The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Freund Precision, Inc.--Reconsideration

File: B-223613.2

Date: May 4, 1987

DIGEST

General Accounting Office affirms a decision holding that contracting activity acted unreasonably in not considering alternate methods for evaluating alternate product where the agency, in a request for reconsideration, does not show that its failure to consider such alternate methods during the 16-month period between submission of the protester's offer and award was reasonable.

DECISION

The Defense Logistics Agency (DLA) requests reconsideration of our decision sustaining the protest of Freund Precision, Inc., Freund Precision, Inc., B-223613, Nov. 10, 1986, 66 Comp. Gen. ____, 86-2 CPD ¶ 543. We found that DLA had unreasonably denied the protester an opportunity to compete for an award under request for proposals (RFP) No. DLA400-85-R-4679.

DLA challenges this decision on two bases. First, DLA maintains that our Office, when deciding this protest, was unaware of relevant facts concerning the steps required to develop a competitive procurement package, a process in which it is now engaged. Second, it argues that the decision was premised on requirements of the Competition in Contracting Act of 1984 (CICA) that did not become effective until after the issuance of the RFP.

We affirm our prior decision.

BACKGROUND

Freund's protest concerned DLA's failure to complete an evaluation of its offer for a light base assembly within the 16-month period between the submission of its initial proposal and award of the contract. This assembly, which is a component of an emergency exit light used on several Air

Force and Navy aircraft, was identified in the RFP by the original manufacturer's part number (Grimes part number 11-04-83-1). Freund proposed its own product (Freund Precision part number 50280) in accord with the standard clause entitled "Product Offered" that was included in the RFP. This clause enables offerors to propose alternate products that are either identical to or physically, mechanically, electronically, and functionally interchangeable with the specified product. This clause also provides that offerors must submit all specifications or other data necessary to enable the government to determine the acceptability of the product before award.

The record showed that Freund had attempted to comply with the agency requests for data concerning its own product and the Grimes part designated in the solicitation. On April 11, 1985, Freund submitted drawings of its own product with its initial proposal. On May 31, 1985, responding to a request from the contracting activity, Freund submitted additional data which included drawings it had developed through reverse engineering of the Grimes part. In June 1986, however, the agency determined that without the actual drawings of the designated part (which neither Freund nor DLA had been able to obtain from Grimes), it could not evaluate the protester's product. DLA therefore awarded the contract to Grimes, the only technically acceptable offeror. By letter dated July 1, 1986, the contracting officer notified the protester of this action and stated that the agency was developing first article tests, so that a competitive procurement package should be completed by September 1987.

In sustaining the protest, we found that had DLA planned ahead, it might have been able to evaluate Freund's part without resort to comparisons with specifications and drawings for the Grimes part. In reaching this conclusion, we particularly noted that the contracting officer had indicated in his letter of July 1 that first article testing could be utilized to evaluate the item. The record disclosed, however, that DLA had not even considered employing this or any other technique within the 16-month period that had elapsed between submission of initial offers and award. As we stated in our decision, had the agency done so at the beginning of this period, it might have been able to conduct a competitive procurement. Moreover, we found the agency's inaction inconsistent with CICA provisions concerning advance procurement planning and development of specifications; these

had become effective by May 1985, when DLA first requested additional technical data from the protester. See 10 U.S.C. § 2304(f)(5) (Supp. III 1985).1/

Although we found that the actual award was not improper because of the established urgent need for the product, we concluded that Freund had been unreasonably denied the opportunity to compete. Since no other remedy was available, we found Freund entitled to its costs of filing and pursuing the protest, including reasonable attorney's fees.

DISCUSSION

In its request for reconsideration, DLA disputes our finding that it could easily have utilized first article testing to evaluate Freund's product. Although not discussed in its original report on the protest, DLA states that before this evaluation technique can be employed, a standard against which the test results can be compared must be developed. Further, because the part is a component of emergency equipment, accurate standards and tests are crucial. In this instance, because of the lack of access to data on the Grimes part, DLA states, it must first reverse engineer the part and, apparently, develop design specifications to be included in a competitive procurement package. Considering these factors, DLA concludes that the utilization of first article tests to evaluate Freund's product was not feasible.

DLA further argues that this item is one among approximately 200,000 in its inventory for which the government does not have adequate technical data. DLA maintains that CICA contemplates a systematic approach to development of specifications for these items, and it cannot all be done immediately, given the limited resources of procuring activities. This particular case, DLA adds, involved a relatively small buy of a product for which little competitive interest had been shown.

We do not dispute DLA's statement that development of first article tests is a complex and time consuming process, so that the development of a competitive procurement package for this part may not have been practicable. We also recognize that procuring activities may not have the resources to undertake such a process for each of the vast number of items

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1/ The requirement for advance planning imposed by CICA applies to all solicitations issued after March 31, 1985. The subject RFP, however, was issued on February 8, 1985.

for which specifications have yet to be developed. We do not question DLA's finding that it lacked sufficient data to determine the technical acceptability of Freund's alternate product.

The fact remains, however, that DLA has not put forth any rationale for its insistence--throughout the entire 16-month period between submission of initial offers and award--that the only way to evaluate alternate products such as the one proposed by Freund was by comparison with drawings of the Grimes part.

We find it unreasonable, especially in view of Freund's express interest in this procurement, that DLA did not even consider the alternate approach that it is now undertaking at any time during the subject acquisition. Instead, as indicated above and in our prior decision, DLA encouraged the submission of alternate proposals by including in the solicitation the "Product Offered" clause. In addition, following Freund's submission of drawings for its own product, DLA requested that the firm provide additional technical data in the form of drawings that Freund had developed through reverse engineering of the Grimes part, and sought the help of the Air Force and Navy in evaluating these drawings. Only when its supply situation had become urgent did the agency even consider whether development of a competitive procurement package for the part in question was feasible, given its available resources and the potential for procurement from other than the original equipment manufacturer. There is nothing in the request for reconsideration that indicates that DLA made such an analysis before issuing the solicitation in February 1985 or for 16 months thereafter. This is what we find unreasonable.

As for the applicability of CICA to this procurement, DLA is correct that the statute did not apply, and by referring to it in the initial decision, we did not intend to suggest that it did. CICA was cited merely because contracting officers, following its enactment in 1984, should have been aware of the critical importance that the Congress accorded to advance planning. Even before the effective date of CICA, however, agencies were required to act in a reasonable manner to enhance competition. Specifically, a procuring activity's evaluation of an alternate product had to be

reasonable, see Rotair Industries, Inc., B-219994, Dec. 18, 1985, 85-2 CPD ¶ 683, and this entailed affording alternate sources, where practicable, an opportunity to compete.

We affirm our prior decision.

Milton J. Socolar

Acting Comptroller General
of the United States