

DECISION



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

FILE: B-213581, B-213668 **DATE:** May 9, 1984

MATTER OF: D Square Engineering Company

DIGEST:

1. A protest that a competitor's product, although on the applicable qualified products list, does not meet the requirements for qualification, must be filed within 10 days of the discovery of the alleged defect in the competitor's parts.
2. In a protest to the agency, a protester need not expressly state that it "protests"; rather, the intent to protest may be conveyed by an expression of dissatisfaction and a request for corrective action.
3. Where the invitation required that offered products be on the applicable qualified products list, bid of items on the list is responsive notwithstanding competitor's complaint that requalification should be required, since bid does not take exception to invitation's requirements.
4. Whether a product should be removed from a qualified products list is a matter for the determination of the qualifying activity, and GAO will not question that determination unless it is shown to be arbitrary or capricious.
5. Whether contractor performance will comply with the invitation's specifications relates to the bidder's responsibility and to contract administration. GAO does not review affirmative determinations of responsibility except in circumstances not present here, and contract administration is a function of the contracting agency.

124108
028791

D Square Engineering Company, Inc., protests two contract awards by the Defense Logistics Agency (DLA) to Riverside Manufacturing Company, Inc., under invitation for bids (IFB) Nos. DLA900-83-B-2544 and -2981. Both IFBs, for toggle switches, required that bidders offer to supply products on the applicable Qualified Products List (QPL). The protester contends that Riverside's switches do not meet the requirements for inclusion on the QPL.

We deny the protests in part and dismiss them in part.

Background

Although the IFBs solicited bids for different types of switches, each required compliance with the same military specification and standard. Bidders were required to submit offers to furnish items that had previously qualified for inclusion on either of two QPLs. D Square and Riverside are the only manufacturers on these QPLs.

Riverside was the low bidder under IFB -2544, for which bids were opened on August 31, 1983. On September 16, D Square sent a letter to the contracting activity stating that D Square was in possession of two defective Riverside toggle switches which apparently had been returned to D Square by mistake.¹ D Square claimed that the two switches were of different "styles," and had been manufactured under different processes and on different equipment. According to D Square, neither switch conformed to the military specification. In addition, D Square contended that the design changes in the "new style" switch were substantial enough to require requalification, which had not occurred.

¹ D Square does not specifically identify these switches as of the type to be delivered by Riverside under the protested contracts, although this evidently is the firm's assumption.

Bids under IFB -2981 were opened on October 3, with Riverside again being the low bidder.

By letter of October 20, 1983, the DLA contracting officer informed D Square that an investigation of the firm's complaint had uncovered no evidence that Riverside was producing unqualified switches. The letter also stated that award had been made to the low bidder under IFB -2544. DLA awarded Riverside the contract under IFB -2981 on October 24.

On November 1, 1983 D Square protested to this Office that award to Riverside under IFB -2544 was improper. D Square protested the award under IFB -2981 on November 8.

Timeliness

DLA contends that D Square's protest at least under IFB -2544 was untimely filed. DLA points out that D Square knew of the alleged defects in the Riverside switches in early September and that D Square's initial protest was not filed with GAO until November 1, 1983. DLA argues that D Square should be charged with knowledge of the basis for protest from at least September 16, the date of D Square's letter alleging defects in Riverside's switches. Therefore, according to DLA, since D Square did not protest to this Office until November 1, the protest was not filed within the 10 working days required by our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1984).

We agree with DLA that D Square had knowledge of the basis for protest in early September 1983. D Square's protest against the alleged failure of Riverside's products to meet QPL requirements for qualification therefore had to be filed with either DLA or our Office within 10 days of the discovery of the alleged defects in the competitor's parts. Air, Inc., B-191665, Sept. 11, 1978, 78-2 CPD ¶ 185.

However, in our view D Square's September 16 letter to DLA clearly constituted a protest to that agency against award to Riverside under IFB -2544. We have held that a protester need not expressly state that it "protests"; rather, the intent to protest may be conveyed by an expression of dissatisfaction and a request for corrective action. Propper Manufacturing Co., Inc., B-208035, March 22, 1983, 83-1 CPD ¶ 279. In the letter, D Square

alleged specific defects in Riverside's switches that, if true, would call into question Riverside's status as a supplier on the QPL, and the firm complained about any prospective award to that bidder. D Square's letter clearly suffices as a timely protest under our Procedures.

By letter of October 20, 1983 DLA denied D Square's protest and stated that award had been made to the low bidder under IFB -2544. D Square protested to our Office on November 1, 1983, within 10 days of the adverse agency action on the protest (the September 16 letter) at that level, as required by our Bid Protest Procedures, 4 C.F.R. § 21.2(a), so that we will consider the protest on the merits. Moreover, since the issue in the second invitation is the same as the issue in the first, and since we find no legal merit to the protest in any case, we need not examine independently the timeliness of the protest under IFB -2981.

Protester's Position

D Square contends that Riverside has made changes in product design, plant location, ownership and management without requalification, and apparently without notifying the U.S. Army Tank-Automotive Command (TACOM), the activity responsible for qualifying switches and maintaining the QPLs.

D Square's principal allegation is that Riverside has changed the design and manufacturing process of its switches since qualification, and that neither the old style switch nor the new style switch meets the criteria of the applicable military specification and standard. Specifically, D Square contends that the bottom connectors on the Riverside switches are shorter than required by the military specification, and that the "radius inside diameter" on the new style Riverside switch also does not comply with the specification. In addition, D Square contends that the plate on the old style switch is curved, contrary to the specification. While the new style switch has a flat plate, as required, D Square argues that this design change has caused a waterproofing problem.

D Square further contends that since 1977 Riverside has twice moved its switch manufacturing operations without requalification. Also, D Square states that "changes in

plant location have made it necessary to change personnel management at all levels and even a change in ownership."

D Square argues that Riverside's switches should, for these procurements, be removed from the QPL pursuant to section 111.1 of the Department of Defense document "Provisions Governing Qualification." That section requires removal of a product from the QPL "for reasons considered by the preparing activity to be sufficient, including the failure of a product offered to meet the military specification and the failure of a manufacturer to notify the qualifying activity of changes in design, materials or process.

DLA's Position

It is DLA's position² that the decision "whether to retest, re-examine or remove products from the QPL is solely within the cognizance of the QPL specification preparing activity," in this case, TACOM. DLA has submitted a letter from TACOM stating that agency's judgment that removal of Riverside from the QPL is unwarranted. DLA also submitted a copy of a July 5, 1983 TACOM site survey of Riverside's manufacturing facility which confirms Riverside's capability to produce switches in accordance with the military specification.

In response to D Square's allegation that Riverside is manufacturing switches at an unapproved location, DLA states that one QPL incorrectly lists Swanton, Ohio as Riverside's QPL manufacturing plant. Riverside moved its QPL manufacturing operations to Coldwater, Michigan in 1976, and TACOM validated and approved the new plant at that time. DLA further explains that Riverside has manufactured its QPL switches at the Coldwater plant since 1976 and the latest edition of the QPL has been corrected to reflect this fact.

² Riverside, the awardee, also has responded to D Square's protests, and basically disputes each of that firm's technical assessments.

Analysis

We first point out that Riverside's bids were clearly responsive to each IFB. The invitations only required that offered items be on the QPL, and Riverside's switches were on the QPL at the time bids were opened under each IFB. Riverside's bids then offered, without exception, to furnish products in compliance with the applicable specifications. See McIntyre Engineering Company, Inc., B-190316, March 7, 1978, 78-1 CPD ¶ 177.

Concerning D Square's contention that Riverside's switches nevertheless should be removed from the QPL because of changes in design, we have recognized that if a manufacturer has modified or changed the material in or processing of a qualified product, re-examination, retesting and/or removal from the QPL of the product could be found necessary. Galbraith-Pilot Marine Corporation, 56 Comp. Gen. 183, 186 (1976), 76-2 CPD ¶ 488. However, it is within the discretion of the QPL-preparing activity to determine whether a qualified product has been sufficiently changed to require such action, and we will not question the preparing activity's determination, or the technical considerations on which it is based, absent a clear showing of arbitrary or capricious action. Id.

Here, TACOM, the QPL-qualifying activity, has recently determined that removal of Riverside from the QPL is unwarranted. This determination is supported by a July 1983 site survey that confirmed Riverside's compliance with the applicable specification and standard. D Square's disagreement with TACOM's technical judgment that Riverside's product should remain qualified does not establish that the activity has abused its discretion or otherwise acted arbitrarily. 52 Comp. Gen. 653, 666 (1973).

D Square also alleges that Riverside failed to requalify for the QPL after changes in plant location and ownership. In this respect, Defense Acquisition Regulation § 7-2003.6 (1976 ed.), which was incorporated into both IFBs, provides that any change in location or ownership of the plant at which a previously-approved product was manufactured requires re-evaluation of the qualification, and a firm's failure to arrange for re-evaluation precludes consideration of its offer.

Although we generally defer to the qualifying activity's technical judgment of a manufacturer's qualification for the QPL, our Office will review an agency decision about the non-technical aspects of manufacture to determine whether the decision was founded on a reasonable basis. 53 Comp. Gen. 249, 251 (1973).

As DLA notes, however, D Square's allegation that Riverside has moved its plant is apparently based on the listing in a superseded edition of the QPL. Riverside moved its switch manufacturing operations in 1976, at which time the new plant was qualified by TACOM, and the latest edition of the QPL correctly reflects the current plant location.

Concerning Riverside's alleged change in ownership, we have stated that re-evaluation is often necessary in that situation because there is a possibility that with new management there will be a change in quality controls and procedures of that nature. 53 Comp. Gen., *supra*. In our opinion, however, TACOM's July 1983 survey of Riverside's plant, in which Riverside received a rating of satisfactory in the category of "Quality Assurance Capability," reasonably supports the view that if Riverside actually has been sold (and this is not clear from the record), the necessary quality control procedures have been maintained.

Finally, we dismiss D Square's complaint to the effect that Riverside will not supply switches that conform to the government's requirements. On the basis of information supplied by TACOM, the contracting officer made an affirmative determination of Riverside's responsibility, that is, he decided that Riverside is capable of furnishing conforming items. Our Office does not review affirmative determinations of responsibility in the absence of a showing of possible fraud or bad faith, or an allegation that definitive responsibility criteria in the solicitation were misapplied. Airtronics, Inc., B-213534, Nov. 10, 1983, 83-2 ¶ CPD 551. There has been no such showing here. Furthermore, whether Riverside actually furnishes acceptable switches is a matter of contract administration, which is a function of the contracting agency, not our Office. Glenn T. Anderson, Inc., B-213585, Nov. 23, 1983, 83-2 CPD ¶ 613.

08170

B-213581, B-213668

The protests are denied in part and dismissed in part.



Acting Comptroller General
of the United States