



**Comptroller General  
of the United States**

**Washington, D.C. 20548**

# **Decision**

**Matter of:** Berema, Inc.  
**File:** B-239212  
**Date:** June 22, 1090

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Peo Sollerud, for the protester.  
Mark Salman, for Skidril Inc., an interested party.  
Judith A. Sukol, Esq., and Capt. Rodney A. Grandon, Esq.,  
Department of the Army, Headquarters, for the agency.  
Jennifer Westfall-McGrail, Esq., and Christine S.  
Melody, Esq., Office of the General Counsel, GAO, par-  
ticipated in the preparation of the decision.

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## **DIGEST**

1. Protest that product that awardee intends to furnish does not comply with specification is dismissed where request for proposals did not ask offerors to identify product they intended to supply, but instead requested only prices; by submitting a price, the awardee offered to provide the required product in conformity with the specification and acceptance of its offer obligated it to do so. Whether or not awardee complies with this obligation is a matter of contract administration not for review by the General Accounting Office.
2. Protest that awardee will be unable to supply an item that meets the solicitation's requirements constitutes a challenge to the agency's affirmative determination of the awardee's responsibility, a matter which the General Accounting Office will not consider absent a showing that the determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met.
3. By certifying under the Buy American Act that it would furnish end products manufactured in Canada that qualified as defense cooperation country end products, the awardee bound itself to furnish either qualifying country end products or domestic end products. Whether awardee complies with certification is a matter of contract administration not for General Accounting Office's consideration.

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## DECISION

Berema, Inc. protests the award of a contract for paving breakers to the Canadian Commercial Corporation (CCC), on behalf of Skidril Inc., under request for proposals (RFP) No. DAAE07-89-R-J108, issued by the U.S. Army-Tank Automotive Command. Berema contends that the paving breakers that Skidril intends to furnish do not comply with the requirements of the solicitation in several respects. The protester also alleges that Berema falsely certified under the Buy American Act that the items it would furnish were manufactured in Canada when they are in fact of Japanese origin. We dismiss the protest.

The RFP requested offers on paving breakers in accordance with military specification MIL-B-734E, as amended, and on various technical data items. Paving breakers are hand-portable machines used to dig and drill holes in rock and hard ground, to cut concrete and asphalt, and to compact ground and asphalt. The submission of technical proposals describing the breakers was not requested,<sup>1/</sup> and the RFP did not contain technical criteria for the comparative evaluation of proposals. Rather, offerors were asked for prices only, with award to be made to the lowest priced responsible offeror.

Berema and Skidril were the only two offerors responding to the RFP. Skidril's best and final offer, which was endorsed by the CCC, totaled \$508,228.05, while Berema's totaled \$649,532. On March 29, 1990, the agency awarded a contract to the CCC on behalf of Skidril.

Berema contends that the paving breaker to be provided by Skidril (the Skidril MA 180) does not comply with several aspects of the military specification. Specifically, the protester alleges that the Skidril technical manual indicates a fuel consumption of 2,500 milliliters per hour in violation of the specification requirement that the fuel consumption not exceed 2.0 quarts (1,890 milliliters) per hour during the operation of any of the accessories. Berema also alleges that the MA 180 violates the requirement that the breaker conform to all currently effective federal laws and regulations governing safety, noise levels, and pollution by not providing for proper separation and insulation of the fuel tank from the engine heat source.

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<sup>1/</sup> Offerors were required to submit documentary evidence of their ability to meet the delivery schedule and content requirements for the technical data items, however.

The protester's arguments are founded upon the incorrect assumption that Skidril offered the model MA 180 in its proposal. The RFP did not request technical proposals or otherwise ask offerors to identify the particular model of paving breaker that they intended to furnish, however, and nowhere in its offer did Skidril identify the model that it intended to supply. Offerors were asked for prices only, and by submitting a price, Skidril offered to provide the required items in conformity with the military specification. The acceptance of Skidril's offer obligated that firm to supply the paving breakers in accordance with the specification. Whether Skidril does in fact comply with this obligation is a matter of contract administration which our Office will not review. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1990); Trados GmbH--Second Request for Recon., B-237919.3, Jan. 12, 1990, 90-1 CPD ¶ 53.

Furthermore, to the extent that Berema is challenging Skidril's ability to furnish a product meeting the specification's requirements, this is a matter concerning Berema's responsibility. Our Office will not consider a protest of an agency's affirmative determination of responsibility absent a showing of fraud or bad faith on the part of procurement officials or an allegation that definitive responsibility criteria were not applied. 4 C.F.R. § 21.3(m)(5). Berema has not made such a showing here. Berema also alleges that Skidril falsely certified, under the Buy American Act,<sup>2/</sup> that the paving breakers it would furnish had been manufactured in Canada when they had, in fact, been manufactured in Japan. The protester contends that the agency should have considered this alleged misrepresentation in determining Skidril's responsibility.

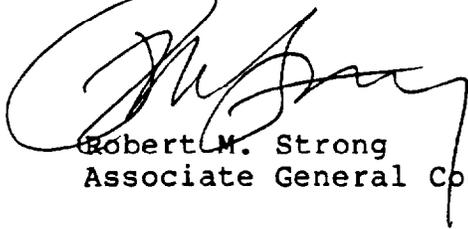
We do not see how Skidril can be said to have misrepresented the country of origin of the paving breakers given that, as

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<sup>2/</sup> Although the RFP, as amended, required offerors to complete the Buy American--Trade Agreements--Balance of Payments Program Certificate, Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 52.225-7005, Skidril (and, for that matter, Berema) mistakenly completed and submitted the Buy American--Balance of Payments Program Certificate, DFARS § 52.225-7000, which had been deleted from the RFP by amendment No. 0001. We do not consider the fact that Skidril certified under the wrong provision to be significant, however, because the subsection in § 52.225-7000 under which Skidril certified that it would furnish supplies that qualified as defense cooperation country-end products is identical to the subsection under which it should have certified in § 52.225-7005.

previously noted, it did not commit itself to furnish any particular breaker. Rather, by certifying under the Buy American Act that it would furnish end products that qualified as defense cooperation country-end products, Skidril bound itself to furnish only breakers manufactured either in a qualifying country or within the United States. See DFARS § 52.225-7006(b), incorporated into the RFP by amendment No. 0001 as clause H-2. Whether Skidril ultimately complies with the certification is, again, a matter of contract administration not for our consideration. Deere & Co., B-224275, Oct. 31, 1986, 86-2 CPD ¶ 504.

The protest is dismissed.



Robert M. Strong  
Associate General Counsel