



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Sun Dial and Panel Corporation

File: B-277660

Date: November 4, 1997

Thomas L. McGovern III, Esq., Hogan & Hartson, for the protester.

Timothy S. Kerr, Esq., Elliott, Reihner, Siedzikowski & Egan, for Control Products Corporation, an intervenor.

Stephen Stastny, Esq., Defense Logistics Agency, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably did not invite protester to compete for emergency contract to provide a relatively small quantity of instrument mounting bezels for use in helicopters until agency can make award of a contract for a large number of bezels pursuant to a competitive procurement where: (1) bezels are critical to flying the helicopters safely; (2) agency had no bezels in its inventory and a large number of bezels were on back-order; (3) a number of helicopters were already grounded because of lack of bezels and more were expected to be grounded in the immediate future; (4) protester had never supplied these bezels to the agency and its bezels would, therefore, have to pass first article testing before the agency would consider them acceptable; and (5) in view of urgent circumstances, agency was unwilling to incur delay associated with first article testing and risk that the protester's bezels might not pass first article tests.

DECISION

Sun Dial and Panel Corporation protests the Defense Supply Center Richmond's (DSCR) issuance, on a sole-source basis, of purchase order No. SPO440-97-M-PP02 for instrument mounting bezels (national stock number 6695-01-342-3191)¹ to Control Products Corporation (CPC) pursuant to request for quotations No. SPO440-

¹Bezels are metal rims that hold the transparent covering of aircraft instruments in place; bezels protect and illuminate critical indicators on the aircraft's instrument panel.

97-Q-TF20.² The protester contends that the agency improperly did not solicit a quotation from it to fulfill the agency's urgent requirement for bezels even though the agency was aware that Sun Dial was interested in and fully qualified to manufacture the parts.

We deny the protest.

On July 16, 1997, the DSCR inventory management section requested an emergency purchase of 63 bezels for use as part of the horizontal situation indicators in UH-60A "Blackhawk" helicopters. The purchase request stated that the bezels were essential to the Blackhawk helicopter's mission and requested that every effort be made to obtain the fastest delivery possible. That same day, a DSCR contract specialist contacted CPC and orally requested that CPC submit a quotation containing its best price and delivery terms for 63 bezels. CPC's initial quotation stated a price of \$1,300 per unit with delivery of all units 160 days after receipt of an order (ARO). The next day, the contract specialist orally requested that CPC provide faster delivery because some aircraft were already grounded. CPC responded that it would commit to delivering all units 120 days ARO and that it would try to deliver 10 units sooner. As CPC had previously supplied the bezels and had no record of any quality problems, the agency considered an award to CPC acceptable. Citing the statutory authority of 10 U.S.C. § 2304(c)(2) (1994)--the unusual and compelling urgency exception to the general statutory requirement for full and open competition--the contracting officer determined on July 17 that a sole-source award to CPC was justified. On July 23, the agency issued a purchase order to CPC for 63 bezels at a total price of \$81,900, and Sun Dial filed this protest shortly thereafter.

The protester contends that DSCR should have asked it to submit a quotation for the 63 urgently needed bezels. The protester asserts that, even though cognizant agency personnel stated that this was an "emergency buy" necessitating a sole-source purchase from CPC, the agency was aware of Sun Dial's interest in supplying bezels because, at the time of the sole-source purchase from CPC, Sun Dial was (and still is) actively participating in another procurement for the same type of bezels that DSCR is presently conducting as a competitive procurement.³ The

²While this is the agency's designated solicitation number, the procurement was conducted orally and no written request for quotations was issued.

³Request for proposals (RFP) No. SPO440-97-R-0843 was issued on February 21, 1996, using competitive procedures to purchase 245 of the same type of bezels with an option to increase the quantity up to 100 percent of the original quantity. Sun Dial submitted a proposal in response to this competitive RFP. In connection with this competitive procurement, Sun Dial states that it used reverse engineering to
(continued...)

protester also asserts that the agency knew that Sun Dial was interested in and was capable of supplying quality bezels in a timely manner because the engineering support activity (*i.e.*, the United States Army Communications-Electronics Command) had, in fact, determined that Sun Dial's bezels were acceptable on July 16, 1997, just 1 week before the purchase order was issued to CPC on a sole-source basis.

The Competition in Contracting Act (CICA) permits the use of noncompetitive procedures where the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2). While CICA requires the agency to request offers from as many potential sources as is practicable under the circumstances, 10 U.S.C. § 2304(e), the agency may still limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. Electro-Methods, Inc., B-250931, Feb. 26, 1993, 93-1 CPD ¶ 181 at 4.

In view of the circumstances existing at the time the purchase order was issued, DSCR reasonably determined that its immediate need for an interim quantity of bezels was of such an unusual and compelling urgency that an emergency, sole-source purchase from CPC was justified. It is clear from the record, and undisputed by the protester, that DSCR had an urgent need for a relatively small quantity of bezels (*i.e.*, 63 units) for use in Blackhawk helicopters until a larger quantity (*i.e.*, 245 units) could be obtained by the agency pursuant to the competitive procurement and that bezels are critical to the Blackhawk helicopter's mission; the helicopter cannot be flown safely without them.⁴ The record shows that, at the time the purchase order was issued to CPC, DSCR had no bezels of this type in its inventory stock, 147 bezels were back-ordered, and DSCR expected more back-orders for bezels to accumulate quickly. Of the 147 bezels that were back-ordered, 35 were classified as issue priority group 1, which includes only the most urgently needed items. In fact, at the time the purchase order was issued, 10 helicopters were already grounded due to the lack of any bezels in stock.⁵ Furthermore, based upon historical usage rates, the agency estimated that

³(...continued)

produce a complete drawing/engineering package which it submitted to the agency in March 1996 in order to have its bezels qualified as acceptable alternates to the brand names listed in the RFP. No award has been made to date.

