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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United Telecontrol Electronics, Inc.

File: B-253281

Date: September 8, 1993

Joseph D. West, Esq., and Susan B. Cassidy, Esq., Arnold & Porter, for the protester.
John S. Pachter, Esq., and Michael K. Love, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for Hughes Missile Systems Company, an interested party.
Major William R. Medsger, Esq., and Edward N. Scruggs, Esq., Department of the Army, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where awardee had acquired facilities of previously qualified producer, with no substantive change in employees, products, or manufacturing processes, agency reasonably determined that successor corporation met solicitation requirement that low offeror be a qualified producer.

2. Protest that agency improperly waived material solicitation requirement for only the awardee is denied where awardee did not request waiver or condition its proposal upon waiver of pilot lot testing; protester concedes that tests required are substantially equivalent to pilot lot testing; and agency reasonably determined that waiver would have no effect upon competition.

DECISION

United Telecontrol Electronics, Inc. protests the award of a contract to Hughes Missile Systems Company under request for proposals (RFP) No. DAAH01-93-R-0035, issued by the U.S. Army Missile Command. On December 15, 1992, the agency issued the solicitation for a firm, fixed-price contract for a quantity of Air-to-Air Stinger (ATAS) missile launchers, Standard Vehicle Mounted Launchers (SVML), and Electronic Component Assemblies (ECA). Clause M.3 of the solicitation,

which provided for award to the low, responsible offeror, also provided as follows:

> "The low offeror must be a qualified producer in order to receive the award. The following is the definition of a 'qualified producer.' A qualified producer is one who has completed all pilot lot inspections as required by the critical item fabrication specifications for all hardware provided by this contract."

The protester argues that Hughes has not passed pilot lot inspection, is not a qualified producer as defined by the solicitation, and was therefore not eligible for award.

We deny the protest.

Since 1984, General Dynamics has been the only qualified producer for the items solicited. General Dynamics designed the ATAS for the OH-58D helicopter in 1984 and received subsequent production contracts; General Dynamics also received production contracts for the SVML, used on Boeing's Avenger system. Both systems employ the General Dynamics-designed Stinger missile and the ECA serves as the interface between the missile launcher and the fire platform for both systems. General Dynamics qualified the SVML in 1989 and the ATAS launcher and ECA in 1990.

In December 1990, the agency awarded the protester a contract to qualify as a second source. On August 24, 1992, while the protester was in the process of becoming a qualified producer, Hughes completed a purchase of the General Dynamics Air Defense Systems Division and assumed responsibility for completion of General Dynamics' remaining production contracts.[1] On October 11, the agency's Senior Procurement Executive approved a justification and approval (J&A) for the use of other than full and open competition as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (1988 and Supp. IV 1992), authorizing the agency to restrict competition to Hughes and UTE as the only qualified producers of the ATAS, SVML, and ECA.[2]

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[1]Since the change in ownership of the facilities, the awardee has delivered 32 ATAS launchers, 86 SVML launchers, and 110 ECAs.

[2]The Commerce Business Daily notice published on August 28 did not acknowledge Hughes' purchase of General Dynamics and stated that competition was limited to General Dynamics and UTE; UTE asserts that it first became aware of Hughes' participation in the competition upon learning of the award.

The protester does not challenge General Dynamics' status as a qualified producer. The protester argues that Hughes, despite its acquisition of the qualified General Dynamics division, is not a qualified source because Hughes itself has not completed pilot lot inspection as required by the solicitation.

In corporate transfer cases, the agency must determine whether the change of location or ownership of the plant affects whether the source should continue to be identified as qualified. Silco Eng'g & Mfg. Co., B-250012.6, May 7, 1993, 93-1 CPD ¶ 372. The agency may look to the circumstances of the transfer to determine whether any factors have changed that affect the quality and reliability of the product itself; where title to the facility changes, with no substantive change in employees, products, manufacturing processes or location, the successor corporation may be determined to meet the qualification requirement. Id. The record here shows that there has been no change in facilities, personnel and processes between the predecessor corporation and the awardee. Accordingly, the agency reasonably determined that Hughes, as the successor of General Dynamics, which had passed pilot lot inspections, was a qualified producer.

