker Hannifin on January 22, 1987, requesting quotations for alternative quantities of seal plates (from 2627 to 7445 units). The solicitation request contained the "Restrictive Acquisition Method Code" clause which, like the CBD, stated that quotations from other sources would be considered if the offeror submitted prior to, or with, its quotation either: 1) evidence of having satisfactorily produced the item for the government or the prime equipment manufacturer, or 2) engineering data sufficient to show acceptability of the part. The solicitation request asked for replies no later than February 23.

Kitco submitted its quotation and data package on February 23. The quotation proposed to supply Kitco's own part, which Kitco was in the process of developing based on reverse engineering Hamilton Standard's part. (Although Kitco also alternatively proposed to supply Hamilton Standard's part, which it alleges the Air Force failed to consider, nothing in the record indicates that Kitco ever submitted the required evidence of having produced the item for Hamilton Standard; thus it appears Kitco really only pursued qualifying as a new manufacturer of an alternate part.)

The Air Force, in March 1987, initially rejected Kitco's proposed part because the agency lacked Hamilton Standard's drawings depicting the latest configuration of the part, and thus lacked adequate data to evaluate Kitco's proposed part. Kitco then advised the agency that it was in the process of producing prototypes that could be evaluated and tested. The agency refused to commit itself to testing until it could ascertain that Kitco's design conformed to Hamilton Standard's. The agency further indicated that any testing would need to include tests for form, fit and function,

possibly including flight testing. While working on the prototypes, Kitco continued its attempts to gain approval of its part based only on technical data.

On April 20, the Air Force obtained authorization from Hamilton Standard to use its latest drawings to evaluate Kitco's data package. In using those drawings to evaluate a revised data package submitted by Kitco on April 27, the Air Force found that Kitco's design deviated from the drawings. Only after Kitco submitted its fifth revision, on July 23, did its drawings conform in all material respects to Hamilton Standard's drawings. In the meantime, Kitco completed its prototypes and had them tested by a firm allegedly authorized by Hamilton Standard and the government to overhaul and test the seal plates. The test revealed no obvious dimensional discrepancies and indicated that Kitco's alternate fit well and performed satisfactorily during a one-hour test run at full temperature and operating pressure; no long-term tests were performed. Kitco forwarded the test results to the Air Force on June 16.

The Air Force determined that the July 23 revisions to Kitco's data package were sufficient to demonstrate the acceptability of the design, but that further testing would be necessary to determine conclusively the acceptability of the actual item. In this regard, the agency decided that imposing a requirement for first article testing (the format of which would have to be developed) would be sufficient to protect the government's interests, and thus granted formal approval of Kitco's alternate on August 7.

The Air Force proceeded with a sole-source award to Parker Hannifin on July 31 for the maximum quantity, 7,445 of the seal plates. A second justification for using noncompetitive procedures, issued July 29, cited an unusual and compelling urgency, see 10 U.S.C. § 2304(c)(2), because the Air Force's stock was projected to be depleted within the lead time for delivery and the agency lacked sufficient data to permit other sources to compete. The contract price was \$169.00 per seal plate, which was \$28.51 higher than Kitco's approximate average unit price.

After Kitco filed its protest, the Air Force reviewed the urgency of the requirement for seal plates and determined that only 2,800 seal plates were urgently required, while the remaining items could be acquired under a separate competitive procurement with a first article testing requirement for a new source. The Air Force therefore partially terminated Parker Hannifin's contract, reducing the quantity by 4,645 units.

Kitco basically contends that the Air Force failed to make reasonable efforts to attain approval of Kitco's proposed part, and thus violated the statutory mandate that agencies seek offers from as many potential sources as practicable under the circumstances, even when an agency's need for the items is urgent. 10 U.S.C. § 2304(e). Kitco complains that the agency also failed to provide the firm prompt notice of the precise requirements for approval and an opportunity to have its part tested which, the protester argues, was required by 10 U.S.C. § 2319 1/. Lastly, Kitco maintains that Parker Hannifin's quotation should not have been considered because it was submitted after the February 23 due date specified in the solicitation request for replies.

The Air Force asserts that it acted diligently to approve Kitco as an available source, and points out that while Hamilton Standard's proprietary rights to the technical data for the part limited what the agency properly could do, it nevertheless worked with Kitco for 5 months, and considered five revisions of Kitco's drawings, in an effort to obtain an acceptable design. The Air Force takes the position that it had no obligation to prepare precise qualification requirements (including possible testing requirements), to provide them to Kitco, or to give Kitco an opportunity to submit its part to any testing requirements, until Kitco submitted a verifiably acceptable design. The Air Force states that, after Kitco achieved a design that conformed with Hamilton Standard's drawings for the part, there was insufficient time to develop necessary testing requirements and subject Kitco's part to the tests without jeopardizing the agency's ability to maintain its stock of the seal plates after April 1988. It is the Air Force's position, therefore, that Parker Hannifin was the only acceptable source available late in July 1987, when the Air Force awarded the contract. The Air Force essentially concedes it initially awarded Parker Hannifin a quantity greatly

1/ This provision states that no potential offeror may be denied the opportunity to compete solely because it is not on a qualified bidders list, qualified manufacturers list or qualified products list, or has not been identified as meeting a "qualification requirement"--defined as a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract. The provision also imposes obligations on the part of an agency establishing qualification requirements, such as providing any offeror, upon request, a written list of the precise requirements and a prompt opportunity to demonstrate its ability to meet the qualification requirements.

exceeding the agency's urgent needs, and already has taken corrective action in this regard.

We believe the Air Force has acted properly. When the Air Force issued the solicitation request, it lacked available data to develop competitive specifications or alternative sources aside from Hamilton Standard (the prime equipment manufacturer) and Parker-Hannifin (which manufactured the seal plates for Hamilton Standard). The protester itself was only in the early stages of developing an alternative part. The agency therefore properly determined that, in essence, only one responsible source (or its supplier) could meet the agency's needs. See C&S Antennas, Inc., B-224549, Feb. 13, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 161. We believe the agency fulfilled the requirement to maximize competition by giving notice of the intended sole-source procurement in the CBD (including a statement that all responsible sources may submit an offer), see 41 U.S.C. § 416, and by not excluding potential sources for not being on a qualified manufacturers or products list. See 10 U.S.C. § 2319.

The mere fact that the CBD notice and the solicitation request referred to the only known source as an approved source and stated that the Air Force would consider proposed alternates did not mean that the agency was obligated to have in place precise qualification requirements to assure that Kitco and other firms could qualify in time to receive this contract. Under 10 U.S.C. § 2319(c)(5), an agency need not delay a proposed award in order to specify qualification requirements or to provide potential offerors an opportunity to meet them. While it is clear that where, through advance planning, an agency can devise prequalification requirements or first article testing requirements that will foster and permit competition, the agency must do so, see Pacific Sky Supply Inc., B-227113, Aug. 24, 1987, 87-2 CPD ¶ 198, we think it is entirely reasonable, depending on the circumstances, for an agency to delay developing such requirements until it actually receives a proposed alternate and the necessary technical data to evaluate it. See Pacific Sky Supply Inc., B-227133, supra; B&H Aircraft Co., Inc., B-222565 et al., Aug. 4, 1986, 86-2 CPD ¶ 143; TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700.

The record here fails to establish that the Air Force reasonably could have developed precise prequalification requirements or first article testing requirements in sufficient time for Kitco to compete. The Air Force was not even able to obtain the technical data from Hamilton Standard necessary to evaluate Kitco's proposed alternate until approximately 1 month after Kitco submitted its proposal, and, in any event, the agency was not at liberty

to disclose the data in the manner of specifications or precise qualification requirements. When Kitco finally submitted acceptable drawings, the agency reasonably determined that testing was necessary. We previously have held that testing requirements may be necessary to assure that items with no proven reliability do not contain latent weaknesses relative to the qualified part. See Pacific Sky Supply, Inc., B-227113, supra.

As for the Air Force's failure to develop testing standards in time for Kitco to compete, Kitco did not develop a prototype for testing or submit short-term testing data to show that its part might function satisfactorily until mid-June 1987, leaving the agency without reasonable time to develop full testing requirements. Moreover, when Kitco submitted its test data, its drawings contained a discrepancy from Hamilton Standard's drawings indicating a problem with the part such that testing reasonably did not appear appropriate. Because the Air Force needed to make an award by July to prevent the depletion of its stock, the agency properly proceeded on an urgent and compelling basis to award a sole-source contract to the only known qualified source capable and willing to provide the seal plates. See Pacific Sky Supply, Inc., B-225420, Feb. 24, 1987, 87-1 CPD ¶ 206.

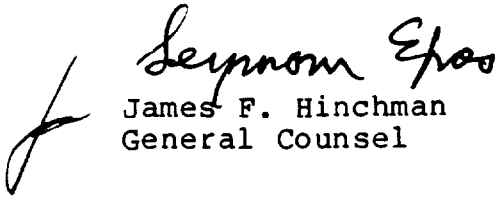
When the Air Force later recognized that the contract awarded to Parker Hannifin included quantities of seal plates for which there was ample time to permit Kitco to compete on the basis of a first article testing requirement, the Air Force properly terminated that portion of the contract to allow Kitco an opportunity to compete. See Factech Corp., B-225989, Mar. 26, 1987, 87-1 CPD ¶ 350.

Given that the Air Force properly determined that Parker Hannifin was the only qualified source that could meet the agency's needs within the required timeframe, the fact that Parker Hannifin's quotation was submitted after the advertised due date had no adverse effect on the protester, and its acceptance therefore was unobjectionable; Kitco could not have received the award in any event.

Finally, Kitco protests the issuance of RFP No. F09603-87-R-1438, to procure the terminated portion of the contract for seal plates. Although Kitco can compete under this solicitation (which has a first article testing requirement for new sources), Kitco basically contends that the solicitation is improper because Kitco should have received the award under the prior solicitation. This position is without

merit since we have already held that Kitco was not qualified for an award under the solicitation request.

The protests are denied.

 Seymour Epos
James F. Hinchman
General Counsel