



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Advanced Seal Technology, Inc.

File: B-249855.2

Date: February 15, 1993

James P. Rome, Esq., for the protester.
John P. Patkus, Esq., Defense Logistics Agency, for the agency.
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DIGEST

Offeror was deprived of a reasonable opportunity to qualify its alternate product and compete for purchase order, where procuring agency did not promptly forward offeror's technical data package to agency responsible for evaluation of such products, and failed to promptly notify offeror of deficiencies in its product.

DECISION

Advanced Seal Technology, Inc. (AST) protests the issuance of a purchase order to Calnevar Seal Co. under request for quotations (RFQ) No. DLA500-92-Q-PB87, issued by the Defense Logistics Agency (DLA) for mechanical seals used in centrifugal pumps, specified on an approved product basis. AST contends that the agency's failure to promptly complete evaluation of its alternate seals deprived AST of a reasonable opportunity to compete under the solicitation.

We sustain the protest.

BACKGROUND

DLA, through the Defense Industrial Supply Center (DISC), is the procuring agency for the seal which is the subject of this protest, National Stock Number (NSN) 5330-01-035-4157. The seal is used in emergency fire pumps on Naval vessels

and is designated as a critical application item.¹ Thus, the Navy is required to approve all sources of the seal. To date, the only seals which have been approved are those manufactured by John Crane-Houdaille, Inc., the original equipment manufacturer (OEM) and Calnevar Seal Co., an approved alternate item manufacturer. The Naval Sea Systems Command (NAVSEA) is responsible for evaluation of proposed 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 which has been attempting since 1986 to gain Navy approval of its alternate seal, which AST designates as part number P/N PFS-2000-3 (P/N 2000-3). In February 1986, AST submitted its first technical data package (TDP) for this seal in response to a DLA solicitation. DISC forwarded the TDP to NAVSEA in July 1986 for evaluation. AST was notified in August 1986 that evaluation would require 6 months and that the procurement could not be delayed that long. In November 1986, NAVSEA recommended to DISC that AST contact NAVSEA to arrange for operational testing. The record does not establish that this recommendation was ever communicated to AST, or that its seal was ever operationally tested.

In October 1989, AST submitted a second TDP and requested approval of the seal based on its similarity to AST's P/N CPS-2000-4 (P/N 2000-4), a seal which had been tested and approved in 1988. In March 1990, DISC forwarded AST's package to NAVSEA along with a Calnevar TDP for the same seal. By letter of September 10, 1990, NAVSEA notified DISC that the Calnevar seal was approved based on its technical package and that operational testing was unnecessary due to the seal's similarity to other approved Calnevar seals. NAVSEA rejected AST's seal as technically unacceptable. The rejection report stated only that AST's "drawings have several errors on them such as the configuration of a part on the detail drawing did not match the configuration of the same part on the assembly drawing."

¹A critical application of an item is one in which the failure of the item could injure personnel or jeopardize a vital agency mission. Federal Acquisition Regulation (FAR) § 46.203(c).

AST learned of its rejection and, by letter of October 3, 1990, "protested" the rejection to DISC. In this letter, AST indicated its intention to submit "formal documentation" when it received the agency's written notification. DISC states that it has no record of AST's October 3 letter and so did not respond to it. AST did not receive a copy of the written notification providing NAVSEA's rationale for rejecting AST's seal, until it was provided as part of the agency report in this protest.

In June 1991, AST met with representatives of DISC and NAVSEA to discuss the agency's failure to complete evaluations of various AST alternate seals. According to AST, NAVSEA requested, and AST agreed to, the redesign of its so called "core 4" seals to include a specific type of bellows.² On or about June 20, 1991, AST incorporated the bellows change in revising several TDPs including P/N 2000-3 and P/N 2000-4. Because AST had not been made aware of the drawing errors referenced by NAVSEA's September 1990, rejection, AST's revised TDP for P/N 2000-3 did not address them. The TDP for P/N 2000-3 was evaluated and rejected as of September 1991. In rejecting the seal, NAVSEA found it was not acceptable because the "detail drawings [had] several errors on them such as the configuration of parts on the detail drawings (1-2000-4, 11-2000-4, and 12-2000-4) do not match the configuration of the same parts on the assembly drawing (PFS-2000-3)." NAVSEA identified AST's need to comply with certain drawing requirements based on DOD-STD-100 and "generally accepted drawing practice."³

THE SOLICITATION

The RFQ in question here was issued on November 5, 1991, and solicited quotes for 24 seals, specifying the Crane and Calnevar P/Ns. The RFQ advised offerors proposing seals not manufactured by these firms of the two-step evaluation procedure required for qualification of alternate items. Specifically, the "Products Offered" clause of the RFQ provided that alternate item offerors must submit legible

²The "core-4" are four seals of varying sizes from which AST planned to seek approval of other seals based on similarity. The record indicates that at least three of the core-4 seals have been reapproved.

