



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Apache Enterprises, Inc.

File: B-275813.2

Date: April 23, 1997

J. Michael Slocum, Esq., Slocum & Boddie, for the protester.

Joshua A. Kranzberg, Esq., and H. Bruce Bartholomew, Esq., Department of the Army, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that source controlled components offered by the awardee were not properly qualified is denied where the record shows that the components satisfied the qualification requirements specified in the applicable drawings.
 2. Protester was not prejudiced by the procuring agency's failure to identify in the solicitation the awardee as an approved source for the components where the record does not show or otherwise evidence that the protester would or could have altered its bid to its competitive advantage had the protester known of this source approval.
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DECISION

Apache Enterprises, Inc. protests the award of a contract to Panelite Engineering, Inc. under invitation for bids (IFB) No. DAAJ09-96-B-0046, issued by the U.S. Army Aviation and Troop Command for night vision modification kits.

We deny the protest.

The IFB, issued June 21, 1996, as a small business set-aside, sought 28 night vision modification kits to be provided to the Republic of Korea under the Foreign Military Sales program. The night vision kits consist of 39 components, three of which (two postlight bases and one postlight cap) are identified as source approved items. The postlight bases and cap provide illumination for aircraft control panels under night vision conditions.

The IFB identified drawings required for the kit components. These drawings identified Apache as the only approved source for the postlight bases and caps, and stated the requirements for source approval. Among other things, sources seeking

approval for the caps were required to provide a test report, which verified that the source satisfied the radiance requirements stated in the applicable military standard, MIL-L-856762A, and in note 5B of the drawings; at note 5B, the method by which the illumination requirements must be tested is set forth.

The IFB also informed bidders that they were required to utilize parts from only approved sources and that bidders could be required to document prior to award that arrangements to obtain source approved components had been made. The IFB provided for first article testing, which, among other things, would verify the use of source controlled components.

At the July 30 bid opening, the Army received three bids, including those of Apache and Panelite. Panelite submitted the low bid of \$145,200, and Apache submitted the second low bid of \$246,788.18. Panelite was asked to verify its bid, which it did. A pre-award survey was also conducted. In response to Apache's complaints, the Army investigated whether Panelite could provide the required source approved components, discovering that Panelite intended to furnish postlight bases and caps of Pan-A-Lite, Inc.,¹ which had been approved as a source for these restricted components in early May 1996, although Pan-A-Lite was not listed on the drawings. Although Panelite was found technically capable of performing, the survey recommended "no award" because of Panelite's high delinquency rate on deliveries. Based on this negative pre-award survey, the Army determined that Panelite was not responsible. This matter was referred to the Small Business Administration, which issued a certificate of competency. Award was made to Panelite on December 8, and this protest followed.

Apache objects to the Army's approval of Pan-A-Lite as a source to provide the restricted postlight bases and caps. Apache contends that Pan-A-Lite's product was not subjected to the same testing as was Apache's to ensure that Pan-A-Lite's product would meet the agency's needs.²

¹The record shows that Panelite and Pan-A-Lite are different companies. Although Apache complains that the two companies may be affiliated, this is not relevant to whether Pan-A-Lite was properly approved as a source for the controlled components.

²To the extent that Apache's complaint is that its product was subjected to more stringent testing than that provided for by the drawings, we will not consider a protest that a procurement should be subject to greater restriction than an agency believes is necessary to meet its needs. See Bell Helicopter Textron, Inc., B-241037, Oct. 12, 1990, 90-2 CPD ¶ 289 at 2. The question we resolve in this protest is whether Pan-A-Lite's product was properly approved as a source in accordance with the requirements specified in the drawings.

The system of qualifying and approving products, which is generally used prior to, and independent of, individual procurements, is nevertheless an integral part of the system of procuring qualified and approved products. Goodyear Tire & Rubber Co., 72 Comp. Gen. 28, 31-32 (1992), 92-2 CPD ¶ 315 at 5; Chemonics Indus., Inc., B-260284, Apr. 19, 1995, 95-1 CPD ¶ 206 at 2-3. Where, as here, a solicitation requires that the product procured be qualified or approved, it is improper to include in the list of approved products an item that has not been properly approved and does not satisfy the applicable specifications; including such a product in the list may constitute a basis for sustaining a protest if the agency's action prejudices the protester. Goodyear Tire & Rubber Co., 72 Comp. Gen. at 40-41, 92-2 CPD ¶ 315 at 17.

The record shows that the Army's approval of Pan-A-Lite as a source for the postlight bases and caps was based upon the test report submitted by Pan-A-Lite to demonstrate that its product satisfied the requirements identified on the source controlled drawings. This test report described the requirements specified on the drawings, detailed the qualification test procedures used, and provided test results demonstrating that Pan-A-Lite's product satisfied all the requirements specified on the source controlled drawings. The Army states that it approved Pan-A-Lite as source for the postlight bases and caps based upon this test report, and, in early May amended the applicable source controlled drawings to indicate that Pan-A-Lite was an approved source.

Apache asserts that Pan-A-Lite's test report does not demonstrate that firm's product satisfied the applicable source approval requirements. Specifically, Apache complains that Pan-A-Lite's qualification testing was conducted by a party that is interested in Pan-A-Lite's receiving source approval; that a government quality assurance representative was not present during the qualification testing; and that the illumination pattern testing performed was not sufficient to ensure even brightness across a specified quadrant only took one illumination reading in each quadrant.

We find, contrary to Apache's arguments, that Pan-A-Lite's test report provided the Army with a reasonable basis to approve Pan-A-Lite as a source for the postlight bases and caps. The test report on its face shows that the testing of Pan-A-Lite's product was conducted in accordance with the requirements specified on the source controlled drawings and that the product tested satisfied those requirements. While Apache complains that the illumination testing of Pan-A-Lite's product consisted of only one reading in each quadrant, the tests specified in the drawings did not require more than this; specifically, the drawings only provide, in this regard, that "measurements shall be taken in each of the four quadrants shown."

There is also no requirement stated in the drawings that specifies who must conduct the qualification testing or that testing must be conducted before a

government quality assurance representative. While Apache states that the testing was done by an "interested party," the protester does not explain, nor does the record otherwise evidence, why the company that performed the testing is "interested" or how this indicates that the testing was improper. In the absence of any evidence discrediting the qualification testing or test results, we find no basis to question the Army's acceptance of the test report.

Apache also complains that it was prejudiced by the Army's failure to identify for bidders that Pan-A-Lite was an approved source for these components. The Army responds that although Pan-A-Lite was approved as a source for these components prior to the issuance of the solicitation, the agency's contracting personnel were unaware of Pan-A-Lite's qualification until after bid opening. The agency states that its engineering personnel amended the drawings identifying Pan-A-Lite as an approved source and forwarded these drawings to the U.S. Army Aviation and Troop Command data repository in early May 1996, but that it takes the repository approximately 2 months to update the drawings, and this is the reason the IFB drawings did not identify Pan-A-Lite as an approved source. The Army argues that, in any event, Apache was not prejudiced by the agency's failure to identify Pan-A-Lite as an approved source. Specifically, the Army notes that Apache's \$246,788 bid is more than \$100,000 higher than Panelite's \$145,200 bid and that the cost impact of the three source approved components on the total kit cost was minimal.³

Prejudice is an essential element of a viable protest, and where no prejudice is shown, or is otherwise evident, our Office will not disturb an award, even if some technical deficiency in the procurement may have occurred. Lithos Restoration, Ltd., 71 Comp. Gen. 367, 371 (1992), 92-1 CPD ¶ 379 at 5-6. Here, to establish prejudice, Apache would need to show that it could and would have displaced Panelite as the low bidder had Apache known of Pan-A-Lite's qualification as an approved source. See Hughes Georgia, Inc., B-244936; B-244396.2, Nov. 13, 1991, 91-2 CPD ¶ 457 at 9-10.

The record does not show or otherwise evidence that Apache was prejudiced by the agency's actions. Apache's generalized statement that it could have submitted a lower bid had it known of Pan-A-Lite's qualification is not sufficient to demonstrate prejudice in these circumstances where there was a large disparity between Apache's and Panelite's bid prices and the cost of the source approved components is minimal in relation to the overall cost of the kits. Moreover, Apache's argument that it would have sought to qualify a product under the allegedly lesser standard applied to Pan-A-Lite's product does not support a finding that Apache was prejudiced in light of the finding above that Pan-A-Lite's product was reasonably

³The Army purchased the postlight caps under a prior purchase order at a unit price of \$28 per each cap.

approved under the qualification standards stated in the source controlled drawings. In sum, there is simply no evidence in the record showing that Apache could or would have altered its bid to its competitive advantage had it known that Pan-A-Lite was an approved source for the postlight bases and caps.

The protest is denied.

Comptroller General
of the United States