



Comptroller General
of the United States

Washington, D.C. 20548

Pogany 148363

Decision

Matter of: Red Wing Products, Inc.

File: B-248601.3; B-248602.3

Date: December 30, 1992

David J. Kuckelman, Esq., and Conward E. Williams, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester. Gregory H. Petkoff, Esq., Lake B. Holt, Esq., and Thomas F. Doyon, Esq., Department of the Air Force, for the agency. Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency may reject a proposal from an unapproved alternate source in a noncompetitive, qualified source procurement if that unapproved source does not demonstrate that it can meet the agency's technical requirements, especially where item being solicited is critical component of conventional and nuclear bomb delivery system aboard military aircraft.

DECISION

Red Wing Products, Inc. protests the award of contracts under request for proposals (RFP) Nos. F09603-91-R-D1294 (D1294) and F09603-92-R-42201 (42201), issued by the Department of the Air Force on a qualified source basis for 30-inch and 14-inch shackles, respectively. Red Wing principally contends that the agency improperly refused to approve Red Wing as a qualified source under the solicitations.

We deny the protests.

The shackles are used in the MAU-12 aircraft bomb racks to carry conventional or nuclear bombs.¹ RFP-D1294 (for 30-inch shackles) was issued on December 19, 1991, and, as amended, established March 30, 1992, as the closing date for receipt of initial proposals. The RFP contained a clause entitled "Urgent Requirement" which stated that "only known qualified sources" would be considered for award, including, as relevant here, offers from firms previously tested by the government or offers from firms that have previously supplied the item to the government. RFP-42201 (for 14-inch shackles) was issued on March 11, 1992, and established April 10, 1992, as the closing date for receipt of initial proposals. This RFP represented an "insurance policy" buy, partially limited to qualified ("proven") sources, and contained a clause entitled "Award of Mission Essential Quantity (MEQ)."² The MEQ clause defined a "proven source" as an offeror which has previously produced the identical item or which proposed to provide an item manufactured by the previous prime manufacturer. The clause defined an "unproven source" as an offeror which has not previously produced the identical item to the government or which proposed to provide an item manufactured by other than the previous prime manufacturer. Thus, both solicitations were either partially or totally limited to qualified sources.

On March 13, 1992, prior to the time for submission of offers, Red Wing submitted a data package to the agency requesting approval as a qualified source.³ Included in

¹Red Wing does not dispute that the items are critical in nature. Indeed, Red Wing states that "failure of the shackles . . . would be disastrous inasmuch as shackle failure [could result] in inadvertent release of the conventional or nuclear weapon being carried which could cause mass destruction of property, loss of lives, radiation poisoning, or nuclear war."

²Under the "insurance buy" procedures, if a qualified source is the low offeror, it is awarded the entire quantity. If an unqualified source is the low offeror, it is awarded a first article contract with an option for the full production quantity. At the same time, the low qualified source is also awarded a small "mission essential quantity" and an option for the full production quantity. If the unqualified source produces an acceptable first article, its production option is exercised, and it is deemed a qualified source thereafter. If the unqualified source is unable to produce an acceptable first article, the qualified source's production option is exercised.

³Red Wing subsequently submitted offers under both solicitations.

this package were the successful results of vibration tests, conducted by an independent laboratory, Dayton T. Brown, of two 30-inch shackles manufactured by the protester, as well as various certifications and documentation as to the source of the components of these shackles. More specifically, and as relevant here, the protester's documentation showed that the raw forgings used to manufacture the 30-inch shackles were purchased from the bankruptcy estate of a debarred firm, Patty Precision Products, which, in turn, had purchased the forgings several years earlier from Trinity Forge, Inc., the debarred firm's subcontractor.⁴

On April 20, 1992, the agency, after its evaluation of the protester's data package, replied as follows to its request for approval:

"[W]e cannot accept any documentation which indicates Patty Precision Products . . . as a source of, or prior owner of, material submitted as a basis for qualification. . . . The purpose of qualification is to certify that the potential source demonstrates the current ability to develop, manufacture, test, and deliver a product which meets all government requirements. . . . Some of these functions may be accomplished by subcontractors but the 'prime' must also demonstrate the ability to contract, administer, and quality control those sources. In this instance, Patty Precision is not a viable entity, has not operated as a source of production for almost 2 years, and, based on recent experiences, does not represent a reliable source of documentation concerning any material."

In that same letter, the agency requested Red Wing to submit a summary of the company's capabilities; a detailed description of its quality program plan; a certification of in-house or independent laboratory capability to perform magnetic particle inspection; a detailed manufacturing plan; and a certified test report. Finally, the agency specifically requested that Red Wing provide "two samples . . . for form, fit, and function, and conformance evaluation." Red Wing refused to provide the samples, and this protest followed.⁵

⁴Patty Precision Products was debarred because a principal of the firm was convicted of criminal fraud in the course of performing a government contract for aircraft bomb racks.

⁵Red Wing apparently is only willing to provide the agency with the shackles which were the subject of vibration
(continued...)

The protester principally contends that it provided the Air Force with sufficient information regarding its technical capability to produce the shackles in its data package submitted on March 13, 1992. According to Red Wing, its documentation which showed its successful completion of the vibration tests performed by Dayton T. Brown⁶ demonstrated that its shackles were manufactured properly in "every respect," including correct material, proper forging, machining, heat treating, plating, and pre-stressing. Red Wing also does not believe that the Air Force should require the firm to submit fresh samples for form, fit, function and conformance evaluation.⁷

The contracting agency has the primary responsibility for determining its minimum technical needs and for determining whether a previously unapproved source will satisfy those needs since it is the agency that must bear the burden of difficulties incurred by reason of a defective evaluation. See Sony Corp. of Am., 66 Comp. Gen. 286 (1987), 87-1 CPD ¶ 212. An agency may reject a proposal from an unapproved alternate source in a noncompetitive procurement if that unapproved source does not demonstrate that it can meet the agency's technical requirements. See JTP Radiation, Inc., B-233579, Mar. 28, 1989, 89-1 CPD ¶ 315.

We find no merit to the protester's contentions. The parties do not dispute that the applicable specification governing qualification is MIL-R-38953. As the agency stated in its report, the purpose of qualification testing

⁵(...continued)

testing by Dayton T. Brown, and which were manufactured with the forgings purchased from the bankruptcy estate of Patty Precision Products. Red Wing, apparently for economic reasons, is currently unwilling or unable to provide the agency with sample shackles manufactured by Red Wing from components purchased from sources normally used in producing the items.

⁶The protester states that the vibration tests were conducted in accordance with MIL-R-38953 which controls the testing requirements for qualification of the MAU-12 aircraft bomb racks.

⁷While, as stated above, Red Wing is willing to submit its previously vibration tested samples for visual inspection, the protester has stated that, if it does so, the Air Force must "give due consideration to the normal wear caused by the [previous] testing of the samples . . . and such normal wear [must] not have a negative impact or prevent a positive result for the Air Force's visual evaluation of the samples."

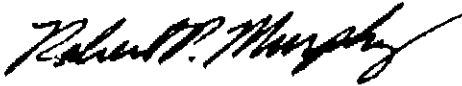
is self-evident--to show to the government that a particular source can actually produce the required item. To that end, MIL-R-38953 requires that tested samples "shall have been produced with manufacturing equipment and procedures normally used in production." We find that the government reasonably determined that Red Wing did not meet this standard by reason of its purchase of components from the bankruptcy estate of a debarred firm. Obviously, a bankruptcy estate is not an on-going source of material, and Red Wing's purchase of material was simply a one-time "auction" buy. In our view, the requirement to employ "procedures normally used in production" does not reasonably encompass auction purchases of critical components from bankruptcy estates; rather, we think the government here reasonably required Red Wing to submit samples that were produced by manufacturing equipment and by purchasing procedures used in actual production.³ Thus, we conclude that the protester's March 13 data package was defective because it was based on sample shackles that were not manufactured by Red Wing from components purchased from sources normally used in producing the items. Accordingly, we find that the agency properly refused to qualify the firm based simply on its March 13, 1992, data package.

Red Wing also contends that the agency improperly approved Marvin Engineering Company, the awardee under one of these solicitations, as a qualified source based on the first article procedures of Marvin's previous contract for these items (which approval now qualifies Marvin as a source under these solicitations). Red Wing alleges that Marvin, during first article, failed critical tests of its shackles performed by the independent test laboratory, Dayton T. Brown, and that the Air Force relaxed specifications to permit Marvin to qualify. The agency states that after Marvin's shackles failed the Dayton T. Brown testing, it determined that these shackles were nevertheless manufactured in accordance with, and within the tolerances of, the shackle part drawing, and that it therefore relaxed certain testing requirements for the benefit of all future submissions (either first article or "off-the-street" samples such as Red Wing). Since Red Wing has yet to submit an acceptable sample for testing by the agency, and since the agency has relaxed the requirements for all future

³We also think that the agency is reasonable in requiring fresh samples for inspection and testing of this item with a critical application.

offerors, we do not think the protester was competitively harmed in any way by this relaxation of requirements. See, e.g., Holiday Inn Lakeside City Center, B-248040, June 17, 1992, 92-1 CPD ¶ 527.

The protests are denied.


for James F. Hinchman
General Counsel

'In its comments on the agency reports filed by the Air Force in response to Red Wing's initial protests and in subsequently filed correspondence, Red Wing for the first time raises a number of miscellaneous issues, including challenges to the terms of the initial solicitations. To the extent that they are intended as additional grounds of protest, we find that Red Wing knew or should have known of these grounds no later than upon its receipt of the agency reports. Yet, its comments were filed more than 10 working days after its receipt of the agency reports, and therefore these protest grounds were untimely filed. See 4 C.F.R. § 21.2(a) (2) (1992).