³The matters identified included the addition of a revision block in the title block and indication of the revision in the P/N itself; inclusion of the revised P/Ns on the bill of materials; inclusion of explanations for "redrawn" aspects; and accounting for the different revisions for traceability purposes.

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.

Five responses to the RFQ were received by the November 26 return date. AST quoted a price of \$275 for its P/N-2000-3, Revision A. The other four responses quoted prices on the Crane part, among which Crane quoted the lowest price of \$320. Subsequent to the return date, a sixth firm quoted a price of \$348.84 on the Calnevar part. In its November 18 quote, AST requested evaluation of its revised seal, and indicated that TDPs for it and P/N 2000-4 were enclosed.

On December 31, the DISC procurement office requested the DISC technical office to advise it whether AST's alternate product was acceptable. The procurement office noted that it did not receive a TDP for AST's seal. Neither office requested AST to resubmit the TDP, which was referenced in AST's November 18 quote. In mid-January 1992, while discussing an unrelated solicitation with the procurement office, AST learned that DISC did not have its TDPs. Under a cover letter dated January 17, AST resubmitted its TDPs. In that letter, AST advised that it had made revisions to both its P/N 2000-3 and P/N 2000-4 drawings based upon the matters identified in the September 1991 letter. It also specifically requested approval based on similarity to its previously approved P/N 2000-4. By January 31, the DISC technical office forwarded the TDPs to NAVSEA requesting evaluation within 60 days and explicitly noting AST's request that the seal be approved based upon similarity. At the same time, DISC procurement and technical personnel noted that "due to low stock levels and high demand that [the] procurement should proceed normally . . . from existing valid sources."

On March 31, based on a telephone call from AST, the DISC procurement office asked the technical office whether AST's quote was acceptable. Seven weeks later, on May 21, the technical office replied that NAVSEA claimed never to have received the AST January TDPs. Duplicates were sent to NAVSEA that same day with the request that review be expedited. NAVSEA received the TDPs on May 29. Although

the technical office stated it would follow up to verify receipt on June 4, it did not verify receipt until July 15. At that time, NAVSEA stated it would be "months" before it got to the evaluation due to "considerable [evaluation] backorders."

On July 14, DISC solicited a quote from Calnevar for its own part. Based on NAVSEA's estimate of the lengthy evaluation time, DISC decided to proceed with the purchase from approved sources due to the priority of supply backorders. On July 21, DISC issued a purchase order to Calnevar at a unit price of \$275.

In an undated letter, AST was advised that a minimum of 90 days was required to complete the evaluation and that due to priority backorders, the purchase could not await the outcome of the evaluation. After AST received this letter on July 30, it protested the purchase order. Since the protest was filed more than 10 days after issuance of the purchase order, performance was not stayed.

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). Accordingly, when a contracting agency restricts contract award to an approved product, and imposes a qualification requirement, it must give nonapproved sources a reasonable opportunity to qualify. BWC Technologies, Inc., B-242734, May 16, 1991, 91-1 CPD ¶ 474. A qualification requirement is a requirement for testing or other quality assurance demonstration that must be satisfied by a prospective offeror before award of a contract. 10 U.S.C. § 2319(a).

Section 2319(b) of title 10 of the United States contains specific responsibilities for agencies imposing qualification requirements. They must provide offerors a prompt opportunity to demonstrate their qualification and must ensure that any offeror seeking qualification is promptly informed as to whether qualification has been attained, and if not, promptly furnish specific information why qualification was not attained. 10 U.S.C. § 2319(b); FAR § 9.202(a). See Rotair Indus., 69 Comp. Gen. 684 (1990), 90-2 CPD ¶ 154. Failure of a procuring agency, which is not itself responsible for the source approval evaluation, to promptly provide a request for qualification to the agency responsible for source approval can deprive an offeror of a reasonable opportunity to qualify its product and to compete for award, thereby violating 10 U.S.C. § 2319(b) and the Competition in Contracting Act. See Classic Mfg., B-249776, Dec. 14, 1992, 92-2 CPD ¶ ____.

AST contends that the government unreasonably delayed 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 agree.

AST has been actively seeking qualification of this seal for approximately 6 years. While NAVSEA has evaluated this seal and rejected it more than once, we find that the delays associated with those evaluations and the failure to advise AST of the results of those evaluations were unreasonable and that neither NAVSEA nor DISC has satisfied the requirements of 10 U.S.C. § 2319(b) and FAR § 9.202(a).

The record reflects that DISC unreasonably delayed forwarding AST's TDPs for evaluation beginning with a 5 month delay in 1986 and failed to promptly advise AST of the November 1986 recommendation to have the seal operationally tested. Similarly, DISC unreasonably delayed forwarding AST's second TDP for 5 months in 1989 and 1990. While some time is necessary for administrative processing and review, the record fails to support the reasonableness of 5 months delay.

