



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: East Norco Joint Venture, Ramer Products, Ltd.

File: B-224022, B-224027, B-224027.2, B-224028
B-224582.2

Date: January 5, 1987

DIGEST

1. Agencies may purchase products from any source, subject to the requirement to obtain competition, when they are available at prices lower than the price of identical products on a mandatory Federal Supply Schedule contract.
2. Protest of alleged solicitation defects, apparent on the face of the solicitation, is untimely when it is included in a proposal. Agency has no obligation to publicly open or review proposals on or before closing date, when a protest of this type must be filed.
3. Where in its proposal and accompanying catalog, a protester fails to demonstrate compliance with critical specification requirements, and catalog in fact indicates non-compliance, agency's rejection of the proposal without discussions or a request for samples is reasonable.
4. Protest against rejection of proposal as technically unacceptable is sustained where agency requested samples only from the proposed awardee and evaluated protester's equipment on the basis of previously-purchased item that proposal specifically indicated had been modified in critical areas. Where the procuring activity determines that samples are necessary for evaluation purposes, it should request them from each offeror in the competitive range.
5. Agency evaluation of technical proposals lacks a reasonable basis where, without explanation or discussions, the agency rejects as technically unacceptable a proposal for equipment described as equal to that on which the agency's acquisition plan and specifications are based.

DECISION

East Norco Joint Venture and Ramer Products Ltd. protest the award of contracts for ski equipment under four different solicitations issued by the Department of the Army, Fort Devens, Massachusetts. Norco and Ramer challenge the rejection of their proposals as technically unacceptable, and

Norco further alleges that the agency should have procured the skis under the firm's mandatory Federal Supply Schedule contract with the General Services Administration (GSA). We sustain the protests in part and deny them in part.

BACKGROUND

On April 17, 1986, the Army announced in the Commerce Business Daily its intention to solicit proposals for winter warfare training equipment for the 10th Special Forces Group. On June 24, the agency issued 13 separate solicitations for various types of equipment, including skis, ski poles, bindings, and boots. Each solicitation required offerors to submit descriptive literature and provided that contracting officials might also request samples of the proposed equipment for evaluation purposes.

After evaluating the proposals received by the July 25 closing date, the agency initially awarded 13 contracts, one under each solicitation, to OMNI International Distributors, Inc. These were based upon OMNI's offer of a "package discount" for award under all solicitations. The Army, however, subsequently determined that it should not have considered an offer encompassing more than one solicitation. Accordingly, the agency reevaluated proposals, terminated the 13 contracts originally awarded to OMNI for the convenience of the government, and reawarded 10 of the contracts to that firm at its non-discounted prices.^{1/} The Army has now suspended performance pending our decision on the protests.

SKIS

Under request for proposals No. DAKF31-86-R-0136, the Army solicited proposals to supply 850 pairs of Alpine/Nordic skis.

The Army reports that before initiating the procurement, contracting officials examined the Federal Supply Schedule and found only recreational skis, not military skis,

^{1/} Each of the protested solicitations contained evaluation criteria that, while not identical, generally related to quality, workmanship, durability, weight, versatility, and quick delivery. In each case, at least some of these factors were more important than price. Apparently, however, those proposals that the Army considered acceptable were also considered technically equal, so that price became the determinative factor in the awards.

available as mandatory items. After the synopsis, Norco contacted the Army to inform it that a Ramer ski meeting specifications had been added by amendment to Norco's Federal Supply Schedule contract. Contracting officials, however, requested a waiver allowing them to purchase skis off the schedule, informing GSA that the Ramer ski which the agency had previously purchased for the 10th Special Forces Group did not meet its minimum needs and that excessive injuries had resulted from what the Army regarded as defects in design. On August 7, GSA granted the waiver.

The Army received eight proposals for skis. Of those at issue here, OMNI offered to supply two types manufactured by Karhu-Titan including (1) an "Alpine Mountaineering" ski labeled "the Ramer military" at \$140 a pair (or \$110 when ordered as part of the total package), and (2) another labeled the "Extreme" at the same price. Erik offered what the agency advises us is a Karhu-Titan ski at \$96.75 a pair. Norco offered what it states is a Ramer military ski at \$110 a pair and another at \$160.30 a pair. The parties disagree as to whether these skis are the same or different products of the same manufacturer. The Army made award to OMNI for the "Alpine Mountaineering" ski at its package price; upon termination of this contract, the agency made award to Erik at a total price of \$82,237.50.

