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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Smith & Wesson

File: B-232681.5

Date: June 27, 1989

DIGEST

1. Arguments concerning potential price leaks during negotiations and preferential treatment of incumbent contractor in negotiation and price comparison phase of procurement will not be considered on reconsideration, where protester is not an interested party under General Accounting Office's Bid Protest Regulations to raise these issues, because protester's samples failed mandatory product testing conducted prior to submission of proposals and, therefore, protester is not eligible for award.

2. Allegation that it is unfair to compare incumbent's option price for pistols under its current contract with other offerors' price proposals because option price is based on supplying defective pistol is without merit where results of contracting agency's testing show that incumbent's pistol performed substantially better than the pistols submitted by the other offerors, both of which failed to meet the government's minimum performance requirements.

3. Allegation that option clause contained in incumbent's contract to supply pistols is invalid and, therefore, incumbent contractor should be required to compete for contract for additional quantity of pistols provides no basis for reconsidering prior decision, where the contracting agency conducted a competitive procurement and treated incumbent as another offeror in that procurement.

DECISION

Smith & Wesson requests reconsideration of our decision in Smith & Wesson, B-232681.2; B-232681.3, Feb. 9, 1989, 89-1 CPD ¶ 134, sustaining the protest Smith & Wesson filed

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concerning request for proposals (RFP) No. DAAA09-88-R-0793 and a related request for test samples (RFTS) issued by the Department of the Army to procure 142,292 9-millimeter pistols. In its protest, Smith & Wesson charged that the procurement was improper for several reasons. We found no merit to several of the protester's arguments, but sustained the protest on the basis that the RFP unfairly favored Beretta, because it improperly allowed the Army to add "generic" and other costs to the price proposals of all offerors except Beretta in the evaluation of proposals for award. Smith & Wesson requests reconsideration of only those issues that were not sustained by our Office. We affirm our previous decision.

Beretta, the incumbent contractor, was awarded a 5-year contract by the Army in 1985.^{1/} The contract is for supplying 321,260 pistols, designated the M9 model, and contains an option for up to 305,580 additional pistols. The Army's intent under the current RFTS was to obtain sample pistols from potential offerors, as well as M9 pistols manufactured by Beretta, and to test those samples in a number of areas in accord with the standards set forth in the RFTS to ascertain that the pistols will meet the Army's minimum needs. As Beretta chose not to submit its own test samples, the Army used M9 pistols manufactured by Beretta under its contract with the Army for test purposes. The Army also intended to receive and evaluate price proposals from offerors whose pistols were found to be technically acceptable in order to decide whether to make award under the RFP or to exercise the option for additional quantities under Beretta's existing contract. On May 23, 1989, the Army notified our Office that, after testing the sample pistols submitted by Smith & Wesson and Sturm Ruger, and the M9 samples, it had decided to exercise the option in the Beretta contract, because the other candidate pistols had failed to meet several mandatory test requirements.

In its request for reconsideration, Smith & Wesson generally argues that our holding that the Army properly could compare Beretta's option price with the prices proposed by other

^{1/}The background to the present request for reconsideration has been summarized in several prior decisions of our Office regarding the Army's procurement of 9-mm pistols and, therefore, will not be repeated in its entirety here. See Smith & Wesson, B-232681.2; B-232681.3, *supra*; Beretta USA Corp., B-232681, Oct. 26, 1988, 88-2 CPD ¶ 395, *aff'd*, B-232681.4, Jan. 9, 1989, 89-1 CPD ¶ 16; Smith & Wesson, B-229505, Feb. 25, 1988, 88-1 CPD ¶ 194, *aff'd*, B-229505.2, Apr. 14, 1988, 88-1 CPD ¶ 366.

offerors was erroneous. Specifically, Smith & Wesson alleges it is unfair for the Army to compare Beretta's option price, which will not include the costs of non-recurring tasks (producing first article test units, training aids, technical manuals, and technical data requirements), with other offerors' proposal prices which will include such costs. Smith & Wesson also alleges that Beretta has a competitive advantage over other offerors that must submit proposals, because, under the terms of the option clause, the Army must negotiate the option price with Beretta, but will not necessarily negotiate with other firms that submit initial proposals in response to the RFP. Smith & Wesson also expresses concern that the Army will reveal other offerors' prices to Beretta during negotiations with Beretta.

As noted earlier, Smith & Wesson was eliminated from consideration for contract award because its sample pistols failed to pass certain mandatory performance tests. Thus, Smith & Wesson will not be allowed to submit a price proposal for comparison with the M9 option price, and the Army will not hold discussions with the firm. As Smith & Wesson is not eligible for award, the firm is no longer an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), for the purpose of protesting potential price leaks or preferential treatment of Beretta relating to negotiations and price comparisons. See John W. Gracey, B-228540, Feb. 26, 1988, 88-1 CPD ¶ 199, aff'd, B-228540.2, May 31, 1988, 88-1 CPD ¶ 508. Accordingly, we will not consider further Smith & Wesson's arguments in this regard.

Smith & Wesson next asserts that it is unfair to allow the Army to compare the option price negotiated with Beretta with other offerors' price proposals, because the gun Beretta has been providing the Army under the M9 contract is "clearly defective" while the guns proposed by all other offerors were required to pass the rigorous testing required by the RFTS.^{2/} However, the Army has completed performance testing under the RFTS, and reported to our Office that both Smith & Wesson and Sturm Ruger failed to meet the RFTS requirements. The Army has also advised our Office that the

^{2/} The M9 pistols supplied to the Army by Beretta under its contract have suffered several serious problems including cracks in the frames and broken slides that can separate from the weapon and injure the person shooting the gun. See our report "PROCUREMENT: Quality and Safety Problems With the Beretta M9 Handgun," GAO/NSIAD-88-213, Sept. 15, 1988, for more detailed information.

M9 samples passed all mandatory test requirements. Thus, to the extent Smith & Wesson contends that Beretta's option price is based on supplying a pistol which does not meet the RFTS requirements, the argument is without merit.

Smith & Wesson next argues that we erred legally when we did not follow the precedent set by our Office in Department of Health and Human Services--Reconsideration, B-198911.3, Oct. 6, 1981, 81-2 CPD ¶ 279, wherein we held that purported options for contract renewals that contemplated negotiation of price, subject to an undetermined price ceiling, for the acquisition of undefined equipment and services to fulfill imprecisely defined needs, were improper and amounted to little more than an attempt to conduct negotiations with the incumbent contractor on a sole-source basis.

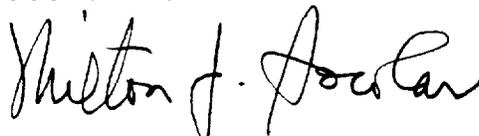
The situation presented here is very different from the situation presented in the cited case. The primary difference is that the present RFP contemplated negotiations with Beretta to be conducted in parallel with a competitive procurement with other offerors to determine the best method for buying guns, rather than negotiations with the incumbent contractor on a sole-source basis. Therefore, other offerors had an opportunity to compete for the present contract. Moreover, the M9 option clause, unlike the option clause in Department of Health and Human Services--Reconsideration, B-198911.3, supra, specifically sets out a formula whereby Beretta and the Army were to negotiate the option price, subject to a ceiling price that also was defined by the option clause. Thus, we believe that the case cited by Smith & Wesson is distinguishable from the present procurement, and that our prior decision on this matter is legally correct.

Finally, Smith & Wesson contends that our prior decision failed to address its argument that the option in Beretta's contract is invalid, and, therefore, Beretta should have been required to compete as other offerors did. Specifically, Smith & Wesson argues that the M9 option violated Federal Acquisition Regulation (FAR) § 17.204(e), which provides that the total of the basic and option quantities in a contract for supplies shall not exceed the requirement for 5 years, unless otherwise authorized by statute.

This argument provides no basis for changing our prior decision. Even assuming that the option provision were inconsistent with the FAR, as the protester suggests, the remedy would be for the Army to conduct a new competition rather than to exercise the M9 option. Basically, that is what the Army has done here. Even though the form of this

procurement--comparison of Beretta's option price with other competitors' price proposals--is somewhat unusual, the Army intended to treat Beretta the same as any other offeror. Thus, Beretta's pistols were to be tested and qualified in accord with the RFTS in the same manner as other offerors' pistols, and the Army intended to negotiate the option price with Beretta at the same time it negotiated with other qualified offerors regarding their proposals during the discussion phase of the procurement. We do not believe that Smith & Wesson was competitively prejudiced by the unique form of this procurement.

As Smith & Wesson has shown no errors of fact or law in our February 9 decision sustaining its protest nor any reason to modify our prior recommendation, we affirm our earlier decision.

for 
Comptroller General
of the United States