



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kitco, Inc.

File: B-272067

Date: September 16, 1996

Randall Finley for the protester.

Eric A. Lile, Esq., Department of the Navy, for the agency.

Robert Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Language in synopsis of proposed source approved procurement inviting potential offerors to submit source approval requests did not guarantee that agency possessed data from the original equipment manufacturer sufficient to determine whether protester's reverse engineered product would be equivalent to the approved product.
 2. Protest that delay in providing details of the reasons for disapproving protester's source approval request resulted in competitive prejudice is denied where protester alleges only that, had it known the reasons earlier, it would have pursued commercial markets for its product in lieu of attempting to supply the product to the government.
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DECISION

Kitco, Inc. protests the award of a contract to the Sundstrand Corporation under request for quotations (RFQ) No. N00383-96-Q-F018, issued by the Department of the Navy for pump diaphragm assemblies. The protester alleges that the agency unduly delayed in providing detailed reasons for the denial of Kitco's source approval request (SAR) and that this delay competitively prejudiced Kitco.

We deny the protest.

BACKGROUND

The proposed acquisition was synopsisized in the Commerce Business Daily (CBD) on January 16, 1996. The synopsis advised potential offerors that the pump diaphragm assemblies had to be obtained from Sundstrand--the only currently approved source for this flight critical item. The synopsis further provided that, although the time required for approval of new sources is normally such that award

cannot be delayed pending approval of a SAR, requests for approval could be submitted by firms other than Sundstrand. On January 27, the RFQ was issued to Sundstrand for a quantity of 293 pump assemblies. Kitco requested and received a copy of the RFQ, submitted a quotation and submitted a SAR for a reverse engineered assembly. Following the denial of the firm's SAR, Kitco filed this protest. Award was subsequently made to Sundstrand for 144 assemblies on the basis of urgency, notwithstanding the pendency of the protest.

On August 29, 1994, Kitco had submitted a SAR to the Navy for the assemblies in question, indicating that source approval based on reverse engineering efforts had previously been granted by the Air Force to a predecessor firm which Kitco had acquired. At about the same time, Kitco submitted a SAR to the Air Force which was disapproved in March of 1995 because the agency lacked detailed drawings and a data package which are proprietary to Sundstrand and which are necessary for the analysis of an SAR based on a reverse engineering effort; the record indicates that Kitco disagreed with the Air Force's decision. Shortly after this decision, the Air Force terminated a contract with Kitco that included the pump assemblies in question.

During the course of its own investigation, the Navy made internal inquiries as to the availability of the drawings, sought without success to obtain them from the manufacturer and, because Kitco had referenced the Air Force approval in its SAR submitted to the Navy, contacted Air Force officials regarding the matter. On May 1, 1995, the contracting activity forwarded the matter, together with the materials obtained from the Air Force, to the Naval Air Systems Command (NAVAIR), the design control activity for Naval aircraft, which has exclusive authority to perform final engineering reviews for flight critical components. On August 16, NAVAIR advised the contracting activity that the SAR had been disapproved; Kitco was advised of the disapproval in a letter dated September 15 which did not provide any specific reasons for the disapproval.

Thereafter, Kitco made several inquiries seeking the details for the disapproval of its SAR, including a Freedom of Information Act (FOIA) request dated January 3, 1996. The Navy responded on February 15, providing responsive records including a technical data package review checklist which summarily set forth deficiencies in the SAR which contributed to its disapproval. On February 20, Kitco sought further information which was provided to the firm by letter dated February 29.

In the February 29 letter, the Navy advised Kitco of the details for disapproval of its SAR noting: (1) Kitco's failure to provide complete dimensional data for the assembly, a failure of Kitco's drawings to include complete dimensions and process data for all components in the assembly and a failure of the assembly drawing to provide detailed manufacturing data which, if not equivalent to the approved source's part, could have an adverse effect on reliability and durability; (2) that

because the Navy does not possess the complete data package for the current approved item, a determination of the validity of the dimensions to include critical tolerances could not be made; (3) that without the details of the processes required for the manufacture and test of the current approved part and without the details of Kitco's and its subcontractors' processes which will be used to manufacture and test the item, a determination cannot be made that Kitco parts would be equally reliable and durable as Sundstrand parts; and (4) that because the Navy does not possess the detailed test requirements used to qualify the Sundstrand part, it cannot perform a prequalification test which would be necessary in order to ensure that Kitco's product would be equivalent to Sundstrand's.

