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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Standard Bent Glass Corporation

File: B-401212

Date: June 23, 2009

Frederick L. Tolhurst, Esq., Cohen & Grigsby, P.C., for the protester.
Nicole J. Owren-Wiest, Esq., Jon W. Burd, Esq., and Daniel I. Nysten, Esq., Wiley Rein LLP, for BAE Systems Land & Armaments, LP, an intervenor.
Wade L. Brown, Esq., and John Wagner, Esq., Department of the Army, for the agency.
Glenn G. Wolcott, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly withheld source approval for protester is denied where protester did not submit a source approval request for the items being procured and failed to diligently pursue the information necessary to obtain source approval.
 2. Where protester is not an approved source for items requiring source approval, protester is not an interested party to challenge the award of a contract for those items.
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DECISION

Standard Bent Glass Corporation (SBG), of East Butler, Pennsylvania, protests the Department of the Army's award of contract No. W56HZV-09-C-0322 to BAE Systems Land & Armaments, LP, of Arlington, Virginia, for improved vehicle emergency escape windshield kits to be installed on the Army's M1151 up-armored high mobility multi-purpose wheeled vehicles (HMMWV) deployed in Iraq and Afghanistan.¹ SBG

¹ The windshield kits, which are sometimes referred to as "kick-out windshields," allow personnel to quickly escape from an HMMWV in an emergency situation by operating a manual latch within the vehicle and pushing outward on the windshield. Agency Motion to Dismiss, Apr. 10, 2009, at 2.

complains that it was improperly denied an opportunity to compete for the windshield kits.

We deny the protest in part and dismiss it in part.

BACKGROUND

The record shows that the U.S. Army Tank-Automotive and Armaments Life Cycle Management Command (TACOM) has been procuring the windshield kits at issue here² from BAE on a sole-source basis since August 2007.³ The complete windshield kit is identified as part number VEE00101 and is comprised of various components, including a driver-side assembly, identified as part number VEE00103, a passenger-side assembly, identified as part number VEE00104, and a windshield adapter that goes around the windshield and into the frame, identified as part number VEE00102.⁴

² The “kickout windshields” were initially referred to as “vehicle emergency escape” (VEE) windshields; the current procurement is for “improved vehicle emergency escape” (IVEE) windshields. There is no dispute that the primary difference between the two windshields is that the VEE is held in place with rivets, whereas the IVEE is held in place with bolts, making the “transparent armor” (that is, bullet resistant glass) in the IVEE more easily replaceable in the field. For purposes of this protest, there is also no dispute that once a source is qualified to provide the VEE windshield, there are no additional testing requirements to qualify as a supplier of the IVEE windshield. Agency Motion to Dismiss, Apr. 10, 2009, at 2.

³ The agency states that BAE “developed the VEE and the IVEE windshield kit at its own expense and presented the item to the [agency] as a safety solution which allows troops to safely escape during rollover and other dangerous situations.” Agency Motion to Dismiss, Apr. 10, 2009, Justification for Other Than Full and Open Competition, exh. A5, at 2. BAE maintains that the windshields are based on a proprietary BAE design and, therefore, BAE’s technical design package for the windshield kits is not available to competitors. BAE Motion to Dismiss, Apr. 13, 2009, at 3.

⁴ SBG’s protest suggests that the windshield kit was comprised of only the driver-side assembly and the passenger-side assembly, and that the agency added the third component, the windshield adapter, after SBG had filed its protest. The record is to the contrary. For example, the record includes a draft purchase description applicable to the windshield kit, dated November 20, 2008, which states:

The VEE Window Kit for the [HMMWV] consists of two modified ballistic window assemblies, with integral, fail-safe latch mechanisms.
The kit also includes the required modified armor components

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In May 2008, in order to increase competition for the windshields, TACOM published several “sources sought” notices, seeking to identify additional suppliers for the windshield kits, as well as additional suppliers for various components of the kits that may be purchased as spare parts. Specifically, on May 29, TACOM issued sources sought notice No. 2008-213, inviting source approval requests (SAR) for part number VEE00101, the complete windshield kit; notice No. 2008-209, inviting submission of SARs for part number VEE00103, the driver-side windshield assembly; and notice No. 2008-210, inviting SARs for VEE00104, the passenger-side windshield assembly.⁵ Each of the notices stated:

Please note that in some cases technical data may not be available. Be advised that, under the bailment program, contractors may buy or borrow sample parts for the purpose of reverse design engineering.

Agency Motion to Dismiss, Apr. 10, 2009, exhs. B2, B3, B5.

The record is clear that, in July 2008, SBG submitted SARs for part Nos. VEE00103 and VEE00104—the driver-side and passenger-side windshield assemblies.⁶ The record is equally clear that SBG did not submit a SAR for part No. VEE00101—that is, the complete windshield kit. Specifically, at the hearing conducted by this Office in connection with this protest,⁷ SBG’s chief operating officer (CEO) testified as follows:

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to adapt the VEE Windows to the vehicle window frame.

[Emphasis added.]

Draft Purchase Description, Nov. 20, 2008, at 1.

⁵ At that time, TACOM also issued two other sources sought notices related to similar windshield assemblies for the M1114 HMMWV; that vehicle and those notices are not at issue in this procurement and are not further discussed.

⁶ The record shows that the agency initially approved SBG’s SARs for the two component assemblies, but subsequently withdrew that approval on the basis that SBG had not submitted all of the required test data. We do not view the agency’s actions regarding source approval for the component assemblies as relevant to this protest, since, as discussed above, there can be no reasonable dispute that the challenged contract was for the complete windshield kit—not the separate component assemblies.

⁷ To address the issues presented in this matter, this Office conducted a telephone hearing during which testimony was obtained from various agency witnesses, including TACOM’s competition advocate, the source development officer, a

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Q. . . . [T]he SAR packages you submitted were for “VEE” window assemblies and not for what’s been referred to as [the] full-up kit for the “IVEE”?

A. . . . we did not submit a source approval request for the full-up “IVEE” kit. Yes sir.

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Q. Why didn’t you submit [a SAR package] for that [complete kit]?

A. We were not sure exactly what that – what all was included 100 percent in that kit.

Hearing Transcript (Tr.) at 156-57.

As noted above, the sources sought notices specifically advised potential offerors that, because technical data was unavailable, contractors would be required to obtain samples of the items for which qualification was sought in order to perform reverse design engineering. Agency MTD, exhs. B2, B3, B5. In this regard, SBG states that, prior to submitting its SAR packages for the component assemblies, it asked the agency to provide a sample of the complete windshield kit, but was told that, at that time, there were no kits within the country.⁸ During the May 2009 hearing GAO conducted in connection with this protest, SBG’s CEO acknowledged that the agency subsequently advised SBG “in about October or November [of 2008]” that a windshield kit was available, Tr. at 159; however, SBG took no immediate action to obtain the kit at that time. SBG’s CEO further acknowledged that it had only taken action to obtain the kit “within the last couple weeks” prior to the May 2009 hearing. Tr. at 160.

DISCUSSION

SBG first protests that the agency’s failure to provide approval for the complete windshield kits reflects bias and/or unreasonable action by the agency. We disagree.

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supervisory engineer, and two other engineers involved in this matter, and from SBG’s chief operating officer.

⁸ The agency states that the windshield kits were being installed on an expedited basis in Iraq and Afghanistan and, therefore, there were no kits available at the time of SBG’s initial request. Agency Post-Hearing Comments, May 18, 2009, at 6.

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). There are various exceptions to this requirement, including a situation where only one responsible source is able to meet the agency's requirements. 10 U.S.C. § 2304(c)(1); HEROS, Inc., B-292043, June 9, 2003, 2003 CPD ¶ 111 at 6. In this regard, when a contracting agency restricts a contract to an approved product or source, and uses a qualification requirement, it must give other potential offerors a reasonable opportunity to qualify; however, there is no requirement that an agency delay a procurement in order to provide an offeror an opportunity to demonstrate its qualifications. Lambda Signatics, Inc., B-257756, Nov. 7, 1994, 94-2 CPD ¶ 175 at 4; Advanced Seal Tech., B-250199, Jan. 5, 1993, 93-1 CPD ¶ 9 at 3; see 10 U.S.C. § 2319(b).

Here, as noted above, the record is clear that the complete windshield kit was comprised of more than the two component assemblies for which SBG sought source approval. Accordingly, even if SBG had been properly approved to supply those components, such approval would not qualify SBG to supply the complete windshield kit for which the agency contracted. SBG's CEO expressly acknowledged that SBG did not submit a SAR for the complete windshield kit due to SBG's uncertainty as to the elements comprising that kit. Although SBG initially sought to obtain the necessary information, through acquisition of a sample kit and reverse design engineering, SBG did not diligently pursue that information, waiting more than 5 months after being advised that a kit was available to actually obtain the kit.

On this record, we find no merit in SBG's assertion that its failure to qualify as an approved source for the items being procured is attributable to the agency. To the contrary, SBG's failure to submit a SAR for the complete windshield kit, due to its lack of knowledge coupled with its own inaction, was the basis for its failure to obtain approval. To the extent SBG's protest is based on assertions that the agency improperly withheld source approval for the procured items, the protest is denied.

SBG's protest also challenges various other matters in connection with award of the BAE contract. However, only an "interested party" is authorized to protest a federal procurement. Among other things, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1) (2009). More specifically, a protester is not an interested party to protest award to an approved source where the protester would not be eligible for award because it is not, itself, an approved source for the item. See, e.g., Precision Kinetics—Recon., B-249975.2, Mar. 12, 1993, 93-1 CPD ¶ 226 at 3; Technical Plastics Corp., B-230947, Apr. 28, 1988, 88-1 CPD ¶ 415 at 2.

As discussed above, SBG is not an approved source for the windshield kits at issue in this procurement. Accordingly, SBG does not qualify as an interested party to further challenge the agency's actions.

The protest is denied in part and dismissed in part.

Daniel I. Gordon
Acting General Counsel