

**United States Government Accountability Office  
Washington, DC 20548**

# Decision

**Matter of:** Advanced Seal Technology, Inc.

**File:** B-311308

**Date:** June 5, 2008

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Thomas Doecker for the protester.

Mike Walters, Esq., Defense Logistics Agency, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest that offeror was deprived of a reasonable opportunity to qualify its alternate item is denied where, although the procuring agency failed to promptly notify offeror of deficiencies in its item, the record shows that the offeror did not suffer competitive prejudice as a result.

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## DECISION

Advanced Seal Technology, Inc. (AST) protests the issuance of an order to Quality Control Corporation by the Defense Logistics Agency (DLA), Defense Supply Center Columbus (DSCC), under request for quotations No. (RFQ) SPM7M3-07-T-D027 for seal assemblies, National Stock Number 4320-01-276-0822 (NSN 0822).

We deny the protest.

NSN 0822 is a critical application item,<sup>1</sup> thus, a designated Engineering Support Activity (ESA) is required to approve all sources. DLA Instruction 3200.1. In this case, the Naval Surface Warfare Center, Carderock Division is the ESA responsible for approval. The approval process consists of the evaluation of a technical data package (TDP) supplied by the potential offeror which, if found satisfactory, results in conditional approval pending an installation test to ensure the fit and function of the proposed alternate item. If the installation test is also satisfactory, the alternate item is approved and the offeror is listed as a qualified source. The only sources

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<sup>1</sup> A critical application item is an item the failure of which could injure personnel or jeopardize a vital agency mission. Federal Acquisition Regulation (FAR) § 46.203.

currently approved to supply NSN 0822 are Blackmer Inc., the original equipment manufacturer, and Quality Control Corporation, an approved alternate item manufacturer.

In December 2005, in response to three DSCC solicitations for NSN 0822, AST attempted to submit a TDP for its proposed alternate item, PFS-0822-21A. AST was unable to submit its TDP because of various technical issues at DSCC. AST then filed agency-level protests regarding each of the solicitations and, as a result, DSCC accepted AST's TDP on January 6, 2006, and forwarded it to the ESA.

In March 2006, while AST's TDP was under evaluation at the ESA, DSCC issued an order for NSN 0822 to another firm at a price higher than that quoted by AST. Concerned with the issuance of the order, AST enlisted the support of an agency contact that had assisted AST in becoming approved as a qualified source for various other NSNs. Comments at 2. Shortly thereafter the order was cancelled, and on May 15, AST's TDP was approved by the ESA.

On July 10, DSCC again issued an order to another firm at a price higher than that quoted by AST. AST protested that order at the agency level, arguing that, because its proposed alternate item had been conditionally approved, it should have been given an installation test before the order was issued to another firm. AST's agency-level protest was sustained, and the order was cancelled.

On October 12, DSCC issued an order to AST under which AST was required to submit two sample units of PFS-0822-21A for use in a first article test (FAT), to serve as the installation test of the alternate item. Even though the order included a FAT requirement, the FAT requirement was not added to the DSCC FAT monitor's tracking system. Agency Report (AR), Tab 4, Affidavit, at 2. As a result, the FAT was never scheduled and the contract administrator, believing that the alternate item was approved, directed AST to expedite delivery of the entire 145 unit order. Id. AST delivered the entire order to the agency on December 8. Comments at 3. However, because the FAT never occurred, AST was not approved as a qualified source.

On May 11, 2007, DSCC issued another RFQ for NSN 0822. Because AST's alternate item had still not undergone an installation test, AST was not listed as a qualified source on the RFQ. Nevertheless, on May 21, believing that it had been approved, AST filed a protest with our Office, challenging DSCC's failure to list it in the RFQ. Through the development of that protest, AST eventually learned that its alternate item had never been subjected to an installation test. In settlement of the protest, DSCC and AST, through its attorney, entered into an agreement under which DSCC would abstain from issuing orders under the RFQ until the ESA completed an installation test of AST's alternate item.

In August 2007, DSCC received an initial response from the ESA indicating that AST's alternate item had failed the installation test. Id. DSCC then notified AST's attorney by telephone that the item had failed testing. Id. On November 5, DSCC

received the ESA's official test report, and on November 27, forwarded that report to AST's attorney. AR at 2. During this time period the attorney, who had represented AST in its previous protests, was no longer retained by AST and did not inform the firm of the test results. Protest at 2. According to the protester, the attorney did inform DSCC that he no longer represented AST, but DSCC never sent the ESA's test report directly to AST, and AST never received the test results. Id. The agency disputes AST's assertion that its former attorney advised DSCC that his representation of AST had ended, but agrees that the test report was not sent directly to AST. AR, Tab 4, Affidavit, at 4.

On December 20, DSCC publicized the issuance of an order to another firm under the RFQ at issue here, at a price higher than that quoted by AST. On December 21, AST inquired as to why its lower-priced quotation had not been considered and was informed for the first time that its proposed alternate item had failed the installation test in August, 4 months before. AST then asked why it had not been informed of the test results earlier and was told that DSCC believed that AST had been notified. Protest at 1.

On December 28, DSCC sent AST a copy of the ESA's test report. On December 29, AST filed an agency-level protest, asserting that it had been denied the opportunity to respond to the adverse technical evaluation of its proposed alternate item due to the agency's failure to promptly notify AST of the installation test results.

By January 9, 2008, AST had modified its alternate item and sent a revised TDP to DSCC, which promptly forwarded it to the ESA. On February 21, AST's agency-level protest was denied, and on February 29, AST filed this protest with our Office. On April 1, AST's revised TDP was rejected as incomplete and insufficient. In its protest here, AST argues that DSCC improperly denied it the opportunity to qualify its alternate item.

The Competition in Contracting Act of 1984 (CICA) requires that an agency obtain "full and open" competition in its procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (2000). Accordingly, when a contracting agency restricts contract award to an approved product and imposes a qualification requirement, it must give nonapproved sources a reasonable opportunity to qualify. Newgard Indus., Inc., B-257052, Aug. 11, 1994, 94-2 CPD ¶ 70 at 2. AST argues that in view of the historical record of its efforts to qualify its alternate item, it is clear that the internal process at DSCC is "broken" and that as a result AST has been denied a reasonable opportunity to qualify. Comments at 10.

While the cumulative effect of repeated shortcomings in the qualification process may deny an offeror a reasonable opportunity to qualify, Advanced Seal Tech., Inc., B-249855.2, Feb. 15, 1993, 93-1 CPD ¶ 137 at 5-6, we do not agree that the record supports such a conclusion here. With regard to the period preceding the specific procurement at issue in the protest, while the record shows that certain issues arose in processing the qualification testing of AST's alternative item, each prior

procurement was the subject of a protest by AST, and each of those protests was sustained by the agency, or resulted in corrective action or settlement. As a result, DSCC has not, until now, issued an order for NSN 0822 to any firm other than AST since AST began its effort to qualify PFS-0822-21A. Under these circumstances, while we do not condone the agency's failure to facilitate AST's request for product approval, we fail to see how AST was prejudiced by any prior shortcomings in the qualification process. REEP, Inc., B-290688, Sept. 20, 2002, 2002 CPD ¶ 158 at 2 (competitive prejudice is an essential element of every viable protest, and unless another firm is actually selected for an award, a protester has not suffered competitive prejudice).

With regard to the specific procurement challenged here, AST argues that DSCC's failure to inform it of the results of the installation test of PFS-0822-21A denied AST a reasonable opportunity to qualify its alternate item before the issuance of the order. By statute and regulation, agencies imposing qualification requirements must fulfill specific responsibilities. As relevant here, they must provide offerors a prompt opportunity to demonstrate their qualification and must ensure that any offeror seeking qualification is promptly informed as to whether qualification has been attained, and if not, promptly furnish specific information on why qualification was not attained. 10 U.S.C. § 2319(b)(4), (6); FAR § 9.202(a)(2)(ii), (4).

In response to AST's argument, DSCC contends that it fulfilled the requirements of 10 U.S.C. § 2319(b)(6) by notifying the attorney who had represented AST in the protest that led to the installation test. DSCC also argues that, even assuming it failed to properly notify AST of the result of the installation test, AST was not prejudiced because, even if it had been promptly notified of the results, the firm could not have successfully qualified in time to compete for this order.<sup>2</sup>

In our view, even assuming that notification of the attorney who represented AST in its previous protests was sufficient to constitute notice to AST, DSCC's notification of AST's former attorney was unreasonably delayed, contrary to the requirements in 10 U.S.C. § 2319(b)(6). The installation test was completed on August 22 and the test report was completed on September 19, but the report was not forwarded to AST's former attorney until November 27. Whether this more than 2-month delay between the completion of the test report and formal notification was attributable to DSCC or the ESA, we conclude that it did not constitute prompt notice as required under 10 U.S.C. § 2319(b)(6).

However, we also conclude that AST was not prejudiced by DSCC's failure to promptly notify it of the results of the installation test. AST first received the results

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<sup>2</sup> A contracting officer need not delay a proposed order in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification. FAR § 9.202(e).

of the installation test on December 28. By January 9, AST had modified its alternative item and sent a revised TDP to DSCC. DSCC forwarded the revised TDP to the ESA, which conducted an evaluation and notified AST on April 1 that its revised TDP was rejected because it was incomplete and contained insufficient information to determine if the modified design would work. The period of time from when AST learned of the result of the installation test to when it was notified that its revised TDP was rejected was 94 days.

Based on that 94-day time period and the ultimate rejection of AST's revised TDP, it is clear that AST would not have had a reasonable chance of receiving the order even if it had been promptly notified of the results of the installation test. Assuming that AST was officially notified of the results of the installation test on September 19, based on the 94-day time period, AST would have received notice that its revised TDP was rejected on December 22, 2 days after DSCC publicized the issuance of the order to another firm.

Moreover, because AST's revised TDP was rejected, AST could not have qualified in time for the order even if the evaluation of the TDP had taken substantially less time. If AST had been notified that its revised TDP was rejected even well ahead of the date the order was issued, AST would have been required to revise its TDP for a second time and submit it for reevaluation before it would have had a chance of again becoming conditionally approved.<sup>3</sup> In our view, there was not a reasonable chance that AST could have become a qualified source in time to receive the order.

The protest is denied.

Gary L. Kepplinger  
General Counsel

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<sup>3</sup> DSCC also notes in its report that it delayed the issuance of the order due to its inability to notify AST of the results of the installation test before November 27. DSCC argues that, had AST been notified on September 19, the order would have been issued earlier than December 18. AR at 5.