We find that NAVSEA's 1990 rationale for rejection of the seal was inadequate to meet the specificity requirements of 10 U.S.C. § 2319(b)(6) and FAR § 9.202(a)(4). Although NAVSEA found "several" drawing errors, it provided only one vague example which did not identify the discrepant part or detail drawing. Further, both agencies unreasonably failed to forward this limited information to AST even though the protester sought it in October 1990. While, in June 1991, NAVSEA advised AST to change the type of bellows in the seal, it was not until September 1991, after a subsequent evaluation and rejection of AST's seal, that AST was informed of the earlier existing drawing errors, this time identifying the detail drawings about which NAVSEA had questions. The record provides no explanation for these delays.

With regard to the current RFQ, DISC unreasonably delayed in ensuring delivery of AST's technical data packages to NAVSEA for more than 6 months between December 1991, and May 1992. DISC does not explain why it took close to 6 weeks for it to realize that the TDPs, referenced in AST's November response to the RFQ, were missing. In view of AST's long history of attempts to qualify its seal, and the pendency of the RFQ, we believe that it was unreasonable for the agency not to even contact AST to verify the enclosure of the TDPs. Once

the replacement TDPs were submitted, we find that DISC unreasonably delayed in ensuring delivery of the TDPs to NAVSEA. Although DISC records show that it forwarded the TDPs to NAVSEA at the end of January, there is no explanation of why the DISC technical office waited until May 21 to verify receipt, despite a March 31 status request from AST and the DISC procurement office. We note further, that after retransmitting the TDPs on May 29, DISC waited until July 15 to contact NAVSEA, learning then that NAVSEA would require "months" to begin the evaluation.

We conclude that DISC unreasonably failed to promptly forward and ensure receipt of the protester's TDPs and, in conjunction with NAVSEA, failed to promptly and reasonably inform the protester of the specific reasons for its failure to attain qualification of its seal. Individually, any one of these delays or omissions could be argued to be an excusable administrative oversight. However, the cumulative effect of these repeated shortcomings in the treatment of AST's submissions, over the course of several years, deprived AST of a reasonable chance to compete. This violated the specific statutory requirements for implementing qualification requirements, 10 U.S.C. § 2319(b), as well as the general statutory requirement that agencies obtain "full and open" competition through the use of competitive procedures. Classic Mfg., supra; BMC Technologies, Inc., supra.

DISC argues that it should not be held accountable for delays prior to January 1992, because the January TDPs contained a "substantive change" over previously submitted TDPs. Previous delays in the approval process are generally not relevant to a current evaluation under revised specifications. Advanced Seal Technology, Inc., B-250199, Jan. 5, 1993, 93-1 CPD ¶ _____. However, the "substantive change" associated with the January 1992 (and apparently, the missing November 1991) TDPs concerned the drawing errors first identified in September 1990. In view of the passage of more than 1 year, and a subsequent evaluation of the seal before DISC informed AST of these deficiencies, we believe it is appropriate to consider the entire pattern of delay and lack of specific communications in reviewing the agencies' handling of AST's latest qualification request.

We are mindful of the apparent volume of qualification requests received at DISC, the number of backlogged evaluations at NAVSEA, due in part to an earlier lack of funds, and the agency's need to expeditiously supply the seals to the using activities. However, the record shows that in 1990 and 1991, NAVSEA was twice able to complete seal evaluations in less than 6 months. Further, the delays and lack of specific information were especially damaging to AST in this procurement. When NAVSEA rejected AST's seal in

September 1991, there was no mention made of any deficiency with AST's incorporation of the new bellows design. It appears that the only issues remaining are relatively minor drawing clarifications, which do not require extensive evaluation to determine whether the candidate seal is technically acceptable. Thus, had DISC been more diligent in ensuring receipt of the TDPs, between November and May, the technical evaluation should have been completed prior to the need for delivery of the seals.

Because there was no stay in performance and we understand that the seals have been delivered, we do not recommend that DLA terminate Calnevar's contract for the convenience of the government. We do recommend that prior to the award of any future contracts or purchase orders for this seal (NSN 5330-01-035-4157), AST be given a fair and reasonable opportunity to qualify its alternate product. This means that AST should be informed of all the nonproprietary requirements that its alternate product has not yet satisfied, and be given a full opportunity to respond. We also find that AST is entitled to be reimbursed for its costs of proposal preparation. 4 C.F.R. § 21.6(d)(2) (1992). In addition, AST is entitled to recover its reasonable costs of filing and pursuing the bid protest including attorneys' fees. 4 C.F.R. § 21.6(d)(1). AST should submit its certified claim for its protest costs and proposal preparation costs directly to DLA within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

for Milton J. Rowan
Comptroller General
of the United States