



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Colvin-Friedman Company
File: B-230272
Date: June 6, 1988

DIGEST

Procuring agency has shown a reasonable basis for restricting solicitation for respirator facepiece covers where restriction is based on National Institute for Occupational Safety and Health (NIOSH) regulations which establish safety standards for respirators in hazardous workplace conditions, and restriction is necessary to maintain NIOSH safety certification.

DECISION

Colvin-Friedman Company protests the Defense General Supply Center's (DGSC) rejection of its bid for an alternate product under solicitation No. DLA400-88-R-0422 and the award of contract to Minnesota Mining & Manufacturing Company (3M). Colvin-Friedman argues that approval for its alternate product was improperly rescinded and that, since its offer was 17 percent lower in price than 3M's offer, it should have received the award.

We deny the protest.

The solicitation was for 300 boxes of facepiece covers to be used with 3M respirators that are worn when spraying paint. The facepiece cover is a self-adhering clear polyester overlay that is affixed to the facepiece or window of the hood on supplied-air respirators. Its function is to keep paint spray off the respiratory unit's lens, thereby maintaining a clear field of vision. The solicitation specified a 3M part-numbered item, but included the "Products Offered" clause, which set forth conditions for offering an alternate product.

Colvin-Friedman submitted a facepiece cover of its own manufacture to DGSC and requested that it be evaluated as an alternate product.

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The agency received eight timely proposals in response to the solicitation, seven offering the 3M part, and Colvin-Friedman's offer for its own product. The protester submitted the lowest price, and 3M was next low.

The record indicates that the DGSC Directorate of Technical Operations performed a technical evaluation of Colvin-Friedman's facepiece cover, and determined that it was acceptable, "based upon the nature of the item and the fact that it does not contribute to the function of supplying breathable air to the wearer." However, this approval was rescinded by DGSC's Engineering Department after it received a letter from the National Institute of Occupational Safety and Health (NIOSH) regarding the interpretation of respirator certification regulations published in 30 C.F.R. § 11 (1987).^{1/} NIOSH pointed out that its regulations stated that approved respirators must be maintained in an "approved condition" and that the substitution of any parts which are not from the original equipment manufacturer will invalidate the approved condition. NIOSH stated this position was in response to "questions and complaints" concerning interchangeability of subassemblies and unapproved modifications jeopardizing respirator performance. DGSC also bases its decision to rescind the approval on a Respirator Users' Notice on the subject of "Use of Unapproved Subassemblies," issued by NIOSH in 1984, which cites the NIOSH regulations as permitting the Mine Safety and Health Administration and NIOSH "to only approve complete respirator assemblies and prohibit the approval of respirator subassemblies such as cylinders or air supply hoses. These requirements are intended to insure that one manufacturer has overall control and responsibility for the integrity of the approved respirator." The notice also cautions against "interchanging subassemblies or making unapproved modifications" to respiratory protective devices.

Finally, DGSC refers to a letter from the Office of the Surgeon General, Department of the Air Force, advising DGSC that replacement of any original part of a respirator "with a part other than the exact original automatically invalidates the [NIOSH] certification" and that "the practice of stocking generic respirators and respirator parts must be terminated." Based on the above, DGSC concluded that the unapproved facepiece cover would result in the loss of NIOSH certification. NIOSH has confirmed DGSC's interpretation of

^{1/} NIOSH is an agency within the Centers for Disease Control, Department of Health and Human Services, which develops occupational safety and health standards to ensure a safe and healthful working environment for all working people.

the regulations, and advised the protester that there is no procedure by which a competitor's replacement part can be certified for use with an original equipment manufacturer's approved product. Thus, the agency concluded that rejecting Colvin-Friedman's product was proper and that award should be made to 3M.

Colvin-Friedman argues that its facepiece cover should not fall under the cited regulation because it does not affect the respiratory function of the equipment. The protester contends, in essence, that by requiring the facepiece cover to be manufactured by the original equipment manufacturer, i.e., 3M, DGSC is placing an unnecessary and unreasonable restriction on competition because the procurement is limited to the product of the NIOSH approved source.

The determination of the government's minimum needs and the best method of accommodating those needs are primarily the responsibility of the contracting agencies. We have recognized that government procurement officials are generally in the best position to know the government's actual needs, since they are the ones most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future. Consequently, we will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. Ray Service Co., 64 Comp. Gen. 528 (1985), 85-1 CPD ¶ 582.

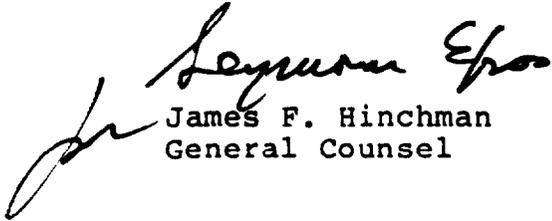
The issue before us is whether it was reasonable for the agency to conclude that only facepiece covers manufactured by 3M would meet the agency's minimum needs.

DGSC asserts that a NIOSH-certified product was required, and that, under the undisputed facts, Colvin-Friedman's facepiece cover was simply unacceptable. The agency further contends that the protest is mainly directed against the NIOSH certification approval requirements, over which DGSC has no control.

We agree that Colvin-Friedman's complaint essentially is against NIOSH, rather than DGSC. In our view, it was reasonable for the contracting officer to defer to the advice of NIOSH as the recognized authority in setting respiratory equipment safety standards. Moreover, we cannot conclude that the agency was required to challenge the regulation or risk the loss of certification for the protester's benefit. Although Colvin-Friedman objects that its facepiece cover does not interfere in any way with the functioning of the respirator, NIOSH, with its established expertise in respirator safety, has determined that the

Colvin-Friedman product cannot be approved for certification. In these circumstances, we have no legal basis to object to DGSC's determination to follow the NIOSH standards, rather than risk the loss of certification. In our view, the agency has supported its contention that the restriction is necessary to meet its actual minimum needs.

The protest is denied.

A handwritten signature in cursive script, appearing to read "James F. Hinchman".

James F. Hinchman
General Counsel