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Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Warren Pumps, Inc.--Reconsideration

File: B-258710.2

Date: July 14, 1995

David R. Hazelton, Esq., Latham & Watkins, for the protester.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Prior decision is affirmed where the requesting party does not show that the prejudice test applied in the prior decision was erroneous.

DECISION

Warren Pumps, Inc. requests that we reconsider our decision in Warren Pumps, Inc., B-258710, Feb. 13, 1995, 95-1 CPD ¶ 79, denying its protest of the proposed award of a contract to Camar Corporation under request for proposals (RFP) No. N00104-92-R-E164, issued by the Department of the Navy for one reciprocating pump.

We affirm the prior decision.

The solicitation's item description listed the pump by its national stock number (NSN), as well as by Warren's commercial and government entity (CAGE) number and its part and drawing number for the pump. Warren is the original equipment manufacturer (OEM) for this stock number. The RFP advised that award would be made to the responsible offeror proposing the lowest price and meeting the solicitation's requirements. Clause L-43 stated that only sources for this item previously approved by the government were solicited, but prospective offerors who had not been solicited could furnish proof of their prior approval as a supplier of this item; data showing they had satisfactorily produced the same or similar items; test data indicating their product could meet service operating requirements; or other pertinent data concerning their qualification to produce the required item for evaluation and approval.

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However, clause L-67, "Procedure for Approval of Prospective Offerors," stated that:

"OFFERORS ARE CAUTIONED THAT UNLESS THEY ARE SOURCE APPROVED (BY THIS ACTIVITY) FOR PRODUCTION OF THE SOLICITED ITEM(S) AS OF DATE OF THIS SOLICITATION, NO AWARD WILL BE MADE TO THEM AS A RESULT OF THEIR PROPOSAL, NOR PAYMENT MADE FOR THE INFORMATION PROVIDED."

The clause continued by explaining that technical data was required to establish, for the purpose of evaluation and possible future awards, the acceptability of the proposed products.

The Navy received proposals from both Warren and Camar. Warren offered its part number--that listed in the RFP's item description--and Camar offered what it called an alternate product, "manufactured to OEM spec," under part number "CV9S4700-036." Camar's proposal included a technical data package for the offered pump.

The Navy determined that Camar's pump was acceptable provided it passed a first article test, and Warren was informed that an alternate offer had been approved. Amendment No. 0001 contained a revised item description adding Camar's CAGE number and a part number, as well as various first article testing requirements. After further review of Camar's drawings the Navy concluded that both offers would be acceptable so long as Camar manufactured the pump in accordance with a specific material revision and underwent first article testing in accordance with a military specification. In attached documentation, the agency noted that the specification's shock test would not be required of Camar during first article testing, and that Warren would not be required to undergo first article testing at all. Amendment No. 0002 specified the material revision and incorporated the military specification, but did not disclose that the shock test would not be imposed during first article testing.

Both Warren and Camar submitted best and final offers, offering the part numbers associated with their respective CAGE numbers on the amended solicitation's item description. After Warren was notified that the Navy intended to award the contract to Camar, the lower-priced offeror, it filed this protest, arguing that Camar was ineligible for award under the terms of the solicitation because, unlike Warren, it was not an approved source as of the date of the solicitation's issuance.

In our decision, we agreed with Warren that clause L-67 limited award to a source approved for the supply of the pump by the date of the solicitation's issuance, and that Warren had apparently been approved prior to this time while Camar had not. However, we also agreed with the Navy that clause L-67 was improperly included in this solicitation. The Navy had not complied with the statutory and regulatory requirements necessary to impose a qualification requirement such as the one here, see Federal Acquisition Regulation (FAR) §§ 9.202(a)(1), 9.202(a)(2), 9.205, and the solicitation did not include the mandatory "Qualification Requirements" provision at FAR § 52.209-1. Since agencies may not enforce qualification requirements without first complying with these regulatory requirements, FAR § 9.206-1(a), clause L-67 was unenforceable. Moreover, such a requirement is contrary to the regulatory requirements to provide an opportunity for offerors to compete; if a potential offeror can demonstrate to the satisfaction of the contracting agency that its product meets the standard established for qualification, or can meet the standards prior to award, it may not be denied consideration for award of a contract solely because it is not yet on the relevant qualified products list. FAR § 9.202(c); Aerosonic Corp., 68 Comp. Gen. 179 (1989), 89-1 CPD ¶ 45.

