



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Advanced Seal Technology, Inc.

File: B-250106

Date: January 6, 1993

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. Protest that agency failed to provide reasonable opportunity for offeror to qualify its alternate product is dismissed as premature where agency has not yet completed evaluation of offers.
2. Agency reasonably determined to require preaward qualification testing, instead of first article testing procedures, for approval of alternate manufactured item, in view of excessive cost, inability to release proprietary technical information, and other complications associated with first article testing.

DECISION

Advanced Seal Technology, Inc. (AST) protests the procuring agency's failure to evaluate its offer or to provide for first article testing (FAT) under request for quotations (RFQ) No. DLA500-92-T-Q925, issued by the Defense Logistics Agency (DLA) for a quantity of mechanical seals used in critical item, centrifugal fire pumps, specified on an approved product basis.¹ The RFQ was issued as a small business set-aside under small purchase procedures.

We dismiss the protest in part and deny it in part.

¹The listed, approved original equipment manufacturers (OEMs) for the solicited seal are John Crane-Houdaille Inc. and Geco Corp., Calnevar Seal Division.

BACKGROUND

DLA, through the Defense Industrial Supply Center (DISC), is the procuring agency for the seal which is the subject of this protest. The Naval Sea Systems Command (NAVSEA) is responsible for evaluation of alternate items. DLA issued the RFQ on August 7, 1992, with a return date of August 28, seeking quotes on 85 seals, National Stock Number 5330-01-173-9337. AST responded on August 28, offering its Part Number (P/N) CPS-1625-66 "A." According to its quote, AST had submitted a technical data package (TDP) for this seal to DLA in January 1992. DLA forwarded the TDP to NAVSEA in April 1992, but NAVSEA has not completed its evaluation.² On August 28, AST filed this protest.

EVALUATION OF OFFERS

AST first contends that the government's failure to complete evaluation of its alternate seal deprived AST of a reasonable opportunity to compete under the solicitation. AST's protest was filed prior to the closing time and date for receipt of quotations, DLA has not eliminated AST's offer from consideration, and there is no evidence that the agency will fail to comply with its responsibility to evaluate AST's offer. Protests that merely anticipate improper agency action are speculative and premature. See General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512. Consequently, we dismiss this ground of AST's protest. If, in the future, the agency takes action that properly forms the basis for a valid bid protest, the protester may file with our Office at that time.

FIRST ARTICLE TESTING

The "Products Offered" clause in the RFQ provided that alternate item offerors must submit 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. Evaluations to determine acceptability are conducted in two stages. First, the alternate or "candidate" seal is subjected to a

²By April, NAVSEA had completed its evaluation of an earlier TDP for this AST seal and found it technically unacceptable due to drawing errors. According to AST, its January 1992 TDP addressed those errors.

technical evaluation in which the candidate seal manufacturer's drawings are compared with the OEM's drawings including comparison of seal component configuration and materials. Second, once an item is approved technically, it undergoes an operational test. The operational test may be waived if the candidate item is sufficiently similar to a previously approved item produced by the applying manufacturer. The cost of the operational testing is ordinarily borne by the candidate seal manufacturer.

AST contends that DLA should have provided a FAT procedure in the RFQ instead of the "Products Offered" clause because the failure to use FAT provisions restricts competition. With FAT procedures, AST contends that it would not have to bear, up front, the high cost of independent evaluation and testing. AST notes that in 1988, NAVSEA recommended AST as a qualified source contingent on AST's seal undergoing successful first article testing.³ AST also argues that since the government possesses the technical information to conduct operational tests, it could develop FAT procedures. We find that DLA was not required to use FAT procedures for this acquisition.

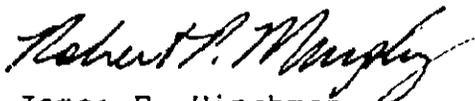
First article testing means testing and evaluating a preproduction model, initial production sample, etc., for conformance with specified contract requirements before or in the initial stage of production. Federal Acquisition Regulation (FAR) § 9.301. A qualification requirement, like that presented in this procurement, concerns a government requirement for testing or other quality assurance demonstration that must be completed before award of a contract. FAR § 9.201. Normally, first article testing and approval are not required in contracts for products requiring qualification before award. FAR § 9.304. Where a solicitation contains a FAT requirement, it must provide the performance or other characteristics that the first article must meet for approval. FAR § 9.306(a), (b). Further, either the government must provide detailed technical requirements for the approval tests (in the case of testing to be performed by the offeror, § 9.306(a)) or the government must provide the tests to which the first article will be subjected (in the case of government testing, § 9.306(b)). The FAR does not express a preference for FAT procedures or preaward qualification testing.

³The seal concerned in that recommendation was AST P/N CPS-1625-6. Although it recommended the seal for approval using FAT procedures, NAVSEA subsequently determined that such procedures were not appropriate. Further, in June 1991, NAVSEA directed AST to redesign the bellows component of this seal. The redesigned seal is identified as CPS-1625-66 "A," the subject of this protest.

While the use of FAT procedures may result in increased competition under a particular solicitation, an agency is not required to provide for them where it has a reasonable basis to prefer preaward qualification testing. The contracting agency is responsible for determining the requisite evaluation scheme to determine the technical acceptability of offers, including the necessary performance or operational testing, as well as evaluating the information supplied by an offeror. Since the agency must bear the burden of any difficulties incurred by reason of a defective evaluation, we will not disturb the agency's determination of which test procedures are necessary to assure that its minimum needs will be met unless it is shown to be unreasonable. See Dixon Pest Control, Inc., B-248725, Aug. 27, 1992, 92-2 CPD ¶ 132.

Here the agency determined to use preaward qualification testing instead of FAT procedures based on several considerations. For example, DLA determined that the cost of using FAT procedures for a routine purchase of 85 seals would be excessive. DLA also considered the problems which would be associated with drafting FAT specifications and setting out performance parameters. In particular, the agency would not have been able to use an approved source's TDP for this purpose, since it contains proprietary technical data. The inability to release proprietary technical data would also complicate the conduct of FAT procedures. Thus, if nonreleasable technical data were required to cure a deficiency in the awardee's seal, the awardee would have to cure the deficiency through a process of trial and error, or risk termination for default. It does not appear that the agency's need for the seals could accommodate such an attenuated procedure, nor do we believe that the agency should be required to risk such uncertainty for delivery of items which are an integral part of lifesaving equipment (fire pumps). Based on the overall combination of considerations, we find no basis to question the agency's election to use preaward qualification testing in this instance.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel