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DECISION

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

[Protest of Agency Procurement Practice]

FILE: B-199662, et al. DATE: January 27, 1981

MATTER OF: Alan Scott Industries

DIGEST:

Since contracting agencies of Government are primarily responsible for determining Government needs and methods of accommodating needs and GAO will question such determinations only when there is clear showing that such determinations have no reasonable basis, protest against current procurement practice is denied in absence of evidence that current practice lacks reasonable basis.

Alan Scott Industries (ASI) protests the Defense Logistics Agency (DLA), Defense Personnel Support Center, issuance of numerous solicitations for medical instruments on two grounds. First, ASI is of the view that DLA should discontinue its current practice of procuring medical instruments by written specification and should instead procure its instrument requirements commercially on the open market. Second, ASI believes that DLA solicitations for instruments should not include clause I-14, testing at Government laboratory. Clause I-14 reads as follows:

"Irrespective of the point of inspection, the Government reserves the right to select samples of any item at any one or more stages of production for testing at a Government laboratory. Any samples so selected shall be forwarded by the Contractor, at its expense, to such Government laboratory as shall have been directed by the cognizant inspector and thereafter no supplies represented thereby shall, unless otherwise directed by said inspector, be shipped until the Contractor shall have been advised that such samples have been approved by such laboratory. Such samples

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> will, unless destroyed in testing, be packed, packaged and returned to the Contractor, at its expense, if so requested by it at the time the same are furnished." (Emphasis supplied.)

We are denying the protest because: (1) the method of procurement selected by DLA has not been shown to be unreasonable; and (2) I-14 meets a legitimate DLA requirement for verification of the supplier's compliance with its contractual obligation to test its own instruments prior to shipment to the Government.

I. FIRST ARGUMENT: COMMERCIAL, OPEN MARKET PROCUREMENT PREFERABLE TO CURRENT PRACTICE

ASI's first ground of protest essentially rests upon ASI's objection to DLA's method of procurement. The record indicates the following bases for this objection: (A) ASI believes that actual compliance with the current written specifications is commercially impossible at either the current market price of instruments or at the price DLA has traditionally paid for instruments; (B) the specifications as written are so broad as to be open to arbitrary and subjective interpretation; and (C) DLA has refused to provide ASI with samples of instruments which meet DLA's minimum requirement. From these bases, ASI appears to argue that since compliance with the stated requirement is commercially impossible, it necessarily follows that DLA in practice accepts something less than its stated requirement. This indicates that DLA's actual minimum requirement is somewhat less than its stated requirement. However, with such broadly written specifications, ASI cannot determine the exact nature of the minimum requirement. Consequently, ASI cannot ascertain at the time it submits its offer exactly what it will ultimately be required to supply. From this line of reasoning, ASI asserts that only a supplier that feels assured that it will receive preferential treatment from DLA will submit an offer in response to such a solicitation. ASI further asserts that the consequence is the reduction of the Government's sources of supply to the single source which feels assured of preferential treatment. ASI believes that the situation can be cured by instead procuring DLA's instrument requirements on the commercial open market.

II. SECOND ARGUMENT: PREAWARD SAMPLE TESTING UNDER CLAUSE D-10 PREFERABLE TO POSTAWARD TESTING UNDER I-14

ASI's second ground of protest, a corollary of its first, again challenges the method of procurement. ASI takes exception to the inclusion of I-14 in the solicitations because it furnishes the contractual basis for random sample testing of instruments following contract award. ASI objects to: (A) incurring the high cost of quantity production of an entire lot of instruments from which the random sample for testing is to be selected as well as the prohibition against shipment until test results are known; (B) the ambiguous nature of the actual minimum requirement; and (C) the broad discretion in choosing which suppliers will be subjected to testing. Again, ASI takes the position that inclusion of the clause is unfair and discourages all but those that feel assured of preferential treatment from submitting offers. ASI believes that clause D-10, which permits the contracting agency to require preaward samples prior to making an award, is sufficient to protect the Government's interest.

III. APPLICABLE LAW

The contracting agencies of the Government are primarily responsible for determining the Government's needs and ascertaining the methods of accommodating them. 38 Comp. Gen. 190 (1958); Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. Generally, Government procurement officials are in the best position to know the Government's actual needs and, accordingly, best able to draft appropriate specifications. Manufacturing Data Systems Incorporated, B-180586, B-180608, January 6, 1975, 75-1 CPD 6. Consequently, our Office will not question an agency determination that an existing Federal specification will meet the actual needs of an agency unless that determination is shown to have no reasonable basis. 44 Comp. Gen. 27 (1964); Ampex Corporation, 54 Comp. Gen. 488 (1974), 74-2 CPD 355.

IV. ANALYSIS OF FIRST ARGUMENT

Aside from ASI's allegation, there is no support in the record for ASI's contention that actual compliance with current written specifications is commercially impossible. It is the protester's responsiblity to present sufficient evidence to affirmatively establish its allegations. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. Since it is not our practice to conduct investigations for the purpose of establishing the validity of a protester's speculative statements, we will not consider this aspect of ASI's protest. Mission Economic Development Association, B-182686, August 2, 1976, 76-2 CPD 105.

In support of its contention that DLA's instrument specifications are so broad as to be open to arbitrary and subjective interpretation, ASI cites the following specifics: a defense investigative service report concerning irregularities in an emergency procurement of medical instruments; an August 7, 1980, letter rejecting a lot of ASI's instruments as unsuitable for Government use; its August 27, 1980, rebuttal of the grounds for rejection; arguments against the use of copper sulfate testing on AISI Type 400 stainless steel; and arguments against the use of terms such as "well rounded," "well cut and defined," and "properly formed" in DLA specifications. ASI states that it has attempted to resolve the matter of subjective standards by requesting samples of acceptable items from DLA in order that it might use these as a standard against which to measure its goods. ASI reports that this request has been consistently denied by DLA. ASI points out that, even if DLA decided to move away from its emphasis on postaward, I-14 testing, and toward more preaward sample testing, the requirement for clear and objective drawings and specifications would remain.

In answer to ASI's contention that the specifications, as written, are so broad as to be open to arbitrary and subjective interpretation, DLA reports: that it is not possible to entirely avoid the use of subjective terminology because of the nature of the manufacturing processes involved; that the complained-of requirements

are "very well understood in the surgical and dental instrument industry"; and that the specifications complained of "represent good manufacturing practice in the industry and have not been questioned by any other suppliers of these items." Further, DLA points out that our Office has in the past reviewed and rejected as unfounded ASI's allegations concerning the impropriety of copper sulfate testing on AISI Type 400 stainless steel instruments.

DLA further reports that, notwithstanding ASI's contention, DLA is furnishing ASI with samples of acceptable instruments as they become available to DLA.

In our opinion, there is an insufficient basis to support ASI's general objection to the method of procurement DLA has selected. Moreover, DLA reports that, contrary to ASI's belief, DLA's procurement practices have not resulted in a history of sole-source awards for the solicited items.

V. ANALYSIS OF SECOND ARGUMENT

Turning to ASI's specific objection to the use of I-14, we note that Surgical Instrument Company of America (SICOA), a small business manufacturing importer of medical instruments, has elaborated on ASI's objections in its comments as an interested party. SICOA points out that testing takes 6 to 12 weeks. SICOA has to finance, at high interest rates, the entire imported "lot" during that time. SICOA states that this finance cost is not figured into its bid price. In SICOA's opinion, its own testing program, together with DLA inspection procedures, constitutes a sufficient safeguard of the Government's interest and renders I-14's "requirements repetitious, arbitrary, and discriminatory in nature." SICOA suggests that DLA permit shipment of the goods and rely upon warranty provisions where receiving depots determine that the goods proffered should be rejected. SICOA also suggests that, where a bidder is known to have good manufacturing practices and test procedures, DLA should shift its emphasis away from postaward (I-14) testing and toward D-10 preaward sample testing in the event of new bidders, new items, or new suppliers to previous bidders.

DLA, by way of background, reports that I-14 has been used in medical supply contracts since 1958 and that it is used in all solicitations and resulting contracts, except purchase orders, issued by its medical material contracting and production division. DLA advises that during calendar year 1980 greater emphasis was placed on I-14 testing and that 57 requests have been directed to various companies for I-14 samples. DLA explains that I-14 is intended to operate as a check on the reliability of supplier testing procedures "in circumstances where the need for such verification is indicated." DLA further reports that the Government exercises its right to call for I-14 verification samples generally when: (1) the offered instrument is of foreign origin; (2) the offeror is a new supplier; (3) the supplier is furnishing the instrument for the first time or for the first time proposes to manufacture the instrument at a different facility; (4) it is not clear that a supplier of a particular kind of instrument has no quality problems; and (5) a supplier's past performance has been unsatisfactory. Moreover, the record shows that the use of I-14 has not inhibited competition in the instrument market.

Although both ASI and SICOA believe the D-10 preaward samples clause provides a sufficient contractual basis to protect the Government's interest, DLA reports that D-10's basic purpose is to:

> "* * * assist the Government in determining, prior to award, the capability of a prospective contractor to produce an item conforming to the applicable specifications. The samples, as such, are not required to conform strictly to specification requirements. Verification samples, on the other hand, are subjected to testing after award of contract. Such samples are required to conform strictly to specification requirements, and the purpose of verification testing is to assure that they do."

Since the record fails to establish the alleged impropriety of the specifications and DLA has stated

the circumstances under which I-14 is applied, we cannot conclude that DLA's use of I-14 has been shown to lack any reasonable basis. Moreover, the record indicates that DLA has only requested verification samples from ASI in two circumstances: (1) where the instruments were of foreign origin and (2) where ASI was supplying the instruments for the first time.

VI. CONCLUSION

Accordingly, ASI's protests are denied.

Milton J. Socolar

For the Comptroller General
of the United States