

DECISION



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

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FILE: B-209858.2; B-209858.3 **DATE:** September 19, 1983.

MATTER OF: Capital Engineering & Manufacturing
Company; Fiat-Allis of North America,
Inc.

DIGEST:

1. GAO will not consider a protest by a potential subcontractor to an unsuccessful offeror since the protest challenges the propriety of the procuring agency's refusal to consider the offeror's late modification and, therefore, the protester, who is ineligible for award, is not an interested party under GAO Bid Protest Procedures.
2. Protest alleging that tractor-scraper offered by the awardee does not comply with Product Experience Qualification clause of the solicitation is denied where record indicates that awardee's equipment, whether viewed as the latest standard model or the latest standard model with a commercially accepted change, complies with the clause.

Capital Engineering & Manufacturing Company (Capital), a potential subcontractor for Fiat Allis of North America, Inc. (Fiat-Allis), and Fiat-Allis have filed protests under request for proposals (RFP) No. DAAE07-82-R-5388, issued by the United States Army Tank-Automotive Command (Army), for 1,047 two-axle, commercially proven tractor-scrappers.

Capital's protest was directed at the Army's refusal to open and consider Fiat-Allis' modification to its proposal. Fiat-Allis initially filed a protest on the same ground as Capital. However, Fiat-Allis, after award was made, amended its protest to include an objection to the award of a contract to Caterpillar Tractor Co. (Caterpillar). Fiat-Allis' protest was subsequently narrowed to the latter ground.

We find Capital not to be an interested party and, therefore, dismiss its protest. In regard to Fiat-Allis' protest, we deny it.

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As noted above, Capital is a potential subcontractor for Fiat-Allis, which submitted its offer in response to the RFP. Under our Bid Protest Procedures, a party must be "interested" before we will consider its protest allegations. 4 C.F.R. § 21.1(a) (1983). Whether a party is sufficiently interested depends upon the degree to which its interest in the outcome is both established and direct. In general, we will not consider a party's interest to be sufficient where that party would not be eligible for award, even if the issues raised were resolved in its favor. See Interscience Systems, Inc.; Amperif Corporation, B-201943, B-202021, August 31, 1982, 82-2 CPD 187.

Capital's protest challenges the propriety of the Army's refusal to open and consider Fiat-Allis' proposal modification. However, Capital was not an offeror. Therefore, it was not eligible for award. Only Fiat-Allis has a direct interest in the outcome of this protest. Moreover, Fiat-Allis, which raised the identical issue, has withdrawn that issue from its protest and is focusing its attention on whether Caterpillar's proposed tractor-scraper complies with the Product Experience Qualification clause in the RFP. In this circumstance, we will not consider Capital's protest because the company is not an interested party. See Radix II Incorporated, B-208557.2, September 30, 1982, 82-2 CPD 302, affirmed, B-208557.3, November 29, 1982, 82-2 CPD 484.

Fiat-Allis' protest essentially questions the award of a contract to Caterpillar on the ground that the tractor-scraper offered by Caterpillar (621B, noncushion hitch model) did not comply with the RFP's Product Experience Qualification clause (L42 B3). That clause states:

"3. Product Experience Qualification:

"Offerors must demonstrate their compliance with the following product experience requirements and production restrictions:

* * * * *

"b. In order to obtain scrapers of demonstrated performance characteristics without the need for extensive acceptance or initial production testing and to permit the Army to realize the benefits of commercially developed products and product improvements, established quality control programs, broad

based parts availability and the assurance of achieving timely compliance with U.S. federal regulations involving energy, safety and environmental protection standards directed to scrapers for use by the industry, the following applies:

"(1) The scraper shall be the latest model of the contractor's standard product for which significant quantities have demonstrated acceptable performance in commercial use for the same or similar application for a period of at least one year prior to the date established for submission of the proposal. The scraper and all features listed as standard equipment in the contractor's published specifications, price list, catalogue, or other brochures or normally furnished to commercial customers as standard equipment shall be furnished to the Government except as provided herein. The scraper shall be furnished with any optional equipment necessary to comply with the requirements of Section C. Optional equipment is defined as equipment not standard with the scraper but which has been furnished to commercial customers in significant quantities for specific applications and has performed acceptably. The offeror shall submit such published data to define the standard commercial scraper in sufficient detail to permit evaluation of both commercial availability of the scraper and all major components.

