



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Smith & Wesson--Request for Reconsideration
File: B-229505.2
Date: April 14, 1988

DIGEST

Decision sustaining in part protest challenging conduct of follow-on procurement of pistols is affirmed on reconsideration where the contracting agency presents no basis on which to alter recommendation that, in view of agency's decision to exempt awardee under initial contract from retesting and failure to justify decision to retest protester, protester's pistol should not be retested on specifications which it met in connection with initial procurement, or in the alternative, if complete retesting is required, awardee should be retested as well.

DECISION

The Army requests reconsideration of our decision Smith & Wesson, B-229505, Feb. 25, 1988, 88-1 CPD ¶ 194, sustaining in part Smith & Wesson's challenge to 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 affirm our original decision.

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

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requirements regarding its pistol's firing pin energy and expected service life. Beretta received the award.

In response to 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 the protest on September 30, 1987. The RFTS 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.

The protester challenged the RFTS on two grounds, arguing that the Army's decision to subject Smith & Wesson to complete testing under the RFTS was inconsistent with the DOD Appropriations Act provision regarding the follow-on procurement and that the specifications in the RFTS regarding targeting and accuracy exceed the Army's minimum needs in light of changes to the specifications made in connection with Beretta's production contract. We found Smith & Wesson's arguments on these issues to be without merit; we sustained the protest in part, however, based on our conclusion that the Army had failed to justify its decision to require Smith & Wesson to undergo complete retesting under the RFTS, including on the specifications which the Army found Smith & Wesson had met under the 1983 RFTS, while exempting Beretta from retesting based on its satisfactory performance under the 1983 RFTS. As a result, we recommended either that the Army not require Smith & Wesson to be retested on the specifications which it met under the 1983 RFTS, or, alternatively, if complete retesting was required, that Beretta be included in the retesting as well.

In its reconsideration request, the Army argues that retesting Smith & Wesson on only those specifications which the Army found Smith & Wesson failed to meet under the 1983 RFTS is not technically feasible. The Army states that the RFTS calls for a particular test sequence which "negatively

impacts" any partial retesting, and that, in any event, due to the passage of time there is no assurance that the Smith & Wesson pistol now offered for testing will be the same as the pistol tested under the 1983 RFTS.

The Army's contentions are being raised for the first time in the reconsideration request. The Army states that it did not raise these objections in connection with the original protest because the option of partially retesting Smith & Wesson was not at issue. The record does not support the Army's position. On the contrary, in response to a request by our Office, both parties filed supplemental comments addressing the retesting issue. The Army responded by letter dated December 29, 1987, justifying its decision to completely retest Smith & Wesson only on the ground that a different lot of ammunition with a slightly higher powering level would be used for the current testing and might affect the pistols' performance.^{1/}

In its reconsideration request, the Army no longer relies on the change in ammunition as a basis for requiring complete retesting; rather, the Army now argues that partial retesting is not technically feasible. The Army first states that certain preliminary tests must be performed before Smith & Wesson's pistol can be tested on the two specifications it previously failed. The Army does not explain the source of the requirement for a particular test sequence or discuss whether, and if so how, the preliminary steps bear on a pistol's ability to meet the two specifications at issue (firing pin energy and service life). On the contrary, as Smith & Wesson points out in its response to the reconsideration request, in connection with prior litigation concerning the 1983 RFTS the Army prepared proposed findings of fact which in part state that the RFTS "did not require that the firing pin energy test be conducted at any particular site, or in any particular test sequence" (Emphasis added.) Further, even assuming the preliminary steps are required, the Army does not explain why it is not practicable to perform them before the Smith & Wesson pistol is tested for compliance with the two specifications.

The Army also maintains that the passage of time since the prior testing casts doubt on whether the Smith & Wesson

^{1/}As we explained in our original decision, the Army's rationale is not persuasive particularly since the Army did not explain 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.

pistol still meets the specifications it passed initially. The Army argues that there may have been wear or changes in Smith & Wesson's production facilities, manufacturing methods or personnel which could affect the performance of the pistol submitted for retesting. As a preliminary matter, the Army's argument regarding the existence of these factors and their effect is speculative only. Further, the Army's position in our view is based on the questionable premise that due to the passage of time, without more, every qualified source for an item must be retested if it is not the current contractor for the item. Finally, the Army has not explained why its concerns regarding whether the same pistol was tested under the 1983 RFTS would be offered for retesting could not be resolved by requiring Smith & Wesson to so certify.

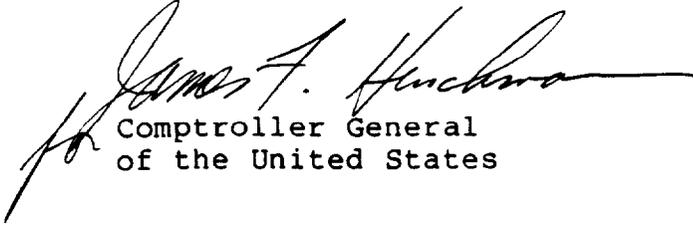
Even assuming that partial retesting presents the technical problems the Army cites, however, our decision contains an alternative recommendation--retesting Beretta. In this regard, the Army argues that requiring retesting of a successful contractor is inconsistent with our decisions in the area of product qualification and testing, citing Rhine Air, B-226907, July 29, 1987, 87-2 CPD ¶ 110, and Kan-Du Tool & Instrument Corp., B-183730, Feb. 23, 1976, 76-1 CPD ¶ 121. Contrary to the Army's contention, however, the decisions the Army cites merely state that the primary responsibility for establishing the procedures necessary to determine product acceptability rests with the contracting agencies, and that we will not disturb their decisions unless they are shown to be unreasonable. In this case, we found that the Army had failed to justify exempting Beretta from retesting based on its satisfactory performance under the 1983 RFTS, since it required complete retesting of Smith & Wesson, even under the specifications it already had met.

The Army also relies on Beretta's performance under its production contract to support its position that retesting Beretta is unwarranted, arguing that the pistols produced under the contract continue to meet the specifications in the RFTS. As discussed in our original decision, however, the Army failed to show that the production contract specifications were consistent with the RFTS specifications. Without such a showing, we have no basis to conclude that Beretta's compliance with the performance specifications under the production contract demonstrates that the Beretta pistol continues to meet the specifications in the RFTS.

Since we see no basis to alter our original decision, we affirm our recommendation that the Army either exempt Smith & Wesson from retesting on the specifications which it

met under the 1983 RFTS, or, if complete retesting is required, include Beretta in the retesting.

Our prior decision is affirmed.


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