



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Department of the Army; OMNI International
 Distributors, Inc.; Ramer Products, Ltd.--
Matter of: Requests for Reconsideration

File: B-224022.2, B-224027.3, B-224027.4, B-224028.2

Date: April 9, 1987

DIGEST

1. Where agency fails to request in writing, or to confirm in writing an oral request for samples that are necessary for the evaluation of proposals, and during a subsequent protest an irreconcilable conflict of fact regarding the request arises, the General Accounting Office is unwilling to presume that the agency's version of events is correct.
2. Agency evaluation of technical proposals lacks a reasonable basis where, without explanation or discussions, an 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.
3. Rejection of proposal as technically unacceptable is unreasonable where agency requests samples only from the proposed awardee and evaluates protester's equipment on the basis of previously-purchased item that the protester has specifically indicated has been modified in critical areas. Where samples are necessary for evaluation purposes, the procuring activity should request them from each offeror in the competitive range.
4. Where in its proposal and accompanying catalog, a protester fails affirmatively to demonstrate compliance with critical specification requirements, and the catalog in fact suggests non-compliance, agency's rejection of the proposal without discussions or a request for samples is reasonable.

DECISION

The Department of the Army, OMNI International Distributors, Inc., and Ramer Products, Ltd. request reconsideration of our

decision in East Norco Joint Venture, et al., B-224022, et al., Jan. 5, 1987, 87-1 CPD ¶ _____. In that decision, we sustained the protests by Norco and Ramer against the Army's award of contracts to OMNI for ski bindings and ski boots, but denied the firms' protests against award of a contract to OMNI for ski poles and award of a contract to Erik Sports, Inc. for skis.

We affirm our prior decision.

BACKGROUND

In June 1986, the Army issued 13 separate solicitations for various types of winter warfare training equipment for the 10th Special Forces Group. Each solicitation required offerors to submit descriptive literature and provided that contracting officials might request samples of the proposed equipment for evaluation purposes.

The Army initially awarded 13 contracts, one under each solicitation, to OMNI, based upon its offer of a "package discount" for award under all solicitations. After subsequently determining that it should not have considered an offer encompassing more than one solicitation, the agency reevaluated proposals, terminated the 13 contracts for the convenience of the government, and reawarded 10 of the contracts to OMNI at its undiscounted prices.

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 "Ultra Extreme" and Kastinger "Messner Combi" boots.

The Army maintained, and Ramer denied, that during a July 31 telephone conversation with the firm, contracting officials had requested Ramer to submit samples. There was no written confirmation of such a request, and we were unable to

determine conclusively from the record whether a request for samples had been made and refused, or whether no request had been made. In any case, Ramer did not submit samples, and the agency based its evaluation upon the firm'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 only offeror that the Army found technically acceptable.

Our review of the Army's acquisition plan found that it included a set of approved specifications which stated that the only boot currently manufactured and available in the United States which met these specifications was the Koflach "Ultra Extreme" boot. The plan recommended that this boot be used as a standard for the procurement. The specifications in the solicitation, with minor exceptions, corresponded with those in the acquisition plan.

In rejecting Ramer's proposal, the Army reported that it had relied extensively on past experience with the boots proposed by Ramer. It stated, for example, that the Koflach boot has a stiff liner that does not flex easily, as well as a hard inner seam that may become uncomfortable and may separate. The agency did 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 a purportedly equal boot proposed by Ramer was 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 had been requested of Ramer, we were unable to find that the agency's evaluation was reasonable. Accordingly, we sustained Ramer's protest as it related to boots and liners.

In its request for reconsideration, OMNI initially argues that we applied the wrong test in determining whether Ramer was requested to submit samples. OMNI would apply the general rule that irreconcilable conflicts in the evidence are to be resolved in favor of the agency.

Where there is a conflict between the protester and the agency on factual matters, in the absence of extraneous evidence, a protester generally has not met the burden of

proving its case. See Data Monitor Systems, Inc., B-220917, Jan. 23, 1986, 86-1 CPD ¶ 82; Security Fence Co., B-218587, July 22, 1985, 85-2 CPD ¶ 67. For the following reasons, we consider this rule inapplicable here. The Army was in a position to reduce the likelihood of misunderstandings and subsequent disputes by requesting, in writing, or by confirming in writing an oral request for the samples if it regarded them as necessary for the evaluation of proposals and the protester's continued participation in the procurement. Where, as here, the agency does not reduce its request to writing, and, during a subsequent protest, an irreconcilable conflict of fact concerning the request arises, we are unwilling to presume the correctness of the agency's version of events. Cf. CoMont, Inc., 65 Comp. Gen. 66 (1985), 85-2 CPD ¶ 555 (oral notice of material change in solicitation); Woodward Associates, Inc., et al., B-216714 et al., Mar. 5, 1985, 85-1 CPD ¶ 274 (oral request for best and final offers).

OMNI also questions our finding that there was no "conclusive evidence" as to whether the Army requested samples from Ramer. Although the agency has provided our Office with a memorandum dated July 30 that lists Ramer among the firms to be contacted for samples, it has also submitted a memorandum dated July 31 on which the notation "FORGOT RAMER/NORCO! DO IT!" is found at the bottom of a list of checked-off names of offerors. A check appears next to this notation, and additional notations of "OK," a contracting official's initials, and "31" are nearby. While the log of outgoing telephone calls indicates that the agency made a brief call to Ramer at 10:44 a.m. on July 31, the calls to the other offerors were made later on that date. Moreover, the memorandum of July 31, which lists the approximate time at which each telephone call requesting samples was made and the person with whom agency officials spoke, does not include such information for Ramer or Norco. We therefore remain convinced that the evidence in this regard is inconclusive.

