



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Smith & Wesson

File: B-229505

Date: February 25, 1988

DIGEST

1. Protest alleging that specifications in solicitation are defective is timely where filed before due date for initial proposals; it need not be filed within 10 days after issuance of solicitation.

2. Protester who does not submit an offer under a solicitation nevertheless is an interested party to challenge the specifications in the solicitation as defective based on its interest as a potential offeror under a revised solicitation if the protest is sustained.

3. Statutory provision calling for a "new competition" in connection with a follow-on procurement of pistols cannot reasonably be interpreted to require the contracting agency to limit the procurement to any particular sources.

4. In procurement for pistols, the fact that the targeting and accuracy specifications applied in the initial testing stage of the procurement were changed in the contract ultimately awarded does not demonstrate that the testing specifications exceed the government's minimum needs where the contracting agency did not intend to relax the initial specifications. Even assuming that the contract specifications are less stringent, the defect is that the agency improperly modified the contract specifications, not that the initial testing specifications exceed the government's minimum needs.

5. In follow-on procurement of pistols, contracting agency should not require protester's pistol to be retested on specifications which it met in connection with initial procurement, in view of agency's decision to exempt awardee under initial contract from retesting and agency's failure to justify its decision to retest the protester.

041400

DECISION

Smith & Wesson protests any award based on request for technical samples (RFTS) No. DAAA09-87-R-0995, issued by the Army as the initial stage in a procurement of 9-millimeter (mm.) pistols. We deny the protest in part and sustain it in part.

In 1985, a multiyear contract was awarded to Beretta USA Corporation for a total of 315,930 9-mm. pistols. The award to Beretta was part of the Army's plan for acquiring a new pistol which uses North Atlantic Treaty Organization (NATO) standard 9-mm. ammunition to replace the .45 and .38-caliber pistols used previously by the Army. To be eligible for the production contract which ultimately was awarded to Beretta, interested firms had to submit a sample group of pistols for testing by the Army for compliance with the specifications set out in an RFTS issued in November 1983. Eight firms submitted samples under the RFTS. Two firms later withdrew; two, including Beretta, were found technically acceptable; and four were found technically unacceptable, including Smith & Wesson, which was eliminated for failing to meet two requirements regarding its pistol's firing pin energy and expected service life.

The procurement which resulted in the award to Beretta was the subject of an investigation by our Office which in part examined Smith & Wesson's claim that the pistol testing under the RFTS was flawed. In addition, Smith & Wesson filed a lawsuit, in which it ultimately did not prevail, challenging its elimination from the competition. In response to the controversy surrounding the procurement, Congress in the 1987 Department of Defense (DOD) Appropriations Act, Pub. L. No. 99-591, 100 Stat. 3341, 3341-128, § 9132 (1986), directed the Army to conduct a new procurement for acquiring additional quantities of the 9-mm. pistols, as follows:

"During the current fiscal year [1987], the Department of Defense shall conduct a new competition for 9-mm handguns, with procurement starting in fiscal year 1988 in parallel with the current contract."

In response to the direction in the DOD Appropriations Act for a follow-on procurement, the Army issued the RFTS involved in this protest on September 30, 1987. As with the 1983 RFTS, the current RFTS invites potential offerors to submit sample pistols for testing to determine if they meet the specifications in the RFTS. The RFTS also states that the pistol currently being acquired from Beretta, designated

the M9, is considered a qualified candidate for award of any additional quantities to be acquired as a result of the new competition and is exempt from the testing required under the RFTS for other firms.

Smith & Wesson first argues that the Army's decision to subject it to testing under the new RFTS is inconsistent with the DOD Appropriations Act provision regarding the follow-on procurement. In the protester's view, Congress intended that the Army conduct a new competition based on price alone limited to three offerors, Smith & Wesson and the two firms, including Beretta, which the Army found technically acceptable in connection with the 1983 RFTS.

Smith & Wesson also contends that the specifications in the RFTS exceed the Army's minimum needs. As noted above, the 1985 award to Beretta followed testing of the competing firms' sample guns for compliance with the specifications in the initial RFTS. Smith & Wesson argues that while certain specifications from the 1983 RFTS relating to targeting and accuracy have been included in the current RFTS, those specifications have been relaxed for Beretta in connection with the pistols produced under its 1985 contract. As a result, Smith & Wesson argues, the specifications in the RFTS necessarily exceed the Army's minimum needs to the extent that they are more stringent than the specifications which Beretta is required to meet under the production contract.

