



Decision

Matter of: Newgard Industries, Inc.
File: B-257052
Date: August 11, 1994

Robert A. Klimek, Jr., Esq., and Lucia E. Casale, Esq., Klimek, Kolodney & Casale, P.C., for the protester. Patricia A. Engel for Oro Manufacturing Company, an interested party. Niketa L. Wharton, Esq., and Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency. Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency determination that the protester was not an approved source for a critical military item and therefore ineligible for award is unobjectionable where the item was critically needed; the determination that the protester was not approved was based on accurate, current information; and the government did not deny the protester a reasonable opportunity to have its item approved.

DECISION

Newgard Industries, Inc. protests the award of a contract to Oro Manufacturing Company under request for proposals (RFP) No. DLA460-93-R-3081, issued by the Defense Logistics Agency (DLA) for certain military aircraft seats. Newgard contends that the agency improperly rejected its offer on the basis that the company was not an approved source for the seats.

We deny the protest.

DLA issued the RFP on August 31, 1993, for certain quantities of an aircraft seat, national stock number (NSN) 1680-00-810-4774. The RFP listed two approved sources, Oro and another company; Newgard was not listed. Prior to the closing date for receipt of proposals, Newgard submitted a written request that it be added as an approved source for

¹The other company was subsequently deleted from the approved source list by an amendment to the RFP.

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Newgard part number 2WC1022R. Newgard's request stated that the company's aircraft seat "has previously been evaluated by [the San Antonio Air Logistics Center (SA-ALC)] and we have been awarded [contract No. F41608-92-C-1009] for this item." The letter appeared to suggest that the omission of Newgard's part from the list of approved sources must have been an oversight on the part of SA-ALC. Based on Newgard's request and documentation confirming that Newgard had been awarded the referenced contract, DLA amended the RFP in November 1993 to add Newgard as an additional approved source under Newgard part number 2WC1022 (that is, without the final "R" included in the part number identified in Newgard's request).

In March 1994, DLA learned that Newgard had not, in fact, delivered any aircraft seats under the referenced contract because that contract was terminated for the convenience of the government. DLA also learned that, although SA-ALC, the engineering support activity responsible for the aircraft seat, had awarded the contract cited by Newgard, the contract was terminated prior to approval of a required first article, and SA-ALC had subsequently concluded that Newgard was not an approved source for this item. On the basis of this information, DLA determined that it had erred in amending the RFP to include Newgard as an approved source.

Because the supply of these aircraft seats was very low and there was a critical need for them, the agency concluded that it could not delay the procurement in order to permit Newgard to complete the approval process. Accordingly, DLA awarded a contract to Oro on April 1.

Newgard argues that DLA improperly concluded that it is not an approved source for this item, and that this conclusion amounted to a de facto debarment. According to the protester, the information from SA-ALC upon which DLA relied was erroneous and outdated. Newgard claims that the determination that its name should not have been listed in the RFP as an approved source resulted from bias on the part of SA-ALC.

An agency imposing a qualification requirement must ensure that an offeror seeking qualification is promptly informed as to whether qualification has been obtained and, if not, promptly furnish specific information why qualification was not attained. 10 U.S.C. § 2319(b)(6) (1988); Federal Acquisition Regulation § 9.202(a)(4). Similarly, when a contracting agency restricts a contract award to approved sources, it must give nonapproved sources a reasonable opportunity to qualify. Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2.

Here, there is no evidence that the government (SA-ALC or DLA) failed to promptly advise Newgard of the basis for its item not being approved, or denied the company a reasonable opportunity to qualify.² Specifically, Newgard concedes that SA-ALC advised it in October 1989 that its seat, part number 2WC1022, was not acceptable under NSN 1680-00-810-4774 because its components were not interchangeable with those of the seat in use. At that time, SA-ALC informed Newgard that "[f]uture procurements for this part will require changes as outlined below and will require another first article submission as well as a copy of your drawings reflecting the changes."

According to Newgard, by December 1990, it had developed a seat that was fully interchangeable with the existing seat; the company assigned the interchangeable seat part number 2WC1022R. In 1992, Newgard was awarded a contract, No. F41608-92-C-1009, under which it was to supply this part. However, first article approval was never obtained because the contract was terminated for the convenience of the government in April 1993. Newgard has offered no evidence that it ever requested approval for its part number 2WC1022R after the termination of that contract in 1993, or that³ this part is currently listed as approved by SA-ALC or DLA.

DLA's determination that Newgard was not an approved source was thus not based on inaccurate or outdated information, as Newgard alleges. Rather, the prior decision to amend the RFP to list Newgard was based on the outdated and partial information provided by Newgard in its request to be listed. Specifically, while it was true, as Newgard stated in that

²The record also does not contain evidence that would establish the existence of bias, that is, evidence that the agency acted with the specific and malicious intent to harm the protester. Group Techs. Corp.; Electrospace Sys., Inc., B-250699 et al., Feb. 17, 1993, 93-1 CPD ¶ 150.

³As to Newgard's part number 2WC1022, Newgard concedes that this part does not meet the interchangeability requirement and thus is not an approved product under NSN 1680-00-810-4774, the part covered by the solicitation at issue in this protest. Newgard complains that DLA improperly listed part number 2WC1022 in the amendment to the RFP, despite Newgard's request that the allegedly interchangeable part, number 2WC1022R, be listed. Because this complaint constitutes a challenge to the terms of the solicitation and a protest of solicitation terms is required to be filed prior to the time set for receipt of proposals, this protest ground is untimely and will not be considered. See 4 C.F.R. § 21.2(a)(1) (1994).

request, that "[o]ur seat has previously been evaluated by SA-ALC," it was not true, as the letter implies, that SA-ALC considered the seat approved. Similarly, while Newgard accurately stated that "we have been awarded" a contract covering the part number at issue, that contract was terminated before first article approval. In sum, the determination that Newgard was not an approved source was based on accurate and current information, and there is no showing that the government has failed to provide the company a reasonable opportunity to have its item approved. Since the agency had a supply shortage that would not permit the time necessary for Newgard to qualify its product, Newgard's proposal was properly rejected.

The protest is denied.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel