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Decision

Matter of: Rotair Industries, Inc.

File: B-409950

Date: September 25, 2014

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Michael J. Kraycinovich, Esq., Debra J. Talley, Esq., and Patrick G. Nelson, Esq., Department of the Army, for the agency.
Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester’s contention that the agency unreasonably delayed acting on the protester’s request to become an approved source is denied where the record shows that the delay was not unreasonable.
 2. Agency is not required to delay award of a contract under a solicitation limited to approved sources in order to permit an offeror to become an approved source.
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DECISION

Rotair Industries, Inc., of Bridgeport, Connecticut, protests the award of a contract to Overhaul Support Services, LLC, of East Granby, Connecticut, under request for proposals (RFP) No. W58RGZ-13-R-0272, which was issued by the Department of the Army, Army Material Command, for maintenance and repair of helicopter drag braces. Rotair argues that it was not afforded a reasonable opportunity to meet the solicitation requirement for approval prior to award.

We deny the protest.

BACKGROUND

On May 16, 2013, the Army executed a justification and approval (J&A) authorizing a competition limited to two approved sources for maintenance and overhaul of drag braces for the Blackhawk weapons system, national stock number 1620-01-523-0905, citing the authority at 10 U.S.C. § 2304(c)(1), and Federal Acquisition

Regulation (FAR) § 6.302-1. RFP at 6; Agency Report (AR), Tab 2.6, J&A, at 2. The J&A stated that a drag brace is classified as a critical safety item, and thus only approved sources for maintenance and overhaul were eligible for award. AR, Tab 2.6, J&A, at 2. The J&A identified the two approved sources as Sikorsky Aircraft Corp. and Overhaul, and stated that “[t]o date, no other sources have expressed an interest in this acquisition.” Id. at 3. The J&A also provided the following regarding the qualification of new sources:

Should a new source(s) become qualified via the SAR [source approval request] process during the contract period of performance, the requirement for future orders will be reviewed. If a new requirement can be validated, a new contract package will be processed and the new source(s) will be given an opportunity to compete for the award.

Id. at 3.

On June 4, Rotair asked the Army about the status of solicitation. AR, Tab 4.3, Email from Rotair to Contract Specialist (June 4, 2013). The same day, the Army notified Rotair that the solicitation had not yet been issued. AR, Tab 4.3, Email from Contract Specialist to Rotair (June 4, 2013). The agency also informed Rotair that although it would be permitted to submit a proposal, the proposal would not be evaluated unless the protester became an approved source before contract award. Id. On June 7 and June 13, the protester requested information required to submit its source approval request (SAR) package. On June 13, the agency provided some, but not all of the requested information, and directed the protester to contact other individuals for the missing information.

The agency issued the RFP on June 11, which listed Sikorsky and Overhaul as approved sources. On July 9, Rotair received the additional solicitation documents that it had requested. Protest at 2. Rotair submitted its proposal for the solicitation on July 15. AR, Tab 2.2, Rotair’s Proposal. Rotair, however, did not submit its SAR package until January 29, 2014, which was received by the agency on February 3. AR, Tab 1.8, Rotair SAR Package; Contracting Officer’s Statement at 2.

On May 2, the agency awarded a 5-year indefinite-delivery, indefinite-quantity contract to Overhaul. AR, Tab 1.11, Notice of Award; Tab 5, Overhaul Contract, at 3. Although the contract is for maintenance and overhaul of the full quantity of 1,224 drag braces authorized under the J&A, the agency notes that the J&A requires the agency to allow other sources to compete for orders, in the event they

later become qualified as approved sources. Contracting Officer's Statement at 2; AR, Tab 2.6, J&A, at 3.¹

On May 5, Rotair filed an agency-level protest challenging the award to Overhaul, arguing that the procurement should be suspended until Rotair is provided an opportunity to become an approved source for drag brace maintenance and overhaul. AR, Tab 1.1, Rotair's Agency-Level Protest (May 5, 2014). The Army denied Rotair's protest, explaining that the protester's SAR package had not been approved at the time of award, and that the agency therefore could not consider the protester an approved source. AR, Tab 1.3, Agency-Level Protest Decision (June 10, 2014), at 2. This protest followed.

As discussed in detail below, Rotair was not qualified as an approved source at the time of award, nor has it become an approved source. Supp. Contracting Officer's Statement (Aug. 25, 2014) at 1. The Army began the review of the protester's SAR package on April 28. Supp. Contracting Officer's Statement at 1. On August 15, the agency advised the protester that the review of its SAR package was placed "on hold" because the package did not meet the requirements of applicable maintenance engineering orders and maintenance work requirements. Letter to Rotair from Army Engineering Directorate (Aug. 15, 2014), at 1. The agency therefore requested additional information and revisions in six areas, including information concerning utilization of subvendors, measurement procedures, and compliance with certain orders and requirements. Id. at 1-3. The agency advised the protester it must respond to the request for additional information and revisions within 60 days, or the agency would no longer consider the SAR package. Id. at 3.

DISCUSSION

Rotair argues that the Army did not provide a reasonable opportunity to become an approved source for maintenance and overhaul of drag braces. The protester also contends that the agency's award was improper because it was based on an outdated J&A that incorrectly stated that the agency had not received expressions of interest from non-approved sources. For the reasons discussed below, we find no basis to sustain the protest.

The Competition in Contracting Act of 1984 (CICA) requires agencies to obtain full and open competition in procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A). An exception to this general requirement is where there is only one responsible source, or a limited number of sources, able to meet the agency's requirements. 10 U.S.C. § 2304(c)(1); HEROS, Inc., B-292043, June 9,

¹ The Army also states that although it currently has a backlog of 579 drag braces in need of repair, its plans to place an initial order with Overhaul for only 300 braces. Contracting Officer's Statement at 4.

2003, 2003 CPD ¶ 111 at 6. This is the exception cited in the J&A here. AR, Tab 2.6, J&A, at 2.

CICA further states, however, that noncompetitive procedures may not be used due to a lack of advance planning by contracting officials. 10 U.S.C. § 2304(f)(5); New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6; TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700 at 5. Our Office has recognized that the requirement for advance planning does not mean that such planning must be completely error-free, but, as with all actions taken by an agency, the advance planning required under 10 U.S.C. § 2304 must be reasonable. WorldWide Language Resources, Inc.; SOS Int'l Ltd., B-296984 et al., Nov. 14, 2005, 2005 CPD ¶ 206 at 12.

In addition, when a contracting agency restricts a contract to an approved product or source, and uses a qualification requirement as the basis for that restriction, it must give other offerors a reasonable opportunity to qualify. Barnes Aerospace Grp., B-298864, B-298864.2, Dec. 26, 2006, 2006 CPD ¶ 204 at 3; see 10 U.S.C. § 2319(b). This opportunity to qualify includes ensuring that an offeror is promptly informed as to whether qualification has been attained and, if not, promptly furnishing specific information about why qualification was not attained. Advanced Seal Tech., Inc., B-250199, Jan. 5, 1993, 93-1 CPD ¶ 9 at 3. Failure to act upon a potential offeror's request for approval within a reasonable period of time deprives the requester of an opportunity to compete and is inconsistent with the CICA mandate that agencies obtain full and open competition through the use of competitive procedures. Barnes Aerospace Grp., supra; Advanced Seal Tech., Inc., supra.

Rotair first contends that the Army failed to provide the company a reasonable opportunity to be qualified as an approved source for maintenance and overhaul of drag braces. Specifically, Rotair noted that the agency delayed approximately 30 days in providing the protester all of the specifications needed to prepare its SAR package. Protest at 9. Rotair contends that this delay, combined with the agency's unwillingness to delay contract award until after completion of its review of the protester's SAR package, unreasonably deprived Rotair of an opportunity to compete. Id. We find no merit to the protester's arguments.

As discussed above, Rotair requested the Army provide the necessary documents to prepare and submit a SAR package on June 7, 2013. AR, Tab 1.6, Email from Rotair to Contract Specialist (June 7, 2013). The agency acknowledges that it did not provide all of the required information until July 9. Contracting Officer's Statement at 2. The protester, however, did not submit its SAR package until January 29, 2014 (which was received by the agency on February 3)--almost 7 months later. Id.

Additionally, the Army advises that Rotair's SAR package was "prioritized" for review on February 28, that the SAR package was moved "to the top of the list of unsolicited SARs" for review on April 24, and that the review process of Rotair's SAR package began on April 28. Supp. Contracting Officer's Statement (Aug. 25, 2014) at 1. As discussed above, the Army awarded the contract on May 2. Subsequent to the award, on August 15, the agency sent Rotair an "on hold" letter because its SAR package did not meet certain requirements. Letter to Rotair from Army Engineering Directorate (Aug. 15, 2014), at 1-3. The agency requested that Rotair address the outlined issues and submit corrected documents within 60 days. Id. at 3.

Although the record shows that the Army delayed in providing data to Rotair that was required for the preparation and submission of its SAR package, the protester was nonetheless responsible for the majority of the delay in submitting the SAR package to the agency. In light of the protester's delay in submitting its SAR package, and the agency's subsequent efforts to review that package, we find no basis to conclude that the agency failed to meet its obligation to provide Rotair with an opportunity to become an approved source.

Rotair next contends that the Army was required to delay award of this contract until the agency completed the review of the protester's SAR package. As discussed above, a potential offeror may not be denied the opportunity to submit an offer for a contract solely because the potential offeror is not an approved source; similarly, a prospective offeror must be provided an opportunity to be qualified as an approved source. 10 U.S.C. §§ 2319(b), (c)(3).

The protester's argument here, however, raises a separate question--whether the agency must delay award of a contract in order to allow an offeror an opportunity to become qualified. As our Office has recognized, the approval process for critical safety items used in aviation can be involved. See Barnes Aerospace Grp., supra, at 6. In addition, the applicable statutes and regulations expressly provide that agencies need not delay proposed procurements in order to provide potential offerors enough time to become qualified. 10 U.S.C. § 2319(c)(5); FAR § 9.202(e). Accordingly, we cannot conclude that the Army acted improperly by not delaying the award here.

Finally, Rotair contends that the award to Overhaul was improper because the J&A restricting the competition to approved sources inaccurately stated that there were no pending expressions of interest by non-approved sources. The protester is correct that the May 16, 2013, J&A's findings regarding expressions of interest was outdated as of the time the agency awarded the contract to Overhaul on May 2, 2014--as shown by the protester's own expression of interest. The J&A, however, concerned the issuance of a solicitation that was limited to two approved sources. AR, Tab 2.6, J&A, at 2. Based on the J&A's authority, the solicitation stated that the competition was limited to approved sources for drag brace maintenance and

overhaul. RFP at 2. Thus, at the time the solicitation was issued, the J&A's statement concerning the absence of other expressions of interest was accurate.

Because Rotair was not an approved source at the time of award, the agency could not make award to that firm in accordance with the terms of the solicitation. AR, Tab 1.3, Agency-Level Protest Decision (June 10, 2014), at 2. Moreover, as discussed above, the agency was not required to delay the award until the review of the protester's SAR. For this reason, we do not think that Rotair's submission of a SAR package provides any basis to challenge the agency's award under the terms of the J&A or the solicitation.

The protest is denied.²

Susan A. Poling
General Counsel

² We note for the record that the J&A provides for the consideration of newly-approved sources after award. In the event new sources, such as Rotair, are qualified, the agency is obligated to consider "the requirement for future orders." AR, Tab 2.6, J&A, at 3. As noted above, the agency's initial order to Overhaul did not include repair and overhaul of the full quantity of drag braces authorized by the J&A. Contracting Officer's Statement at 4.