

DECISION

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

FILE: B-215972

DATE: May 10, 1985

MATTER OF: Caelter Industries, Inc.

DIGEST:

1. A company may qualify for waiver of first article testing and product approval on the basis of the contract and production history of its predecessor company when the facilities, personnel, assets and products of the two companies are similar or identical.
2. Based on its predecessor's production history, successor corporation to a government contractor properly was found to meet a solicitation requirement that the items to be offered must have been previously produced and sold commercially or to the government, where there have been no substantial changes in the product, manufacturing process, or staff.
3. GAO will not review a procuring agency's affirmative determination of responsibility in the absence of a showing of fraud or an allegation of failure to apply definitive responsibility criteria.

Caelter Industries, Inc. (Caelter), protests the award to SMI Industries USA, Inc. (SMI), of a contract for two airport runway towed sweepers under request for proposals (RFP) F09603-84-R-0157, issued by Warner Robins Air Logistics Center, Robins Air Force Base, Georgia. We deny the protest in part and dismiss it in part.

The RFP invited firms to submit offers based on first article testing or based on waiver of the requirement. Award was to be based on the lowest evaluated cost to the government. The contracting agency received three proposals that complied with the solicitation requirements for waiver of first article testing ^{1/} and, after evaluation, awarded the contract to SMI, the low offeror.

^{1/} A fourth company submitted a proposal that did not meet the requirements for waiver of first article; that proposal was evaluated on that basis.

Caelter's protest is founded upon its contentions that the awardee is a "newly organized nonmanufacturing subsidiary" of a Canadian corporation. Caelter protests the award on three bases: that the contracting officer improperly waived the first article requirement for SMI; that the contracting officer failed to conduct an adequate preaward survey of SMI facilities; and that SMI's proposal was not responsive in that it did not offer "an established end product" that had been supported with spare or repair parts, as required by the solicitation.

Background

The history of the corporate relationship between the protester and the contract awardee is important to the resolution of the issues of this protest. The protester, Caelter Industries, Inc., is a New York corporation located on Purdy Avenue, Watertown, New York. This corporation operates a manufacturing division in Watertown called Sicard. Prior to June 1984, Caelter's Sicard division was called SMI New York. Caelter Industries, Inc., was formerly the wholly owned subsidiary of a Canadian corporation, Caelter Enterprises, Ltd., which had a manufacturing facility in Ouebec, Canada.

In December 1982, Caelter Enterprises, Ltd., went bankrupt. Most of the assets of that bankrupt Canadian corporation were purchased in May 1983 by another Canadian corporation, now known as SMI Industries Canada, Ltd. The assets of Caelter Enterprises, Ltd., that were purchased by SMI Industries Canada, Ltd., included all of its machinery and equipment, work in process and finished goods, parts and components inventory, drawings, designs, trademarks and patents.

In September 1983, SMI Industries Canada, Ltd., formed SMI Industries USA, Inc. That company assumed operations on Bradley Street Road, Watertown, New York, in October 1983 and was incorporated under the laws of the state of New York in 1984.

The solicitation set forth conditions under which the first article testing requirement could be waived, as follows:

"L.45. Conditions For Waiver of First Article Requirements

"a. . . .

"b. First Article test requirements may be waived by the Contracting Officer under the following conditions:

"(1) If the contract is awarded to a contractor currently in production, under a Government contract or a subcontract to a Government prime contractor, of end articles identical or similar to those specified in this solicitation.

"(2) If the contract is awarded to a contractor not presently in production of the item who has previously satisfactorily furnished, under a Government contract or a subcontract to a Government prime contractor, end articles identical or similar to those specified in this solicitation. . . ."

The solicitation also required that the offeror list the contract numbers, if any, under which identical or similar supplies were previously accepted from the offeror by the government and stated that if first article test requirements were waived, the contractor had to furnish end items identical to those furnished under its most recent previous government prime contract or subcontract.

SMI's request for waiver of first article testing was made on the basis that the runway sweepers SMI offered complied with solicitation specifications, and that its product had passed all first article testing requirements since it was the same equipment that was previously manufactured by Caelter under the brand name "SMI 300." SMI also indicated that the Air Force then had in excess of 150 of the SMI units it was offering. In response to the Air Force's request for the contract numbers under which the sweepers had previously been supplied to the government, SMI listed the three most recent contracts between Caelter and the government for the SMI runway sweepers. SMI also explained to the Air Force contracting officer that its company was the successor company to Caelter

Enterprises, Ltd./Sicard, which formerly controlled all the engineering, design, production, and quality assurance for the SMI series 300 runway sweepers that SMI then owned and, by court order, had exclusive right to use the SMI product name and trademark. The first article test requirement was waived with respect to SMI based in large part on the information provided.

Waiver of First Article Testing

The first issue is whether SMI qualified for waiver of first article testing following SMI Industries Canada, Ltd.'s, purchase of the assets of Caelter Enterprises, Ltd., based on its apparent assumption of that company's operations.

Caelter contends that SMI did not qualify for waiver of first article testing because it had not previously manufactured or produced the SMI runway sweeper or provided the sweeper under a government contract as it claimed in its representations to the contracting officer. Although the protester admits that this equipment was manufactured by its now defunct former parent, Caelter Enterprises, Ltd., it is of the view that production of the equipment by its former parent is unrelated to SMI's ability to offer the product.

As a general rule, the determination as to whether an offeror qualifies for waiver of first article testing is within the discretion of the contracting agency, and we will not overturn the agency's decision unless it was arbitrary or capricious. Julian A. McDermott Corp., B-189798, Dec. 9, 1977, 77-2 C.P.D. ¶ 449. Further, we have held that the contract history of a predecessor company may qualify a successor company for waiver of first article testing based on the similarities of the companies' manufactured products, facilities, management, staff, production and quality control processes. See Keco Industries, Inc., B-207114, Aug. 23, 1982, 82-2 C.P.D. ¶ 165; Kan-Du Tool & Instrument Corp., B-183730, Feb. 23, 1976, 76-1 C.P.D. ¶ 121.

SMI states that its Canadian manufacturing plant has the same equipment, engineering designs and personnel as the former Caelter Enterprises, Ltd. According to the

record, SMI manufactures the same SMI runway sweepers at its Canadian facility that were formerly manufactured and produced by Caelter. The former executive vice president and plant manager of Caelter Industries, Inc., is now president of SMI Industries USA. Although Caelter argues that SMI did not acquire or take over the actual operations of its former Canadian manufacturing company, and that SMI has no relationship to that defunct corporation, Caelter has not suggested that there is any substantive difference between the runway sweeper formerly manufactured by Caelter Enterprises, Ltd., and that offered by SMI; nor has Caelter shown any substantive change in the management, personnel or plant location of the two companies. Under these circumstances, we cannot find that waiver of first article testing for SMI, based on the experience and previous contract history of Caelter Enterprises, Inc., was arbitrary or capricious. Keco Industries, Inc., B-207114, supra; Julian A. McDermott Corp., B-189798, supra; Kan-Du Tool & Instrument Corp., B-183730, supra. The protest on this issue is denied.

Acceptability of SMI's Proposal

Caelter further contends that SMI's proposal was not acceptable in that it did not meet the solicitation requirements for providing an established end product and spare parts. The solicitation states that the end product offered must have been previously produced and sold commercially or sold to the government. In the alternative, it must be substantially the same as such product, and it must have been routinely supported by spare/repair parts produced or sold in the normal course of business. It appears that Caelter's contention on this point is founded upon its view, discussed above, that SMI has no corporate relationship with the former Caelter Enterprises, Ltd., or any right to benefit from its production history.

The contracting agency, however, determined that the runway sweeper and spare/repair parts support offered by SMI were substantially the same as that previously sold to, and then in use by, the government. In corporate transfer cases such as this, we see nothing improper in the agency looking to the actual circumstances to determine whether there have been any changes in those factors that impact upon the product itself. When there have been no substantial changes in the product, manufacturing processes or staff of a previously qualified predecessor company, we see no reason to require rejection of the offer under a

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qualifying provision such as the one used here. The protest on this point, therefore, is denied.

Preaward Survey

Caelter also contends that the Air Force failed to conduct an adequate preaward survey to determine whether SMI was a responsible offeror.

The record indicates that on the basis of a preaward survey, Air Force procuring officials determined that SMI was capable of performing the contract as required. A contracting agency's decision concerning an offeror's responsibility involves a high degree of discretion on the part of the procuring officials and is essentially a matter of business judgment. Therefore, we will not review a protest against the agency's affirmative determination of responsibility in the absence of a showing of possible fraud on the part of the procuring officials or an allegation of failure to apply definitive responsibility criteria. Elliott Co., et al., B-212897; B-212897.2, Jan. 30, 1984, 84-1 C.P.D. ¶ 130. Caelter's disagreement with the Air Force's decision on SMI's responsibility does not involve either situation and, therefore, we will not review the agency's decision.

The protest is denied in part and dismissed in part.

for *Signature* *Epas*
Harry R. Van Cleve
General Counsel