

117898

21242

Toyle

DECISION



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

FILE: B-203418

DATE: March 22, 1982

MATTER OF: Caelter Industries, Inc.

DIGEST:

GAO finds that an RFP provision--that the towed sweeper shall be a commercial product of manufacturer's latest design and shall include specified requirements--is merely a part of the general specifications concerning design and performance and, in these circumstances, the provision does not establish a precondition to award. Therefore, the procuring agency properly determined that the low-priced offer, proposing to satisfy all the specifications, was technically acceptable.

Caelter Industries, Inc., through its SMI New York division (SMI), protests the proposed award of a contract to Sweepster, Inc. (Sweepster), under request for proposals (RFP) No. DLA700-81-R-1487 issued by the Defense Logistics Agency (DLA) for eight rotary snow sweepers. SMI contends that Sweepster's low-priced proposal is technically unacceptable. We find that SMI's protest is without merit.

The RFP provided that the "towed sweeper shall be a commercial product of manufacturer's latest design, and shall include the requirements specified herein." The RFP required each offeror to certify that the model offered was the manufacturer's latest standard commercial product as such is required by the RFP's specifications. Sweepster proposed its model 2900; Sweepster certified that the model 2900 was its latest standard commercial product; and Sweepster took no exceptions to the RFP's general specifications concerning design or performance.

DLA determined that Sweepster's low-priced proposal was acceptable but the preaward survey reported that Sweepster's model 2900 differed from

the design specifications requiring a vane motor. The survey reported that Sweepster's model 2900 had a piston motor. In response, Sweepster explained that the model 2900 can be delivered with either vane or piston motor, at the customer's option, and Sweepster directed DLA to two customers to which Sweepster delivered model 2900s with vane motors. After checking with the two customers, DLA prepared to make award to Sweepster.

SMI contends, based on its examination of Sweepster's technical literature on the model 2900, that the model 2900 does not meet the RFP's design and performance specifications in 15 particular areas. SMI concludes, therefore, that Sweepster's proposed model 2900 was technically unacceptable. In response, DLA reports that Sweepster took no exceptions to the RFP's requirements and, thus, Sweepster's proposal was technically acceptable.

SMI also contends, referring to Department of Defense Directive No. 5000.37 (September 29, 1978), that deliveries of conforming model 2900s to two customers (only one of which was a sale) does not satisfy the definition of commercial product, which is, a product in regular production sold in substantial quantities to the general public at established market or catalogue prices. SMI concludes, therefore, that Sweepster's conforming model 2900 is not a commercial product, rendering Sweepster's proposal unacceptable. In response, DLA reports that Sweepster's model 2900 was a commercial product within the meaning of the RFP.

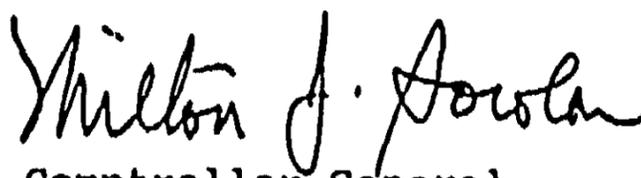
SMI further contends that, after evaluating proposals, DLA considered changing the RFP to make acceptable "a commercial product of the manufacturer's latest design, except for changes that are necessary to comply with the specification." SMI argues that this contemplated change is evidence that Sweepster's proposal was technically unacceptable. In response, DLA reports that the RFP was not amended because the contemplated change added nothing to the intent of the language of the RFP. In DLA's view, the RFP reasonably may be interpreted to permit some necessary minor modification in order to conform the commercial product to the military needs. In essence, DLA reports that the RFP, as written, is an accurate statement of its minimum needs. On that point, SMI offers no objection.

We note that the RFP did not require offerors to submit descriptive literature or to demonstrate how they intended to satisfy each RFP requirement. We also note that Sweepster did not submit, as a part of its proposal, the literature examined by SMI. Thus, we conclude that the first aspect of SMI's protest is erroneously premised on irrelevant differences between Sweepster's literature and the RFP requirements. Second, we note that the RFP did not contain a specific definition for the term "commercial product" nor did it refer, expressly or by implication, to the definition relied on by SMI. Thus, in these circumstances, the meaning of commercial product must be obtained from its use in the context of the RFP.

In our view, the RFP's commercial product provision is merely a part of the general specifications concerning design and performance and it does not establish a pre-condition to award. See, e.g., E.C. Campbell, Inc., B-204253, February 2, 1982, 82-1 CPD ____; Johnson Controls, Inc., B-200466, February 20, 1981, 81-1 CPD 120. Whether Sweepster will deliver equipment in conformance with the contract requirements concerns a matter of contract administration, which is the responsibility of the contracting agency and which is not considered under our bid protest function. Maxton Lock Company, Inc., B-200469, February 4, 1981, 81-1 CPD 66. Whether Sweepster can deliver equipment in conformance with the contract requirements concerns the bidder's responsibility and is not reviewed by our Office in these circumstances. Id.

In sum, Sweepster proposed to satisfy all the RFP's design and performance specifications and Sweepster certified that its model 2900, which would meet all those requirements, was Sweepster's latest commercial product. Accordingly, Sweepster's proposal was properly determined to be technically acceptable. In view of that conclusion, we need not consider the merit of DLA's argument that the RFP permitted modification of a commercial product necessary to meet the RFP's requirements.

Protest denied.

for 
Comptroller General
of the United States



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

B-203418

March 22, 1982

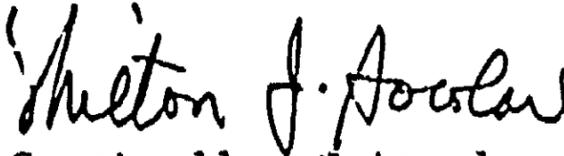
The Honorable Jim Dunn
House of Representatives

Dear Mr. Dunn:

We refer to your interest expressed by Ms. Cindy Turcott concerning the protest of Caelter Industries, Inc., through its SMI New York division, against the proposed award of a contract to Sweepster, Inc., under request for proposals No. DLA700-81-R-1487 issued by the Defense Logistics Agency for eight rotary snow sweepers.

By decision of today, copy enclosed, we have denied the protest.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure