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DECISION

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

FILE: B-212847.2 **DATE:** April 18, 1984

MATTER OF: Bataco Industries, Inc.--Reconsideration

DIGEST:

1. Where protester argues that GAO decision first raised an issue that was not argued by the parties but record shows that in fact the protester raised the issue during the course of its protest, reconsideration of the protest without regard to that issue is not required.

2. GAO reaffirms prior decision where reconsideration request merely reflects protester's disagreement with decision and does not provide any evidence that the decision was erroneous.

Bataco Industries, Inc. requests reconsideration of our decision in Bataco Industries, Inc., B-212847, February 13, 1984, 84-1 CPD 179, in which we denied Bataco's protest that the specification for barbed tape in invitation for bids No. DLA700-83-B-0247, issued by the Defense Construction Supply Center (DCSC), was unduly restrictive of competition.

We affirm our decision of February 13, 1984.

We held that it was Bataco's private agreement not to compete for future procurements of the specified design that placed Bataco at a competitive disadvantage, rather than the specification itself. Considering this circumstance, we concluded that the specification was not unduly restrictive of competition and that DCSC had no duty to field test Bataco's proposed alternative design for barbed tape.

Bataco contends that its protest concerned the restrictive nature of DCSC's specification, and that the existence of a private agreement which inhibited Bataco from bidding on the specified barb design is therefore irrelevant to the consideration of the protest. Moreover, according to Bataco, the matter of its private agreement

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was raised sua sponte by this Office, so that the parties did not have an opportunity to argue the matter. Bataco requests accordingly that all discussion of this issue be stricken from the record.

The record simply does not support Bataco's position. Bataco introduced the issue of its agreement not to compete in its August 25, 1983 letter, when it argued that this procurement should be handled like a prior procurement where Bataco's alternate design was considered. In this regard, Bataco states that while it was initially unable to bid under the prior solicitation for the same barbed tape as specified here "due to the sale of some of its equipment and the production rights" to a competitor, DCSC's amendment of that solicitation permitted consideration of Bataco's alternate design. Bataco goes on to state that with respect to this prior procurement:

> "For many years, Bataco was the leading supplier of this type [the design specified in the instant procurement] of barbed wire. In 1982, Bataco sold its equipment and the right to make the type of wire being procured to Clark International Security, Inc., and agreed not to compete with Clark in the United States."

While it is true that Bataco's protest of the present procurement focuses on Bataco's argument that the specification is unduly restrictive, Bataco again makes it clear that it is Bataco's situation, and not the specification, which inhibits Bataco, when it states:

> " . . . As discussed earlier, Bataco was formerly the major supplier of such wire but, by contract, is no longer permitted to supply such wire; however, Bataco is not prohibited from supplying its bayonet design which, we submit, also satisfies the minimum needs of the Government."

Accordingly, Bataco's agreement not to compete was introduced by Bataco itself as one of the considerations that restricted its ability to compete under the present solicitation.

Bataco also disputes our conclusion that the specification itself was not restrictive of competition. First, it contends that we were incorrect in concluding that the

specified barbed tape design had been field tested because the specified design was modified after the testing. As Bataco is aware, the specified barbed tape was tested to determine its effectiveness in achieving its intended purpose, that of deterring intruders, while the subsequent modification to that specification concerns the painting of the barbed tape. We therefore saw no reason to question DCSC's position that the specified design, i.e., the shape and spacing of the barb, had been field tested to determine its effectiveness in deterring intruders and that Bataco's alternate design had not.

Second, Bataco now argues that the painting specification has a negative effect on the snagging characteristics of the barb, but fails to furnish any rationale why this is so. It is certainly not obvious that painting the barbed tape as specified necessarily affects its snagging characteristics, but even if it does, it presumably affects all designs equally, and is therefore not restrictive. Moreover, because this argument was not raised in the original protest, it is now untimely because any newly raised issue must independently satisfy the timeliness requirements of our Bid Protest Procedures, 4 C.F.R. § 21.2 (1983); Air Tech Industries--Reconsideration, B-211252.2, June 28, 1983, 83-2 CPD 37.

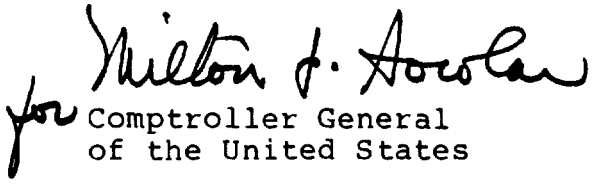
As to the painting specification itself, Bataco does not contend that it cannot paint barbed tape in the manner specified, or that the painting specification is in any manner restrictive. Rather, in Bataco's judgment, the specified paint type and painting technique are not the best methods for meeting the government's needs, and it has provided "reasonable substantiation for the merits of its position." This of course, is not the appropriate test; rather, it is the reasonableness of the agency's determination of its minimum needs and how they must be met, that is controlling that determination, and the technical judgment that goes into it, necessarily is primarily the responsibility of the procuring agency. Interstate Court Reporters, B-208881.2, February 9, 1983, 83-1 CPD 145. We will not object to an agency's conclusions in those respects unless the protester shows that the agency acted unreasonably or arbitrarily. Hill Industries, Inc., August 24, 1983, 83-2 CPD 246; Industrial Acoustics Company, Inc., et al., B-194517, February 19, 1980, 80-1 CPD 139.

The protester also challenges our statement in the decision that DCSC believes the specified barb tape design is preferable because its shorter barbs are less likely to

entangle when the barbed tape is coiled for storage. Bataco reiterates its contention that DCSC's conclusion in this regard is based upon an unsubstantiated, self-serving statement of its competitor. It is true that as support for its position that shorter barbs are less likely to entangle when coiled, DCSC furnished an analysis prepared by an individual now employed by Bataco's competitor. However, Bataco fails to provide any rationale that would support the opposite conclusion, i.e., that longer barbs are somehow less likely to entangle when coiled; instead, Bataco would have us dismiss an analysis that undercuts its position simply because of its origin. Consequently, Bataco has not met its burden of presenting clear and convincing evidence that the agency's judgment is in error. Bowne Time Sharing, Inc., B-190038, May 9, 1978, 78-1 CPD 347.

Bataco also restates a number of other arguments, including its concern that we did not place proper emphasis upon the fact that DCSC purchased a substantial quantity of its alternate design in a prior procurement and that this barbed tape is by all accounts serving its intended purpose. Because all of this was fully considered in our original decision, Bataco in effect is rearguing its original protest, taking exception to our legal conclusion without providing any new arguments or facts. Mere disagreement with our prior decision does not provide a basis to reverse our decision. Solenergy Corporation--Reconsideration, B-208111.3, March 22, 1983, 83-1 CPD 280.

The decision is affirmed.



for Comptroller General
of the United States