Notwithstanding this conclusion, since the solicitation did contain this clause, and Warren prepared its proposal with the reasonable expectation that it would be competing against other previously approved sources or, at the very least, other approved sources, and that its competitors would be subject to the same source approval requirements to which it was subject, we reviewed the record to determine whether Warren was prejudiced by the agency's improper inclusion of the clause.

We stated that in a case where a solicitation clause was inadvertently included, our review of prejudice turns on whether the inclusion of the clause could have had an effect on the preparation of the protester's offer, citing Comdyne I, Inc., B-232574, Dec. 21, 1988, 88-2 CPD ¶ 611. Warren, specifically citing this case, asserted that it was prejudiced because it believed that only approved items would be accepted, and the Navy was subjecting Camar to less stringent requirements than Warren was required to meet to obtain approval; Warren could have reduced its costs if it had known it could have supplied the pump in accordance with these less stringent requirements. However, our review of the record showed that Camar was required to supply the pump in accordance with the same specifications as Warren and that, as a result, Warren was not prejudiced.

In its request for reconsideration, Warren argues that our standard for the review of prejudice should not have been whether the inclusion of the clause could have had an effect on the preparation of its offer, but whether Warren would have been in line for award had the Navy complied with the RFP's qualification requirement.

Contrary to Warren's implication, the prejudice standard used in this case is not an aberration. An agency's failure to adhere to a solicitation requirement that was improperly included in that solicitation is tantamount to a waiver of the requirement. In such a context, prejudice does not mean that, had the agency failed to waive the solicitation requirement, the awardee would have been unsuccessful. Rather, the question is whether, had the protester known what the agency's actual requirements were (or how the agency understood the solicitation), it would have submitted a different offer that would have had a reasonable possibility of being selected for award. Corporate Jets, Inc., B-246876.2, May 26, 1992, 92-1 CPD ¶ 471; RGI, Inc., B-243387.2; B-243387.3, Dec. 23, 1991, 91-2 CPD ¶ 572; Tektronix, Inc., B-244958; B-244958.2, Dec. 5, 1991, 91-2 CPD ¶ 516. This is especially so where, as here, the requirement is unenforceable and contrary to applicable statute and regulation. Indeed, during the pendency of this protest, while Warren did, in fact, argue that it was prejudiced because compliance with this provision necessarily prevented award to Camar, its specific arguments with respect to prejudice were that it would have reduced its costs by relaxing its specifications and manufacturing procedures if it had known that this clause would not be applied.

Warren now seeks to distance itself from those latter arguments, asserting that it makes no sense to adopt a prejudice test which requires the protester to demonstrate that it would have changed its proposed product. However, the test is not whether the protester would have changed its proposed product, but whether the protester would have changed its offer. In our decision, we did consider Warren's argument that it would have changed its offer by reducing its costs and, as a result, its price, but we concluded that Warren's arguments in this regard were unpersuasive. Warren does not specifically challenge this conclusion.

While Warren now contends that it could have decided not to compete at all if it had known that it would have to compete against unapproved sources such as Camar; decided to be more aggressive in pricing its proposal; protested the solicitation's terms; or taken other appropriate action with the agency, it did not make this argument during the pendency of the protest. A party's failure to make all

arguments or to submit all information available during the course of the initial protest undermines the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. See Pynco, Inc.--Recon., B-257853.2, Apr. 13, 1995, 95-1 CPD ¶ 195.

The prior decision is affirmed.



Robert P. Murphy
General Counsel