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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Microwave Corporation

File: B-251673

Date: March 25, 1993

Howard Cohen for the protester.
Charles J. Roedersheimer, Esq., and Vasso K. Monta, Esq.,
Defense Logistics Agency, for the agency.
Andrew T. Pogany, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Where contracting agency restricts a procurement to approved products, it must give offerors proposing alternate products a reasonable opportunity to qualify. Agency delay of approximately 1 year to obtain necessary technical drawings and to draft first article requirements which would permit alternate sources to compete is unreasonable and improperly deprived alternate source offeror of the opportunity for contract award.

DECISION

General Microwave Corporation protests the award of a contract to Frequency Sources, Inc. under request for proposals (RFP) No. DLA900-92-R-A285, an approved source solicitation, issued by the Defense Electronics Supply Center (DESC), Defense Logistics Agency, for a radio frequency switch. General alleges that it was not afforded a reasonable opportunity to meet the solicitation requirement for approval of its alternate product prior to award.

We sustain the protest.

BACKGROUND

The radio frequency switch, national stock number (NSN) 5985-00-321-7640, is used by the Department of the Air Force in its electronic countermeasure (ECM) system on various aircraft. The ECM system is an aircraft masking device that generates radio frequency signals to shield aircraft from enemy radar. The radio frequency switch is located inside a pod which is part of the ECM system and serves the function of selectively directing the radio

frequency signals generated by enemy radar to the appropriate ECM system components that activate the masking functions. The technical requirements for this item are contained in Westinghouse Corporation drawing No. 581R128, which lists three approved sources; Westinghouse Electric Corporation, Hyletronics Limited Partnership, and Crown Microwave, Inc. The Westinghouse drawing calls out various other drawings which are necessary for a complete description of the item. One of drawings called out is PDS21917, which is classified. The agency considers the radio frequency switch a critical weapons system item.

Prior to February 1992, supply management responsibility for this item was with Warner-Robins Air Logistics Command, Robins Air Force Base, which also served as the engineering support activity (ESA) responsible for engineering and technical assistance, including the development of technical data and engineering criteria, and for rendering technical decisions in management of the item. In February 1992, management of this item was transferred to DESC as part of the Department of Defense Consumable Item Transfer (CIT) program;¹ the ESA function was transferred from Warner-Robins Air Logistics Command to Wright-Patterson Air Force Base.

At the time of the transfer of functions, the coding of the item--identifying whether the item can be purchased through open competition or restricted to certain sources--showed that the government possessed a complete technical data package allowing for full and open competition. Records furnished by Warner-Robins state that the technical data was shipped to "DLA" (presumably DESC) at the time of transfer. DESC states that due to many problems encountered with the transfer of CIT items generally, it did not actually receive any information on this NSN item other than the stock and part number.² Consequently, DESC changed the coding on the item to show that the item was suitable for competitive acquisition but that the government did not physically have in its possession sufficient, accurate, or

¹The CIT program is an effort to consolidate procurement responsibility for numerous spare part items within the Defense Logistics Agency rather than with each individual military service.

²DESC explains that many problems occurred during the transfer of functions, including misidentification of NSNs, misassigned items, and misaddressed receiving organizations. DESC's failure to receive the complete technical data package for the item here has not been specifically explained.

legible data to purchase this part from other than current sources, DESC states that at that time, the DESC value engineering office undertook a project to obtain all the technical data, including the classified drawing, and recreate a complete technical data package for full and open competition.

In March 1992, DESC was notified that a need had arisen for 739 units of this item, and a purchase request was generated for procurement of the switches. The DESC value engineering office still lacked the classified drawing and was attempting to obtain a legible copy of another drawing. On April 24, DESC executed a justification for other than full and open competition, citing 10 U.S.C. § 2304(c)(1) (1988), because "complete unrestrictive technical data is not currently available and cannot be developed to permit full and open competition on the instant acquisition."

In the meantime, on April 21 and 28, 1992, the DESC value engineering office for the first time attempted by telephone to secure the classified drawing from Warner-Robins and Westinghouse, respectively, but was unsuccessful.³ The DESC value engineering office made a second "follow-up" attempt to Warner-Robins to secure the classified drawing by letter dated July 14, 1992, which referenced the previous April 21 telephone conversation and stated as follows:

"National Stock Number 5985-00-321-7640 has been transferred to DESC . . . from [Warner-Robins], as a consumable item transfer. DESC needs this data to fully identify quality assurance requirements for procurement of this item Please forward a copy of the latest revision of Drawing (997942) PDS21917 to [DESC]."