⁴It is undisputed that bezels are critical to the safety of Blackhawk helicopters and those flying in them.

⁵The number of grounded helicopters increased to 16 by August 1.

approximately 41 additional bezels would be needed during the 3-month period following the order from CPC.

The protester questions the agency's requiring that its bezels pass first article testing before the agency will accept them, since the engineering support activity had conducted a review of its technical data package and determined that Sun Dial's bezel was an acceptable part for use in Blackhawk helicopters. Our Office will not question an agency's determination that first article testing is required unless the determination is the result of bad faith or fraud, or there is a clear showing of abuse of discretion by the agency. Brunswick Corp., Defense Div., B-231996, Oct. 13, 1988, 88-2 CPD ¶ 349 at 6. No such showing was made here.

The contemporaneous record shows that, subsequent to the engineering support activity's approving Sun Dial's bezel based on the technical data that Sun Dial submitted, the engineering support activity expressed a desire for DSCR to include a first article test requirement in the competitive RFP so that any manufacturer that had not previously manufactured this bezel would be required to prove that its product is acceptable. In fact, the contracting officer reports that the approving engineer specifically told him that he approved Sun Dial's bezel with the expectation that it would be required to undergo first article testing and that he desired that the bezel be subjected to such testing. Because the engineering support activity's approval of Sun Dial's drawing/engineering package was contingent upon the bezels passing first article testing, and because Sun Dial had never supplied this particular bezel to DSCR, we think the agency reasonably decided not to waive the first article test requirement on behalf of Sun Dial.

Sun Dial contends that, even if its bezels were required to undergo first article testing, the agency should have solicited a quotation from it for the emergency buy, since, according to the protester, it could have completed production and testing of a first article and still have delivered all 63 bezels within 120 days ARO as required under the agency's accelerated delivery schedule. The agency responds that, since Sun Dial had never supplied these bezels to it before, it could not be sure that Sun Dial's bezels would pass the first article tests. In view of the critical need for these parts, the agency reports that it could not risk the additional delay that failure to pass first article tests would cause. Notwithstanding a firm's claim, such as Sun Dial's here, that it can meet the leadtime required for first article testing of an urgently needed item, an agency is not obligated to take the risk that the product will not pass first article testing, since such a failure would delay delivery. Rotair Indus., 69 Comp. Gen. 684, 688 (1990), 90-2 CPD ¶ 154 at 5. In view of its extremely urgent need for quick delivery of bezels, and because Sun Dial had never supplied these particular bezels before, the agency, reasonably in our opinion, was unwilling to incur the delay associated with first article testing and approval and the risk that Sun Dial's bezel would not pass first article tests.

In sum, even though the engineering support activity had reviewed and approved Sun Dial as a qualified source for the bezels based upon the technical data package that Sun Dial had submitted to the agency in connection with the competitive procurement, DSCR reasonably decided that, for the emergency purchase, it would not consider a quotation from Sun Dial or any other firm that had not actually manufactured these bezels before. Because this part is critical to the Blackhawk helicopter's ability to fly safely, and because a number of the helicopters were already grounded and others were expected to be grounded in the near future, we have no reason to question the agency's decision not to invite Sun Dial to compete for the interim, emergency purchase. See BlueStar Battery Sys. Corp., B-270111.2, B-270111.3, Feb. 12, 1996, 96-1 CPD ¶ 67 at 4-5.

In its comments on the agency's report, Sun Dial raises a new protest ground--*i.e.*, that the urgent need for the interim quantity of bezels was the direct result of a lack of advance planning on the agency's part. Referring to the allegedly overlong period of time that had elapsed since the issuance of the competitive RFP, Sun Dial states:

Examining the overall circumstances of this procurement--which actually started in February 1996--it is clear that DSCR itself created the urgency by wasting months of time (for no apparent reason) in procuring these items.

In support of this argument, Sun Dial points out that, at the time the purchase order was issued to CPC, DSCR had been in the process of conducting the competitive procurement for roughly 17 months and evaluating Sun Dial's bezel for roughly 16 months, and neither process had been completed. In view of the fact that bezels are critical and that the lack of them eventually caused the grounding of some helicopters, the protester asserts that the agency should have done something to speed up either the competitive procurement or the product approval process. This protest ground is untimely. Sun Dial knew when it filed its initial protest that the agency had justified its sole-source award to CPC on the basis of urgency and, as Sun Dial had participated in the competitive procurement from its inception and submitted its data package for approval just 1 month later, Sun Dial also knew of the delays associated with the competitive procurement and product approval process. Nevertheless, Sun Dial did not raise this issue in its initial protest but, instead, waited until it filed its comments on the agency report to raise this issue. Because Sun Dial knew at the time of its initial protest filing that there appeared to be an inconsistency between the urgency of the sole-source award and the alleged dilatory nature of the agency's actions in conducting the competitive procurement and evaluation of Sun Dial's bezel, Sun Dial should have raised this issue in its initial protest. As Sun Dial waited more than 10 days after it should have known

this protest basis to file this new protest ground, this protest ground is dismissed as untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1997); AT&T, B-251177, B-251177.2, Mar. 16, 1993, 93-1 CPD ¶ 236 at 5-6.

The protest is denied.

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