



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Advanced Seal Technology, Inc.

File: B-249190; B-249619

Date: October 16, 1992

James P. Rome, Esq., for the protester.

John P. Patkus, Esq., Defense Logistics Agency, for the agency.

Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably rejected proposed alternate product where, during its evaluation of the alternate product, the agency determined that the offeror's technical information package contained drawing errors which indicated that the product fails to meet dimensional requirements.

2. Protest that agency failed to provide reasonable opportunity for offeror to qualify its alternate product is denied where agency was unable to complete the requisite review in time to be able to make an award which would satisfy its need for the specified item.

DECISION

Advanced Seal Technology, Inc. (AST) protests the award of contracts to Calnevar Seal Co. under request for proposals (RFP) No. DLA500-91-R-0606 (RFP 0606) and to John Crane-Houdaille Inc. under RFP No. DLA500-92-R-A114 (RFP A114), both issued by the Defense Logistics Agency (DLA) for quantities of different mechanical seals used in centrifugal pumps, specified on an approved product basis.¹ AST contends that the agency's failure to complete evaluation of

¹The listed, approved original equipment manufacturers (OEMs) for the RFP 0606 seal are Crane and Aqua-Chem Inc., while the OEM for the RFP A114 seal is Crane. Both RFP 0606 and RFP A114 were issued after completion of justifications for other than full and open competition. The basis for these justifications was the government's lack of necessary proprietary data and the impracticability of government reverse engineering of the parts.

its alternate seals deprived AST of a reasonable opportunity to compete under the solicitations.²

We deny the protests.

BACKGROUND

DLA, through the Defense Industrial Supply Center (DISC), is the procuring agency for the seals which are the subject of these protests. The Naval Sea Systems Command (NAVSEA) is responsible for evaluation of alternate items. These evaluations are conducted in two stages. First, the alternate or "candidate" seal is subjected to a technical evaluation to compare it with the OEM's seal, which includes a comparison of materials and dimensions. Second, once an item is approved technically, it is subjected to an operational test. The operational test may not be required if the candidate item is sufficiently similar to a previously approved item produced by the applying manufacturer.

AST, a small disadvantaged business, is a seal manufacturer. In 1988, NAVSEA approved four of AST's seals as alternate items; the so-called "core 4." From April 1987 to August 1989, AST prepared and submitted technical data packages (TDPs) for more than 100 separate seals for evaluation as alternate items. Among these are the two seals at issue in these protests.

RFP 0606

In early July 1988, AST first submitted a TDP for its part No. (P/N) CPS-1000-11, its alternate item for the seal solicited here under RFP 0606. Between 1988 and 1991, AST responded to three solicitations for the seal, each time either supplying a TDP or referring to its original submission. In October 1988, NAVSEA had advised AST that there was insufficient time to complete a review for one of the procurements. During this 3-year period, no evaluation was completed on the seal.

On July 11, 1991, DLA issued RFP 0606 for the supply of mechanical seals manufactured by Crane or Aqua Chem. The RFP advised offerors of the two-step evaluation procedure necessary for qualification of alternate items. The "Products Offered" clause of the RFP provided that alternate

²AST has filed six other protests--B-249855; B-249859; B-249881; B-249998; B-250106; and B-250199--raising similar arguments under different solicitations. We will address these protests after the records have been completed.

item offerors must submit legible copies of drawings, specifications, or other data necessary to clearly describe the characteristics and features of the product offered. It also provided that the government would make every reasonable effort to determine acceptability prior to award, but that if it could not, proposed alternate products could be considered technically unacceptable for this procurement. Upon completion of the evaluation, the offeror was to be notified and, if the item was acceptable, it would be considered for future requirements.

On August 8, 1991, AST, Calnevar, and Crane submitted offers in response to RFP 0606. AST submitted a TDP for P/N CPS-1000-11 and sought approval based upon its similarity to an approved seal. Calnevar also submitted technical information for its part. On September 24, DISC forwarded AST's technical information to NAVSEA for evaluation with a 60-day priority notation. In response to evaluation comments on its seal, AST submitted its revision "A" of P/N CPS-1000-11 to DISC on November 1. This revision, which dealt with minor format changes, was forwarded to NAVSEA on November 8. The forwarding form noted that AST sought approval on the basis of similarity to an approved seal. On January 20, 1992, AST submitted its revision "B" of P/N CPS-1000-11 (addressing further format issues) to DISC, and DISC forwarded it to NAVSEA.

