

Williams



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Kessler International Corporation  
File: B-230662  
Date: July 8, 1988

### DIGEST

Protest against the sole-source award of a delivery order is denied where agency reasonably determined that only one known source could timely supply the needed part which was a government nondevelopmental item which is unique and proprietary in nature, and where record does not support protester's assertion that agency unreasonably delayed its evaluation of the protester's alternate part.

### DECISION

Kessler International Corporation (Kessler) protests the award of a delivery order to General Motors Corporation, Detroit Diesel Allison Division (DDAD) by the Department of the Army, Tank-Automotive Command (TACOM) under basic ordering agreement No. DAAE07-84-G-A002. The delivery order was for 502 engine crankshafts for the M113 tracked armored personnel carrier and related vehicles. Kessler, as agent for the Ohio Crankshaft Company (OCCO), complains that the sole-source award was improper because OCCO, which once was a supplier to the original equipment manufacturer (OEM), could have met the government's needs, but was deprived of an effective opportunity to compete because the agency delayed approval of OCCO's part.

We deny the protest.

The Army published initial and revised notices in the October 6 and 8, 1987, issues of the Commerce Business Daily (CBD) of its intent to acquire 653 engine crankshafts identified by National Stock Number and part number. The notices indicated that a sole-source award was contemplated under the authority of 10 U.S.C. § 2304(c)(1) (Supp. IV 1986), as implemented by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 6.302-1 (1987). The CBD notices referenced "Note 22", which advised potential offerors that notwithstanding the government's intent to solicit and negotiate with only one known source, firms interested in the procurement may identify their interest and capability

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or submit proposals which would be evaluated by the government for purposes of determining whether to conduct a competitive procurement if any proposals were received within 45 days of the CBD notices.

In response to the CBD notices, Kessler contacted the Army and expressed OCCO's interest in competing for the award. Kessler further advised the procurement agent that as a former supplier of these crankshafts to the OEM, DDAD, OCCO was capable of supplying the items in question. On November 18, Kessler submitted a request to the Army that OCCO be approved as a source for these items along with an unsolicited price proposal to furnish the acquisition quantity.

On February 1, 1988, the Army synopsisized in the CBD the award of a delivery order to DDAD for 502 engine crankshafts at a price higher than Kessler had quoted. On February 3, Kessler filed an agency-level protest objecting to the award on the grounds that the requirement was not properly synopsisized; that a formal solicitation was never issued and that the agency improperly failed to follow the procedures set forth in FAR, Part 14. In denying Kessler's agency-level protest, the contracting officer stated that due to the limited inventory for this item, he decided not to delay -- award pending the approval of OCCO's crankshaft and the issuance of a competitive solicitation to DDAD and OCCO. The contracting officer also stated that although a re-synopsis for the reduced quantity was never published, the acquisition was nevertheless properly synopsisized initially, and award would still have been made to DDAD in view of the agency's need for timely delivery. As to the protester's references to FAR, Part 14, the contracting officer noted that this section of the FAR, which applies to sealed bidding, was inapplicable to the instant procurement because there was only one approved source and contracting by negotiation was therefore the appropriate method. Subsequent to the denial of its agency-level protest, Kessler filed this protest at our Office.

The gravamen of Kessler's protest is that the contracting officer failed to consider all the information provided by the firm in its request for approval as an alternate source prior to making an award to DDAD; consequently, it has been improperly excluded from competing for the requirement. In this regard, Kessler points out that as a former OEM supplier OCCO had previously manufactured this item for DDAD "therefore its acceptability should never have been in question with the information furnished." Moreover, the protester asserts that the Army's engineer had "verbally approved" OCCO's crankshaft and the Army's failure to expedite the mere "formalization" of that approval resulted