The protester points out that in a cover letter to its proposal, Hughes indicates that it intends to shift final assembly and testing from Rancho Cucamonga in California to its Navajo Agricultural Products Industries (NAPI) in New Mexico and Fort Defiance, Arizona. While General Dynamics had obtained the agency's permission to move subassembly manufacturing to the NAPI facility in 1991 and has since been using that facility for production, the protester contends that even if the agency properly attributed General Dynamics' status as a qualified producer to Hughes, the NAPI facility has not been approved for final assembly and testing. In this regard, paragraph 1.11.3 of the solicitation's product assurance requirements, paragraph E.4 of the solicitation, states as follows:

> "If a facility and/or process change has occurred for any of the contract line items, the contractor shall perform pilot lot tests [in accordance with] the [technical data package] for those items, as applicable."

UTE argues that in view of its plans to move final assembly and testing from Rancho Cucamonga to NAPI, Hughes must undergo pilot lot testing; since it has not done so, it is not a qualified producer as defined by paragraph M.3.

An agency that establishes a qualification requirement has the responsibility of reexamining a qualified producer when

the firm has modified its product, or changed the material or the processing sufficiently so that the validity of the previous qualification is questionable, or it is otherwise necessary to determine that the quality of the product is maintained in conformance with the specification. FAR § 9.204(i)(1),(3). Since the agency bears the consequences if a proposed change impairs product quality, the agency necessarily has broad discretion in assessing the risk that a proposal such as Hughes', involving a change in facilities, presents, and in determining the measures necessary to insure product quality.

The record here shows that Hughes will be using the same personnel, equipment, and processes at NAPI as at Rancho Cucamonga; only the facility will change, and the facility to which Hughes plans to move is already significantly involved in production of the items. The agency has determined that, under these circumstances, periodic conformance testing and hardware requalification, instead of pilot lot testing, are sufficient to insure product quality. Since there is little substantive change proposed in the manufacturing process, we have no basis to challenge the agency's determination that full pilot lot testing is not required.

UTE argues that by not requiring Hughes to undergo pilot lot testing as contemplated by paragraph 1.11.3, the agency waived a material requirement of the solicitation.[3] As UTE points out, an award must be based upon the requirements stated in the solicitation, and agencies may not award contracts with the intention of significantly modifying them after award. Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96. The record contains no evidence, however, that the waiver of pilot lot testing constituted any such significant modification; that it provided the awardee any competitive advantage; or that it prejudiced the protester in any way.

As noted above, although it waived pilot lot testing, the agency nevertheless is requiring Hughes to conduct periodic conformance testing and hardware requalification at the NAPI facility; UTE concedes that these requirements constitute a substantial portion of the pilot lot testing required to relocate a facility.[4] The agency states that it did not

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[3]Although the agency did not waive the requirement for pilot lot testing until 2 weeks after award, the agency concedes that it was considering the waiver prior to award.

[4]UTE suggests that without waiver of pilot lot testing, the awardee cannot meet the required delivery schedule; however, UTE concedes that the actual testing can be conducted in

(continued...)

anticipate that UTE, which had only qualified as a producer 1 week prior to the submission of initial proposals, would seek to relocate the facilities that had just completed qualification; Hughes, which was still using General Dynamics' original facilities, was simply in a different position. In addition, there was no indication in Hughes' proposal that its price was conditioned upon waiver of pilot lot testing. In short, the record shows that the testing required has not been substantially modified, and there is no basis to conclude that an offer to waive pilot lot testing for both offerors would have substantially affected the competition. UTE has submitted nothing to show that the agency's determination that it was unnecessary to request revised proposals, based upon a waiver of pilot lot testing, was either unreasonable or resulted in competitive prejudice to UTE.

The protest is denied.

for James F. Hinchman
General Counsel

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[4](...continued)
6 months, which is ample to meet the schedule here. UTE asserts that it takes additional time to purchase materials, assemble manufacturing equipment, train staff and establish manufacturing processes, but there is no evidence that any of these delays will affect the awardee, which would have all of these elements in place. The record also shows that only three personnel are involved in the relocation. UTE suggests that the price impact should be measured by the nearly 50 percent decrease in the prices offered by General Dynamics and Hughes, but Hughes' price is only $4 million lower than the protester's; the historical prices of General Dynamics, prior to any movement to the lower cost facilities, and in a noncompetitive environment, are not relevant.