By letter of April 16, DISC advised AST that the evaluation was still in process but that award could not be delayed pending the results of the evaluation. However, prior to entering negotiations with Crane as the sole approved source, DISC learned that NAVSEA had completed the evaluations. In June, AST's basic and revision "A" designs were rejected as unacceptable due to drawing errors. Neither item was interchangeable with the OEM seal: the axial (length) dimensions were found not to be compatible with the seal cavity.³ Review of revision "B" is still pending. NAVSEA approved Calnevar's design and waived the operational test.

On June 11, DLA advised AST that its product had been found technically unacceptable for the reasons cited by NAVSEA and that there was no estimated completion date for the revision "B" evaluation. DLA awarded Calnevar the contract on June 16 at a price \$55 higher per seal than that offered by AST (\$195 per unit versus \$140 per unit). AST filed its protest with our Office on June 23.

³The agency has advised our Office that the dimensional difference is more than 1/8 inch.

DISCUSSION

The Competition in Contracting Act of 1984 (CICA), requires that an agency obtain "full and open" competition in its procurements through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A) (1988). When a contracting agency restricts a contract to an approved product, and uses a qualification requirement, it must give offerors proposing alternative products a reasonable opportunity to qualify. BWC Technologies, Inc., B-242734, May 16, 1991, 91-1 CPD ¶ 474; see Vac-Hyd Corp., 64 Comp. Gen. 558 (1985), 85-2 CPD ¶ 2; 10 U.S.C. § 2319(b). This opportunity to qualify includes ensuring that an offeror is promptly informed as to whether qualification has been attained and, if not, promptly furnish specific information why qualification was not attained. Rotair Indus., 69 Comp. Gen. 684 (1990), 90-2 CPD ¶ 154; see Federal Acquisition Regulation § 9.202(a)(4). Failure to act, within a reasonable period of time, upon requests for approval as a source deprives an offeror of a reasonable chance to compete and is inconsistent with the CICA mandate that agencies obtain "full and open" competition through the use of competitive procedures. Rotair Indus., Inc., B-224332.2 et al., Mar. 3, 1987, 87-1 CPD ¶ 238.

AST contends that the government unreasonably delayed in completing the evaluation of its alternate item; failed to notify it of its deficiencies; and failed to provide specific information on its deficiencies. AST argues that these actions violate the applicable procurement statutes and regulations governing the qualification of new sources and, by effectively frustrating AST's right to compete, violate the CICA requirement for "full and open competition." We disagree.

AST relies on our decision in BWC Technologies, Inc., supra, as authority for a finding of unreasonable treatment by the government. In BWC, the agency had a sample of the protester's alternate product for close to 2 years without testing it. We found that this was inconsistent with the statutory and regulatory requirements for prompt qualification procedures. However, we did not find that the agency was required to award the contract on the basis of an unacceptable product. In sustaining the protest, we recommended that the agency complete testing on the alternate products and that if the protester's or another offeror's products successfully passed the tests, then to award the contract to the low priced, technically acceptable offeror. AST's situation is distinguishable.

It is true that the government had AST's technical packages for approximately 4 years before completing its evaluation and notifying AST that its basic and revision "A" seals were

unacceptable. While this may be viewed as an unreasonable delay in evaluation, we have no basis for providing AST any relief as we did in BWC. Here, in June 1991, the government agreed to expedite its review of AST's alternate products. NAVSEA completed its evaluation of AST's basic and revision "A" seals within 8 months after AST submitted its TDP in August 1991. We do not find this period for evaluation unreasonable. Further, unlike the situation in BWC, here the government completed its evaluation before awarding the contract.⁴

It is true that by failing to notify AST of the rejection of its seals for two months, the government did not meet its responsibility to provide prompt notice. However, we do not find that this delay prejudiced AST. See Southwest Decor, Inc., B-246964 et al., Apr. 20, 1992, 92-1 CPD ¶ 373. AST's seals are not compatible with the seal cavity dimensions. To meet the dimensions, AST will have to redesign its seal, and AST has not argued that it could have accomplished such a design effort in time for approval prior to the award in June. Having waited 11 months since the closing date for this procurement, we do not find that the agency was required to further delay award for AST to complete a redesign effort.

