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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Beretta USA Corporation--Reconsideration

File: B-232681.4

Date: January 9, 1989

DIGEST

1. Decision dismissing as without merit on its face 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) is affirmed where the protester fails to show that initial holding--that RFTS clearly indicated that all sample weapons, including protester's, were required to pass all mandatory tests to be considered for follow-on quantity--is erroneous.

2. Summary dismissal of protest is appropriate under General Accounting Office Bid Protest Regulations where on its face protest does not state a valid basis for protest.

DECISION

Beretta USA Corporation requests reconsideration of our decision Beretta USA Corp., B-232681, Oct. 26, 1988, 88-2 CPD ¶ 395, dismissing its protest concerning 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 affirm the dismissal.

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,

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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 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 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. We dismissed the protest, finding it to be without merit on its face since the RFTS clearly advised Beretta that the M9 would have to pass the mandatory tests and that Beretta's existing contract was tied to the performance of the M9 under the RFTS.

In its request for reconsideration Beretta reiterates its argument that the Army failed to advise it that the option in its existing contract would not be exercised unless the M9 passed all the mandatory tests under the current RFTS. We see no basis to disturb our prior decision dismissing the protest.

As we stated in our prior decision, the only reasonable interpretation of the RFTS for the follow-on procurement is that all candidates for the follow-on quantity, including Beretta's M9, had to pass all the mandatory tests in the RFTS in order to be eligible for award of the follow-on quantity. Based on the argument in its protest and the

request for reconsideration, Beretta apparently assumed that the Army might still exercise the option under its existing contract even if the M9 being tested under the RFTS failed the mandatory tests. According to Beretta, without more explicit advice from the Army, Beretta was not adequately on notice that exercise of the option depended on the M9's successful performance under the RFTS. In our view, this position simply is not reasonable.

As a preliminary matter, as we discussed in our earlier decisions concerning this procurement, Congress, prompted by the controversy over the selection process for the basic quantity, directed the Army to conduct a new competition to select the offeror to provide the additional quantity of pistols the Army required. Consistent with this intention, our decision sustaining the protest by Smith & Wesson to the Army's initial plan to exempt Beretta from retesting in connection with the follow-on procurement held that the Army should impose the same requirements on Beretta as on the other offerors, either by completely retesting Beretta or by limiting retesting of Smith & Wesson to the two mandatory characteristics it had failed previously. Thus, in our view, the history of this acquisition clearly shows that selection of the offeror to provide the follow-on quantity was to be based on the results of a new competition with all offerors, including Beretta, on an equal footing.

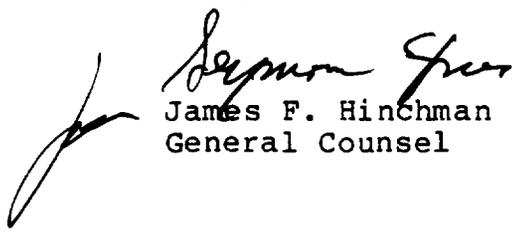
The Army implemented our decision by giving Beretta the opportunity to submit its own candidate for testing under the RFTS, but stating that, if Beretta chose not to submit a candidate, the Army would provide pistols for testing from its own M9 stock. While Beretta maintains that it did not understand the RFTS to mean that there was a connection between testing under the RFTS and exercise of the option, Beretta does not explain what other purpose would be served by the Army's decision to test an M9 from the Army's own stock in the event that Beretta chose not to submit a test pistol itself.

More important, assuming that either the M9 alone or all the candidate pistols failed the mandatory tests in the RFTS, the Army could not, as Beretta suggests, procure the follow-on quantity of pistols through exercise of the option under Beretta's existing contract. Given that the mandatory tests in the RFTS were included as an expression of the Army's minimum needs for the 9-mm. pistol, exercise of Beretta's option under these circumstances would constitute selection of a pistol which did not meet the Army's minimum needs. Accordingly, as we held in our initial decision, it was not reasonable for Beretta to assume that the exercise of its option to procure the follow-on quantity called for under

the RFTS would be unaffected by the M9's performance under the RFTS.

Beretta also argues that we exceeded our authority when we summarily dismissed its protest because we decided the protest on the merits; Beretta asserts that summary dismissals are authorized only where they are based on procedural grounds. This argument is without merit. As stated in our Bid Protest Regulations, 4 C.F.R. § 21.3(m) (1988), we will summarily dismiss a protest when on its face it does not state a valid basis for protest. Contrary to Beretta's contention that this provision refers only to protests dismissed on the basis of "technicalities," rather than those decided on the merits, we consistently rely on section 21.3(m) as the basis for dismissing protests which, like Beretta's, lack merit on their face. See, e.g., Wilton Corp., 64 Comp. Gen. 233 (1985), 85-1 CPD ¶ 128; Sun Environmental, Inc., B-228491.2, Dec. 3, 1987, 87-2 CPD ¶ 546; Southwest Mobil Systems Corp., B-223940, Aug. 21, 1986, 86-2 CPD ¶ 213. Dismissal under these circumstances is consistent with the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(a)(3) (Supp. IV 1986), which specifically authorizes the Comptroller General to dismiss any protest which is determined to be frivolous or which, on its face, does not state a valid basis for protest.

Our prior dismissal is affirmed.



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General Counsel