On March 13, Kitco protested this decision to the Navy. On March 29, the firm submitted a new SAR including additional dimensional information and a report of its reverse engineering results. By letter dated May 1, the Navy denied the protest on the basis that the agency could not obtain the data necessary to evaluate Kitco's SAR.¹ This protest followed.

PROTEST AND ANALYSIS

Kitco makes two principal allegations: (1) the language of the CBD notice inviting offerors to submit SARs for consideration precludes the government from disapproving a SAR based on a lack of proprietary data from the only approved manufacturer; and (2) the protester was prejudiced by a delay in learning the reasons for the rejection of its original SAR.²

When a contracting agency restricts contract award to an approved product, and imposes a qualification requirement, it must give unapproved sources a reasonable opportunity to qualify. This opportunity to qualify includes ensuring that an offeror

¹On March 11, the Navy offered to purchase the proprietary data from Sundstrand; Sundstrand refused the offer on April 2.

²Kitco has also suggested that, knowing that source approval was rendered impossible by a lack of Sundstrand data, the agency was remiss in not attempting to develop alternative methods of testing alternative products without the data. In the initial protest Kitco made several suggestions as to alternative methods of testing which were addressed in the agency report in detail. The Navy specifically pointed out why Kitco's proposed methods were inadequate and described why Sundstrand data was necessary to design reliable alternative qualification tests. In its comments on the agency report, the protester specifically acknowledged that its proposed tests were incomplete and did not address the agency's rationale supporting the need for the proprietary data. Accordingly, we have no basis for questioning the Navy's judgment not to develop alternative testing.

is promptly informed as to whether qualification has been obtained and, if not, promptly furnishing specific information why qualification was not obtained. Electro-Methods, Inc., B-255023.3; B-255023.4, Mar. 4, 1994, 94-1 CPD ¶ 173. The lack of a technical data package sufficient to complete necessary testing is a proper reason for not approving a SAR. Id.

With regard to the first issue, Kitco argues that Electro-Methods is inapplicable to this procurement because the agency in that case restricted award to currently approved sources and advised that there was not enough time to qualify new sources. By contrast, Kitco argues that in the protested procurement, the synopsis effectively bars the agency from using its lack of a technical data package to disapprove an SAR noting that its language "suggested that the government would consider any proposal submitted within the specified time and there was clearly enough time for a potential supplier to be qualified on the part."

Kitco's distinction is erroneous. The CBD announcements in both cases are virtually identical in all material respects. Each stated that the Navy did not possess sufficient technical data to support full and open competition for a flight critical item and each stated that award would be restricted to approved sources. While each indicated that other potential sources might be considered if they submitted SARs, each also cautioned offerors that the time required for source approval is normally such that award cannot be delayed pending approval of a new source. We, therefore, find no reason to draw the distinction urged by the protester, and we have no basis to conclude that the agency was precluded from relying on the lack of a technical data package to disapprove Kitco's SAR. Moreover, we note that Kitco appears to have been aware since March of 1995 when its Air Force SAR was rejected that the government lacked sufficient technical information to process it.

With regard to the second issue, in its initial protest Kitco argued that the delay in providing the firm with the detailed reasons for the rejection of its SAR from September of 1995 until February of 1996 prejudiced the firm because it precluded the protester from redirecting "its own efforts in defining alternative source approval solutions." In its comments on the agency report, Kitco elaborated:

"Had Kitco been informed immediately that there was no way it could process Kitco's SAR due to lack of data, Kitco would have begun the process of getting qualified through the FAA for PMA so that we could at least compete in the commercial aircraft market. Kitco was prejudiced by delay. We were following the more beneficial course. Had we been able to receive approval through the Navy then Kitco would be in a position to supply the part to the larger of the two markets. . . . We made a strategic decision to attempt approval with the military."

Kitco seems to be arguing that, had it known in September that the Navy lacked the requisite technical data, the firm would have abandoned its qualification pursuits with the government altogether. This is tantamount to saying that early disclosure would have foreclosed Kitco's attempted participation under the protested RFQ altogether. Accordingly, we fail to see how the delay in question caused competitive prejudice with respect to this procurement—a necessary element of a viable protest. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379. Further, the record does not support Kitco's contention that it expended any resources attempting to qualify between September and February. Accordingly, this aspect of the protest is without merit.

The protest is denied.

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