"(2) Additionally, the scraper shall be furnished with various features which are necessary to meet requirements peculiar to the military environment. These features need not be standard or optional equipment on the contractor's standard commercial product but must be commercially proven in another similar commercial earthmoving equipment application.

"(3) The Government may accept changes to the standard commercial scraper being offered which have been incorporated during the one year period prior to the closing date established for submission of the RFP, if the contractor can demonstrate commercial acceptability of the changes.

"(4) Military peculiar features or changes to the standard commercial scraper described in (2) and (3) above must be properly matched and rated for use in conjunction with other scraper components. These provisions are not to be construed as blanket authorization to make changes to the standard commercial scraper. It must be conclusively demonstrated that the standard commercial scraper must be changed to meet the specification requirements. Submission of sufficient valid sales data, warranty data, and test reports for the scraper being offered, key components affected by the changes including any failures or problem areas and corrective action taken, and reason for the change will be provided. In the event that data furnished is insufficient to provide evidence of commercial acceptability, the Government reserves the right not to accept the change."

Fiat-Allis states that Caterpillar's 621B, noncushion hitch model, was introduced, on paper, in March 1982, less than a year before the November 15, 1982, closing date and was not produced prior to May 1983. The Army confirms that the 621B was introduced in March 1982, but does not refer to the model's production; rather, it states that the model was not sold prior to May 1983. Apparently, the lack of sales was an outgrowth of a 7-month strike at Caterpillar and low demand for commercial construction equipment. In view of these facts, Fiat-Allis contends that the model offered by Caterpillar does not meet the requirements (quantity, use and time) set forth in L42B(3)(b)(1), and the Army's need to avoid initial production testing was not met.

Moreover, Fiat-Allis argues that since the cushion hitch is standard equipment on the 621 model, Caterpillar cannot avoid the mandate in L42B(3)(b)(1) that standard equipment furnished to its commercial customers must be furnished to the Army. Furthermore, Fiat-Allis does not believe that the data supplied to the Army by Caterpillar was sufficient to permit evaluation of commercial availability, another requirement in L42B(3)(b)(1). Fiat-Allis also contends that Caterpillar should not be permitted to use data relating to Caterpillar's 621R model, a noncushion hitch model that is marketed in Brazil, since it is essentially a different piece of equipment than the 621B model. For example, the 621R model has a lower horsepower engine, a modified torque converter, a different hydraulic system capacity and weighs 5,290 pounds less than the 621B model.

Fiat-Allis stresses that Caterpillar's failure to comply with L42B3(b)(1) was not and cannot be excused by relying on clauses L42B3(b)(2), (3) or (4), above. It is Fiat-Allis' position that those clauses mandate that changes to an offeror's standard commercial item must be necessary to meet the vehicle specifications referred to in the RFP. Since either a rigid hitch or a cushion hitch would meet the specifications, Caterpillar's 621B cushion hitch model "fully meets" the vehicle specifications and no changes to that model can be justified. Fiat-Allis' position, whether interpreting L42B3(b)(2) or L42B3(b)(3) (alone or in conjunction with L42B3(b)(4)), remains the same--changes will only be allowed "where it has been 'conclusively demonstrated' that such changes are 'necessary' to meet vehicle specifications."

Fiat-Allis also argues that the Army favored Caterpillar since it allowed Caterpillar to change its standard model and refused to allow Fiat-Allis an opportunity to do the same. Fiat-Allis advises that it discussed with the Army the possibility of substituting a less powerful engine which would still satisfy the vehicle specifications and result in a significant price reduction. We note that while this engine has been used by Fiat-Allis in offshore earthmoving applications, it has not been used in the proposed tractor-scraper. Fiat-Allis alleges that the Army's response to the suggested substitution was that a change in any major item (i.e., engine or transmission), without having 1-year prior experience, would probably result in the rejection of its proposal. It is Fiat-Allis' belief that Caterpillar's proposal should have been rejected on this basis. Fiat-Allis requests that Caterpillar's contract be terminated for the convenience of the Government and award be made to Fiat-Allis.

The thrust of the Product Experience Qualification clause is to achieve a balance between the Army's desire to obtain commercially tested equipment and established quality control programs, without extensive initial production testing (L42B(3)(b)), and to allow the equipment manufacturers flexibility concerning changes made to their standard equipment based strictly on commercial experience (a non-"military peculiar" change) without a relationship to a particular procurement so long as the manufacturers can demonstrate commercial acceptability of the change (See L42B(3)(b)(3)). While certainly the sale of a manufacturer's product can demonstrate commercial acceptability, there is nothing in the latter clause which requires that a sale have taken place. Moreover, that clause focuses on the

change itself, not the proposed model. Consequently, we believe that acceptance of the change can be demonstrated by pointing to incorporation of the change on other models manufactured by a proposer.

In regard to the contention that the change must be necessary to meet specification requirements under subparagraph (4), above, we find that since the phrase "military peculiar" modifies "features" and "changes," this requirement is limited to "military peculiar" features or "military peculiar" changes. If we accepted Fiat-Allis' interpretation of this clause (all changes must be necessary to meet the RFP's specifications) it would eliminate any flexibility for the equipment manufacturers concerning the implementation of changes to their standard equipment. Under Fiat-Allis' interpretation, if a manufacturer wanted to submit a proposal to the Government, any change made within 1 year of the issuance of the RFP to its standard item would have to have been necessary to meet unknown vehicle specifications; otherwise, its proposal will be unacceptable. This result is contrary to the purpose of the clause--to obtain the benefits of commercially tested equipment and its commercially accepted changes.

The record indicates that between 1965 and 1972 Caterpillar was manufacturing its 621 tractor-scraper model with a rigid hitch. During this time, the cushion hitch was introduced, but apparently it was not until the period of time between 1972-1974 that sales of the cushion hitch became significant. Toward the end of the latter time period, Caterpillar made a decision to only use the cushion hitch on its 621B tractor-scraper model. This policy continued until March 1982 when Caterpillar made available its 621B model with a rigid hitch. Caterpillar advises that its decision to make two standard configurations available was based on giving its customers a choice of price. In addition, we note that Caterpillar's decision was also based on its commercial experience. It found that the cushion hitch was unnecessary to some and, since it was a maintenance item, undesirable to others. It is Caterpillar's position that its 621B with a cushion or rigid hitch performs in essentially the same manner. Moreover, Caterpillar submits that, with the exception of engine and torque converter, there is no significant difference between the "R" series, marketed in Brazil, and the "B" series--both are considered Caterpillar's latest model (621 wheel tractor-scraper) and both perform similar functions. All of the "R" series tractor-scrappers have a rigid hitch which is the same one offered by Caterpillar in this instance and the same one used on 621 tractors and larger tractor-scraper models.

The Army compared Caterpillar's 621R model to its 621B model and found that the 621R had a lower horsepower engine and modified torque converter, which results in a lower top speed; did not have a canopy, which made it lighter; had a higher hydraulic system capacity; and the cutting edge hydraulic penetration force was less and some of the minor standard equipment (batters, lights etc.) was different. The Army advises that it agrees with Caterpillar's assessment that these differences are not significant. The difference in the hydraulic system capacity was found not to impact performance since the hydraulic components are not affected. In regard to the cutting edge hydraulic penetration force, the Army explains that such "is a weight dependent feature which changes when the scraper bowl is loaded." The Army points out that there is no specification requirement for this. Furthermore, the Army has determined that the weight difference, in and of itself, is not a major source of concern. It is the Army's position that the use of the rigid hitch has been commercially proven on the 621R model and the 621 model. The Army submits that since the rigid hitch "is merely a large fabricated steel component," i.e., a minor component, its reliability and durability are a certainty. Moreover, the Army points to the fact that only Caterpillar has a cushion hitch; all others utilize the rigid hitch in their equipment. This, the Army believes, also demonstrates commercial acceptability of the rigid hitch.

We find that the record supports the Army's conclusion that Caterpillar demonstrated that the rigid hitch was commercially accepted and the differences between the "R" series and the "B" series were of minor significance. Whether we conclude that Caterpillar has two standard 621B model tractor-scrapers, one with a cushion hitch and one with a rigid hitch, or we find that Caterpillar offered its 621B cushion hitch model without the cushion hitch, the result is the same--the tractor-scraper offered by Caterpillar meets not only the intent of the Product Experience Qualification clause but complies with L42B(3)(b)(1) (latest model including all standard equipment) or L42B(3)(b)(3) (commercially accepted change to standard equipment).

Based on the foregoing, the remainder of Fiat-Allis' protest is rendered academic and will not be considered on the merits.

Fiat-Allis' protest is denied.

for *Milton J. Arosow*
Comptroller General
of the United States