



Decision

Matter of: Pilkington Aerospace, Inc.

File: B-259173

Date: March 13, 1995

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DIGEST

Protest that procuring agency improperly awarded a sole-source contract for advanced design windshields for the F-15 aircraft is denied where the awardee was the only available source for the windshields.

DECISION

Pilkington Aerospace, Inc. protests the award of a sole-source contract to Sierracin/Sylmar Corporation under request for proposals (RFP) No. F09603-94-R-22417, issued by the Department of the Air Force for a quick replacement windshield for the F-15 aircraft, models A through E.

We deny the protest.

BACKGROUND

The current windshield used on the F-15 aircraft, manufactured by Pilkington, which is composed of stretched acrylic, can withstand a birdstrike of approximately

*The decision issued on March 13, 1995, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions are indicated by "[deleted]."

410 knots, and takes more than 56 hours to replace. As a result of the cost and time involved in replacing the windshield, and a need for greater birdstrike protection for the F-15, in February 1990, the Air Force held a meeting with transparency manufacturers to explain that it wanted to acquire a windshield that could be quickly replaced in the field and had increased birdstrike capability. Although that effort was dropped due to a lack of engineering development funds, in November 1990, Sierracin submitted an unsolicited proposal to the Air Force for a windshield assembly¹ that had increased birdstrike capability and could be quickly replaced in the field. The Sierracin proposed windshield was to be composed of laminated polycarbonate.

After evaluating and testing Sierracin's prototype windshield, in May 1992, the Air Force published a notice in the Commerce Business Daily (CBD) of its intention to award a sole-source contract to Sierracin to develop and test the windshield. That CBD notice stated that the authority for the sole-source award was 10 U.S.C. § 2304(c)(1) (1988), and included standard note 22 stating that while the proposed contract was for supplies or services for which the government intended to solicit and negotiate with only one source, any interested person could identify its interest and capability to respond to the requirement, and all proposals received within 45 days after the CBD notice would be considered for the purpose of determining whether to conduct a competitive procurement. No offeror other than Sierracin responded to the announcement.

In July 1992, the Air Force executed a class justification and approval (J&A) to award a sole-source contract to Sierracin to develop, test, and produce a quick replacement windshield, to provide 350 production units and to provide procurement data and master tooling for future competitive procurements. The J&A concluded that a sole-source award to Sierracin was justified under 10 U.S.C. § 2304(c)(1), which authorizes the use of other than competitive procedures when the supplies or services needed by the agency are available from only one responsible source, or from a limited number of sources, and no other products will satisfy the agency's needs.

Also in July 1992, Sierracin was provided with the solicitation which included a statement of work (SOW) that required Sierracin to develop a windshield which, among other things:

¹The windshield assembly includes the windshield or transparency and the frame. This protest concerns the windshield.

1. Met the requirements for optics in McDonnell-Douglas Aerospace specification 21232.²
2. Could be replaced in the field in no longer than 8 hours.
3. Was interchangeable on all models of the F-15.
4. Had the capacity to withstand a 500-knot birdstrike by a 4-pound bird.

The solicitation also required Sierracin to provide procurement data and two sets of master tooling so that in the future the Air Force could obtain the parts on a competitive basis.

A follow-on sole-source requirement for 10 "Spare Replacement" windshield assemblies and 5 transparencies was synopsisized in the CBD in February 1994. Again, while the synopsis included note 22, only Sierracin responded to the notice. Subsequently, in July 1994, the current solicitation was synopsisized in the CBD for 35 windshield assemblies. Although the CBD synopsis again cited Sierracin as the only source for the items, and included note 22, Pilkington did not request a copy of the solicitation. Proposals under the solicitation were due on September 12. On September 1, the Air Force learned that additional funding was available so it amended the solicitation to request 325 units.³ The agency did not publish a CBD notice of the increased quantity. The sole-source contract was awarded to Sierracin in September 1994, and in October, Pilkington filed its protest with our Office.

PROTEST OVERVIEW

Pilkington protests that the sole-source award to Sierracin is improper because the Air Force did not issue an amended CBD synopsis to announce its intention to purchase 325, rather than 35, windshield assemblies. Pilkington also asserts that the Air Force cannot justify the sole-source purchase because it never stated what its needs were and

²In its unsolicited proposal, Sierracin requested that it be allowed to provide a windshield with light transmittance of 80 percent rather than the 89 percent required by the specification, and a haze factor of 3 percent rather than 2 percent as required by the specification. The Air Force agreed to these deviations but failed to include them in the SOW. The SOW was subsequently amended to include these deviations.

³The protested contract is for 273 units.

kept changing its statement of needs throughout the history of the windshield development and the protest. Pilkington asserts that it is capable of meeting the agency's needs but did not request a solicitation in response to the CBD announcements because it was not interested in supplying only 35 units and because it was waiting for the Air Force to provide a definitive statement of its requirements. Pilkington further argues that the sole-source award to Sierracin is improper because Sierracin is not capable of providing a product that meets the agency's needs.

The Air Force concedes that it should have issued a CBD notice to reflect the increase in the number of windshield assemblies it was purchasing. The Air Force argues, however, that Pilkington was not harmed by its failure to do so because Pilkington is not capable of supplying the windshields. The Air Force also asserts that Sierracin is capable of meeting its needs and that the agency properly stated those needs in the J&A and in the SOW provided to Sierracin in its development contract.

We first agree with Pilkington that the Air Force erred by failing to publish a CBD notice that reflected the increased quantity in Sierracin's contract. In this respect, when an agency relies on 10 U.S.C. § 2304(c)(1) to justify the use of other than competitive procedures, the agency must publish in the CBD a notice of the proposed procurement, 41 U.S.C. § 416(a)(1)(A) (Supp. V 1993), and such notice must include "an accurate description of the property or services to be contracted for." Reference Technology Inc., B-222487, Aug. 4, 1986, 86-2 CPD ¶ 141. We conclude that the Air Force failed to publish an accurate description since the initial CBD notice indicated that the Sierracin contract would call for 35 units while the J&A eventually justified 350 units and the contract called for 273 units. Id.

Nonetheless, as we explain below, we conclude that Pilkington was not prejudiced by the agency's failure to publish an accurate notice of its requirements since Pilkington is not capable of meeting the needs of the Air Force. We also conclude that Sierracin is capable of meeting those needs and that the agency properly stated its requirements.

ADEQUACY OF THE AGENCY'S STATEMENT OF ITS NEEDS

Pilkington argues that the Air Force cannot justify the sole-source award to Sierracin because the agency never analyzed its minimum needs for the windshield. Pilkington argues that the Air Force has continually changed its statement of its requirements for the windshield throughout the development of the windshield, and in fact, only

provided a definitive statement of its requirements on January 5, 1995, after Pilkington made repeated requests for a statement of the requirements during the protest.

Pilkington also argues that the requirements statement finally issued by the agency is flawed because it does not address compatibility of the windshield with the Heads Up Display (HUD).⁴ In this regard, Pilkington reports that at the February 1990 industry meeting, the agency stated its goal for a windshield that: (1) could be replaced in 4 hours by four servicemen and had a 4-year service life; (2) was compatible with the HUD and night vision goggles; (3) conformed to existing optical standards; and (4) was compatible with existing moldlines. Pilkington states that the agency recognized at that meeting that not all of these goals were immediately achievable and that the first stage of the planned development would be technical tradeoff studies, which Pilkington believes were never done. However, asserts Pilkington, when the agency decided to accept Sierracin's unsolicited proposal, the J&A issued by the agency included only a few of the agency's requirements: a reusable frame, and low acquisition cost and field replacement in 8 hours or less. Pilkington states that increased birdstrike capability was not listed as a reason justifying the sole-source award, but was only listed as a bonus feature and that the J&A did not state that any of the current F-15 requirements could be relaxed. Then, continues Pilkington, when Sierracin was awarded the sole-source development contract in 1992, the agency relaxed the requirements for light transmission and haze.

Pilkington argues that if the agency was making tradeoffs between birdstrike capability and other requirements that were omitted, it was required to do so in the J&A or under a competitive procurement, not throughout the procurement with Sierracin. Pilkington also asserts that it relied on the agency's statement that the requirements for light transmission and haze would not be waived in deciding not to develop a laminated polycarbonate windshield because that material would not be compatible with those requirements. In addition, Pilkington states that it was waiting for the agency to state its requirements before finalizing the development of its own windshield.

We do not agree that the agency has failed to adequately and accurately state its requirements. As Pilkington points out, on January 5, in response to a document request from

⁴The HUD displays 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.

Pilkington regarding its requirements, the Air Force sent Pilkington a letter in which it stated that its requirements were in the J&A and in the SOW in Sierracin's contract and listed the essential ones as:

1. A reusable frame with a transparency panel that could be replaced in the field in 8 hours or less.
2. The capacity to withstand a 500-knot birdstrike by a 4-pound bird.
3. Interchangeability among all models of the F-15 aircraft.
4. Master tooling and procurement data.

Pilkington states that this January 5 letter was the first time that the agency ever stated all of its requirements, and that prior to this, the Air Force kept changing the requirements. We disagree. The requirements listed in the January 5 letter were in the SOW of Sierracin's development contract. Most of those requirements were also listed in the J&A. While these requirements may be somewhat different from the goals that the Air Force stated at the February 1990 industry meeting, the Air Force was not required to adhere to those goals when it determined its actual requirements.

Pilkington also points out that the J&A did not state that any of the current requirements of the F-15 could be relaxed, but that some, such as light transmission and haze, were. The purpose of the J&A, however, was not to provide a definitive statement of the requirements that an offeror would have to meet and there is no requirement that the J&A provide such a definitive statement.

Finally, while Pilkington argues that it was waiting for the Air Force to create a final statement of its requirements for an advanced design windshield before proceeding with the development of its own windshield, the fact is that the agency did so in its SOW which Pilkington could have obtained if it had responded to the agency's CBD synopsis of the development contract with Sierracin and requested a copy of the solicitation.

PILKINGTON'S ABILITY TO MEET THE REQUIREMENTS OF THE SOLICITATION

As explained above, the Air Force issued a J&A under 10 U.S.C. § 2304(c)(1), providing for the award of a sole-source contract for the windshield on the basis that only Sierracin could meet its requirements. As stated in the

J&A, the requirements used to justify the sole-source acquisition included the ability to withstand a 500-knot birdstrike by a 4-pound bird,⁵ replacement in the field in no more than 8 hours and interchangeability on all models of the F-15. The J&A covered development and testing and 350 production units, the number of windshields that the Air Force believed it would need in 2 years, which was the time the Air Force estimated it would take to qualify another source and obtain windshield assemblies under a competitive procurement.

Pilkington argues that the sole-source contract with Sierracin is improper because Pilkington is also capable of meeting the agency's needs. According to Pilkington, it has [deleted] that will meet the agency's needs for birdstrike resistance at 500 knots, interchangeability between all models of the F-15, and replacement in less than 8 hours. Pilkington explains that it has been working on these [deleted]. Pilkington further states that even if the Air Force only wants [deleted] Sierracin's development contract. Finally, Pilkington asserts that, even if the Air Force is justified in purchasing some units from Sierracin on a sole-source basis, it has no need to purchase 350 units as permitted by the J&A.

The Air Force responds that Pilkington has not provided any documentation to support its assertion that it has [deleted] that will meet its needs. Regarding the [deleted] the Air Force asserts that while Pilkington states that it has been tested for birdstrike capability [deleted] the windshield. The Air Force also has provided test data to demonstrate that [deleted]. In addition, the Air Force questions Pilkington's ability to meet the 8-hour replacement time and the interchangeability requirement.

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA permits noncompetitive acquisitions in specified circumstances such as when the items needed are available from only one responsible source. 10 U.S.C. § 2304(c)(1); The Entwistle Co., B-249341, Nov. 16, 1992, 92-2 CPD ¶ 349. Our Office held a hearing on this protest

⁵While this requirement was stated in the J&A under the heading "OTHER FACTS SUPPORTING USE OF THE EXCEPTION" to the requirement for competitive procedures rather than under the heading "DEMONSTRATION THAT AUTHORITY IS APPROPRIATE," we disagree with Pilkington that it was not a basis for justifying the sole-source award to Sierracin.

on February 16, 1995.⁶ Based on our review of the protest record, including testimony at the hearing, we conclude that the Air Force properly awarded the contract to Sierracin on a sole-source basis because only Sierracin could provide a windshield meeting its needs.

At the hearing, a Pilkington representative testified as to how far the firm has come in developing on its own a windshield that will meet the agency's needs. Pilkington also acknowledged, however, that it does not have a product on the shelf now. Tr. 300. Pilkington's representatives stated that Pilkington could have [deleted]. Air Force officials testified that because of the critical nature of the windshield, the agency will only purchase windshields from a source that has been qualified. Tr. 77. Air Force officials also explained that the 350 production units were called for by the J&A because there are currently no windshields in stock for the F-15, Tr. 45, and it will take 2 years to qualify a new source and obtain units under a competitive procurement. Tr. 60, 85-86.

The 350 production unit requirement is based on a need for 110 windshields per year for depot level maintenance and a minimum of 65 units per year for field use. Tr. 43, 61-62. Testimony of agency officials and other information in the record shows that the 2-year period is based on 2 months for birdstrike testing, 1 month for optical testing, 1 month for a trial installation, 1 month for kit proofing, 12 months for flight evaluation, 6 months for contract award and 2 months for asset delivery. Tr. 58-60, 87-88. An Air Force official testified that these time periods, which are based on the agency's previous experience with F-15 windshields and similar parts, include not only the time for testing but also the time needed for such things as making arrangements for testing and transporting samples. Tr. 86, 94. Air Force officials stated that the test requirements here would be required for any new windshield, [deleted]. In this regard, the agency explained that the Sierracin data package does not contain manufacturing techniques or Sierracin proprietary data. Tr. 70-71. Rather, the data, when it is released to Pilkington and other potential sources, will provide some measurements and will call out some materials, but it will be up to Pilkington to come up with its own windshield. Tr. 70-71, 131-132.

Even assuming that the Air Force can perform some of these steps in a shorter period of time, cognizant Air Force officials have testified that 12 months is the absolute minimum time for flight testing. Tr. 85, 116-118. While

⁶Tr. is used to designate citations to the transcript of the hearing.

Pilkington argues that this time can be shortened because in the past not all items were flight tested for 12 months and because it is not a written standard, the requirement for testing generally is a matter within the competence of the contracting agency, so that we will not disturb the agency's position in that respect in the absence of evidence indicating the position is unreasonable. Hill Aviation Logistics, 67 Comp. Gen. 244 (1988), 88-1 CPD ¶ 140. Here, nothing in the record establishes that 12 months is not the time which the Air Force currently uses for flight testing windshields and other critical parts and nothing demonstrates that 12 months of flight testing would be unreasonable.

Twelve months for flight testing plus the additional 4 months Pilkington has stated it will take to complete the [deleted]. That leaves an additional 8 months in the 2-year timeframe during which the Air Force must test the windshield for birdstrike resistance and compliance with the optical specification, do a trial installation and kit proofing, conduct a procurement and receive delivery of the windshields, tasks which the Air Force estimated would take 13 months. If we assume as Pilkington argues, that the agency can accelerate these steps, it is not likely that it could accelerate the process by more than 5 months. Accordingly, we find that the Air Force can purchase 2 years of its requirements or 350 windshields on a sole-source basis because Pilkington will not be able to deliver windshields meeting the specifications in that timeframe.⁷

While Pilkington asserts that the Air Force could purchase the windshields that it currently uses from Pilkington and delay its procurement of the new windshields while Pilkington becomes qualified, the fact is that the windshields previously supplied by Pilkington no longer meet the agency's requirements. We see no reason for the Air Force to purchase windshields that do not meet its needs because Pilkington chose not to request the development solicitation and attempt to qualify its own windshield starting as early as May 1992. In this regard, we are not suggesting that Pilkington could only develop a new windshield under a development contract with the Air Force. However, at some point, if Pilkington wanted to be able to compete for the agency's requirements for advanced design

⁷Since Pilkington has stated that it can provide a prototype laminated polycarbonate windshield within 1 year after it receives Sierracin's data from the Air Force and this version also would have to undergo testing, including 1 year of flight testing, Pilkington also cannot have the laminated polycarbonate windshields available in the 2-year time period.

windshield production units, it should have informed the Air Force it was developing a windshield and should have attempted to have its part qualified. By failing to attempt to qualify its windshield earlier, Pilkington accepted the risk that the Air Force would release a solicitation and Pilkington would not be able to provide its windshields in a timely manner.

SIERRACIN'S ABILITY TO COMPLY WITH THE SPECIFICATIONS

Pilkington also argues that Sierracin's windshields do not meet Air Force requirements for compatibility with the HUD. As discussed above, the SOW for Sierracin's contract requires Sierracin to provide windshields that comply with McDonnell-Douglas optical specification 21232. This specification includes requirements for angular deviation⁹ and the interface of the windshield and the HUD. The windshields provided by Sierracin meet the optical specification governing the HUD that is contained in Sierracin's contract. After the contract was awarded, however, the Air Force decided that angular deviation should be measured from the point of view of the pilot rather than perpendicular to the windshield, as it had been in the past and requested McDonnell-Douglas to develop a new specification. Pilkington protested that the award to Sierracin is improper because the Sierracin windshields do not meet the revised requirements. At the hearing, however, Air Force representatives testified that there is no revised specification. Tr. 330-331, 362-366. Rather, the agency is currently considering what the new specification should be.

⁸Pilkington argues that the Air Force has not demonstrated any urgency for the acquisition of the advanced design windshields. Nonetheless, since the sole-source is based on 10 U.S.C. § 2304(c)(1), which allows a noncompetitive procurement where only one source is available, there was no requirement that the agency demonstrate urgency, as it would if the authority cited had been 10 U.S.C. § 2304(c)(2), which permits noncompetitive procurements in circumstances of unusual and compelling urgency.

⁹Angular deviation is the measurement of how much light bends when it passes through a curved optical surface.

Therefore, there is no merit to this allegation since Sierracin is only required to meet the specifications in its contract.

The protest is denied.

Robert P. Murphy
General Counsel