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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-192248, B-192748,  
B-194585

DATE: August 29, 1979

MATTER OF: Ikard Manufacturing Company

*[Protest of Army Contract Award]*  
DIGEST:

1. GAO declines to consider issues directly related to propriety of default termination which have been raised by protester on appeal to Armed Services Board of Contract Appeals because propriety of default termination is matter for consideration under disputes clause and not for resolution under GAO Bid Protest Procedures, and protester should not be allowed to collaterally argue case in two forums concurrently. GAO will only consider such issues as they relate to allegation that contracting activity exhibited consistent pattern of partiality in favor of other firms against protester up to and including time of instant procurement.
2. Protester has burden of affirmatively proving its case. Protester alleges that contracting activity has exhibited steady pattern of partiality against protester by, among other things, actively interfering with protester's subcontract on prior contract. Where allegation is not supported by record and conflicting statements by parties constitute only evidence regarding allegation, protester has not satisfied burden of proof.
3. Protester alleges that contracting activity exhibited pattern of partiality against protester and in favor of other firms and requested that GAO review numerous examples cited by protester to show agency's alleged prejudice. Review of all evidence in support thereof does not show that pattern of partiality existed in events leading to prior default termination of protester or in other procurement actions.

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4. Contracting officer is vested with reasonable degree of discretion to determine extent of competition required consistent with agency needs. Where critical agency need and urgent delivery schedule did not permit time to manufacture, test, and approve first articles, contracting officer did not abuse discretion by restricting solicitation to offerors which had first articles previously approved or submitted.
5. Where solicitation was restricted to offerors which had had first articles previously approved or submitted, but reserved to Government right to waive first article test requirement, fact that awardee did not have first article approved until after date solicitation was issued did not disqualify awardee under terms of solicitation since award-ee's first article was approved prior to award. Restriction dealing with capability of offeror to produce required item is matter of responsibility. Therefore, offeror could properly qualify by having first article approved at any time prior to award.

Ikard Manufacturing Company (Ikard) protests award of a contract for 118 hydraulic locks, for use in the HERCULES Missile System, pursuant to request for proposals (RFP) No. DAAH01-78-R-1034, issued by the United States Army Missile Materiel Readiness Command (MIRCOM), Redstone Arsenal, Alabama. Award was made to Sonora Manufacturing, Inc. (Sonora), on November 7, 1978, during the pendency of Ikard's protest in our Office. Ikard also protests the subsequent cancellation by MIRCOM of invitation for bids (IFB) No. DAAH01-79-B-0214 which was for the production of an additional 32 hydraulic locks for use in the missile system.

The protests are denied.

### Background

Solicitation No. DAAH01-78-R-1034, a 100-percent small business set-aside, was issued on August 2, 1978. As originally issued the RFP called for delivery of 86 hydraulic locks. All 86 units were being reprocured as the result of cancellation of two prior solicitations. Fifty-eight of the locks were previously covered by solicitation No. DAAH01-78-B-0056 which was the subject of our decision in the matter of Ikard Manufacturing Company, B-192248, September 22, 1978, 78-2 CPD 220, in which we held that the solicitation was properly canceled after bid opening when the contracting officer determined that the specifications overstated MIRCOC's minimum needs. Twenty-eight of the units were previously covered by IFB No. DAAH01-78-B-0364 which was canceled by the contracting officer prior to bid opening because the specifications overstated MIRCOC's minimum needs in the same way as solicitation No. 78-B-0056. On August 8, 1978, solicitation No. 78-R-1034 was amended to increase by 32 the number of locks required. These last 32 units represented a quantity which was being reprocured because of the default termination of a contract with Ikard (contract No. DAAH01-77-C-0234) on March 13, 1978. Thus, RFP No. 78-R-1034, as amended, required a total of 118 hydraulic locks and required that proposals be submitted by August 17, 1978.

IFB No. 79-B-0214 was issued by MIRCOC on January 30, 1979, for the procurement of an additional 32 hydraulic locks, plus a first article. This IFB contained a Technical Data Package (TDP) which required the use of castings in the manufacturing process. Subsequent to bid opening on March 7, 1979, the contracting officer determined that the TDP specifications were inadequate since the TDP had not been updated to allow substitution of materials (hot rolled plate, hot rolled bar, or steel bar, as well as castings). The contracting officer, therefore, canceled the solicitation because the IFB did not reflect the current minimum needs of the Government, did not provide the optimum manufacturing methods and materials, and did not provide the least expensive method for producing the locks.