in the improper exclusion of OCCO as an alternate source and the sole-source award to DDAD.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(1), permits use of other than competitive procedures where there is only one known source that can meet the government's needs. However, before using noncompetitive procedures, an agency must execute a written justification for so doing that is to include a description of efforts made to ensure that offers are solicited from as many sources as practicable, and a description of any market survey conducted or a statement of the reasons why a market survey was not conducted. 10 U.S.C. § 2304(f). We have said that in light of the clear intent of Congress to make full and open competition the standard for conducting government procurements, our Office will give careful scrutiny to an allegation that a particular contractor has not been provided an opportunity to compete for a particular contract. See 10 U.S.C. § 2304(a)(1)(A); Johnson Engineering and Maintenance, B-228184, Dec. 3, 1987, 87-2 CPD ¶ 544. Where the agency has substantially complied with the procedural requirements of CICA for the written justification and higher-level approval of the contemplated sole-source action and publication of the requisite CBD notice to solicit offers, we will not object to the sole-source award unless it is shown that there is no reasonable basis for it. See Johnson Engineering and Maintenance, B-228184, supra. Thus, a sole-source award is justified where the agency reasonably concludes that only one known source can meet the government's needs within the required time. Id.

The record developed in response to the protest has established that the Army prepared a justification and approval (J&A) for the procurement of the item on a sole-source basis citing the authority of 10 U.S.C. § 2304(c)(1), as previously noted. This action was approved by the Competition Advocate on November 12, 1987. According to the J&A and the ordering activity's written request upon which that justification was based, this engine crankshaft is a government Non-Developmental Item (NDI) that was designed by the manufacturer, DDAD, at its own cost. The J&A further states that the item in question is unique and proprietary in nature and a technical data package to support a competitive procurement was not available due to the NDI nature of the procurement. Consequently, the procurement was restricted to the OEM and approval of alternate sources was required because this item was determined to be a "critical application" part necessary for the performance of safety, mission and readiness requirements of the M113 family of vehicles.

Based on our review of the record, we find that the Army's grounds for its sole-source action are reasonable. The record shows that the Army complied with the requirements of CICA for a sole-source procurement. A written justification setting forth detailed reasons for the agency's decision to acquire the parts on a sole-source basis was prepared; a market survey was conducted; and the CBD notice clearly urged potential contractors to identify their interest and capabilities. Moreover, as discussed elsewhere in this decision, the agency determined that award would not be delayed pending approval of Kessler's part since a lengthy delay in the award could have created an inventory shortage for the crankshaft.

The record shows that at the time of award OCCO had not been approved, and still remains unapproved, as an alternate source for this item. The Army has provided an affidavit, which Kessler has not challenged, from its source approval engineer to rebut Kessler's allegation that the firm had received verbal approval of its item. According to the affiant, after he had only preliminarily evaluated the technical data submitted by Kessler, he responded to an inquiry from a representative of Kessler's that "it looked as if Kessler's crankshaft should be approved." The agency maintains that this statement was meant to convey the results of the engineer's initial assessment only and that written notification of approval was required by the agency's regulations governing the approval of alternate sources. The engineer states that upon additional review, he reassessed his position and concluded that the Kessler part could not be approved based on the data submitted.

From the record it appears that the Army received the technical/engineering data submitted by Kessler for approval purposes on November 18, 1987, and the approval process was begun immediately thereafter on November 19. On that same day, the procurement agent also inquired as to the stock status for the engine crankshafts to determine if the award could be delayed pending the possible approval of the OCCO part and the subsequent issuance of a competitive solicitation to DDAD and Kessler. The item manager's report indicated approximately 4 months of stock on hand and that additional quantities would have to be delivered by March 1988 to avoid depletion of current inventory.

After reviewing the information on the stock status, the contracting officer concluded that there was insufficient time to complete the approval process and conduct a competitive procurement for this critical item; accordingly, a preliminary determination was made to place the order with DDAD and Kessler was so advised on November 23. Award of the delivery order to DDAD was made on January 5, 1988,

because there was no change in the short supply of the crankshaft and no imminent engineering approval of the OCCO crankshaft was anticipated.

Further, the agency contends that there were deficiencies in Kessler's submission which precluded approval of its part. Specifically, the Army reports that the protester had submitted documentation on the wrong crankshaft and that the evidence of prior crankshaft sales to DDAD was insufficient. In addition, the Army argues that any delay in the approval of OCCO's crankshaft was attributable to a combination of factors: Kessler's failure to seek approval of its part in advance of any procurement action; its delay from October 8 to November 18, 1987, in providing data to support its request for approval as an alternate source; and its failure to submit documentation on the particular model of crankshaft being acquired.

In comments on the agency report, Kessler takes issue with the Army's position that any delay in the qualification process was attributable to it. According to the protester, the firm has been routinely seeking approval for a number of OCCO's parts and the purpose of its November 13, 1987, submission to the Army, which was received on November 18, was to illustrate that approval of its parts by other government agencies was now a "routine procedure." Thus, Kessler dismisses as "irrelevant" the agency's assertion that it submitted incorrect and inadequate documentation for the particular crankshaft being procured.

Kessler also denies that there was any delay between its initial contact with the procurement agent and the submission of documentation requesting approval. Kessler further denies being informed on November 23 by the procurement agent that award was imminent and would not be delayed pending OCCO's approval. Had it been so informed, Kessler argues, it would have "expedited matters so that our offer would have been considered." Moreover, the protester alleges that it was incumbent upon the agency to expedite the approval process so as to permit OCCO to compete in this procurement inasmuch as the agency knew that its inventory for this item was low.

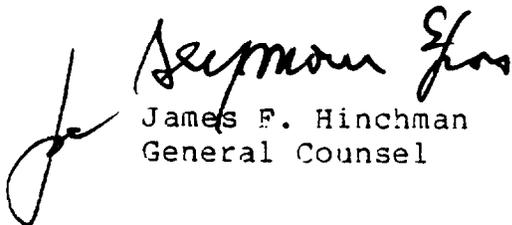
Our Office has consistently held that agencies may limit competition for the supply of parts if necessary to assure the safe, dependable, and effective operation of government equipment, B. H. Aircraft Co., Inc., B-222565 et al., Aug. 4, 1986, 86-2 CPD ¶ 143. In such cases, parts should generally be procured only from sources that have satisfactorily manufactured or furnished them in the past, Aero Technology Co., B-227374, Sept. 25, 1987, 87-2 CPD ¶ 301 at 3; and nonapproved sources must be given a reasonable

opportunity to qualify. Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2 at 8. Although we have sustained protests where agencies unreasonably delayed the qualification process, see e.g., Pacific Sky Supply, Inc., 66 Comp. Gen. \_\_\_\_ (1987), 87-1 CPD ¶ 358 (3 1/2 months delay between initial request for approval and agency's referral to user agencies); Rotair Industries, Inc., 66 Comp. Gen. \_\_\_\_ (1987), 87-1 CPD ¶ 238 (delay of up to 2 years in certain instances), a protester's mere allegation that the agency's procedures for approving alternate sources takes more time than the protester believes is necessary, is not a showing that the procedures fail to provide a reasonable competitive opportunity. Rotair Industries, Inc., 66 Comp. Gen. supra.

Here, Kessler does not dispute the Army's assertion that the crankshaft was in short supply. Nonetheless, it argues that the Army could have taken action to expedite the approval process, such as informing Kessler of the urgent need to make award, and by contacting engineers at the Defense Logistics Agency's Defense Contract Supply Center who were "familiar with our products and who had successfully evaluated similar items."

Notwithstanding Kessler's arguments to the contrary, the written record establishes that the Army did not delay or fail to expedite approval of OCCO's part. The administrative record contains memoranda which show that Kessler was notified that award would not be delayed pending approval of its part and that the parties exchanged correspondence and participated in telephone conversations pertaining to the status of the protester's request for approval. Moreover, while Kessler labels as "irrelevant" the deficiencies in its data submission identified by the agency, it has provided no probative evidence to rebut the agency's position on this issue. Under these circumstances, we agree with the agency that it did not cause substantial and unreasonable delays in its consideration of Kessler's product such that the firm was deprived of a reasonable opportunity to compete. Mercer Products & Mfg. Co., Inc., B-230223, June 13, 1988, 88-1 CPD ¶ \_\_\_\_.

The protest is denied.

  
James F. Hinchman  
General Counsel