OMNI further maintains that our decision ignored Ramer's obligation to demonstrate in its proposal that its proposed boot met the agency's minimum needs.

We will review agencies' technical evaluations to ensure that they have a reasonable basis. See Intelcom Support Services, Inc., B-222547, Aug. 1, 1986, 86-2 CPD ¶ 135. Where, as here, an offeror proposes equipment described as equal to that on which the agency's specifications are based, and the agency rejects that proposal as technically unacceptable

without affording an opportunity for discussions, showing that the proposed equipment was materially different from that specified, or otherwise explaining the apparent inconsistency, then the technical evaluation lacks a reasonable basis.

Accordingly, we affirm our prior decision as it relates to the award for ski boots and liners.

SKI BINDINGS

Under solicitation No. DAKF31-86-R-0138, the Army requested proposals for 1,487 pair of ski bindings; it received proposal from eight offerors. 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 a second, higher-priced offeror) to be technically unacceptable.

Although the Army requested and received samples from OMNI, the agency's report responding to this protest stated that "Ramer Products, Ltd. was not required to submit a sample binding." The agency instead based its evaluation 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 protesting the rejection of its proposal, Ramer denied that the accidents could be attributed to defects in its bindings. More importantly, Ramer pointed out that in its proposal, it had specifically indicated that it was offering a new model that included improvements in critical areas, i.e., the adjustment for boot length and in the lateral release mechanism.

In our prior decision, we held that where a procuring activity determines that preaward samples are necessary, it generally should request samples from each offeror in the competitive range. See RCA Corp., et al., 57 Comp. Gen. 809 (1978), 78-2 CPD ¶ 213. It appeared, however, that the Army had requested samples only from OMNI and, as

noted above, had rejected Ramer's proposal on the basis of previously-purchased bindings that Ramer specifically indicated it had modified in critical areas. Accordingly, we found that the Army had unreasonably eliminated the firm from the competitive range, and we sustained Ramer's protest as it related to the bindings.

We likewise sustained Norco's protest, since it had offered the same bindings as Ramer, and the Army had rejected its proposal in the same manner--without a request for samples.

In its request for reconsideration, the Army contends that our decision ignored an October 1986 statement by a contracting official that Ramer and Norco "were asked to submit samples of all products for which they had . . . bid and for which they had not submitted a previous sample."

As indicated above, however, the agency's administrative report specifically stated that Ramer was not required to submit a sample binding. Ramer also denied that the agency had requested a sample. In addition, the administrative report indicated that the agency had rejected the Ramer and Norco proposals on the basis of previously-purchased bindings; the contracting official's statement indicated that the agency did not request samples from offerors that had previously submitted samples; and a July 30 memorandum by the same official included the notation "Ramer--Samples?" under the heading for bindings. We therefore concluded that the agency had not requested samples of Ramer or Norco. We see no reason to alter our prior conclusion.

Accordingly, our prior decision as it relates to ski bindings is affirmed.

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 those proposals at issue here, Ramer submitted a proposal for \$65 and an alternate proposal for \$70, while OMNI submitted the highest price, \$85.25 (or \$74 under the package discount).

The Army reported that its examination of Ramer's proposal revealed inconsistencies between the cover letter and the accompanying catalog. The agency claimed 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 stated that the description of the ski pole therein was consistent with the pole

previously purchased and used by the 10th Special Forces Group. The Army rejected Ramer's proposal as technically unacceptable and made award to OMNI.

In its protest, Ramer challenged the rejection of its proposal for ski poles/shovels for deficiencies 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.

Our review of Ramer's proposed adjustable pole, as described in the firm's catalog, revealed that it extended only to 55 inches. Further, we found nothing in Ramer's proposal demonstrating that its poles were capable of being stacked. Since the Army maintained that the 9 to 12 foot height and adjustability were critical, we concluded that it had a reasonable basis for rejecting Ramer's proposal.

In its request for reconsideration, Ramer initially points out that its proposal included a general offer to meet all the specifications. A blanket offer of compliance, however, is not sufficient when a solicitation requires the submission of detailed technical information that an agency deems necessary for evaluation purposes. AEG Aktiengesellschaft, 65 Comp. Gen. 418 (1986), 86-1 CPD ¶ 267.

Ramer further argues that it did not take exception to the requirement for poles capable of being stacked to a height from 9 to 12 feet, but instead included descriptive literature describing the ski poles as capable of "easy conversion into avalanche probes." Further, although Ramer admits that the length of its ski pole as set forth in the descriptive literature is only 55 inches, it points out that the proposal indicated that one of the quoted prices included "additional extensions."

An offeror must affirmatively demonstrate technical sufficiency in its proposal. Id. The Army found the language cited by Ramer to be insufficient to demonstrate affirmatively that its proposed equipment met the specification requirements, and we are unable to conclude that the agency lacked a reasonable basis for that determination.

Accordingly, our prior decision as it relates to the award for ski poles and pack shovels is affirmed.

for *Milton J. Fowler*
Comptroller General
of the United States