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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marine Instrument Company

File: B-241292.3

Date: March 22, 1991

William Nadel and Steven J. Nadel for the protester.
Irene Richeal for John E. Hand & Sons Co., an interested party.

Jonathan H. Kosarin, Esq., and Gary Van Osten, Esq.,
Department of the Navy, for the agency.

Anne B. Perry, Esq., Paul Lieberman, Esq., and John F.
Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably waived first article testing requirement for firm which successfully produced items under previous contracts with the agency, and whose specifications for the items were used by the agency as the basis for the solicitation specifications.

2. Allegation that protester was improperly denied an opportunity to compete on an equal basis with awardee because first article testing requirement was waived only for awardee is denied where waiver was properly allowed and any resulting competitive advantage accrued by awardee did not result from improper governmental action.

DECISION

Marine Instrument Company (MIC) protests the award of a contract to John E. Hand & Sons Co. under request for proposals (RFP) No. N00104-90-R-G167, issued by the Department of the Navy for magnetic compasses used as a secondary navigational device on large ships. MIC contends that the agency improperly waived the requirement for first article testing (FAT) for Hand, since the awardee has not passed the new FAT requirements contained in this solicitation.

We deny the protest in part and dismiss it in part.

This acquisition was a total small business set-aside for the purchase of 41 Navy No. 1 magnetic compasses with 7-1/2 inch compass cards and binnacles which provide support and adjustment capability to the compass. The solicitation required the awardee to conduct first article tests on five preproduction units and submit a FAT report to the Navy for approval before commencing production. The solicitation also advised offerors that the Navy reserved the right to waive this FAT requirement for any offeror whose identical or similar supplies have been delivered by the offeror and accepted by the government under identical or similar specifications as those contained in the RFP.

The solicitation was issued to 25 potential sources and twice amended. Both amendments made changes to the quality assurance requirements and extended the date for receipt of initial proposals. Two offers were received by the closing date for receipt of proposals, one from the protester and the other from Hand, whose prices were based on the FAT requirement being waived. Based upon a review of the government's procurement history for these items, and a consultation with the cognizant in-service engineering activity, the contracting officer determined to waive the FAT requirement for Hand. Subsequently, Hand was awarded the contract as the low-priced, technically acceptable offeror.

MIC argues that the agency improperly waived the FAT requirement for Hand because Hand has never completed the specific first article tests that are contained in this solicitation. The protester alleges that although Hand has supplied magnetic compasses to the agency under previous contracts, the Navy has admitted that Hand's drawings and specifications were inadequate, and thus the agency's decision to waive the FAT requirement for Hand was improper. MIC also argues that the agency's waiver of the FAT requirement under this solicitation for Hand shows that the contracting officials acted fraudulently and in bad faith. This allegation is apparently premised on MIC's belief that the agency has not permitted MIC to compete on an equal basis with Hand because MIC's compasses are required to undergo first article testing which renders its products more expensive. MIC alleges that its product has passed the same shock and vibration first article tests that Hand's product has passed, and that new quality assurance requirements were added to this RFP for the sole purpose of foreclosing MIC from competing. The essence of MIC's protest appears to be that in order for all offerors to compete on an

"equal" basis, they must all be required to perform the first article tests.^{1/} We disagree.

An agency's decision to waive a FAT requirement is largely discretionary since the requirement is for the protection and benefit of the government, and will not be disturbed unless shown to be unreasonable. Whittaker Technical Prods., Inc., B-239428, Aug. 29, 1990, 90-2 CPD ¶ 174; Kan-Du Tool & Instrument Corp., B-183730, Feb. 23, 1976, 76-1 CPD ¶ 121. While MIC has alleged that it was unfair of the Navy to waive the FAT requirement for Hand, because it cannot also do so for MIC, the protester has not demonstrated that the agency's decision to waive the FAT requirement for Hand was unreasonable. Hand has successfully supplied the same item to the agency under several contracts during the past 20 years, and it is appropriate to base a waiver of FAT requirements on such past performance where, as here, no problems developed during the life of the product and the specifications have not materially changed. Federal Acquisition Regulation § 9.303; See Baird Corp., B-213233, Dec. 20, 1983, 84-1 CPD ¶ 8. The Navy's decision to waive the FAT requirement for Hand is also supported by the fact that the specifications used by the Navy to competitively procure this item were derived from Hand's drawings and specifications.

MIC has not provided any credible rationale for its theory that Hand's magnetic compasses must be required to undergo the FAT requirements in this solicitation, in view of the fact that Hand's prior production of compliant compasses provides a reasonable basis for waiver. With respect to the quality assurance provisions of the solicitation, the protester has not provided any basis for its contention that they are improper or unnecessary.

Although the protester may suffer a competitive disadvantage because its product, unlike Hand's, must incur the added expense of first article testing, there is no requirement that the agency nullify Hand's competitive advantage in this respect, since it was not the result of improper preference or unfair agency action. See Valentec Kisco, Inc., B-238359, May 11, 1990, 90-1 CPD ¶ 465. Here, the agency drafted

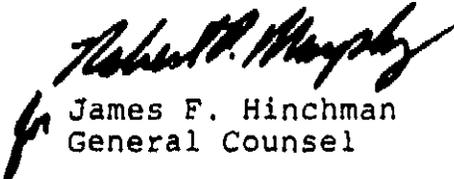
^{1/} The protester also argues that the technical advisor on this procurement has limited knowledge of the workings of magnetic compasses, and has a predisposition against MIC. Evaluator's qualifications are within the contracting agency's sound discretion and do not give rise to review by our Office unless there is a showing of possible abuse of discretion. Cajar Defense Support Co., B-237426, Feb. 16, 1990, 90-1 CPD ¶ 286. There has been no such showing here, nor is there any evidence in the record which demonstrates bias against MIC. Id.

performance specifications for the express purpose of promoting competition, rather than relying on the design specifications which Hand provided as the prior sole-source supplier. In fact, the contracting activity did not determine that Hand's specifications were incomplete or that Hand's product is not compliant with the specifications used in this procurement, as the protester contends. Rather, the Navy informed MIC that Hand's drawing did not provide sufficient detail to be used as the basis for a competitive procurement. As a result, the agency properly formulated more complete specifications for use in this procurement. Any competitive advantage which Hand enjoyed as a result of its FAT waiver was simply the result of its successful past performance, and was not due to any improper preference or unfair agency action. Further the agency's reasonably based decision to waive the FAT requirement for Hand does not evidence bad faith or fraud, which requires a showing that the contracting agency acted with the specific and malicious intent to injure the protester. Campbell Indus., B-238871, July 3, 1990, 90-2 CPD ¶ 5.

MIC also protests that the FAT requirement unreasonably requires testing on five units rather than just one. We dismiss this allegation as untimely since it concerns an alleged apparent solicitation impropriety, but was not protested prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1990).

MIC also challenges Hand's competency, since the ownership of Hand has changed, further alleging that the current owner has no technical background, and that Hand lacks the capacity to provide a required inspection system. We dismiss this allegation because it challenges the agency's affirmative determination of responsibility, which is not for review by our Office under these circumstances. 4 C.F.R. § 21.3(m)(5).

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel