DOCUMENT RESUME

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[Protest against a Qualified Products List Requirement in a Solicitation]. B-188780. September 15, 1977. 6 pp. + enclosure (1 pp.).

Decision re: Air Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: General Services Administration.
Authority: Armed Services Procurement Act of 1947 (10 U.S.C. 2305). Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253). 4 C.F.R. 20.2(b)(1, 2). A.S.P.R. 1-1103. A.S.P.R. 3-807.1(b)(1)a. F.P.R. 1-2.404-1, 2. 54 Comp. Gen. 973. 36 Comp. Gen. 809. 43 Comp. Gen. 223. 55 Comp. Gen. 374. B-180732 (1975). B-181971 (1975). B-182091 (1975). B-188131 (1977). B-185684 (1976). Defense Standardization Manual 4120.3-M.

The protester objected to a qualified products list (QPL) requirement in a solicitation. The protest was timely since it was filed prior to bid opening. The record indicated that there was a reasonable basis for the QPL requirement and that the requirement did not unreasonably limit competition. Since the record does not show a deliberate or conscious attempt to preclude the protester from competing and since adequate competition was obtained, the protest was denied. (Author/SC)

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-188780 DATE: September 15, 1977

MATTER OF: Air Inc.

DIGEST:

1. Protest against qualified products list (QPL) requirement in solicitation is timely when filed prior to date for bid opening even where QPL requirement for product had been in effect for years, since protest concerns inclusion of QPL requirement into specific solicitation.

2. Where agency complied with applicable qualified products list (QPL) procedures, there were three manufacturers whose products were on QPL and record indicates reasonable basis for QPL requirement, GAO will not object to determination to utilize QPL requirement.

3. Since record does not show deliberate or conscious attempt to preclude protester from competing through alleged improper handling of application for qualified products list approval and adequate competition was obtained, protest is denied conditioned upon contracting officer determining reasonableness of responsive bids.

The General Services Administration (GSA) issued invitation for bids (IFB) FTAP-B5-95032-EA on March 7, 1977, for a requirements contract for pneumatic tools. The IFB required that items 15 and 16, pneumatic needle scalers, be on a qualified products list (QPL).

Air Inc. (Air) protests, by letter filed in our Office on April 6, 1977, against the QPL requirement on the grounds that (1) it unfairly restricts competition and (2) Air's request for qualification approval was improperly handled, which excluded it from competition.

Since the QPL was handled by the Department of the Navy Navy Ship Engineering Center, the Naval Sea Systems Command (NAVSEA) responded to the protest rather than GSA.

Timeliness of Protest

NAVSEA first contends that the portion of Air's protest concerning the QPL requirement is untimely under our Bid Protest Procedures which provide that protests other than those based upon alleged improprieties in the solicitation "* * * shall be filed not later than 10 days after the basis for protest is known or should have been known." 4 C.F.R. § 20.2(b)(2) (1977). NAVSEA contends that since Air was aware of the QPL requirement as early as 1975, when it first requested testing, that part of the protest is untimely.

However, Air's protest here concerns the inclusion of the QPL requirement in the subject IFB. Therefore, it is a protest of an alleged impropriety in the solicitation, and as such comes within 4 C.F.R. § 20.2(b)(1) (1977), which requires that such protests be filed prior to the bid opening date. Since the bid opening date was April 8, 1977, and Air's protest was filed on April 6, it is timely.

Restrictiveness of QPL Requirement

Air supports its contention that the QPL requirement is unfairly restrictive of competition by asserting that there was only one manufacturer, the Ingersoll-Rand Company (Ingersoll-Rand), whose product was on the QPL at the time the IFB was issued. Air also points out that its bid was $43 per unit while the next low bid was $104.89 per unit.

NAVSEA, in justifying the QPL requirement, states that the Navy had procured needle scalers for several years without a qualified product specification and during that time had experienced numerous and continued field failures. Consequently, it determined that qualified product testing was necessary to prevent premature replacement of needle scalers and to reduce work delays caused by the failure of scalers. NAVSEA further states that equipment necessary for testing scalers is only available at the Philadelphia Naval Shipyard and that is justification for placing the scalers on a QPL under Armed Services Procurement Regulation (ASPR) § 1-1103 (1976 ed.), which, in pertinent part, provides:

> "* * * [A] qualification requirement may be included in a specification when one or more of the following conditions exist.
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> * * * * *
>
> "(ii) Quality conformance inspection would require special equipment not commonly available."

Additionally, NAVSEA notes that by the date of bid opening there were three firms on the QPL and all submitted responsive bids. Thus, NAVSEA contends there was adequate competition as defined by ASPR § 3-807.1(b)(1)a (1976 ed.), which in pertinent part, provides:

> "Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's (e.g., the Government's) requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting priced offers responsive to the expressed requirements of the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the foregoing conditions (i) through (iv) is satisfied."

NAVSEA recognizes that, while this definition of competition is specifically applicable to negotiated procurements, the conditions of the definition were present in the immediate procurement.

Our Office has consistently held that the QPL method of procurement, while inherently restrictive of competition, is ordinarily proper in view of the authority contained in the Armed Services Procurement Act of 1947, 10 U.S.C. § 2305 (1970) and the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 253 (1970), which vest agencies with a reasonable degree of discretion to determine the extent of competition that may be required consistent with the agency's needs. 36 Comp. Gen. 809 (1957); 43 id. 223 (1963); D. Moody & Co., Inc.; Astronautics Corporation of America, B-180732, B-181971, B-182091, July 1, 1975, 75-2 CPD 1.

In the present case, NAVSEA has complied with ASPR § 1-1103 as required. Additionally, since there were three suppliers whose products were on the QPL, the opportunity for competition was present. See 45 Comp. Gen. 365, 367 (1965). Moreover, the Government does not violate the letter or the spirit of the competitive bidding statutes where only one firm can supply its needs, provided the specifications are reasonable and necessary for the purpose intended. Ibid. The record indicates a reasonable basis for the Navy's determination to have a QPL requirement in this case. Therefore, our Office will not object to the agency's determination. See Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232. Further, in connection with Air's contention that the contract award to the successful bidder will result in a higher cost to the Government than an award to Air (whose bid does not comply with the QPL requirement), it has been the position of our Office and the courts that the strict maintenance of the competitive bidding procedures required by law in the

letting of public contracts is infinitely more in the public interest than the obtaining of a possible pecuniary advantage in a particular case by violation of the rules. Marsh Stencil Machine Company, B-188131, March 23, 1977, 77-1 CPD 207.

Alleged Mishandling of Air's QPL Request

Air contends that NAVSEA mishandled its request to have its needle scalers tested for possible inclusion on the QPL. Air first requested an inspection of its facilities on November 11, 1975. NAVSEA requested the Defense Contract Administration Services (DCAS) to inspect Air's manufacturing facility. DCAS visited the plant on December 1, 1975. At that time, Air requested that the inspection be postponed until March 1, 1976, when Air would actually be producing needle scalers. NAVSEA states that a DCAS representative repeatedly attempted to reschedule the inspection but that each time further postponements were requested by Air. Air, however, states that no rescheduling attempts ever took place.

NAVSEA notified Air on August 11, 1976, that its facilities had been judged insufficient to manufacture pneumatic needle scalers in accordance with the applicable specification. This determination was made on the basis of the DCAS visit of December 1, 1975.

Air renewed its request for inspection on February 11, 1977. DCAS surveyed the facilities during a production run and determined that they were adequate for producing the needle scalers. This, however, occurred subsequent to the date of bid opening on the present solicitation. The DCAS report of survey was sent to NAVSEA on April 22, 1977. The scalers were tested next and, according to Air, QPL approval was given on June 3, 1977.

Air states that it cannot prove that there was a deliberate plan to exclude it from award under this solicitation, but it points to the following facts as showing that its QPL application was improperly handled so as to effectively exclude it from consideration for award.

First, Air claims that there has been no change in its operations from the time of the initial QPL request, inspection and subsequent rejection to the present request and inspection; yet the present request led to approval of its facilities after the date for bid opening and after this protest was filed. Air also argues that the time taken for the current inspection and approval was unreasonably long. Air points out that the Qualification Requirements Support Data Format lists seven firms as "potential suppliers" of pneumatic needle scalers, but does not list Air,

which had been a major supplier prior to 1974. Finally, Air states that the original solicitation for this item, which did not require QPL approval, was withdrawn with no award when Air appeared to have submitted the low bid.

NAVSEA states that the QPL requirement was instituted and administered in accordance with ASPR section I, part 11, and chapter IV of the Defense Standardization Manual 4120.3-M (1972). NAVSEA notes that potential suppliers of pneumatic needle scalers have had approximately 4 years to qualify their products and that NAVSEA has periodically advertised the QPL requirements in the Commerce Business Daily. NAVSEA states that it cannot be blamed for Air's lack of diligence in requesting testing and DCAS's inability to schedule an inspection to coincide with a major production run, as Air requested, prior to the solicitation. Additionally, NAVSEA asserts that the time taken to process Air's present QPL request has not been unreasonable in light of the February 11, 1977, request date, the April 8, 1977, bid opening date, and the time required to conduct an inspection of the manufacturing facilities and to test samples of the product.

We have held that inadvertent actions of an agency which preclude a potential supplier from competing on a procurement do not constitute a compelling reason to resolicit so long as adequte competition was generated and reasonable prices were obtained and there was no deliberate or conscious attempt to preclude the potential supplier. Scott Graphics, Inc., et al., 54 Comp. Gen. 973 (1975), 75-1 CPD 302; Valley Construction Company, B-185684, April 19, 1976, 76-1 CPD 266.

The existence of three responsive bids may be deemed adequate competition. See Valley Construction Company, supra. The reasonableness of the prices on the bids is a matter for determination by the contracting officer. Federal Procurement Regulations §§ 1-2.404-1(b)(5) and 1-2.404-2(c) (1964 ed. amend. 121). There is nothing in the record which indicates that the contracting officer has made any determination in that regard. As to whether there was a deliberate or conscious attempt to preclude Air from competing on the procurement, NAVSEA, as it contends, appears to have instituted and administered the QPL requirement according to the applicable procedures. It does not seem unreasonable for the QPL testing of Air's product to have been incomplete by April 8, 1977, the date of bid opening, when the request was made on February 11, 1977. Further, as NAVSEA stresses, QPL testing has been available for 4 years. Thus, potential suppliers have had ample time to satisfy the requirements prior to this solicitation.

We assume that Air's allegation that its manufacturing facilities had not changed between the initial unfavorable DCAS inspection and the subsequent favorable inspection is meant to cast doubt on the accuracy of DCAS's initial inspection. While there may not have been any significant difference in the basic facilities, Air overlooks the fact that the December 1, 1975, inspection, unlike the subsequent inspection, did not take place during a production run, which Air believed was necessary for a fair evaluation. Consequently, the different findings appear reasonable.

Also, the fact that Air was not listed on the "potential suppliers" list is not an indication that the Navy intended to exclude it from competition, since Black & Decker Manufacturing Company, the low responsive bidder under the IFB, was not listed either.

Finally, the withdrawal of the original solicitation under which Air was the low bidder does not establish an intent to exclude Air from competing on the present solicitation.

Accordingly, the protest is denied on the grounds considered. However, as noted above, the record is silent as to the contracting officer's position regarding the reasonableness of the responsive bids and this decision does not take that aspect into consideration. By separate letter of today we are bringing the latter matter to the attention of GSA for its consideration in acting upon the IFB.

P. F. Kelly

Deputy Comptroller General
of the United States

W. Wotherspoon
Proc. I

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-188780

September 15, 1977

The Honorable Joel W. Solomon
Administrator, General Services
Administration

Dear Mr. Solomon:

Enclosed is a copy of our decision of today in the matter of Air Inc.

As indicated in the decision, it is being brought to the attention of GSA because the record is silent as to the contracting officer's position concerning the reasonableness of the responsive bids and a determination in that regard should be made before acting upon the invitation for bids.

Sincerely yours,

R.F. Keller

Deputy Comptroller General
of the United States

Enclosure