We recognize that the government has not provided AST with the exact size of its deficiency, but do not find that the government has violated the requirement for specificity. While lack of the precise dimensions make a redesign effort more difficult (through, e.g., reverse engineering), we disagree with AST's assumption that the government was required to reveal the dimensions. According to the government, the exact dimensions of the seal are proprietary to the OEM and there is nothing in the record to controvert this position. An agency is only required to provide information consistent with the proprietary nature of the OEM's data. See Kitco, Inc.--Recon., B-241868.2, Apr. 9, 1991, 91-1 CPD ¶ 361.

AST also contends that the government accorded preferential treatment to Calnevar at both stages of approval of its seal. While it is a fundamental principle of federal procurement that all offerors must be treated equally, Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182, on this record there is no evidence of unequal treatment.

⁴ The failure to evaluate revision "B" has no effect on our decision. Revision "B" concerned only minor matters which do not affect the dimension compatibility problem identified in the evaluation.

Evaluating offers of alternate products pursuant to the Products Offered clause essentially involves a determination of the technical acceptability of the proposal (that is, compliance with the technical requirement to describe clearly the characteristics of the product and to establish its interchangeability with the specified product). Julie Research Laboratories, Inc., 70 Comp. Gen. 158 (1990), 90-2 CPD ¶ 526. Whether an offeror has presented sufficient information to convince the agency that the alternate item meets the agency's requirements is a technical judgment within the agency's discretion. Sony Corp. of Am., 66 Comp. Gen. 286 (1987), 87-1 CPD ¶ 212. We will not disturb the agency's technical determination unless it is shown to be unreasonable. Rotair Indus., Inc., B-219994, Dec. 18, 1985, 85-2 CPD ¶ 683.

AST's first objection concerns NAVSEA's technical evaluation to establish the interchangeability of Calnevar's seal with the OEM seal. Although NAVSEA found that Calnevar's spring drawing needed to reflect the "free height" and "number of coils" in the spring, the government explains that these omissions are not cause for rejection because the assembly drawing correctly depicts the overall seal parameters. We find reasonable NAVSEA's determination in this regard. Rotair Indus., Inc., supra. Unlike AST's drawing, which indicated dimensional noncompliance, the Calnevar drawing provided sufficient information to assure the government of the interchangeability of its seal with the OEM seal. Thus, there is no basis to conclude that the government improperly waived a technical deficiency for Calnevar but failed to accord AST the same treatment.

AST's second objection concerns NAVSEA's waiver of the operational testing requirement for Calnevar. Testing may be waived if certain criteria are met including similarity in design, application, materials, and shaft diameter size between the candidate seal and a prior approved seal. AST argues that Calnevar's seal does not meet the size criterion. We will not address this issue because AST is not an interested party to raise it. Under our Bid Protest Regulations, a party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. 4 C.F.R. §§ 21.0(a) and 21.1(a) (1992). Since the agency properly found AST technically unacceptable, and since there was another acceptable proposal other than AST's in line for award (Crane), the protester is not an interested party for purposes of challenging this aspect of the agency's evaluation. Dick Young Prods. Ltd., B-246837, Apr. 1, 1992, 92-1 CPD ¶ 336.

The protest is denied.

RFP A114

In January 1987, AST first submitted a TDP for its P/N DCPS-1000-1, its alternate item for the type of seal solicited here under RFP A114. In March 1987, the TDP was forwarded for evaluation and in September 1987, DISC was informed of the need for operational testing. According to the agency report, in February 1988, in response to an AST proposal, NAVSEA advised DISC that AST's seal had not been approved; was not under evaluation; and needed to be tested. AST was advised to contact NAVSEA for procedures on testing. According to AST, it has never received approval of this seal.

In June 1991, AST met with representatives of DISC and NAVSEA to discuss the agency's failure to complete evaluations of its alternate seals. According to AST, NAVSEA requested, and AST agreed to, the redesign of its "core 4" seals to include a specific type of bellows. NAVSEA agreed that it would evaluate this design change without requiring retesting.⁵ With regard to approximately 17 to 20 AST alternate seals-- submitted for approval based on similarity to approved seals--NAVSEA agreed to expeditiously review and approve the seals without further testing if they met NAVSEA criteria.