Issues of Protest

Ikard has raised several protest issues, as follows:

1. MIRCOM has exhibited a steady pattern of favoritism towards Sonora and/or Precision Specialty Corp. (Precision) and against Ikard. Several subsidiary matters have been enumerated by Ikard which taken together allegedly show MIRCOM's partiality up to and including the time of the present protested procurement actions:

A. Referring to the reprocurement of the requirement of contract No. 77-C-0234, the procuring activity showed partiality towards both Sonora and Precision and against Ikard when Ikard's contract was defaulted. Both Sonora and Precision had had delivery schedules under contracts similar to Ikard's prior contract extended several times while Ikard had been granted only one delivery extension prior to being defaulted. Ikard has appealed the default termination to the Armed Services Board of Contract Appeals (ASBCA).

B. RFP No. 78-R-1034 contained a provision which allowed substitution of materials for three parts while Ikard's defaulted contract did not allow such substitutions. This issue has also been raised before the ASBCA by the protester.

C. Ikard has requested that we reexamine the record in the prior Ikard protest against MIRCOM's cancellation of solicitation No. 78-B-0056. Ikard apparently believes that reexamination of the record in the prior protest, in light of the new protest matters raised by Ikard, will reveal the pattern of partiality.

D. The procuring activity actively interfered with one of Ikard's subcontractors under contract No. 77-C-0234 to such a degree that Ikard's subcontract with that subcontractor had to be canceled.

E. MIRCOM improperly canceled IFB No. 79-B-0214 after bid opening. Although Sonora's bid price was lower than Ikard's bid price, Sonora was not responsive because it failed to bid on item No. 0002, the first article requirement, and, therefore, Ikard was the lowest responsive, responsible bidder. However, in order to deprive Ikard of the award, MIRCOM canceled the solicitation using the "Canned Excuse" that the TDP had not been updated to reflect the current minimum needs of the Government.

2. Solicitation No. 78-R-1034 was restricted to prior producers of the required locks which had had first articles previously approved. This restriction improperly limited the number of firms which could qualify to two--Sonora and Precision. There was no real competition even between these two offerors since Precision had never manufactured the item being procured but qualified as a prior producer only because of a previous contract under which Precision had subcontracted the manufacture of the locks to another firm. Precision was not equipped to manufacture the locks, and Precision could not compete with Sonora in such circumstances since Precision had to include the subcontractor's profit as one of its costs, and then had to add Precision's own profit margin before arriving at a price. The procurement, though having the appearance of competition, was actually an unjustified sole-source award to Sonora. Additionally, MIRCOM never solicited a proposal from Ikard even though Ikard was fully equipped to manufacture the required hydraulic locks at the time this procurement was issued.

3. Even if we find that the restriction of RFP No. 78-R-1034 to prior producers which had first articles previously approved was proper, Sonora's proposal should not have been considered for award because Sonora had its first article under another contract rejected on June 8, 1978, and, therefore, did not qualify for award on the date RFP No. 78-R-1034 was issued (August 2, 1978).

Partiality by MIRCOM (Protest issue 1)

The Army argues that our Office should not consider protest issues 1A and 1B since they relate to Ikard's termination for default which is a matter of contract administration. We have held that whether a contract should be terminated for default is a matter of contract administration for consideration under the disputes clause of the contract in question and not for resolution under our Bid Protest Procedures. Engineering Service Systems, Inc., B-191538, April 13, 1978, 78-1 CPD 285. Moreover, we do not believe that Ikard or any other protester should be allowed to collaterally argue its case in two forums concurrently. Therefore, since the propriety of the termination for default has been appealed by Ikard to the ASBCA, we decline to rule on any matters which directly relate to the propriety of the default termination of Ikard's prior contract. See Union Carbide Corporation, B-188692, B-191319, B-191491, May 18, 1978, 78-1 CPD 380. However, we will consider these matters as they relate to Ikard's contention that MIRCOM consistently favored Sonora and/or Precision over Ikard up to and including the time of the protested procurement actions. Our review will be strictly limited to consideration as to whether these procurements were properly conducted with the requisite impartiality by MIRCOM. GTE Sylvania Incorporated, B-192985, January 25, 1979, 79-1 CPD 53.

The Army denies any partiality towards either Sonora or Precision in the administration of contracts similar in nature to the defaulted Ikard contract. The contracting officer reports that both Sonora and Precision submitted evidence of orders placed, production scheduled, and supply vendor commitments received by them. The contracting officer further states that production problems and supply vendor failures were reported and that proposed revised delivery schedules were requested by both Sonora and Precision when appropriate during performance of their contracts. According to the contracting officer, Ikard never submitted any evidence of having ordered the locks, lock components, or materials from suppliers prior to default. The contracting officer states that Ikard did not have a subcontractor and did not submit

a production plan, nor had Ikard begun production on its own. The record shows that Ikard attempted to place an order for supply of the required items with Sonora, but that the order was rejected. The agency report also indicates that Ikard's delivery schedule was extended 176 days, until February 2, 1978, but that no progress was made by Ikard toward fabrication of the locks during this extended delivery period. In rebuttal, Ikard says that after it received award, "We put forth a tremendous effort, time, and cost." Ikard admits that, after it received award, it became aware of technical problems that Precision was having on a similar contract for the same type of hydraulic locks. Ikard made a technical study and learned that it was not possible for Ikard to produce the required locks with the machinery Ikard then possessed. Ikard ordered machinery with which it could manufacture the hydraulic locks, but this machinery was not delivered to Ikard until after the contract was terminated. However, Ikard points out that since delivery of the necessary machinery to Ikard, Ikard possesses the capability to produce hydraulic locks and, therefore, should have been solicited under RFP No. 78-R-1034.

Regarding the fact that RFP No. 78-R-1034 authorizes certain material substitutions but that Ikard's defaulted contract did not, the contracting officer reports that Ikard never requested authorization to substitute materials or to use alternate procedures on any parts required under contract No. 77-C-0234 at any time during the 402 days between award and default. Furthermore, the contracting officer states that Ikard never requested any assistance nor offered any explanation for its lack of production progress. Accordingly, the contracting officer terminated Ikard's contract for default and added the 32 locks required under Ikard's defaulted contract to solicitation No. 78-R-1034 by amendment.

We have reexamined our file in the earlier Ikard protest in light of protest issue 1C. Ikard had protested MIRCOC's decision to cancel solicitation No. 78-B-0056 after bids had been opened. Ikard contended that, since Ikard was apparently in line for award, the sole purpose for the cancellation was to avoid award to Ikard. In that case, the Army reported

that, after a review of the specifications by MIRCOC engineers, the contracting officer had determined that an equal product could be produced at substantial cost savings to the Government by allowing the use of steel bar stock instead of castings. The contracting officer canceled the solicitation after determining that the original specifications, which required castings, did not accurately reflect the actual needs of the agency and should be revised.

We held that the cancellation was not only proper but was required since the agency had determined that the original specifications overstated the agency's minimum needs. We further stated that there was no evidence of bad faith on the part of MIRCOC and no arbitrary or capricious actions toward Ikard. RFP No. 78-R-1034 is a reprocurement of the earlier requirement and authorizes material substitutions in accord with the MIRCOC engineers' determination of minimum needs. The MIRCOC engineers' determination as to minimum requirements and the contracting officer's decision to cancel were upheld in our decision.

Regarding Ikard's protest issue 1D, the Army denies any interference with one of Ikard's suppliers. The record shows an attempt by Ikard to purchase only one hydraulic lock from Sonora for use as a first article. However, Sonora rejected Ikard's purchase order because of Sonora's prior understanding that Ikard would purchase 31 additional locks after first article approval. The protester has the burden of affirmatively proving its case. Since the protester's statement is in direct conflict with the agency's statement and because these conflicting statements constitute the only evidence of record on this allegation, Ikard has not satisfied the burden of proof on this point. See Kessel Kitchen Equipment Co., Inc., B-190089, March 2, 1978, 78-1 CPD 162.

With respect to the cancellation of IFB No. 79-B-0214 (protest issue 1E), the TDP required the use of "castings." MIRCOC engineers had previously reviewed this TDP in an earlier procurement (IFB No. 78-B-0056) and had determined that an equal product could be produced at substantial savings to the Government by allowing the use of "hot rolled plate, hot rolled bar, and steel bar" as well as "castings." The earlier

solicitation had been canceled because the contracting officer determined that the specifications overstated the agency's minimum needs. Ikard protested the cancellation and, as previously discussed, our Office upheld MIRCOC's cancellation and denied Ikard's protest against the cancellation. The contracting officer canceled the instant IFB because its TDP had not been updated to incorporate the revisions determined necessary in the earlier procurement action and protest and, therefore, did not allow the substitution of materials.