As a preliminary matter, the Army argues both that the protest is untimely and that Smith & Wesson is not an interested party to maintain the protest. We find these arguments to be without merit. With regard to timeliness, the Army argues that Smith & Wesson should have filed its protest within 10 days of the issuance on September 30 of the new RFTS which put the protester on notice of the basis of its protest. Since the protest was not filed until October 28, more than 10 days later, the Army argues that it is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987), however, protests such as this one which challenge alleged improprieties in a solicitation are timely if filed before initial proposals are due. Here, since the protest was filed on October 28, well before the December 1 date for submission of samples under the RFTS, it clearly is timely.

The Army also argues that since Smith & Wesson has chosen not to submit a sample under the RFTS and therefore is not eligible for award under the new competition, it is not an interested party to maintain the protest. We disagree. Where, as here, a protest involves allegedly defective solicitation specifications, a protester's interest as a

potential competitor under a revised solicitation if the protest is sustained is sufficient for it to be considered an interested party. Newport News Shipbuilding and Dry Dock Co., B-221888, July 2, 1986, 86-2 CPD ¶ 23.

1987 DOD APPROPRIATIONS ACT

As noted above, the initial competition which resulted in the award to Beretta in 1985 was the subject of a report by our Office which concluded that the Army's evaluation of the performance of the Smith & Wesson pistol was flawed. Pistol Procurement-Allegations on Army Selection of Beretta 9-mm. as DOD Standard Sidearm (NSIAD-86-122, June 16, 1986). The report concluded that Smith & Wesson was unfairly excluded from the competition based on the Army's erroneous conclusion that its pistol failed to satisfy two requirements in the RFTS. The report's conclusion later was adopted in a report on the competition by the Committee on Government Operations of the House of Representatives. In reliance on those reports, Smith & Wesson now contends that Congress intended through passage of the Appropriations Act provision to require the Army to limit the new competition for the pistols to three firms, Smith & Wesson, Beretta and SACO Defense Systems Division of the Maremont Corporation, the other offeror found technically acceptable by the Army under the 1983 RFTS.

We believe that the protester's interpretation of the statutory provision is too narrow and is not supported by the statutory language. As noted above, the statutory provision calls for a "new competition" for the follow-on procurement. In addition, the conference report on the Appropriations Act, H. Rep. No. 1005, 99th Cong., 2d Sess. 489 (1986), provides as follows:

"The House bill included a provision requiring a cancellation of the current contract and recompetition of performance specifications for the 9mm handgun prior to obligation of fiscal year 1987 funds. The Senate bill had no such provision. The conferees are aware of the controversy surrounding the initial 9mm handgun competition. As a result, the conference agreement includes a general provision which directs the Department of Defense to hold a competition during fiscal year 1987 for a follow-on procurement of the 9mm handgun, but without any restrictions on obligation of 1986 and 1987 funds. The conferees have provided \$15,000,000 over the budget request in the Procurement of Weapons and Tracked Combat Vehicles, Army account to fund this competition

and for the initial period of follow-on production beginning in fiscal year 1988.

"The conferees expect the new competition will be based on the same performance specifications used for the award of the current multiyear contract. The conferees further agree that (1) the current multiyear contract shall not be terminated as a result of any questions concerning the earlier competition or as a result of this new competition, and (2) that there will be no options or extensions exercised to the current multiyear contract until the Committees on Appropriations of the House and Senate have been notified of the results of the new competition.

"The Department of Defense is requested to submit a report to the Committees on Appropriations of the House and Senate on the results of the competition which includes a list of alternatives for smoothly incorporating the winning bidder into the 9mm handgun acquisition plan."

In our view, neither the statutory provision nor the accompanying conference report indicates that the new competition is to be limited to any particular sources or that Congress had adopted the conclusion in our report that Smith & Wesson should be considered technically acceptable. In addition, there is no indication that the Army was to limit the new competition to consideration of price proposals from Smith & Wesson, Beretta and SACO, or was precluded from retesting pistols for compliance with the specifications. On the contrary, the conference report specifically states that "[t]he conferees expect the new competition will be based on the same performance specifications used for the award of the current multiyear contract." This language, together with the statutory language calling for a "new competition," in our view indicates that Congress did not intend to require the Army to limit the scope of the follow-on procurement as Smith & Wesson suggests.

RFTS SPECIFICATIONS

Smith & Wesson argues that the specifications in the RFTS exceed the Army's minimum needs in light of changes to the specifications made in connection with Beretta's production contract. The protester's argument focuses on two specifications regarding targeting and accuracy which, to the extent relevant to the protester's argument on this issue,

are the same in the 1983 RFTS and the current RFTS. The specifications provide that (1) the mean radius for ten 10-round shot groups at 50 meters shall not be more than 3.6 centimeters greater than that for the same ammunition when fired from an accuracy barrel; and (2) the average center of impact for ten 10-round shot groups at 50 meters shall not be more than 10.2 centimeters radially from the point of aim. Compliance with the specifications is to be determined based on the average performance of 5 sample pistols each firing 10 rounds at 10 targets.

In comparison, under the contract awarded to Beretta, each pistol must meet the targeting and accuracy requirements; in addition, 10 pistols from each production lot are retested after an interchange of parts and again each pistol must meet the requirements based on firing 10 rounds at one target. The Army states that the contract originally incorporated the same targeting and accuracy requirements as in the RFTS (10.2 centimeter center of impact and 3.6 centimeter mean radius.) The requirements subsequently were changed, however, to enlarge the acceptable impact areas. As currently written, the center of impact specification states that at a range of 50 meters, all rounds of one 10-round shot group must fall within or touch the outline of a target which is 47 centimeters wide and 56 centimeters in height, with the point of aim at the center of the target. (The target dimensions approximate the measurements of a man's chest.) With regard to the mean radius specification, the contract provides that at a range of 50 meters, the mean radius of one 10-round shot group must not be more than 8 centimeters or 4.6 centimeters greater than for the same ammunition fired from a test barrel, whichever is greater.

According to the Army, the targeting and accuracy specifications in the Beretta contract were adjusted to accommodate a degree of variability in individual production pistols which is consistent with the average requirements imposed on the sample pistols used in the RFTS testing. As the Army explains, since the performance of the sample pistols was based on the average measurements from 50 targets (5 pistols firing at 10 targets each), the RFTS specification allowed some pistols to perform better than the required average measurements and some to perform worse; the pistols would be regarded as meeting the RFTS specifications so long as the average performance of the individual guns met them. In contrast, under the Beretta contract, compliance with the specifications is based on the performance of each pistol. As a result, imposing the average center of impact and mean radius requirements on individual pistols under the production contract in effect would make the specifications stricter, since it would require each pistol produced to meet the specifications

which the sample guns under the RFTS only had to meet on an average basis.

Smith & Wesson contends that the contract specifications go beyond merely translating the RFTS specifications into criteria appropriate for production testing of individual guns. In the protester's view, the specifications in the Beretta contract are more relaxed than the RFTS specifications since the acceptable impact areas have been substantially expanded; as a result, each pistol produced under the contract could perform only at the outer acceptable boundaries of the new enlarged impact areas and still meet the contract specifications, even though, on average, the pistols would not meet the RFTS specifications.

We recognize in theory the Army's need to modify the RFTS sample testing specifications from an average measurement to an equivalent measurement based on the individual performance of the pistols produced under the contract; the RFTS average requirements clearly become more stringent if applied on an individual basis to each gun produced. On the other hand, we recognize, as the protester contends, that all the guns produced by Beretta may meet the specifications under the contract yet, on average, not meet the RFTS specifications. The Army has not explained how it calculated the new measurements included in the Beretta contract. Without any information in the record on this point, we cannot determine whether the contract specifications are consistent with the RFTS specifications.

In our view, however, this does not mean that the RFTS specifications exceed the Army's minimum needs, as the protester argues. On the contrary, the Army maintains that it did not intend to relax the specifications in the production contract, but only to modify the specifications to the extent necessary to accommodate the change from measuring the average performance of the sample pistols under the RFTS to measuring the individual performance of each pistol produced under the contract. Accordingly, even assuming that the contract specifications do not accurately reflect the RFTS specifications, the defect is that the Army incorrectly translated the RFTS specifications into the contract specifications, not that the RFTS specifications overstate the Army's minimum needs. As a result, we deny the protest to the extent that Smith & Wesson contends that the RFTS specifications exceed the Army's minimum needs.

Further, whether the guns produced by Beretta meet the Army's minimum needs as expressed in the RFTS specifications

involves a question of contract administration which our Office does not review in a bid protest proceeding. 4 C.F.R. § 21.3(f)(1). In this regard, however, we note that the Army states that in addition to the production tests mentioned earlier, the Beretta contract contains two test requirements designed to verify that the pistols continue to meet the RFTS requirements, an initial production test performed on five pistols selected by the Army from the first article production, and comparison tests performed on five accepted pistols 14 months after first article approval and five additional pistols every following 12 months. Based on the initial production and comparison tests to date, the Beretta pistols have met the average requirements in the RFTS specifications.

Smith & Wesson also argues that the service life specification in the current RFTS is more stringent than in the 1983 RFTS and that, as a result, it is improper for the Army to rely on Beretta's compliance with the allegedly less restrictive specifications in the 1983 RFTS to exempt Beretta from retesting its pistol under the current RFTS. The 1983 RFTS called for the pistols to have "an expected service life of at least 5,000 rounds." Under the Army's interpretation, the specification required that each pistol have a minimum life of 5,000 rounds. The Army found that Smith & Wesson failed to meet this requirement because one of its test pistols showed a crack in the frame that the Army concluded had occurred before 5,000 rounds were fired. In contrast, our report on the procurement concluded that the specification required only that the pistols have an average service life of 5,000 rounds, which the Smith & Wesson pistols met.

Regardless of the proper interpretation of the 1983 specification, however, the Army's position is that it always intended to impose a minimum, not an average, service life requirement. To clarify its intention, the Army changed the specification in the current RFTS to require "a minimum service life of 5,000 rounds" and specifically advised offerors that they will be eliminated from the competition if any single pistol submitted experiences a failure before 5,000 rounds.

We do not agree with Smith & Wesson that the change in the specification language requires the Army to retest Beretta's pistol under the current RFTS. The Army's interpretation of the service life requirement has not changed; in both the 1983 and current pistol testing, its intention has been to require a minimum service life of 5,000 rounds, which the Army found that Beretta met and Smith & Wesson did not. Since the changed language of the specification merely clarifies the Army's interpretation of the requirement as it

was applied under the 1983 RFTS and which Beretta met, we see no basis to conclude that Beretta now should be required to retest its pistols to demonstrate again that its pistol meets the minimum service life requirement.

With regard to the specification for firing pin energy, Smith & Wesson argues that the current RFTS failed to correct a miscalculation in the 1983 specification which was identified in our report. The report stated that in calculating the 24-inch-ounce firing pin energy requirement in the specification, the Army had increased the actual requirement slightly (from 23.29343 inch ounces to 24 inch ounces) due to rounding of numbers in the metric to U.S. conversion. Under the more precise conversion, Smith & Wesson would have met the requirement. The current RFTS retains the 24-inch-ounce requirement. The Army's position is that the slight increase in the measurement identified in the report was deliberately adopted to ensure that the pistols could fire all NATO ammunition and is consistent with the government's practice of establishing more stringent requirements than its NATO counterparts. Since the Army has determined that the 24-inch-ounce requirement is necessary to meet its minimum needs, and Smith & Wesson has not shown that this determination is unreasonable, we see no basis to object to the retention of the requirement in the current RFTS. See Monitor Security & Control Systems, Inc., B-227643.2, Sept. 15, 1987, 87-2 CPD ¶ 253. Further, the record shows that the Beretta pistol in fact met the 24-inch-ounce requirement under the 1983 RFTS.

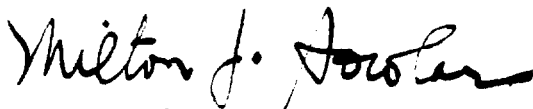
RETESTING SMITH & WESSON

While we find without merit the protester's arguments regarding the propriety of the RFTS specifications, we are concerned about the Army's decision to require Smith & Wesson to completely retest its pistols under the current RFTS. As we understand it, the Army's position is that Smith & Wesson should be retested because it was found technically unacceptable under the 1983 RFTS. As noted above, the Army determined that Smith & Wesson failed to meet the requirements regarding firing pin energy and service life. Although our report concluded that Smith & Wesson met the two requirements, we see no basis to object to the Army's decision to retest Smith & Wesson on those requirements since the report's conclusion was based on an interpretation of the specifications which the Army maintains is not consistent with its minimum needs. Accordingly, we believe it is reasonable for the Army to retest Smith & Wesson's pistol to ensure that it meets the Army's minimum needs, which are now more clearly expressed, regarding firing pin energy and service life.

As discussed above, the 1987 DOD Appropriations Act requires the Army to conduct a "new competition" in connection with the follow-on procurement. Given this broad statutory language, the Army reasonably could have decided to completely retest all potential offerors, including Beretta. Instead, the Army decided not to retest Beretta based on its satisfactory performance under the 1983 RFTS, a decision which also is consistent with the statutory language. In view of the Army's decision to exempt Beretta from retesting, however, we question its decision to retest Smith & Wesson on the specifications which the Army itself found that Smith & Wesson met.

The Army justifies its decision on the ground that a different lot of ammunition with a slightly higher powering level will be used for the current testing and may affect the pistols' performance. Internal Army correspondence provided as part of the protest regarding the effect on performance of the different ammunition is inconsistent with this position, however, and states that the change should have no significant effect. Further, the Army has not explained why the change in ammunition can be expected to have a significant effect on the testing when the pistols are required to operate with all types of NATO standard ammunition. As a result, we find unpersuasive the Army's rationale for testing Smith & Wesson based on the change in ammunition. Since the Army has offered no other explanation, and in view of its decision to exempt Beretta from retesting, we believe the Army should not require Smith & Wesson to be retested on the specifications which it met under the 1983 RFTS, and should allow Smith & Wesson, if it so chooses, to submit samples for testing on this modified basis. In the alternative, if complete retesting is required, the Army should include Beretta in the retesting as well. We are so advising the Secretary of the Army.

The protest is denied in part and sustained in part.



Acting Comptroller General
of the United States