



United States Government Accountability Office
Washington, DC20548

Decision

Matter of: Advanced Seal Technology, Inc.

File: B-400088; B-400089

Date: July 14, 2008

Thomas C. Doepker for the protester.
Richard Ferguson, Esq., Defense Logistics Agency, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protests challenging agency's decision to proceed with procurements for an item requiring source approval on the basis that the protester was deprived of a reasonable opportunity to requalify its alternate item is denied where the protester was notified of its removal as an approved source and the reasons for the removal before the challenged solicitations were issued; contracting agency need not delay a proposed procurement while a vendor pursues qualification of its product.

DECISION

Advanced Seal Technology, Inc. (AST) protests the issuance of an order to another vendor under request for quotations (RFQ) No. SPM7M3-08-T-7834, and the terms of request for quotations (RFQ) No. SPM7M1-08-U-C373, issued by the Defense Logistics Agency (DLA), Defense Supply Center-Columbus (DSCC) for mechanical seals, National Stock Number (NSN) 4320-01-279-2321 (NSN 2321).

We deny the protests.

BACKGROUND

NSN 2321 is a critical application item, thus, a designated Engineering Support Activity (ESA) is required to approve all sources.¹ DLA Instruction 3200.1. In this

¹ A critical application item is an item the failure of which could injure personnel or jeopardize a vital agency mission. Federal Acquisition Regulation (FAR) § 46.203.

case, the Naval Surface Warfare Center, Carderock Division is the ESA responsible for approval.

AST is a manufacturer of mechanical seals and is involved in government-sponsored efforts to reverse engineer certain items of supply, to provide competition in procurements where the original equipment manufacturers (OEM) have refused to share technical information. AST has reverse engineered an alternate item for NSN 2321, which was approved by the ESA in March 2005.

In May 2007, AST filed a protest with our Office, challenging DSCC's failure to include AST on the list of approved sources in an RFQ for a smaller version of NSN 2321, NSN 4320-01-276-0822 (NSN 0822). Through that protest it became clear that DSCC had failed to properly complete a first article test of AST's alternate item for NSN 0822 during a prior procurement. Therefore, in settlement of that protest, DSCC agreed to suspend procurement of NSN 0822 until AST's alternate item was subjected to an installation test.

According to the agency, in June 2007, during the effort to installation test AST's alternate item for NSN 0822, the ESA's pump shop did not have a pump requiring an NSN 0822 seal but did have a pump requiring an NSN 2321 seal, and had AST's alternate item for NSN 2321 on hand. As the NSN 0822 and NSN 2321 seals were nearly identical, the ESA attempted to install an NSN 2321 seal as a preliminary evaluation of AST's NSN 0822 design. Agency Report (AR), Tab 4, ESA Email, June 13, 2007; Tab 6, DSCC Email, July 12, 2007.

The agency states that, when the AST NSN 2321 seal was installed in the appropriate pump, it interfered with the pump casing and was found to have been machined too large. AR, Tab 4, ESA Email, June 13, 2007. When compared to the OEM seal, there were visible differences. Id. Also, in early October, DSCC received a Product Quality Deficiency Report (PQDR) for two NSN 2321 seals supplied by AST. AR, Tab 5, PDQR. The PQDR indicated that the AST seals were of an incorrect shape and could not be utilized for their intended purpose. Id. On the basis of the PDQR and the ESA pump shop's problems installing the NSN 2321 seal, DSCC made the decision to remove AST from the list of approved sources of NSN 2321 on December 18. AR, Contracting Officer's Report, at 2; Tab 6, DSCC Email, May 8, 2008. Unfortunately, DSCC failed to inform AST that its approval had been revoked at that time.

According to AST, it did not become aware that there were any problems with its alternate item for NSN 2321 until January 17, 2008, when DSCC issued an RFQ for NSN 2321 and an agency employee contacted AST to explain that AST was not listed as an approved source. Protest at 2. DSCC believes that AST learned that it had been removed as an approved source at an earlier date, as evidenced by AST's submission of a revised Source Approval Request on January 8. AR, Contracting Officer's Report, at 3.

AST filed an agency-level protest of the January 17 RFQ and of an earlier issued order for NSN 2321 on January 21, asserting that it had been improperly removed as an approved source without notice or opportunity to respond. DSCC sustained AST's protests on February 26, acknowledging that AST had not been promptly notified of the revocation of its approval as a source for NSN 2321. On the same date, DSCC forwarded AST a formal notice of AST's removal as an approved source for NSN 2321, which included a summary of the results of the June installation of AST's alternate item at the ESA's pump shop, and set forth instructions for requalification. AR, Tab 7, Notification, at 2.

On March 3, DSCC issued the RFQs challenged here, neither of which listed AST as an approved source. As a result, AST filed agency-level protests of the RFQs, arguing that procurement of NSN 2321 should be suspended until AST had an opportunity to view the engineering documents that describe the problem with its alternate item and make the necessary revisions to be included as an approved source on the RFQs. While considering AST's protests, on April 1, DSCC notified AST that its January 8 revised SAR for NSN 2321 was insufficient and that AST would need to perform further testing. DSCC then denied AST's agency-level protests on April 4. AST subsequently filed two protests with our Office, challenging the denial of its protests at the agency level.²

ANALYSIS

In its protests here AST argues that its ability to attain prompt requalification of its product has been hampered by the agency's failure to promptly notify it of the revocation of its source approval and immediately provide technical information related to the revocation, as well as by the agency's proposed 180-day timetable for the review of revisions to AST's alternate item. AST requests that all procurements of NSN 2321 be suspended until AST can become requalified. DSCC responds that its decision to proceed with the procurement of NSN 2321 was not improper where AST was notified that it had been removed as an approved source before the challenged RFQs were issued, and DSCC is not required to--and, in view of its needs for the part, cannot--delay the procurement of NSN 2321 while AST pursues the requalification of its alternate item.

The Competition in Contracting Act of 1984 (CICA) requires that an agency obtain "full and open" competition in its procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (2000). Accordingly, when a contracting agency restricts contract award to an approved product and imposes a qualification requirement, it must give nonapproved sources a reasonable opportunity to qualify. Newguard Indus., Inc., B-257052, Aug. 11, 1994, 94-2 CPD ¶ 70 at 2. This opportunity to qualify includes providing offerors a prompt opportunity to demonstrate their

² The agency issued an order under the first RFQ to Quality Control Corp. on April 17; no order has yet been issued under the second RFQ.

qualification and ensuring that the offeror is promptly informed as to whether qualification has been attained and, if not, promptly furnishing specific information why qualification was not attained. 10 U.S.C. § 2319(b)(6); FAR § 9.202(a)(2)(ii), (4).

DSCC sustained AST's earlier agency-level protests on the basis that DSCC had failed to promptly inform AST of its removal as an approved source and of the reasons for that removal, thereby denying AST a prompt opportunity to qualify in connection with the earlier-issued RFQs. Those facts are not repeated in the current protests. Here, AST had notice that it had been removed as an approved source by January 17, and was formally notified and given specific information as to why it had been removed on February 26.³ Therefore, because AST had the notice and information necessary to undertake requalification before the RFQs were issued on March 3, we see no basis to conclude that DSCC denied AST a reasonable opportunity to qualify its alternate item in connection with the currently challenged RFQs.

AST also argues that DSCC has denied AST a prompt opportunity to demonstrate its qualification by suggesting a 180-day review process for revisions to AST's alternate item. The 180-day time period is derived from the ESA's Source Approval Information Brochure, which states that "within 180 days of a SAR being prioritized for review, the contractor shall be advised of the approval or disapproval thereof, or if additional time is required to process the request, the date on which approval or disapproval will be provided." Source Approval Information Brochure at 13. AST has not explained why that time period is unreasonable other than to cite its previous experiences in which review has occurred more rapidly, and on the record here we see no basis on which to find that the 180-day review period violates the prompt opportunity requirement in 10 U.S.C. § 2319(b)(6). Further, we note that AST's seal failed to qualify previously, and therefore AST's alternate item must be evaluated again.

With regard to whether DSCC must delay or suspend procurement of NSN 2321 in order to allow AST to requalify, a potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror is not an approved source, if the potential offeror can demonstrate to the satisfaction of the contracting officer or ESA that the potential offeror or its product can meet the standards of qualification before the date specified for award. 10 U.S.C. § 2319(c)(3). However, there is no statutory requirement that an agency

³ AST argues that DSCC's February 26 notice did not provide enough specific engineering information about problems with AST's alternate item to enable AST to begin the requalification process. While it may not have provided the level of engineering detail that AST would have preferred, DSCC's letter to AST explained how AST's alternate item had failed during an operational test, and designated a contact at the agency for questions, concerns, and requalification. We conclude that DSCC's letter provided sufficient notice and information to AST to allow it to promptly undertake requalification.

delay a procurement in order to provide an offeror an opportunity to demonstrate its ability to become qualified. 10 U.S.C. § 2319(c)(5); Marc Ave. Corp., B-261968.2, Jan. 11, 1996, 96-1 CPD ¶ 79 at 3. Accordingly, we agree with DSCC that it has no obligation to suspend its procurements of NSN 2321 here.⁴

The protests are denied.

Gary L. Kepplinger
General Counsel

⁴ In fact, the agency maintains that its needs would not permit it to postpone the procurements. Specifically, DSCC states that as of May 21, there were 38 backorders of NSN 2321, 9 of which were high priority, and asserts that a delay in procuring the part will adversely affect the government.