



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Enterprises, Inc.

File: B-251403

Date: April 1, 1993

William J. Spriggs, Esq., and David J. Taylor, Esq., Spriggs & Hollingsworth, for the protester.

David H. Doro, Esq., Department of the Air Force, for the agency.

John Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's award of a sole-source contract for the repair of F-16 head-up display optic modules is denied where the agency reasonably determined that it was necessary to limit competition in order to ensure the safe, dependable and effective operation of the modules and reasonably concluded that only the single source was qualified to repair the modules.

2. Allegation that agency should have determined that protester is a qualified source for repair of F-16 optic modules is denied where agency tested head-up display optic module which protester repaired in order to show its capability and agency reasonably determined that repaired module did not meet qualification requirement that the repaired unit "demonstrate full operational serviceability."

DECISION

International Enterprises, Inc. (IEI) protests the sole-source award of a contract to Pilkington PE LTD. under request for proposals (RFP) No. F42620-91-R-31146, issued by the Department of the Air Force for repair of F-16 head-up display (HUD) optic modules. HUD modules display flight and target information on a transparent combiner glass which is mounted within the pilot's immediate field of vision allowing the pilot to see the information while looking outside the aircraft.

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

In August 1991, the Air Force synopsized this requirement in the Commerce Business Daily (CBD), stating its intention to award a contract to Pilkington on a noncompetitive basis. The CBD notice stated that the services required were available from only one or a limited number of responsible sources and cited 10 U.S.C. § 2304(c)(1) (1988) as the authority for the proposed procurement. The notice invited potential sources to respond or submit proposals and stated that such responses would be considered by the agency in determining whether to conduct a competitive procurement.

After issuing the CBD notice, the agency finalized a Justification and Approval (J&A) for other than full and open competition. Citing 10 U.S.C. § 2304(c)(1), the J&A states that the government does not have in its possession the technical data covering repair procedures and test equipment specifications to permit development of a competitive repair package and provides that "Pilkington is the only source with complete technical data, manufacturing and repair experience who can provide for the Air Force requirements."

The agency also prepared a Repair Source Qualification Statement dated October 4, 1991, which sets forth qualification procedures for alternative sources to demonstrate their capability to repair the F-16 HUD modules. That document requires that potential offerors have equipment and data necessary for repair of the modules and, in addition, requires that a firm seeking to become qualified must demonstrate its capability by repairing one or more nonserviceable modules. The qualification document limits the repair/approval process to 120 days and allows an offeror to apply for a waiver of all or part of the qualification requirements based on previous experience repairing or manufacturing the F-16 HUD module, or a similar item.

The Air Force issued the RFP on October 25 to six firms, including IEI. The RFP contemplated award of a contract to supply the agency's requirements for HUD module repairs for a base year and 4 option years. The RFP did not refer to the October 4 Qualification Statement. Pilkington and IEI submitted a proposal before the November 26 closing date. Since IEI was not a qualified source, on January 17, 1992, the Air Force delivered to IEI a HUD module which the firm was to repair in accordance with the Qualification Statement.

In a January 31 letter concerning the RFP, IEI referenced the Qualification Statement and requested a waiver of the repair demonstration requirement based on its previous experience with the A-10 and other aircraft. By letter of April 2, the contracting officer denied IEI's waiver

request, stating that the agency did not consider IEI's "repair of the A-10 HUD a guarantee that IEI can successfully repair and test the F-16 HUD Optics Module." The April 2 letter requested that IEI satisfy the requirements of the Qualification Statement and stated that upon satisfactory approval of the repaired item and IEI's test procedures, IEI would become a qualified source.

On April 9, IEI submitted to the agency additional materials to support its request for a waiver of the qualification requirements. In an August 12 letter to IEI, the contracting officer again denied IEI's waiver request, stating that agency technical personnel had reviewed the additional materials and that the agency's "[e]ngineer does not currently consider [IEI] a qualified repair source for this item." Citing the Qualification Statement, the letter also provided: "[d]rawings, tools and test procedures need to be provided," and "IEI has had the loaned item [the repairable HUD module] for 200 days and as of this date has not provided a repaired item . . . for testing." Finally, the August 12 letter stated that the agency would continue to process the requirement on a sole-source basis until IEI demonstrated its repair capability.

On October 6, IEI returned the loaned HUD module to the Air Force. After test and evaluation of the item, by letter of November 9, the contracting officer notified the firm that "IEI is not an approved repair source. The unit received is unserviceable." The November 9 letter included a list of defects found by agency technical personnel in the HUD module repaired by IEI. The agency then awarded the contract to Pilkington on November 16.

IEI challenges the Air Force's sole-source justification.

Because the overriding mandate of the Competition Contracting Act of 1984 is for "full and open competition" in government procurements through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), this Office will closely scrutinize sole-source procurements under the exception to that mandate provided by 10 U.S.C. § 2304(c)(1). Berkshire Computer Prods., B-240327, Oct. 31, 1990, 91-1 CPD ¶ 464. The propriety of the agency's decision to procure Pilkington repair services on a sole-source basis rests on whether or not it was reasonable to conclude that Pilkington was the only available source. Id.

More specifically, IEI argues that the J&A's reliance on 10 U.S.C. § 2304(c)(1)--which allows other than full and open competition when there is only one or a limited number of responsible sources and no other services will satisfy the agency's needs--is misplaced. IEI points out that the

J&A states that the agency "does not have in its possession the technical data covering repair procedures and test equipment specifications to permit the development of a competitive repair package." IEI argues that the J&A is flawed since it does not explain what technical data the agency lacks and why the data is necessary for a competitive procurement. Moreover, according to IEI, sufficient data was readily available and was used by IEI to prepare its proposal.

IEI misreads the J&A. In addition to the language quoted by IEI, the J&A states that "Pilkington is the only source with complete technical data, manufacturing and repair experience who can provide for the Air Force requirements." Thus, the J&A does not justify the use of other than full and open competition solely on the lack of technical data; rather, the J&A also states that only Pilkington is qualified to perform the required repairs.

IEI further argues that it should have been approved as a source and allowed to compete. According to IEI, the Air Force should have waived the qualification requirement for it based on its work on other aircraft or should have concluded that IEI is qualified based on the firm's repair demonstration.

IEI's contention that the Air Force should have waived the qualification requirement is untimely. Under our Bid Protest Regulations, a protest must be filed within 10 working days of when the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1992). Here, the Air Force denied IEI's waiver request in an April 2 letter and again in an August 12 letter. In the August 12 letter, the contracting officer stated that the agency did not consider IEI a qualified repair source and that the agency would continue to process the requirement on a sole-source basis until IEI demonstrated its repair capability. Thus, IEI knew that the Air Force had rejected its waiver request at the latest when it received the August 12 letter. Since the protest was filed on November 23, this aspect of the protest is untimely.

Although IEI argues that the question of whether the qualification requirement could be waived for IEI "was still open for discussion" at a November 18 meeting, this contention is not supported by the record. The August 12 letter clearly rejected IEI's request for waiver of the qualification requirement and the agency's willingness to accommodate the protester by continuing to discuss the matter did not toll the timeliness requirements. See Phoenix Prods., Inc., B-248790; B-248791, Aug. 17, 1992, 92-2 CPD ¶ 111.

In support of its contention that it should have been considered a qualified source based on its repair of the loaned HUD module, IEI argues that it successfully completed the repair in October and that Air Force technical personnel made numerous errors in their analysis of the repaired item. IEI also maintains that it resolved all technical disputes regarding its repair procedures at a November 18 meeting with agency officials and that it should have been considered qualified after that meeting.

The October 4 Qualification Statement says that proper operation of the HUD module is "vital to the safety and operational capabilities" of the F-16 and that "[c]omplete qualification testing is necessary to assure that a product will perform properly." In addition, the Qualification Statement emphasizes that completion of the "repair source qualification requirements will ensure the government that the offeror is capable of repairing the item in compliance with the applicable technical specifications/data and within the schedule and economic constraints of the contract." The Qualification Statement also provides that the unit repaired by the offeror "shall demonstrate full operational serviceability," and that after a repaired unit is successfully evaluated it is to "be returned to Air Force inventory for issue as a serviceable asset." Finally, the Qualification Statement provides that the repair/approval process is to be limited to 120 days and that the expiration of that period without approval "shall indicate the offeror is not capable of unlimited repair of this part" and will result in disapproval of the offeror as a repair source.

The Air Force found that IEI's repair of the loaned HUD module did not meet the standards set forth in the Qualification Statement for operational serviceability. For example, the agency found that IEI's repaired module was missing potting compound and several parts: a CRT focus shim, a CRT shim clamp plate and three CRT shim mounting screws. In addition, the Air Force found that four mounting studs which connect the optical module to the electrical chassis assembly had damaged threads. The agency also found that the shipping cover on IEI's repaired module was not seated properly in the optical housing and was only held in place with one of three mounting screws, which was only screwed in halfway. Finally, according to the agency, IEI repaired a combiner lens which, pursuant to the applicable technical order, should have been replaced rather than repaired.

IEI disputes some, but not all, of these alleged defects. Nonetheless, it is our view that the criticisms listed above provided sufficient grounds for the agency to question IEI's capability to repair the HUD modules.

For instance, although IEI argues that the missing focus shim was present when it tested the module, there is no dispute that this part was missing when the module was returned. The agency explains that the absence of the focus shim prevented an air tight seal from forming and allowed moisture to contaminate the lens assembly. In addition, IEI does not deny that its HUD module was missing two other parts as well as some potting compound and that the four mounting studs which connect the optical module to the electrical chassis assembly had damaged threads. The protester does not assert that the missing parts or the potting compound were only cosmetic or otherwise were not required for proper functioning of the module. Under the circumstances, since the IEI module could not be placed in inventory for use in aircraft, we think the agency reasonably determined as a result of these defects that the module did not "demonstrate full operational serviceability," as required by the Qualification Statement.

IEI does not dispute the defects with respect to the shipping cover; rather, the protester argues that the cover simply provided protection during shipment and was not necessary for proper functioning of the module. Air Force technical personnel state that it is not possible to perform a required leak test without this part attached properly and that the condition of the IEI-repaired module caused concern over whether IEI understood this. The protester does not deny that the shipping cover was on the module when IEI received it and does not explain why it failed to properly attach the cover before returning the module. We think that this reasonably led the agency to question whether IEI had properly repaired and tested the module.

Finally, IEI does not deny that it repaired the combiner lens which, pursuant to an applicable technical order, should have been replaced. IEI explains that, instead of replacing this part, it attempted to demonstrate to the Air Force that it could be repaired with no effect on safety or performance and at considerable savings. IEI also argues that this issue should not reflect poorly on its capability to perform since it will always follow the government's stated requirements.

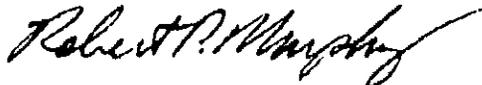
While the combiner lens may in fact be repairable, the agency explains that IEI did not request approval to change the technical order instruction to replace the part. We think the agency reasonably considered the failure to follow the technical order to be a reflection on IEI's ability to repair the module in accordance with the stated requirements.

IEI also argues that the Air Force should not have awarded the contract before the November 18 meeting. According to

the protester, it should have been considered qualified based on its explanation of its repair procedures at the meeting. Given the defects in the IEI-repaired module, we do not see how an after-the-fact-explanation could have changed the agency's decision that IEI was not qualified. In any event, IEI took from January 17 to October 5, almost 9 months, to repair the module. Since the qualification statement required repair within 120 days, we cannot conclude that the Air Force acted unreasonably in refusing to withhold the award to grant another extension to allow an explanation from IEI.

Finally, IEI argues that the J&A did not include required information and that the agency failed to adopt an acquisition plan as required by Federal Acquisition Regulation §§ 7.102 and 7.105. Since we have concluded that the Air Force's determination that IEI has not established itself as a firm qualified to repair the subject HUDs under the Qualification Statement was reasonable, we do not see how IEI could have been prejudiced by these alleged deficiencies and therefore we see no point to considering them.

The protest is denied in part and dismissed in part.



for James F. Hinchman
General Counsel