Norco first protests the GSA's waiver of the requirement that the Army purchase the skis from its mandatory schedule contract, arguing that the Ramer military ski available under it is the very same ski offered by OMNI and Erik. Norco also states that the skis previously purchased for the 10th Special Forces Group are not the same as those available on the schedule. The Army, on the other hand, maintains that the Ramer military ski offered by Norco is different than the technically acceptable skis offered by Omni and Erik.

We need not resolve the dispute as to whether these are the same or different products of the same manufacturer. Agencies may purchase products from any source when they are available at prices that are less than the prices of identical products on a mandatory Federal Supply Schedule contract. Federal Property Management Regulations, 41 C.F.R. § 101-26.401-4(f) (1986); see also Federal Acquisition Regulation (FAR), 48 C.F.R. § 8.404-1(e) (1985) (off-schedule purchases subject to the requirement to obtain competition). Norco offers Karhu-Titan military skis under its schedule contract at \$107.60 or \$121 a pair, depending on the model. Since Erik offered its Karhu-Titan ski for only \$96.75 a pair, the Army was under no obligation to place an order

under Norco's contract even if, as Norco alleges, the skis are the same. If, on the other hand, the ski offered by Norco differs from that offered by Erik, Norco has provided our Office with no basis to question the agency's determination that Norco's was technically unacceptable.

Accordingly, we deny Norco's protest as it relates to the Army's award of a contract for skis.

SKI POLES/PACK SHOVELS

Under request for proposals No. DAKF31-86-R-0137, the Army requested proposals for 850 ski poles and, as an attachment, 850 pack shovels.

Of the proposals at issue here, Otto Webber submitted the low price, \$55.95; Ramer submitted the next-low price, \$65, as well as an alternate proposal at \$70; and OMNI submitted the highest price, \$85.25 (or \$74 under the package discount). The Army reports that its examination of Ramer's proposal revealed inconsistencies between the cover letter and the accompanying catalog. The agency reports that on July 31 it requested Ramer to provide a sample; however, it never received one, and it therefore evaluated Ramer's proposal based upon the catalog. The Army states that the description of the ski pole therein was consistent with the pole previously purchased and used by the 10th Special Forces Group.

Contracting officials found only the proposals submitted by OMNI and Webber to be technically acceptable and made award on the basis of initial proposals. Although Webber had submitted the lowest price for the ski pole/shovel system, the award initially went to OMNI on the basis of its package price. Upon termination of this contract, the Army offered Webber the contract. That firm, however, withdrew its offer, and the Army therefore reawarded to OMNI at its undiscounted price, \$72,462.50.

Ramer first protests that the Army afforded OMNI unfair advantages. The protester alleges that the agency consulted with OMNI in writing the specifications; did not provide Ramer with the solicitation until several weeks after it was issued; and denied Ramer's request to contact the using activity directly concerning the technical specifications, while affording OMNI such access.

The Army, however, denies that it consulted with OMNI or any other potential offeror in preparing the specifications, and Ramer has provided our Office with no basis to question the

denial. The Army also denies that it refused Ramer access to the using activity or provided OMNI with such access. This last basis of protest is untimely since Ramer did not raise it until more than 10 days after it allegedly was refused access to the using activity. 4 C.F.R. § 21.2 (1986).

Ramer next alleges that the solicitation for ski poles/shovels contained vague and ambiguous specifications and evaluation criteria, pointing out that in its proposal it took exception to some of the specifications, for example requirements that the poles be watertight and use split-head screws as a locking device.

Our Bid Protest Regulations require protests based upon alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals to be filed by that date. 4 C.F.R. § 21.2(a)(1). As a general rule we do not regard an allegation included in a proposal as a timely pre-opening protest to the agency, since there is no requirement that an agency open or read proposals on or before the closing date, when a protest of this type must be filed. See Colorado Research and Prediction Laboratory, Inc.--Reconsideration, B-199755, May 11, 1981, 81-1 CPD ¶ 369. Therefore, since Ramer did not protest either to the agency or to our Office until after award, we dismiss this basis of protest.

Ramer also challenges the rejection of its proposal for ski poles/shovels as technically unacceptable. Among the deficiencies that the agency found in Ramer's proposal were those relating to extension and stacking capabilities. The specifications required the ski poles to be adaptable for use as avalanche probes, antennae masts, shelter poles, and other purposes; to extend from 42 to 60 inches; to allow for stacking to a height from 9 to 12 feet; and to accept guide wire retaining rings for stability when so connected. The agency maintains that the height range of 9 to 12 feet is critical, given the intended uses of the pole.

Our Office generally will not disturb an agency's technical evaluation absent a clear showing that the determination was unreasonable or violated the procurement statutes and regulations. The protester's mere disagreement with a technical evaluation does not satisfy this requirement. Ridge, Inc., B-222481, June 24, 1986, 65 Comp. Gen. _____, 86-1 CPD ¶ 583.

Our review of Ramer's proposed adjustable pole, as described in the firm's catalog, shows that it extends only to 55 inches. Further, nothing in Ramer's proposal demonstrates that its poles are capable of being stacked. In view of the importance that the Army accorded height and adjustability, we find that the agency had a reasonable basis for rejecting Ramer's proposal for ski poles. In view of this conclusion, we need not discuss the other deficiencies that the agency found in Ramer's proposal.

Accordingly, we deny Ramer's protest as it relates to the Army's award of a contract for ski poles and pack shovels.

SKI BINDINGS

Under solicitation No. DAKF31-86-R-0138, the Army requested proposals for 1,487 pair of ski bindings; it received them from eight offerors. Webber proposed bindings at \$95.90 and \$139.80 a pair; OMNI proposed bindings at \$119 and \$129 (\$106 with discount) a pair; Norco proposed Ramer "Universal" ski bindings at \$84.75 a pair and Ramer "Guide" bindings at \$100.75 a pair; and Ramer proposed its own Universal bindings at \$82 a pair and "Guide" bindings at \$97 a pair. The Army found all proposals except those of OMNI (and Webber for the \$139.80 bindings) to be technically unacceptable and made award to OMNI on the basis of its package price. After it terminated the first contract, the agency again made award to OMNI at its undiscounted price of \$191,823.

Although the Army requested and received samples from OMNI, it did not request samples from any other offeror. The agency based its evaluation of the Ramer binding on the firm's written proposal and on previously-purchased Ramer bindings. The Army found these unacceptable primarily because of their lack of a toe or complete lateral release mechanism that would separate the boot from the ski in the event of an accident. (It attributed a number of injuries involving members of the 10th Special Forces Group who had used the bindings to these factors and to deficiencies in the quality of materials.) In support of its conclusions, the agency provided our Office with numerous accident reports and with photographs of the previously-purchased Ramer bindings.

In protesting the rejection of its proposal, Ramer denies that the accidents can be attributed to defects in its bindings. More importantly, Ramer points out that in its proposal, it specifically indicated that it was offering a new model that included improvements in the adjustment for

boot length and in the lateral release mechanism. In addition, Ramer questions whether the bindings offered by OMNI in fact provide superior or even equivalent performance. Finally, Ramer suggests that the agency predetermined the outcome of the evaluation, since its acquisition plan concluded that Ramer bindings had not lived up to expectations for reliability or safety and instead recommended procurement of the bindings offered by OMNI, among others.

Where a procuring activity determines that preaward sampling is necessary, it should generally request samples from each offeror in the competitive range. See RCA Corp., et al., 57 Comp. Gen. 810 (1978), 78-2 CPD ¶ 213. The Army in this case, however, requested samples only from OMNI and, as noted above, rejected Ramer's proposal on the basis of previously-purchased bindings that Ramer specifically indicated had been modified in critical areas.

Accordingly, we find that the Army's evaluation of bindings without providing Ramer with an opportunity to provide a sample of its modified model unreasonably eliminated the firm from the competitive range. We therefore sustain Ramer's protest as it relates to the award of a contract for bindings.

Norco likewise protests the rejection of its proposal for bindings and the subsequent award to OMNI at a higher price. Since Norco offered the same bindings as Ramer, and the Army rejected its proposal in the same manner--without a request for samples--we also sustain Norco's protest on this basis.

SKI BOOTS

Under request for proposals No. DAKF31-86-R-0142, the Army requested proposals for 900 pairs of boots and two different types of cold weather liners. It received proposals from six offerors; Ramer's total price was \$246,240 and OMNI's \$250,142 (\$232,173.80 with package discount).

Ramer offered as alternates two models of boots, (1) an "Expedition" boot, which it described as "equivalent to" the "Extreme" boot manufactured by Koflach, and (2) an "Alpine Touring" boot, which it described as "equivalent to" the "Combi" boot manufactured by Kastinger Messner. Ramer included with its proposal descriptive literature detailing the characteristics of the Koflach and Kastinger boots.

The Army maintains, and Ramer denies, that during a July 31 telephone conversation with the firm, contracting officials requested Ramer to submit samples. There is no written

confirmation of such a request, and we are unable to determine conclusively from the record whether a request for samples was made and refused, or whether no such request was made as alleged by Ramer. In any case, the firm did not submit samples and the agency based its evaluation upon Ramer's written proposal, catalog cuts, and previously purchased Kastinger and Koflach boots that had been used by the 10th Special Forces Group. Samples were requested from and submitted by OMNI. The Army found only the proposal submitted by OMNI technically acceptable; the agency made award to that firm on the basis of its package discount price and subsequently reawarded the contract to it at its undiscounted price.

Our review of the Army's acquisition plan shows that it included a set of approved specifications, stated that the only boot currently manufactured and available in the United States which met these specifications was the Koflach "Ultra Extreme" boot, and recommended that it be used as a standard for the procurement. The specifications in the solicitation corresponded with those in the acquisition plan except for the additional requirements that the toe be squared to fit into ski bindings and that the boots fit men's sizes 6-1/2 to 14EE. While Ramer's descriptive literature indicated that its boot was available only in sizes 5-1/2 to 13, Ramer in fact proposed a price for every specific size and width.

The Army reports that it relied extensively on past experience with the boots proposed by Ramer in rejecting Ramer's proposal. It states, for example, that the Koflach boot has a stiff liner that does not flex easily. In addition, the Army states that the Koflach liner has a hard inner seam that may become uncomfortable and may separate. The agency does not explain, however, how contracting officials could first conclude, in their acquisition plan, that the Koflach boot was the only one currently available in the United States that could meet its specifications and then conclude, under nearly identical specifications and based upon "past experience," that the boots proposed by Ramer, one of which was stated to be equal to the Koflach boot, were so deficient that negotiations were unnecessary. In the absence of a showing that the boot proposed by Ramer and the one specified in the acquisition plan were materially different, and in the absence of conclusive evidence as to whether a sample was requested of Ramer, we are unable to find that the agency's decision which resulted in a competitive range of one, was reasonable.

Accordingly, we sustain Ramer's protest as it relates to the Army's award of a contract for boots and liners.

REMEDIES

By letter of today to the Secretary of the Army, we are recommending that the agency extend to Ramer and Norco the same opportunity it afforded OMNI of submitting samples of the bindings that they are proposing under solicitation No. -0138. If appropriate, the Army should terminate the protested contract and award a new one.

In regard to solicitation No. -0142, we are recommending that the Army request that Ramer provide samples of the boots. On the basis of these and any relevant descriptive literature, the agency should reevaluate proposals, fully documenting its conclusions. If appropriate, the Army should terminate the protested contract and award a new one.

In both cases, the Army should justify any decision to make award to the lowest priced, technically acceptable offeror by formally finding that the proposed equipment is equal as to other listed and more important evaluation factors.

To the extent indicated, the protests are denied in part and sustained in part.

for *Harry D. Jan Cleave*
Comptroller General
of the United States