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J. Spangenberg
Page I

DECISION



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

**FILE: B-185955
B-186168**

DATE: December 15, 1976

MATTER OF: Galbraith - Pilot Marine Corporation

DIGEST:

1. Although RFP specified part number of item, with only one firm had previously supplied, alternate, qualified, equal, and interchangeable products made by other firms meeting Government's RFP requirements can be considered, since those alternate products were not specifically excluded by RFP, albeit that they were not specifically solicited; previous sole-source firm was made aware that requirement was going to be competed; and there is no indication of prejudice to potential offerors because of RFP's failure to state "equal" assemblies were acceptable.
2. No modification to qualified product portion of item offered by successful offeror under RFP was necessary to meet Government's requirement of interchangeability with previously supplied product, although unqualified portion of item was altered. In any case, QPL preparing activity, acting within its discretion, has found requalification of product to be not necessary. Therefore, offeror offered qualified product in accordance with RFP QPL requirements and was eligible for award.
3. Protests that successful offeror cannot meet requirement that procured items be interchangeable with protester's previously supplied units, without violating proprietary rights and infringing on patents of protester, will not be considered on merits.

The Galbraith - Pilot Marine Corporation (GPMC) has protested the award of contracts to Beckman Instruments, Inc. (Beckman), under requests for proposals (RFP's) NOO104-76-R-XA31 (-XA31) and NOO104-76-R-1376 (-1376), issued by the Navy Ships Parts Control Center (SPCC), Mechanicsburg, Pennsylvania. RFP -XA31 called for NSN (National Stock Number) 2H 6630-00-983-2579 (NSN-2579), GPMC part number PMC N8LV-MODS salinity indicating cell and valve assemblies. RFP-1376 called for NSN 1H 6630-00-983-2577 (NSN-2577), GPMC part number CNS-S3 cell and valve assemblies. The RFP's required the assemblies to be qualified for listing on qualified products list (QPL) 15103-6, dated April 1, 1975.

P-185955
B-186168

The Navy has reported that NSN-2579 and NSN-2577 assemblies are extremely similar. Each designated NSN assembly consists of the same GPMC manufactured cell and valve assembly listed on the QPL with different sized flanges, nuts and bolts.

Since these items had previously been supplied only by GPMC, the RFP's were initially issued to GPMC in August and September of 1975. However, in August 1975, the Defense Contract Audit Agency and the Defense Contract Administration Services Region had determined that GPMC's price under a previously awarded letter contract (N00104-75-C-4264) for NSN-2579 assemblies appeared to be excessive. Consequently, in November 1975, after GPMC submitted prices under the RFP's, SPCC contacted other potential suppliers of the assemblies, including Beckman, to ascertain whether units equivalent to and interchangeable with GPMC's units could be obtained. In December 1975, Beckman, which also has a cell and valve assembly listed on the above QPL, indicated an interest in competing under the RFP's. Therefore, the RFP's were opened for competition.

Although Beckman's assembly is of different construction than the GPMC unit, Beckman guaranteed electrical and mechanical interchangeability of its unit with the units previously acquired from GPMC. Beckman also stated that it would manufacture the unit in accordance with Beckman's design approved for listing on QPL 15103-6. Beckman also required certain additional information about the GPMC unit to assure interchangeability, which SPCC apparently supplied.

The closing dates for receipt of proposals under the RFP's were on January 30, 1976. Awards were made to Beckman as the low offeror for \$212 per unit under RFP -2579 on February 20, 1976, and for \$248 per unit under RFP -2577 on February 24, 1976.

GPMC has protested that, although Beckman may have qualified assemblies for listing on QPL 15103-6, it had not qualified a cell and valve assembly in accordance with NSN -2577 and -2579 as required by the RFP's and consequently was ineligible for award. GPMC has also alleged that the Beckman assemblies are not designed to operate interchangeably with the GPMC units currently in use, and the likelihood of malfunctions, damage, and errors in readings and connections would significantly increase if such an interchange were attempted.

B-185955
B-186168

GPNC also contends that the RFP's, as amended, require interchangeability to be established prior to award, which the Navy admits Beckman did not establish here. GPNC finally asserts that GPNC's proprietary data rights (e.g., the temperature resistance characteristic curve data for the thermistor on the GPNC assembly) would have to be violated and various GPNC patents would have to be infringed in order to make Beckman's assemblies interchangeable.

Each RFP schedule specified a National Stock Number and GPNC part number, which represented an item only GPNC had previously supplied. However, although alternate products were not specifically solicited, the RFP's did not specifically exclude alternate, qualified, equal and interchangeable assemblies meeting the Government's RFP requirements and manufactured by firms other than GPNC. Moreover, since of those firms approached by SPCC which have products listed on the QPL only Beckman expressed an interest in competing on the RFP's, there is no indication that any potential offeror was prejudiced by the RFP's failure to state that "equal" assemblies were acceptable under the RFP's. Finally, the Navy states that GPNC was made aware that the RFP's were going to be competed rather than sole-sourced. Under these circumstances, SPCC could consider such alternate assemblies under the RFP's. See B-149962, December 26, 1962; B-164848, October 15, 1968; 48 Comp. Gen. 600, 610 (1969); 48 id. 612, 613 (1969); B-176861, January 24, 1973.

Furthermore, although the Navy clearly apprised Beckman prior to the closing dates for receipt of proposals that interchangeability was an essential requirement, the RFP's did not specifically include this requirement. Nor was there any RFP requirement that interchangeability be demonstrated prior to award.

The Beckman contracts awarded pursuant to the RFP's did include a requirement for electrical and mechanical interchangeability with the GPNC unit and provide for tests to confirm interchangeability. The Navy reports that the interchangeability tests were successfully completed under the contracts on sample Beckman unit. GPNC has submitted no substantive evidence to indicate that the Beckman assemblies to be supplied are not totally interchangeable with GPNC's units.

If a manufacturer, such as Beckman, has modified or changed the material or processing in a qualified product, reexamination, retesting and/or removal from the QPL of the product could be found necessary. See paragraph A-109, Defense Standardization Manual 4120.3-M, January 1972; D. Moody & Co., Inc., 55 Comp. Gen. 1, 28 (1975), 75-2 CPD 1.

B-185955
B-186168

However, it is within the discretion of the QPL-preparing activity (in the present case, the Naval Ship Engineering Center (NAVSEC), Hyattsville, Maryland) to determine whether a qualified product has been "sufficiently" changed to require reexamination, retesting, or removal from the QPL. The preparing activity's determination in this regard will not be questioned absent a clear showing of arbitrary or capricious action. See 52 Comp. Gen. 653, 666 (1973); B-176159, September 26, 1972, affirmed January 24, 1973.

In the present case, the Navy asserts that although the Beckman unit was calibrated electrically, in thermistor value, to be compatible with GPMC's unit, no modifications to Beckman's qualified cell and valve assembly were necessary to make it interchangeable with GPMC's assembly. The Navy indicates that the flanges of the RFP items were altered in order to meet the interchangeability requirements. However, as indicated above, the flanges are not subject to qualification requirements. In any case, the interchangeability tests were observed by a NAVSEC (QPL-preparing activity) representative, who found that the altered Beckman units did not have to be requalified. In view of the foregoing, it would appear that Beckman was offering a qualified product in accordance with the RFP's requirements and was thus eligible for award. See 49 Comp. Gen. 224 (1969), affirmed B-165179, B-165800, December 16, 1969; 52 Comp. Gen. supra; B-176159, supra.

Also, we have held that protests that patent infringement would result from performance under a Government contract are not for consideration by our Office. Rather, any patent holder's remedy against the Government under such circumstances is by suit in the United States Court of Claims for money damages. See Aeroquip Corporation, B-184598, September 25, 1975, 75-2 CPD 188, and cases cited therein; 28 U.S.C. § 1498 (1970).

Finally, GPMC's contention that its proprietary data rights would have to be violated in order for Beckman to supply an interchangeable assembly relates to Beckman's responsibility, i.e., Beckman's ability to perform the contract in accordance with the RFP's requirements. We no longer consider "proprietary data" protests, which either directly or indirectly question another firm's responsibility. Polarad Electronics Corporation, B-187517, November 9, 1976.

2-185955
2-186168

In view of the foregoing, GPR's protest is denied.

W. K. ...
Deputy Comptroller General
of the United States