



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Aerosonic Corporation
File: B-232730
Date: January 18, 1989

DIGEST

Where the contracting agency has an urgent requirement for clocks used in navigation of aircraft and the applicable procurement regulation calls for acquisition of domestically-manufactured clocks if available, the agency properly may restrict reprocurement after default to the one firm, the agency has determined can produce the domestic item without first article testing and attendant delays.

DECISION

Aerosonic Corporation protests the award of a reprocurement contract to Waltham Clock Company for domestically-manufactured clocks for Army and Air Force aircraft under request for proposals No. DAAA09-89-R-0015, issued by the Army Materiel Command (AMC). Aerosonic asserts that the agency failed to obtain competition to the maximum extent practicable, as required in a reprocurement, and that the contract constitutes an improper sole-source award.

We deny the protest.

BACKGROUND

The requirement at issue here, 1,588 domestic aircraft clocks, is the undelivered quantity under a previous contract with Waltham Precision Instruments, Inc. AMC terminated that contract for default after Waltham Precision had disaffirmed the contract and undergone dissolution in bankruptcy. On October 28, 1988, the agency awarded a replacement contract to Waltham Clock, the successor in bankruptcy to Waltham Precision, with deliveries to commence November 30, 1988.

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AMC justified the award without further competition on the basis that only Waltham could satisfy the urgent need for the clocks, which are used in navigation and required for the safe operation of Army and Air Force aircraft. According to AMC, the shortage of clocks resulting from the defaulted contract already had caused the grounding of a number of aircraft, and both the Army and the Air Force had determined that additional aircraft would be grounded each month the resumption of deliveries was delayed. AMC's determination that only Waltham Clock could meet the requirement was based on its finding that Waltham Clock was the only manufacturer that (through its predecessor, Waltham Precision) had supplied aircraft clocks entirely of domestic manufacture, as called for by the Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 8.74. In this regard, AMC found through preaward surveys of Waltham Clock and Aerosonic that only Waltham Clock qualified for waiver of a first article test (FAT), which was deemed necessary to avoid further delays.

Aerosonic objects that it was improper for AMC to waive a FAT requirement for Waltham, and otherwise to treat the firm as if it were equivalent to the predecessor firm, Waltham Precision; it disputes AMC's finding that Waltham Clock, having acquired virtually all of Waltham Precision's assets and most of its employees, is essentially the same firm. Aerosonic asserts that Waltham Clock, unlike Waltham Precision, is not among those firms whose aircraft clocks are on the relevant Qualified Products List (QPL) of clocks that had been tested and approved by the agency, or whose pinion and gear components for the clocks are on the list of confirmed domestic sources. Since Waltham allegedly was not entitled to waiver of the FAT requirement, Aerosonic contends it should have been solicited for the requirement as well, in either of two ways: either the agency should have considered the procurement of clocks containing foreign-made components (which Aerosonic could have provided), which is permitted where domestic clocks are unavailable, DFARS § 8.7403(a)(2); or the requirement should have been added to an earlier solicitation for domestic clocks on which Waltham Clock and Aerosonic competed, and under which Aerosonic received an award on August 31, 1988. Since under either of these alternatives Aerosonic allegedly would have been able to deliver the clocks as quickly as Waltham Clock if Waltham Clock were subject to the FAT requirement (as Aerosonic argues it should be), Aerosonic concludes that AMC improperly failed to permit Aerosonic to compete, resulting in an improper sole-source award.

ANALYSIS

Generally, in the case of a repurchase after default, the statutes and regulations governing regular federal procurements are not strictly applicable. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. To repurchase the same requirement on a defaulted contract, the contracting agency may use any terms and acquisition methods deemed appropriate for the repurchase, provided that competition is obtained to the maximum extent practicable and the repurchase is at as reasonable a price as practicable. Federal Acquisition Regulation (FAR) § 49.402-6; United States Pollution Control, Inc., B-225372, Jan. 29, 1987, 87-1 CPD ¶ 96. Aeronomic does not question the reasonableness of the contract price (the same as the price under Aeronomic's own contract for domestic clocks). The question here, therefore, is whether the award to Waltham Clock satisfied the competition requirement. We find that it did.

Competition Based on Non-Domestic Clocks

First, we do not agree with Aeronomic that AMC could or should have considered Aeronomic available for a competition based on its on-hand supply of non-domestic clocks. The DFARS specifically provides that defense requirements for aircraft clocks must, to the maximum extent practicable, be of domestic manufacture only; non-domestic clocks may be purchased only when domestic items cannot be obtained. DFARS § 8.74. Here, AMC specifically determined that domestic clocks could be obtained from Waltham Clock, and that there thus was no need to purchase non-domestic clocks under the DFARS exception.

Aeronomic challenges AMC's conclusion that domestic clocks were available on the basis that AMC incorrectly determined that the Waltham Clock was entitled to a FAT waiver (which would enable the firm to meet the delivery schedule), based on the past performance of Waltham Precision, an entirely different company. We find nothing objectionable in the agency's determination. In June 1988, AMC conducted a preaward survey of Waltham Clock. Based on that survey, both the Army and the Air Force determined that no FAT would be required for Waltham Clock and the firm would be able to commence deliveries of domestically-manufactured clocks 30 days after award. The conclusion was based, in part, on the findings that Waltham Clock had purchased virtually all of the assets of the bankrupt Waltham Precision, which had been the only manufacturer of domestic aircraft clocks for the government since World War II, and that Waltham Clock's key engineering, quality control, and production personnel had previously worked for Waltham Precision and were "the

best in their business." Aerosonic's argument that Waltham Clock is not the same firm as Waltham Precision is of limited relevance; the preaward survey focused on Waltham Clock, not Waltham Precision, and represented an assessment of that firm's production capacity. Thus, in our view, AMC reasonably concluded that Waltham Clock did not require a FAT, and thus was in a position to make prompt delivery of domestic clocks; see Automated Power System, Inc., B-224203, Feb. 4, 1987, 87-1 CPD ¶ 579. There thus was no need for AMC to invoke the exception to the DFARS permitting the purchase of non-domestic clocks.

Incorporation in Aerosonic Contract

Aerosonics' alternative argument that AMC should have added the requirement in question to the quantities under its August 1988 contract also is unpersuasive. First, we fail to see how a noncompetitive award of the requirement to Aerosonic would eliminate the impropriety Aerosonic alleges, namely, the award of a contract without competition. More importantly, we think AMC reasonably determined that Aerosonic could not perform this requirement within AMC's urgent timeframe. In this regard, at the same time (June 1988) Waltham Clock was found capable of performing without a FAT and commencing deliveries 30 days after award, AMC determined that the FAT requirement could not be waived for Aerosonic; Aerosonic had never manufactured domestic aircraft clocks prior to its August 1988 contract, and the FAT results from that contract were not due until December 30, with delivery not scheduled to commence until February 28, 1989. In light of the FAT requirement, AMC reasonably concluded that Aerosonic could not timely furnish the clocks, whether under its August 1988 contract or a new contract.

We conclude that AMC reasonably determined that only Waltham Clock, and not Aerosonic (there is no evidence that other firms were available), was capable of delivering the required aircraft clocks within the agency's urgent timeframe. It follows, therefore, that AMC's award of a contract to Waltham Clock was consistent with the requirement that procurement awards be based on the maximum practicable competition.

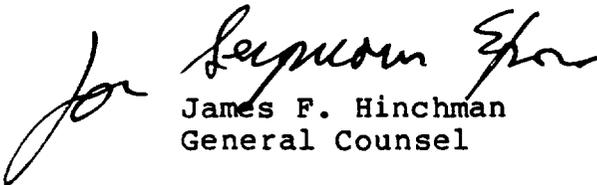
Other Issues

Aerosonic's other objections also are without merit. For example, Aerosonic asserts that Waltham Clock was not qualified for award because it was not a firm whose aircraft clocks were listed on the relevant Qualified Products List (QPL). However, AMC has submitted evidence that on

November 10, 1988, the name of Waltham Clock was approved to replace that of Waltham Precision on the QPL for the particular model of aircraft clock at issue here; further, the agency reports that Waltham Clock had satisfied all of the requirements for being placed on the QPL, and had in fact qualified for listing, prior to the award on October 28. In any event, if a potential offeror can demonstrate to the satisfaction of the contracting agency that the offeror (or its product) meets the standards established for qualification, or can meet those standards prior to award, it may not be denied consideration for award of a contract solely because it is not yet on the relevant QPL. See FAR § 9.202 (c). Here, the agency has determined that the product manufactured by Waltham Clock was essentially the same as that manufactured by Waltham Precision, which it had already qualified and which was already on the QPL. The delay in adding Waltham Clock to the list was an administrative technicality, irrelevant to the issue of whether the firm was a qualified source.

Similarly, with respect to Aerosonic's objection that Waltham Clock was not on the list of confirmed domestic sources for pinions and gears (components of the aircraft clocks), AMC reports that Waltham Clock was in fact qualified to be placed on the list, but that the practice of maintaining lists of confirmed domestic sources for these components expired on December 31, 1987, well before the award was made.

The protest is denied.


James F. Hinchman
General Counsel