The missing drawing was never obtained by DESC prior to the award for this item, which was made on December 15, 1992. Rather, the ESA advised DESC in November that it had started

³The only explanation the agency gives for its inability to obtain the drawing was that it generally has encountered "problems . . . in the transfer of classified documents pursuant to the CIT program." The agency does not explain why it did not receive the drawing from Westinghouse which stated to the agency in the April telephone conversation that "they are sending." The agency has also not specifically explained why Warner-Robins was unable to provide the drawing in response to DESC's April 21 and subsequent requests. The RFP was issued on an approved source basis on June 15, 1992.

a project to obtain the complete set of data to draft first article requirements for offerors of alternate items and had established an estimated completion date for the project of March 26, 1993.

THE SOLICITATION AND EVALUATION OF OFFERS

The RFP was issued on June 15, 1992, and, as amended, established a closing date for receipt of initial proposals on July 31, 1992. The RFP listed the name of the three approved sources contained on the Westinghouse drawing. The RFP contained a "Products Offered" clause which permitted offers of alternate products that were not previously approved by the government. This clause required offerors proposing an alternate product to furnish with their offer all drawings, specifications, and data necessary to clearly describe the characteristics and features of the proposed product, including its design, materials, performance, function and interchangeability. The RFP specifically advised offerors of alternate products that the agency would "make every reasonable effort to determine, prior to award, the acceptability of any products offered." The RFP also stated that if the determination of acceptability of an alternate item could not be accomplished by the expected contract award date, the product might be considered technically unacceptable.

Six offers were received by the agency, including an alternate offer from General which stated that its Model 1754 switch was an exact equivalent to the part being solicited; General also stated that it could not enclose the applicable Westinghouse drawings because they were classified, but informed DESC that the drawings were available and could be reviewed and inspected at the firm's facility. General's offered price was significantly lower than that of any other offeror. The buyer forwarded General's offer to the DESC value engineering office which contacted Warner-Robins and ascertained that General had not previously been approved as a source of supply for this item.

DESC also determined that before any alternate item proposal could be considered acceptable, the offeror would have to agree to submit first article samples for testing and approval by Warner-Robins and the ESA. The agency states that the first article requirement was necessitated by the criticality of the item in question. The agency further states that the DESC value engineering office had to establish first article testing criteria for alternate items; however, the agency needed a complete technical data package, including the missing drawing, to accomplish drafting first article testing criteria.

The agency therefore decided to reject General's alternate offer, and a proposed notice to this effect was given the contracting officer on October 7, 1992. The contracting officer then discussed the possibility of canceling the solicitation until first article requirements were prepared, but the agency technical officials advised him that "first article requirements could not be drafted until a complete data bid set was created, and it could be several months to a year until all this was finalized and coordinated with the ESA."

Meanwhile, the contracting officer had already received notice from the inventory manager responsible for maintaining adequate stock levels that the award action had to proceed quickly. Because of the missing drawing which precluded drafting first article requirements, the contracting officer decided that an award had to be made to an approved source. On November 9, 1992, General was notified that its offer of an alternate item was rejected.⁴ The contracting officer explains that the rejection was based on the fact that not only had General not provided the classified drawing but also that General had not included any documentation that it had been approved by Warner-Robins as a source of supply for this item. The agency stated to General at that time that "[e]ven if DESC visited General's facilities and reviewed the classified drawing, evaluation of its alternate item could not be accomplished in time for this procurement [because] new sources required first article testing before approval [and] DESC needed this drawing in its possession before it could even begin to draft first article requirements." General then filed an agency-level protest; in response, the agency, on December 7, 1992, restated its position that it did not currently "have adequate technical data to evaluate [General's] proposal [and the] ESA is currently attempting

⁴In "early November," apparently at or after the time the agency had determined to reject General's offer, a representative of the agency's value engineering office called the sales representative of General and told her that the established procedure for handling classified documents was to forward them to the custodian designated by DESC and that DESC could not visit General's facilities for an inspection of the drawings. He also told her that even if DESC visited General's facilities, development of first article requirements would preclude award to General. General states that it only became aware of DESC's desire for the drawing in November and questions why the agency did not request a copy earlier in the procurement.

to establish first article testing requirements, but is unable to estimate a completion date." Award was made by the agency to Frequency on December 15.⁵ This protest to our Office followed.

PROTESTER'S CONTENTIONS

General contends that it offered the exact equivalent of the item solicited in conformance with the current revision of the Westinghouse drawing and advised the agency in its offer that the Westinghouse drawing and specifications were available at its facility, but were classified; General states that it advised the agency on more than one occasion that the government may inspect and review these documents at its facility. General contends that the agency had more than sufficient time to properly evaluate its offer and make an award based on its alternate item. General states that qualification test requirements are defined in the classified Westinghouse drawing and that the government--had it reviewed the drawing--would not need as long as 1 year to develop the first article test requirements.⁶

ANALYSIS

The agency generally restricted the procurement to previously approved sources and rejected the only alternate offeror not previously approved because it determined that first article requirements--which it allegedly could not draft prior to award--precluded award to other than approved sources. Thus, the agency states, and the record shows, that the agency conducted a noncompetitive procurement (other than full and open competition, citing 10 U.S.C. § 2304(c)(1)) because it could not timely obtain a missing drawing which would have enabled the agency to draft first article requirements to permit previously unapproved alternate offerors to receive contract award.

⁵Frequency offered an item other than the three approved source items listed in the RFP. However, DESC verified with the Air Force that Frequency had been previously approved by Warner-Robins as a source of supply and had previously furnished this exact NSN item to the government under other contracts with Warner-Robins.

⁶Specifically, General states that qualification test requirements are defined in Table VI of Westinghouse drawing No. PDS21917, entitled "Qualification Test," which specifies the mechanical, visual, electrical, and environmental tests to be performed. Therefore, according to General, "the one year (maximum) estimate to develop the first article . . . test requirements is unjustified and unwarranted."

Generally, where a contracting agency restricts a procurement to approved products, it must give offerors proposing alternate products a reasonable opportunity to qualify. BWC Technologies, Inc., B-242734, May 16, 1991, 91-1 CPD ¶ 474. Here, the agency solicited offers from alternate sources by specifically promising in the RFP that it would "make every reasonable effort to determine, prior to award, the acceptability of any products offered." A brief recitation of the facts shows that the agency did not do so. In February 1992, management of the item was transferred to DESC; the ESA function was reassigned at the same time to Wright-Patterson Air Force Base. At that time, DESC learned that the government possessed a complete technical data package but that it had not received it. Although the agency identified a need in March to procure the item, the agency had not obtained the drawing necessary to permit alternate offerors to compete by the award date of December 1992, 9 months later.

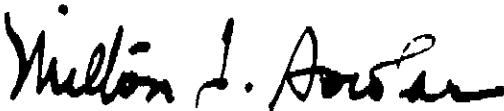
There appear to be two reasons for the agency's failure to obtain the necessary drawing and establish qualification requirements. First, General had proffered a copy of the missing classified drawing, which it represents defines first article or qualification test requirements, with its offer on July 30. DESC asked General in August whether General's part met all requirements of the relevant Westinghouse drawings, was an exact equivalent of the Westinghouse part, and met interchangeability requirements. Yet, the procuring agency did not discuss the proffered classified drawing. Procedures for submitting the drawing to DESC were not discussed with General until November, after the firm called to discuss rejection of its offer. General was told at that time that it was too late to obtain qualification for the procurement.

Second, there was no follow-up with regard to DESC's initial efforts to reconstruct the missing technical data package in April. It was not until November 1992, that the ESA first started a project to obtain a complete set of data to draft first article requirements for offerors of alternate items; when it finally started the project, it established a completion date of March 26, 1993, more than a year after the ESA function for this item was transferred to it, and approximately 1 year after the agency identified a procurement need for the item.

As a result of these delays, General was excluded from the competition. We find that DESC's (and the ESA's) delay in obtaining the relevant technical data and establishing qualification (or first article) requirements unreasonably deprived General of an opportunity to qualify. For this reason, we sustain the protest.

The record shows that the agency urgently needs the quantity of the item awarded to Frequency to maintain an in-stock position for the item; consequently, we will not disturb the award. By separate letter of today, we are recommending to the Director of the Defense Logistics Agency that the agency should refrain from any future procurement of this item (except for emergency quantities) until such time as it has identified and obtained the data necessary to permit award to alternate sources. We also find the protester to be entitled to the reasonable costs of filing and pursuing this protest, including attorneys' fees, as well as its proposal preparation costs. 4 C.F.R. § 21.6(d) (1992). The protester should submit its claim for costs directly to the agency.

The protest is sustained.

for 
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