J. Vickers

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Barrier-Wear

File: B-240563

Date: November 23, 1990

Francis Louis Zarrilli, Esq., Zarrilli and Zarrilli, for the protester.
Diane Cherinchak, Esq., and Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
James Vickers, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. While protester contends that patented cloth does not comply with requirements of military specification based on results of test conducted by independent laboratory retained by the protester, General Accounting Office has no basis upon which to object to agency's judgment that the cloth meets the requirements where it has tested the item twice, observed and approved the manufacturer's test and in each instance the results have indicated compliance with specifications.

2. Where protester contends that patent indemnity clause in solicitation results in supplier of patented item being in sole-source position, but record shows that agency has reasonable basis for concluding that use of clause was authorized by regulations, clause is unobjectionable.

DECISION

Barrier-Wear protests the specifications in request for proposals (RFP) No. DLA100-90-R-0219, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency. Barrier-Wear contends that the RFP specifications are unrealistic and cannot be met by any supplier.

We deny the protest.

The RFP is for 27,096 pairs of extended cold weather camouflage trousers. These trousers are to be made of moisture vapor permeable, waterproof, laminated cloth in accordance with Military Specification, Mil-C-44187.

Gore-Tex II, manufactured by W.L. Gore and Associates, is the only cloth which has been found by DPSC to be acceptable under this Military Specification.

Barrier-Wear contends that because of Gore's position as the only source approved to provide the cloth, Gore has restricted supply of two cloth to only four end item manufacturers and Barrier-Wear is not one of them. Barrier-Wear also contends that Gore-Tex II cloth does not comply with paragraph 3.5 of the specification requiring a minimum moisture vapor transmission rate (MVTR) of 600 grams per square meter in 24 hours. The protester argues that none of the cloth supplied by Gore to end item manufacturers like the protester has been tested by DPSC but, instead, has been accepted based on a certificate of compliance furnished by Gore to the manufacturers. Barrier-Wear states that it obtained a sample of the Gore-Tex II material and two parkas manufactured under prior DPSC contracts and the sample and parkas failed the MVTR requirement when tested by an independent testing laboratory. The protester therefore concludes that the agency has been accepting nonconforming items for a number of years and states that this shows that the MVTR requirements currently in Mil-C-44187 are "unrealistic."

An agency is required to specify its needs in a manner designed to promote full and open competition. See LaBarge Prods., Inc., B-232201, Nov. 23, 1988, 88-2 CPD ¶ 510. Restrictive provisions should only be included to the extent necessary to satisfy the agency's minimum needs. The contracting agency which is most familiar with its needs and how best to fulfill them must make the determination as to its needs in the first instance. Similarly, it must determine the type, and amount of testing necessary to ensure a particular product will meet these stated needs. Those determinations must be reasonable. Constantine N. Polites & Co., B-239389, Aug. 16, 1990, 90-2 CPD ¶ 132.

First, in so far as Barrier-Wear's allegation involve the alleged deficient performance of the Gore-Tex II cloth delivered under prior procurements, this is a matter which involves contract administration and does not constitute a proper basis of protest. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1990); Sonetronics, Inc., B-237267, Feb. 12, 1990, 90-1 CPD ¶ 178.

Further, Barrier-Wear's arguments concerning Gore-Tex II's compliance with the MVTR requirement are not supported by the record. DPSC states that the Gore-Tex II material fully complies with the MVTR requirement. To support this conclusion, DPSC has furnished our Office with test results. The first results are from tests conducted by the United States Army Natick Research, Development and Emergency Center

in April 1990 on material received from Gore in July 1989. According to the agency, the material had an average MVTR of 602. Second, the record shows that DPSC's Clothing and Textile Testing Laboratory, in July 1990, found that the material it tested met the MVTR requirement. Finally, DPSC personnel in February 1988, observed the MVTR testing at Gore's laboratory and concluded the tests were being conducted properly.

While Barrier-Wear states that the results of the two agency conducted tests are "open to question" and says that it cannot determine whether the rolls of material tested were randomly selected it has raised no reasonable basis for us to question the results of testing methods used by the agency. It has discounted the tests conducted by Gore essentially because, in the protester's view, they could not have been conducted objectively. The protester insists that its tests conducted by an allegedly independent laboratory clearly show that the cloth is noncompliant. We have carefully reviewed the descriptions of the three tests set forth in the record and we simply find no reason to question their results or the agency's conclusion that Gore-Tex II meets the specification requirements. See Crest-Foam Corp., B-234628.3, June 20, 1990, 90-1 CPD ¶ 572. The fact that another laboratory test produced different results, and that the protester strongly believes that the Gore-Tex II cloth is inadequate, are not reasons enough for us to interfere with the agency's technical judgment in this matter and its approval of Gore-Tex II as an approved product for this procurement. The fact that only one firm's product can meet a solicitation requirement does not itself mean that the requirement is improper. Mid-Atlantic Serv. & Supply Corp., B-218416, July 25, 1985, 85-2 CPD ¶ 86.

Barrier-Wear next objects to the inclusion of the Patent Indemnity clause in the solicitation. The clause, found at Federal Acquisition Regulation (FAR) § 52.227-3, requires a contractor to indemnify the government for liability incurred as a result of patent infringement. Since Gore has a patent on Gore-Tex II the inclusion of the Patent Indemnity clause, according to the protester, establishes Gore as the only source for the cloth that must be used in the trousers solicited under the subject RFP. Barrier-Wear states that DPSC should negotiate a royalty agreement with Gore so that others could produce cloth using Gore's laminating process. The protester says that after this agreement is reached all solicitations could then include a notice as to the royalty to be paid and offerors could include such an amount in their prices.

As we noted earlier, the fact that a particular specification requirement is proprietary in nature or requires a patented item or process does not necessarily indicate that it is

unduly restrictive or improper. As long as a requirement is reasonably related to the procuring agency's minimum needs, the fact that there is only one source does not render it unduly restrictive. Mid-Atlantic Serv. & Supply Corp., B-218416, supra.

The RFP incorporated both the Authorization and Consent Clause set forth at FAR § 52.227-1 and the Patent Indemnity Clause set forth at FAR § 52.227-3. The first clause provides that any suit for infringement of a patent committed by the award in performing the contract must be brought against the government. The other clause requires the contractor to indemnify the government against infringement of any patent arising from performance of the contract.

Here, only Gore-Tex II cloth has been found to meet the government's minimum needs, notwithstanding the fact that DPSC continues to test other manufacturers' material. In view of the possibility of patent infringement in the performance of the contract, we find DPSC's use of the Authorization and Consent and Indemnity clauses to be proper since they permit firms other than the patent holder to compete. While the indemnity clause places the financial risk of infringement on the offerors, they are expected to take the uncertainties or risk of such litigation into account in computing their prices. Cryo-Technologies Mktg. Group, B-207138, Oct. 27, 1982, 82-2 CPD ¶ 372. The fact that the solicitation imposes the risk on offerors does not make it improper. Id.

Concerning Barrier-Wear's suggestion that a royalty agreement should be negotiated with Gore, that firm has refused to license other manufacturers or to negotiate a royalty agreement with the government and we are unaware of any legal requirements that it do so.

Finally, regarding Barrier-Wear's allegation that Gore, because of its position, is able to select the end item manufacturers, we note there has been competition under solicitations for clothing using Gore-Tex II cloth. In the

most recent procurement, nine offers were received and seven were in the competitive range. Over the 5 year period the program has been in existence, contracts have been awarded to four different end item manufacturers.

The protest is denied.

Robert P. Murphy

for James F. Hinchman
General Counsel