On February 25, 1992, AST submitted revision "C" of its P/N DCPS-1000-1 to DISC. DISC forwarded it to NAVSEA on March 19 for evaluation as similar to an approved AST seal. The forwarding form contained a 60-day priority notation.

On April 7, 1992, DISC issued RFP A114 for a quantity of mechanical seals, listing a Crane part as the only approved product. As with RFP 0606, offerors were advised of the two-step evaluation procedure necessary for qualification of alternate items. The RFP also contained the same Products Offered clause regarding submissions and evaluation of alternate items. Only Crane and AST submitted offers by the May 7 closing date.

DISC followed up on the evaluation in late May and June. On June 26, DISC received a NAVSEA letter explaining that due to staff/resource limitations, workload and current backlog, it would not look at AST's item for another 3 months, i.e., September or October. In an undated letter, the contracting officer informed AST that administrative processing and technical evaluation would require a minimum of 90 days. On July 17, DISC awarded the contract to Crane at a price approximately \$140 per unit higher than that offered by AST.

⁵The record indicates that at least three of the core-4 seals have been reapproved.

After learning of the award, AST filed its protest with our Office.

DISCUSSION

AST contends that the government's delay in evaluating its alternate item under RFP A114 violates the applicable procurement statutes and regulations governing the qualification of new sources and, by effectively thwarting AST's right to compete, the government has violated the CICA mandate for "full and open" competition. 10 U.S.C. § 2304(a)(1)(A).

As noted above, AST is correct that an agency using a qualification requirement must give offerors proposing alternative products a reasonable opportunity to qualify, BWC Technologies, Inc., supra, and that failure to act on requests for evaluation within a reasonable period of time deprives an offeror of a reasonable chance to compete and is inconsistent with the CICA mandate that agencies obtain "full and open" competition through the use of competitive procedures. Rotair Indus., Inc., B-224332.2 et al., supra. However, we disagree that DISC or NAVSEA deprived AST of a reasonable opportunity to compete under RFP A114.

AST's situation here is distinguishable from that in BWC Technologies, Inc. AST submitted a revised TDP for its P/N DCPS-1000-1 in late February 1992 and DISC forwarded it to NAVSEA 3 weeks later. This was more than 6 weeks before the closing date for RFP A114. DISC requested a priority review of the seal (60 days) and inquired as to the status of the review in late May and June. According to NAVSEA, staff and resource limitations and a current backlog of work prevented it from commencing evaluation for an additional 90 days.⁶ There is nothing in the record to contradict DISC's assessment that, due to the large number of priority back-orders for the seal, award could not be delayed further⁽¹⁾ to await the evaluation. We find no basis for concluding that the government unreasonably delayed evaluation of AST's alternate seal.⁷

We are mindful of the fact that AST submitted its original design for this seal in January 1987, and that the agencies

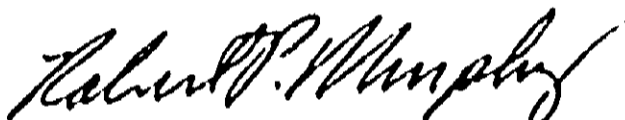
⁶In fact, according to a September 1992 NAVSEA memorandum, it has exhausted its funds for outside contractor evaluation and "has not had the opportunity to evaluate any offers in the recent past."

⁷While we do not find that the agency acted unreasonably, we do believe, in view of the time which has already elapsed, that it should expeditiously evaluate the protester's item.

agreed in June 1991 to expedite review of AST's seals. We also have considered AST's belief that the seal at issue did not really require redesign of the bellows to be an effective alternate product. However, the record indicates that the delays in evaluation are not solely attributable to the agencies.

While NAVSEA had an earlier version of the seal since 1987, it did complete at least a first-stage review. AST's original seal was considered appropriate for operational testing in September 1987, and AST was advised of the need for testing in 1988, yet AST does not explain why it apparently never sought operational testing. Further, the revised seal incorporates a substantive change requested by the government. Even though AST now challenges the need for the redesign, it admits that it agreed to the effort. However, AST did not submit that redesign until late February 1992. In view of the nearly 9 months AST took to submit its revised design, it would appear that the change is substantial. Under these circumstances, we find that the delay in evaluating the seal was not unreasonable.

The protest is denied.


for James F. Hinchman
General Counsel