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DECISION



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

FILE: B-219341

DATE: August 29, 1985

MATTER OF: Saratoga Industries

DIGEST:

1. Allegation that agency misappropriated information contained in protester's unsolicited proposal and developed specifications based on that information is denied where the specifications derive from performance and physical specifications in previous procurements and not from the unsolicited proposal.
2. Contracting officer has discretion not to request a preaward survey of prospective contractor, and GAO will not review such a decision nor an affirmative responsibility determination absent a showing of possible fraud or bad faith, or that definitive responsibility criteria in the solicitation were not met.

Saratoga Industries (Saratoga) protests the award of a contract to Astra Products Company, Inc., under invitation for bids (IFB) No. DAAB07-85-H019, issued by the Department of the Army for power supply units. Saratoga contends that the IFB's specifications include unique attributes of a power unit Saratoga previously offered in an unsolicited proposal, and that the Army improperly appropriated and disclosed proprietary data from the unsolicited proposal.

We deny the protest in part and dismiss it in part.

Initially, we note that the Army requests that we dismiss this protest as untimely. Prior to bid opening, Saratoga timely filed a protest with the Army that the specifications contained Saratoga's proprietary data. The Army argues that Saratoga failed to protest to our Office within 10 working days of adverse agency action on its protest, that is, the Army's opening of bids on May 23,

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1985 without correcting the alleged deficiency. See United Technical Products, Inc.--Request for Reconsideration, B-218060.2, Feb. 28, 1985, 85-1 CPD ¶ 264. However, Saratoga did file a protest with our Office on June 7, within 10 working days of bid opening. Accordingly, we will consider the merits of the protest.

In 1981, Saratoga submitted its unsolicited proposal to provide the Army an upgraded 25 ampere power unit, having basically the same size and weight of 10 ampere power units then in use, to replace the larger and considerably heavier model used by the Army. Saratoga envisioned that the new unit could eliminate entirely the Army's need for the old 25 ampere model, and in many instances could replace two of the 10 ampere units. Although the Army determined that the Saratoga unit did offer certain advantages, no action was taken at that time, because the current units were considered satisfactory.

Subsequently, however, the Army decided to purchase additional units and, in July 1983, the Army published a notice in the Commerce Business Daily to ascertain the commercial availability of smaller and lighter 25 ampere power units. Several manufacturers expressed interest in supplying the power units and, as a result, the Army decided to draft specifications and conduct a competitive procurement for these units. Proposed specifications were drafted and distributed in September 1983 to interested manufacturers, including Saratoga, which did not object to the specifications at that time. The current IFB was issued on April 30, 1985.

Saratoga complains that the IFB's requirements regarding the maximum size and weight, and the minimum overall efficiency of the units are the same as in Saratoga's unsolicited proposal. Saratoga alleges that other specification requirements are also based on the proven performance characteristics of its model. Saratoga argues that the Army's actions in this regard constitute an improper disclosure of data contained in its unsolicited proposal, and requests that the award to Astra be terminated and the contract awarded to Saratoga.

The Army contends that the current specifications were developed internally based upon the performance requirements of the old 25 ampere model, except for a requirement of improved efficiency to take into account currently available state-of-the-art technology. The

Army further states that the IFB's size and weight requirements are the same as those for the 10 ampere power unit used by the Army. The Army therefore argues that no proprietary information contained in Saratoga's proposal was disclosed, and that the unsolicited proposal had no impact on the current specifications.

The protester bears the burden of proof in this matter and must show that its material was disclosed in confidence, that the preparation of the material involved significant time and expense, and that the material contained data or concepts that could not be independently obtained from publicly available literature or from common knowledge. NEFF Instrument Corp., B-216236, Dec. 11, 1984, 84-2 CPD ¶ 649; John Baker Janitorial Services, Inc., B-201287, Apr. 1, 1981, 81-1 CPD ¶ 249.

We find that Saratoga has not submitted sufficient evidence to establish the proprietary nature of the information allegedly disclosed by the Army. The Army has asserted an independent basis for the IFB's specifications separate from Saratoga's unsolicited proposal, and our review indicates that the IFB specifications are similar to the requirements for the power supply units currently utilized by the Army. Although Saratoga alleges that the specifications use unique information contained in its unsolicited proposal, the information was available from prior specifications or, as regards improved efficiency, from publicly available information concerning state-of-the-art technology. Andrulis Research Corp., B-190571, Apr. 26, 1978, 78-1 CPD ¶ 321.

Saratoga's real objection appears to be that since it first demonstrated the feasibility of providing a unit having the performance characteristics of the old 25 ampere model and the physical characteristics of the 10 ampere model, the Army should be precluded from seeking such a unit from any other source. The protester, however, presents no legal authority for its position, and we are aware of none. In our view, since the Army did not disclose how Saratoga proposed to produce such a unit, the Army did not improperly appropriate proprietary data

from the unsolicited proposal. Rather, the Army determined that it indeed had a need for such a power unit, surveyed commercial sources to determine whether other firms were capable of producing the unit, and--upon determining the availability of competition--issued a competitive solicitation. We believe these actions were proper in light of the general requirement that all responsible sources be permitted the opportunity to compete for a government contract. See, e.g., Jervis B. Webb Co., et al., B-211724, et al., Jan. 14, 1985, 85-1 CPD ¶ 35.

Saratoga also complains that the Army failed to conduct a preaward survey of the awardee. A preaward survey involves an evaluation of a prospective contractor's capability to perform the proposed contract--that is, the contractor's responsibility. Federal Acquisition Regulation, 48 C.F.R. §§ 9.101 and 9.106 (1984). A contracting officer may request such a survey to help determine whether the proposed awardee is responsible, but a preaward survey is not a legal prerequisite to an affirmative determination of responsibility. Freund Precision, Inc., B-216620, Oct. 23, 1984, 84-2 CPD ¶ 456. It is within the contracting officer's discretion not to request a preaward survey, and we will not review such a decision nor an affirmative determination of responsibility absent a showing that the contracting officer may have acted fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met. Id.; Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 CPD ¶ 264. The protester has made no such showing, and we therefore dismiss this aspect of the protest.

The protest is denied in part and dismissed in part.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel