



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Beretta USA Corporation

File: B-232681

Date: October 26, 1988

DIGEST

Protest challenging alleged failure of contracting agency in connection with follow-on procurement of handguns to advise protester that agency would not exercise option under protester's existing contract unless protester's handgun passed all mandatory tests under request for test samples (RFTS) in follow-on competition is without merit where RFTS clearly indicated that all sample weapons, including protester's, were required to pass all mandatory tests to be considered for award, whether through exercise of an option or through a new contract award.

DECISION

Beretta USA Corporation protests the selection procedures under request for test samples (RFTS) No. DAAA09-88-R-0793, issued by the Army for 9-millimeter (9 mm.) handguns. We dismiss the protest.

In 1985, the Army awarded a multiyear contract to Beretta to produce 315,930 9-mm. pistols, designated the M9 model. After various challenges to the selection process by other offerors, Congress directed the Army to conduct a new competition in fiscal year 1987 for an additional quantity of handguns. See 1987 Department of Defense Appropriations Act, Pub. L. No. 99-591, 100 Stat. 3341, 3341-128, § 9132 (1986). As a result, the Army issued a new RFTS on September 30, 1987, calling for retesting to specified requirements of all offerors' pistols except the Beretta M9, which was considered to be an already qualified candidate. Based on the results of the new competition, the Army planned to decide whether to obtain the additional weapons from Beretta or another offeror.

Smith & Wesson, a potential offeror under the RFTS, filed a protest with our Office challenging various aspects of the

043659/137150

procurement. In part, Smith & Wesson argued that it was improper for the Army to exempt Beretta from testing based on its current contract while requiring Smith & Wesson, which had failed to meet only two requirements in connection with testing under the earlier procurement, to undergo complete retesting. We sustained the protest on this ground, and recommended two alternatives: 1) if the Army did not require the Beretta M9 to be retested in full, the Smith & Wesson weapon should be retested only on the two mandatory characteristics it failed previously, or 2) if complete retesting of the Smith & Wesson weapon was considered necessary, the M9 should be retested as well. See Smith & Wesson, B-229505, Feb. 25, 1988, 88-1 CPD ¶ 194, aff'd on reconsideration, B-229505.2, Apr. 14, 1988, 88-1 CPD ¶ 366.

The Army then issued the current RFTS on May 10, 1988, inviting all interested firms to submit sample weapons for testing by August 17. In response to the recommendation in our decision on Smith & Wesson's protest, the new RFTS provides as follows:

"The current standard M9, 9mm pistol will be tested along with weapons submitted in response to this RFTS. In the event the current producer of the M9, Beretta USA, does not offer the M9 as its candidate, then the Government will provide test weapons from its own resources."

The RFTS further states that based on fixed-price proposals to be submitted pursuant to a solicitation to be issued later, the Army will decide whether to make award under the current procurement or to exercise the option for additional quantities under Beretta's existing contract. The Army's intention thus was that Beretta's M9 and the option terms of its existing contract would be evaluated against the samples and price proposals of other offerors.

By letter dated August 8, prior to the August 17 due date for submission of sample weapons, the contracting officer responded to several questions raised by potential offerors at a preproposal conference. One question posed by Beretta concerned whether the Army intended to require that the sample weapons be randomly selected from a firm's standard production, without screening to select the most desirable weapons. The Army responded that the RFTS did not specify a particular methodology for selection of samples. The Army noted, however, that while random selection was not required, an offeror which submitted a finely tuned sample in an attempt to obtain optimum performance under the test requirements would assume the risk that the sample would

become the standard for acceptable performance during production.

Beretta chose not to submit a sample weapon by the August 17 due date. As a result, under the terms of the RFTS, the Army itself submitted the M9 currently being produced by Beretta as a candidate for testing. By letter dated August 18 to the contracting officer, Beretta again raised the issue regarding the sample selection methodology, challenging the Army's decision not to require random selection and instead to allow offerors to submit finely tuned samples. By letter dated August 29, the contracting officer reiterated the Army's position that no particular selection methodology was required and noted further that Beretta, like the other offerors, had had the opportunity to submit finely tuned samples, but chose not to do so.

Beretta then filed its protest with our Office on September 20, contending that the Army had deprived it of a meaningful opportunity to decide whether to submit a sample weapon under the RFTS by failing to advise Beretta that the option under Beretta's existing contract would not be exercised unless the M9 submitted for testing passed all the mandatory tests in the RFTS. Beretta in essence argues that it may have chosen to submit a finely tuned sample rather than rely on the Army to randomly select an M9 from its own stock if it had known that the M9 would have to pass all the mandatory tests.

The Army argues in part that the protest is untimely since any protest challenging the method for sample selection had to be filed before the due date for submission of samples. Beretta contends that it is not challenging the Army's decision regarding sample selection but rather the Army's failure to notify Beretta of the mandatory test requirements for the M9. Beretta argues that it was not on notice that the exercise of the option under its current contract depended on whether the M9 passed the mandatory tests in the RFTS until September 15, when an Army official made a statement to that effect during testimony on the procurement before a Congressional committee. Since the protest was filed within 10 days later, Beretta maintains that it is timely.

As discussed below, even accepting Beretta's characterization of the basis of its protest, we find the protest on its face to be without merit since the RFTS clearly advised Beretta that the M9 would have to pass the mandatory tests and that the Army's decision whether to exercise the option under Beretta's existing contract was tied to the performance of the M9.

The RFTS provided that sample weapons would be evaluated for conformance with the characteristics set out in the RFTS, which were divided into four categories:

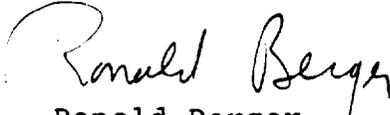
- 1) Mandatory - Must be Demonstrated During Initial Inspection,
- 2) Mandatory - Must be Demonstrated During Testing,
- 3) Mandatory - Should Be Demonstrated During Testing/Will Be Demonstrated After Testing,
- 4) Desired.

The RFTS also stated that only those samples which meet the first three categories will be considered for award. For example, Enclosure 1 to the RFTS, which describes the four categories in detail, states that "[o]fferors who fail to meet Category 1 through 3 requirements will not be considered in the final procurement evaluations." This requirement is repeated in the sections describing test scoring and the narrative explaining the individual test categories.

Beretta does not explain how it interpreted the RFTS with respect to testing of the M9; in our view, however, there was no reasonable basis for Beretta to have assumed that compliance with the mandatory requirements of the RFTS was not required for the M9, whether that weapon was to be procured under the solicitation or under the option in Beretta's contract. The RFTS clearly stated that all samples, including the M9, were to be tested to the mandatory requirements, and that eligibility for award was contingent on successful performance of the test requirements. The RFTS specifically stated that if the M9 was evaluated as the winner under the RFTS and solicitation to be issued, the Army, rather than award a new contract to Beretta, might exercise options in the existing Beretta contract. While the RFTS did not explicitly state what would happen if the M9 lost the competition, we think the clear implication, and indeed, the only reasonable interpretation in light of the history of this acquisition, is that a contract would be awarded to a new vendor and the options in Beretta's contract would not be exercised. Accordingly, Beretta's contention that it was not on notice that the M9 had to pass

the mandatory test requirements in order for the Army to consider exercising its current option is simply not reasonable.

The protest is dismissed.


Ronald Berger
Associate General Counsel