The Army contends that IFB No. 79-B-0214 contained an unrevised TDP because of an oversight on the part of the contracting officer. The contracting officer was unaware that the TDP was outdated and too restrictive until several days after bid opening when the contracting officer was so informed by a representative of Ikard. The Army contends that Ikard had a duty to inform the contracting officer of the prior protest and of the identical deficiency in the present TDP prior to bid opening. Ikard contends that the contracting officer was aware that the TDP had not been revised prior to issuance, and that the real reason for the cancellation was not that the TDP was outdated, but, rather, was to prevent Ikard from getting the contract since Sonora was nonresponsive.

There is no evidence in the record to show that the contracting officer was aware of the deficiency in the TDP prior to bid opening or that an inadvertent oversight did not occur. Further, it appears to us that it would be in a bidder's best interest to report such an error to the contracting officer while there is still time to issue an amendment to correct the deficiency. Since Ikard must bear the burden of affirmatively proving its case and because the record does not support Ikard's allegation that the contracting officer knew of the TDP deficiency prior to being so informed by Ikard, Ikard has not satisfied its burden of proof. Kessel Kitchen Equipment Co., Inc., supra.

We think that the contracting officer acted in a reasonable manner and properly canceled the IFB once the deficiency was brought to light--especially in

view of our prior decision upholding a similar cancellation. Since we are upholding the cancellation and because the Army indicates that the necessary revisions have now been incorporated into the TDP, we believe that Ikard's protest that Sonora's bid was nonresponsive is now moot and will not consider it further. United Security, Inc., B-194867, June 21, 1979, 79-1 CPD 445.

Our review of all the evidence presented regarding Ikard's allegation that MIRCOC was prejudiced against Ikard and in favor of Sonora and/or Precision does not show that a pattern of partiality existed in the events leading to Ikard's termination for default or in the protested procurement actions taken by MIRCOC since that time. Moreover, the Army reported on July 5, 1979, that Ikard has been awarded 39 contracts and 88 purchase orders by MIRCOC since the award made to Sonora under solicitation No. 78-R-1034.

Solicitation Restriction (Protest issue 2)

The solicitation provision in RFP No. 78-R-1034 to which Ikard objects restricts the procurement as follows:

"This solicitation is limited to prior producers who have first article(s) previously approved by the Government and/or the missile system developer. Submission of first article(s) would be required from any other source. Delivery requirements of the item(s) in this solicitation are urgent and do not permit delay of production by the necessity for manufacture, test, and approval of a first article. If an offeror has not been solicited and can furnish acceptable proof of prior approval of a first article of the item(s) set forth in this solicitation, notify the PCO in writing, furnishing said proof along with the request for solicitation. Acceptability of the proof and waiver of first article submission rests solely with the Government."

We note that the solicitation also stated that the procurement was restricted to firms "who have previously submitted a First Article on this item," and to prior producers "who have submitted first article on a previous contract for this item, to whom first article can be waived on instant procurement." The Army reports that the 118 hydraulic locks being reprocured under RFP No. 78-R-1034 were in critically short supply. The 58 hydraulic locks originally required under solicitation No. 78-B-0056 had been assigned an Issue Priority Designator (IPD) of "08," the 28 locks originally required under solicitation No. 78-B-0364 had been issued with an IPD of "12," and the 32 locks originally required under Ikard's defaulted contract No. 77-C-0234 had had an IPD of "09." The reprocurement under solicitation No. 78-R-1034 was issued with an IPD which was upgraded to "02" in recognition of the urgency created by the supply shortage. Because of the critical delivery requirement, the contracting officer determined that the reprocurement had to be restricted to Sonora and Precision--the only two known small business firms for which the first article requirement could be waived. This determination was based upon the advice of HERCULES technical advisors who indicated that submission, testing, and approval of a first article would take approximately 345 days and that the needs of the Government were so urgent that such a delay could not be permitted. With regard to the fact that Ikard was not solicited, the Army report states in part that:

"In the instant procurement there was no systematic or automatic exclusion of Ikard from competition. Although he had contributed to the Government's critical supply shortage by failing to deliver the quantity of 32 each under defaulted Contract 77-C-0234, the reason Ikard was not solicited was because of the decision to go to the only two sources for whom first article could be waived. Ikard could not qualify for first article waiver."

The procurement statutes and regulations require procuring agencies to obtain maximum competition consistent with the nature and extent of the services or

items being procured. However, procuring agencies are vested with a reasonable degree of discretion to determine the extent of the competition which is required consistent with the needs of the agency. We have upheld a variety of restrictions on competition, including prequalification procedures, when their use was adequately justified so as not to impose any undue restrictions on competition. Department of Agriculture's Use of Master Agreements, 56 Comp. Gen. 78 (1976), 76-2 CPD 390. The Government's interest in obtaining maximum competition must be weighed against a bona fide administrative determination that the exigencies of a particular procurement program are such that the delay involved in obtaining maximum competition would adversely affect the Government's interest. See, generally, Department of Agriculture's Use of Master Agreements, 54 Comp. Gen. 606 (1975), 75-1 CPD 40. In situations involving "exigency" the contracting officer has considerable discretion to determine the extent of competition that is consistent with the urgent needs of the Government and unless it is shown that the contracting officer acted without a reasonable basis, our Office will not question the award even where the procurement was sole-sourced. Moreover, expected delivery delays and their potential adverse impact on an agency's missions are particularly compelling reasons to justify sole-source procurements based on urgency. See Ikard Manufacturing Company, B-192189, November 28, 1978, 78-2 CPD 371.

We do not believe that the protested restriction is objectionable. The record shows that there was a critical shortage of the required parts which was in part contributed to by Ikard's default on contract No. 77-C-0234. Due to the short period of time in which a contract had to be consummated, this solicitation was given a high priority and it was determined by the contracting officer that the time required to receive and test first articles (345 days--according to MIRCOM's estimate) was too long to be permitted. The record does not support a finding that there was any systematic attempt by MIRCOM to exclude Ikard. In fact, Ikard admits that it was incapable of producing the required parts during the extended performance period of contract No. 77-C-0234. According to Ikard,

it was only after Ikard had been defaulted under contract No. 77-C-0234 that new machinery which allegedly gave Ikard the capability of manufacturing the hydraulic locks was acquired by Ikard. There is no indication in the record that the Army was aware of Ikard's alleged new capability or that this alleged new capability would have qualified Ikard given the time constraints of the procurement. In such circumstances, we find no abuse of discretion by the contracting officer in limiting this reprocurement to prior producers which had first articles previously approved or submitted. See Ikard Manufacturing Company, B-192316, November 1, 1978, 78-2 CPD 315. See, also, 36 Comp. Gen. 809 (1957).

Qualification of Sonora for Award (Protest issue 3)

Since we have upheld the propriety of the solicitation restriction limiting the present solicitation to prior producers which had first articles previously approved or submitted, Ikard's protest issue 3 will be addressed.

The Army reports that Sonora's first article was rejected on June 8, 1978, prior to the issuance of this solicitation, but that the first article submission was of such quality that it clearly demonstrated Sonora's technical capabilities and provided an adequate basis for waiver of the first article requirement. The Army also states that the poor performance by Ikard on its prior defaulted contract precluded waiver of the first article requirement for Ikard in the present procurement. Although Sonora's first article had not been approved by the time the RFP was issued, the record shows that it was resubmitted and was finally approved on September 12, 1978, and that award to Sonora did not take place until November 7, 1978.

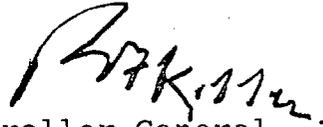
As mentioned above, the solicitation also contained language permitting the qualification of firms which had submitted first articles. Also, the Army could, at its sole discretion, waive the first article test requirement. We believe that, reading all these provisions together, the RFP contemplated that proposals could be accepted from firms which did not have

their first articles approved prior to the issuance of the RFP but which could obtain first article approval prior to award.

In spite of the urgent delivery schedule, Sonora managed to have its first article approved prior to award because Sonora had already submitted a nearly acceptable first article. Since matters dealing with the capability of a firm to provide the required items are matters of responsibility, evidence may be submitted by the offeror after the date set for receipt of proposals and offerors may qualify any time prior to award. Accordingly, Sonora's submission of a first article after the RFP was issued and the Army approval of that first article prior to award were proper. See B-176256, November 30, 1972, and ERA Industries, Inc., B-187406, May 3, 1977, 77-1 CPD 300.

Conclusion

The protest is dismissed in part and denied in part.



For The Comptroller General  
of the United States