

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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RC Fluid Engineering, Inc. ) ASBCA No. 56228  
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Under Contract No. F09603-02-C-0144 )

APPEARANCE FOR THE APPELLANT: Michael T. Kavanaugh, Esq.  
McKenna Long & Aldridge LLP  
Los Angeles, CA

APPEARANCES FOR THE GOVERNMENT: Col Neil S. Whiteman, USAF  
Chief Trial Attorney  
Maj Christopher L. McMahan, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Appellant (RC) appeals the denial of its claim for the government’s alleged bad faith in failing to exercise an option under the captioned contract (Contract 0144). The alleged facts constituting the alleged bad faith, however, are that the government improperly awarded a sole source contract to a competitor for a redesigned product that made RC’s option product obsolete. The government moves to dismiss, or in the alternative for summary judgment. We grant the motion to dismiss.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 29 November 2001, the Warner Robbins Air Logistics Center (WRALC) posted a pre-solicitation notice stating that requests for proposals (RFPs) would be issued to RC and Aeroquip Corporation (Aeroquip) for manufacture and delivery of 200 F-15 aircraft elbow tubes, NSN 4730-01-346-7878 FX (NSN 7878), with an option for up to an additional 182 tubes. The elbow tube was the center section of the Engine to Airframe Manifold (ETAM) that provided fuel to the aircraft engines. Aeroquip was the original equipment manufacturer (OEM) of the elbow tube. (R4, tab 2, ex. 2 at 1, ex. 3 at 2-3)

2. On 21 December 2001, the RFPs referenced in the 29 November 2001 pre-solicitation notice were issued. On 29 January 2002, RC submitted a proposal, and on 5 February 2002, RC was awarded Contract 0144. The contract option was exercisable at anytime within 12 months after date of award. (R4, tab 1 at 1, 6)

3. On 4 February 2002, one day before the award of Contract 0144, WRALC posted a pre-solicitation notice stating that a sole source solicitation would be issued to

Aeroquip for 200 F-15 aircraft elbow subassemblies, NSN 4730NCC623564. The stated justification for the sole source procurement was that “manufacturing data is not available for this item.” (R4, tab 2, ex. 2 at 2)

4. On 29 March 2002, WRALC completed a justification and approval (J&A) for the procurement of the F-15 elbow subassemblies, NSN 4730-01-493-8729 FX (NSN 8729), sole source from Aeroquip.<sup>1</sup> The J&A stated in relevant part:

The ETAM has had a long history of leaking during engine start that has caused it to be the number one ground abort item on the F-15 aircraft. In an effort to eliminate this problem the F-15 SPO and the cognizant engineering authority at the time...approached Aeroquip Corp. (the original equipment manufacturer) to determine if a redesign effort to eliminate the leakage problem was possible. Aeroquip agreed to take on this task at their own expense. Aeroquip redesigned a new elbow subassembly that would have less wear thereby theoretically leading to increased service life of the parts. Aeroquip developed a prototype part for the USAF. The USAF accomplished a flight evaluation and tear down analysis of this prototype part. The results of the test were very positive. Based on this testing the decision was made that this new elbow assembly would become the preferred spare for future procurements.

....

Aeroquip accomplished the development of this elbow subassembly with no USAF funding. They supplied their data (with Proprietary legends) as a courtesy for our use in cataloging actions. Solicitation must be limited to Aeroquip Corporation.

(R4, tab 2, ex. 3 at 1-3)

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<sup>1</sup> Although the NSNs were different, this was the same part (by manufacturer’s part number, AE73294U) as the item in the 4 February 2002 pre-solicitation notice.

5. On 21 September 2002, the government awarded Contract No. F09603-02-C-0328 to Aeroquip for 200 F-15 aircraft elbow subassemblies (compl. ¶ 25). On 5 February 2003, the option under RC's Contract 0144 expired without having been exercised.

6. The basic quantity under Contract 0144 was the last purchase of F-15 elbow tubes (NSN 7878) by the government. All subsequent procurements of the F-15 aircraft ETAM center section to date have been sole source procurements from Aeroquip of the elbow subassembly (NSN 8729). (R4, tab 2, ex. 3 at 4-6)

7. On 23 February 2006, RC submitted a certified claim for alleged bad faith, abuse of discretion, and arbitrary and capricious actions of the government in procuring sole source the redesigned F-15 ETAM center section. The claimed damages were (i) \$117,208 for lost profits on the unexercised Contract 0144 option quantity, (ii) \$47,836 for scrapping tools, fixtures, dies and gauges, and (iii) \$70,492 for scrapping of materials, all resulting from its option product being made obsolete by the redesigned ETAM center section. (R4, tab 2 at 16, 17)

8. RC's claim summarizes the alleged bad faith, abuse of discretion, and arbitrary and capricious actions of the government as follows:

The government secretly approached Aeroquip and "asked" Aeroquip to redesign the "Elbow Tube;" the government solicited the part under different names and NSN numbers; the government misrepresented market research efforts on the sole source justification; the government misrepresented the existence of other responsible sources; the government concealed key information from RC Fluid when RC Fluid inquired about the new "Elbow Tube" solicitations; and the government offered a valuable sole source contract, at a greatly increased price, based on scant technical data, to RC Fluid's competitor. One need not have sophisticated knowledge of federal government contracting to get a strong sense of impropriety under these circumstances. The available evidence indicates that the Air Force's decision not to award RC Fluid option contract F09603-02-C-0144-1001 was arbitrary and capricious, and abuse of discretion or done in bad faith, and as such amounts to a breach of contract.

(R4, tab 2 at 18)

9. On 30 July 2007, the contracting officer denied RC's claim (R4, tab 3). This appeal followed.

### DECISION

The government moves to dismiss for lack of jurisdiction on the ground that RC's claim is in substance a protest against a sole source procurement. The government moves in the alternative for summary judgment on the ground that the decision to procure the redesigned part was a sound business decision, within its broad discretion to obtain the best components for safety of flight, and not made in bad faith with the sole intent of injuring RC or otherwise improper. (Gov't mot. at 5-6). RC opposes on the ground that government actions "qualifying Aeroquip's new part number as the 'preferred' part, and its subsequent solicitation of that part under a different name and on a sole source basis...demonstrate [the government's] palpable bad faith in the award of Appellant's base contract and its arbitrary and capricious decision not to exercise the option included in Appellant's contract" (app. opp'n at 4).

We agree with the government that we have no jurisdiction over procurement ("bid") protests, and accordingly, we will not delve into the alleged impropriety of the government's failure to solicit RC for, and sole source procurement from Aeroquip of, a redesigned ETAM center section for the F-15 aircraft. *See Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). Moreover, examining the operative facts of the claim, there are no allegations in the claim of bad faith, abuse of discretion, arbitrary and capricious conduct that are independent of and unrelated to those actions involving the sole source procurement of the redesigned ETAM center section. In short, the claimed lost profits and scrapping of tooling, fixtures, dies, gages and materials are damages resulting from the alleged improper sole source procurement of the redesigned center section which made RC's product obsolete, and not the result of any government actions in the award and administration of Contract 0144. The claim therefore does not arise under or relate to the captioned contract.

The appeal is dismissed for lack of subject matter jurisdiction

Dated: 31 October 2008

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56228, Appeal of RC Fluid Engineering, Inc., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals