



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

PR

Matter of: Koehring Cranes & Excavators; Komatsu Dresser Company

File: B-245731.2; B-245731.3

Date: November 23, 1992

Tom Skodack for Koehring Cranes & Excavators, and Matthew S. Simchak, Esq., and Steven A. Kaufman, Esq., Ropes & Gray, for Komatsu Dresser Company, the protesters.
Edward M. Lindsey for Tractor & Equipment Company, an interested party.
Marsha M. Wright, Esq., and Deborah Yoon, Esq., Defense Logistics Agency, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a negotiated procurement, issued on a "brand name or equal" basis, award was improperly made to a firm offering an "equal" product where the descriptive material provided by the awardee, as required by the solicitation, did not demonstrate compliance with the stated salient characteristics.

DECISION

Koehring Cranes & Excavators and Komatsu Dresser Company protest the award of a fixed-price contract to Tractor & Equipment Company (TECO), under request for proposals (RFP) No. DLA730-91-R-7251, issued on a "brand name or equal" basis by the Defense Construction Supply Center (DCSC), Defense Logistics Agency (DLA), for hydraulic scrap handlers¹ for DLA's Defense Reutilization and Marketing Service (DRMS). Koehring and Komatsu contend that TECO's offered "equal" product does not satisfy the RFP's stated salient characteristics and is unacceptable.

¹The scrap handler sought by the RFP is a mobile boom crane that can be fitted with either a grapple (hook) or electronic magnet to lift scrap.

We sustain Komatsu's protest and dismiss Koehring's protest on the ground that Koehring, not being in line for award, is not an interested party.

The RFP, issued June 3, 1991, sought either the Koehring 6644 or Caterpillar 235C scrap handler or their equal and stated salient characteristics that "equal products" must satisfy to be acceptable. In pertinent part, the salient characteristics required a commercial-type scrap handler that had a three-section boom with a minimum horizontal reach of 53 feet over a continuous 360 degree circle, and that:

"Minimum lift capacity, as measured at bare stick tip positioned in maximum reach and 10 feet above ground level, shall be 8,000 pounds over a continuous 360 degree circle. Rated lift capacity shall not exceed 75 percent of tipping capacity^[2] nor 87 percent of hydraulic capacity.^[3] Lifting hook required. Minimum operating weight is 110,000 pounds. Over counterweighting to meet minimum weight unacceptable."

Offerors were also informed that "[a]ny modification to increase the structural/lift capacity of an existing under-carriage is not acceptable."

A number of other salient characteristics were stated, including the requirement for a scrap grapple, a 230 volt magnet and a 25 kilowatt generator. Finally, offerors were informed that the scrap handler must be a commercial model as follows:

"The scrap handler shall be of the latest model of the manufacturer's standard commercial product and shall have been in production, marketed, and in use for a minimum of [1] year preceding the solicitation for the procurement. The introduction of normal product improvement changes in the year is acceptable."

²"Tipping capacity" refers to the maximum load or weight that can be supported at the end of the boom without any bucket or attachments (called the bare stick tip) before the scrap handler begins to tip off its tracks.

³"Hydraulic capacity" is the maximum weight that the hydraulic system is capable of lifting at the bare stick tip.

The RFP incorporated the standard "brand name or equal" clause contained in the Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.210-7000 (1988 ed.),⁴ which requires firms that offer equal products to furnish descriptive material (such as cuts, illustrations, drawings or other information) to demonstrate that the equal product satisfied the stated salient characteristics. Offerors were also informed that if they proposed to modify their product to make it conform to the solicitation requirements they must include in their offers a clear description of the proposed modifications and clearly mark any descriptive material to show the proposed modifications. The RFP did not contain technical evaluation criteria for the comparative evaluation of technical proposals, and contemplated an award to the lowest priced, technically acceptable and responsible offeror.

DLA received seven offers in response to the RFP, including TECO's and Komatsu's offers of equal products and Koehring's brand name offer. Offers of equal products were evaluated by DRMS to determine their acceptability, and both TECO's and Komatsu's equal products were found unacceptable. Discussions were conducted with TECO and Komatsu, who submitted proposal revisions.⁵ Komatsu's and TECO's proposals were then found technically acceptable and best and final offers requested. TECO offered the lowest priced, technically acceptable proposal, while Komatsu and Koehring offered the second and third lowest priced, technically acceptable proposals, respectively. Award was made to TECO on July 21, 1992, and these protests followed. Performance of TECO's contract has been suspended pending our decision in this matter.

Komatsu and Koehring both contend that the agency waived salient characteristics that TECO's offered equal product, the Barco Hydraulics 550 CRL, does not satisfy. Specifically, the protesters contend that the Barco scrap handler does not satisfy solicitation requirements for: (1) an 8,000 pound minimum lift capacity, (2) a minimum operating weight of 110,000 pounds, and (3) the offer of a standard commercial product. In addition, Komatsu argues that TECO's descriptive data and statements of compliance do not demonstrate that the Barco handler's rated lift capacity will not exceed 75 percent of its tipping capacity nor 87 percent of its hydraulic capacity. Koehring emphasizes

⁴The 1988 edition of the DFARS was applicable to the RFP, which was issued prior to the effective date of the current DFARS.

⁵No technical discussions were conducted with Koehring whose proposal was evaluated as technically acceptable.

that TECO's offered model is a lighter weight design that, while less expensive than others, is undersized and ultimately will result in higher costs to the agency; the firm argues that it could have offered a lighter weight scrap handler or a new design if permitted by the specifications.

DLA responds that it did not waive any specification or salient characteristics for TECO, but that TECO's pre-proposal satisfied all the RFP requirements. In this regard, the agency affirms that the stated salient characteristics represent its minimum needs.

As an initial matter, we find that Koehring is not an interested party to protest this award under our Bid Protest Regulations. 4 C.F.R. § 21.1(a) (1992). An interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. Here, the solicitation provided for award to the low-priced, technically acceptable offeror. As noted above, Komatsu's and Koehring's proposals were both found to be technically acceptable and were second and third low-priced, respectively. Since Koehring has not challenged Komatsu's acceptability or eligibility for award, Komatsu, and not Koehring, is in line for award if the protests are sustained. Accordingly, Koehring lacks the direct economic interest required to maintain a protest. See Negotiations Int'l, Ltd., B-242374, Mar. 26, 1991, 91-1 CPD ¶ 329.

As to the merits of Komatsu's protest, a procuring agency enjoys a reasonable degree of discretion in determining whether a particular product meets the solicitation's technical requirements as set forth in the salient characteristics, which we will not disturb unless it is shown to be unreasonable. Tri Tool, Inc., B-241703.2, Mar. 11, 1991, 91-1 CPD ¶ 267. Here, from our review of the record, we find unreasonable DLA's determination that TECO's proposal was acceptable.

TECO, in its initial proposal, provided a commercial product brochure for the Barco 550 CRL and a blanket statement of compliance with the stated salient characteristics. DRMS found that TECO had not demonstrated compliance with the salient characteristics and that the firm's statement of compliance was inconsistent with the product information in the commercial brochure. Specifically, while TECO claimed that its offered equal product had a lift capacity of

8,078 pounds at 53 feet⁶ and an operating weight in excess of 112,000 pounds, the product brochure for the Barco 550 CRL showed a maximum lift capacity at full reach (55 feet) of 6,141 pounds and a working weight of 105,000 pounds. Also, the brochure indicated that the stated lift capacities were "based upon 100 [percent] hydraulic efficiency" and not the 87 percent of hydraulic capacity required by the RFP. Finally, the brochure also did not indicate whether the maximum lift capacity shown at full reach does not exceed 75 percent of the tipping capacity. Based upon this information, DRMS concluded that TECO's proposal was unacceptable.

DCSC conducted discussions with TECO, requesting that the firm explain the inconsistencies between its statement of compliance with the required salient characteristics and the descriptive literature that had been provided with the proposal. In response, TECO ultimately submitted a letter from Barco, the scrap handler's manufacturer, that stated that the commercial product brochure was general and outdated, and that the model 550 CRL, as configured to meet the requirements of the RFP, would meet the salient characteristics. Specifically, Barco claimed:

"The 550 CRL as specified by your prospective customer, including a three section 55 [foot] boom and magnet generator package will weigh 114,500 [pounds] . . . The capacity of this unit will be 8,722 [pounds at] 87 [percent] of hydraulic capacity [at] a radius of 54 [feet] and 9,268 [pounds at] a radius of 53 [feet] . . . All of the above information has engineering documentation and is available for your perusal by request."

Engineering documentation to support Barco's claims was not provided to, or requested by, DLA. DRMS determined from its review of Barco's letter that TECO's equal product satisfied the stated salient characteristics.

Komatsu argues that TECO never stated the lift capacity of its offered product at full reach, as required by the RFP. We agree. While the salient characteristics only require a minimum horizontal reach of 53 feet, they also require that the scrap handler be capable of a maximum lift capacity of 8,000 pounds at "maximum reach" at 10 feet above ground level in a continuous 360 degree circle. The offered Barco 550 CRL has a maximum reach of 55 feet, yet TECO's proposal, as revised during discussions, never stated that the offered

⁶TECO annotated the Barco product brochure to add the lift capacity at 53 feet.

Barco 550 CRL had this maximum reach lift capacity or that a Barco 550 CRL modified to meet these requirements could be considered a manufacturer's standard commercial product in use for a minimum of 1 year preceding the solicitation.

Specifically, TECO stated, in its initial proposal, that its maximum lift capacity at 53 feet was 8,078 pounds, and it annotated the commercial brochure with this figure. As noted above, the brochure indicated that the stated lift capacities, which presumably includes this figure, were for 100 percent hydraulic capacity and not for the 87 percent required, so it seems certain, from this data, that the Barco 550 CRL cannot satisfy the 55 foot "maximum reach" lifting capacity. Indeed, the commercial brochure stated a maximum lift capacity at full reach of 6,141 pounds at 100 percent hydraulic capacity, which was substantially below the maximum reach lifting capacity required by the RFP. Moreover, the proposal provided no data, other than blanket statements of compliance, as to whether the rated lifting capacity exceeded 75 percent of the tipping capacity as required by the RFP.

As discussed above, TECO later presented a letter from Barco stating that the Barco 550 CRL's maximum lift capacity at 53 feet was 9,268 pounds at 87 percent of hydraulic capacity. TECO provided no engineering data to support this capability or state how the Barco 550 CRL would be modified to have this capability, even though this information was inconsistent with Barco's earlier submitted data that at 53 feet the lifting capacity was rated at 8,078 pounds at 87 percent hydraulic capacity. Even if one accepts TECO's explanation that the commercial brochure it had submitted was outdated, TECO has not explained how the Barco 550 CRL was upgraded to meet the lifting capacity requirements. Of even more significance is the fact that TECO still did not state a revised 55-foot "maximum reach" lifting capacity at 87 percent of the hydraulic capacity or represent that this capacity did not exceed 75 percent of the tipping capacity.⁷

⁷No evidence has been presented that suggests that the "maximum reach" lifting capacity can be interpolated from the data submitted by TECO. Komatsu has presented persuasive evidence that suggests that based on TECO's earlier submitted data that the "maximum reach" lifting capacity would be significantly less than 8,000 pounds, even accepting the higher lifting capacity ratings for 53 feet.

Given TECO's inconsistent statements concerning its lift capacity and failure to affirmatively demonstrate the equivalence of its equal product, DLA could not reasonably accept TECO's blanket promises that its offered equal product satisfied the solicitation's requirements, particularly given the express RFP requirement that offerors submit all descriptive material necessary to establish that their "equal" products satisfied the stated salient characteristics. In a "brand name or equal" procurement, an offeror has the obligation to demonstrate the acceptability of its alternate product. Tri Tool, Inc., supra; United Satellite Sys., B-237517, Feb. 22, 1990, 90-1 CPD ¶ 201 (blanket statement of compliance in a brand name or equal procurement is insufficient to establish equivalence of equal product).

Even assuming DLA could accept blanket promises of compliance that were inconsistent with commercial literature, we fail to see how DLA could reasonably consider TECO's offered product in compliance with the commercial product requirements. In this regard, the record indicates that TECO may intend to substantially modify its hydraulic lift system to meet the lifting requirements by using "high pressure" hydraulics as opposed to the "low pressure" hydraulics that are standard in the Barco 550 CRL. While this upgraded hydraulic lift system has apparently been used in other Barco models, there is no evidence that it has been used on the Barco 550 CRL. The record suggests that this improvement represents more than the "introduction of normal product improvement changes" such that the upgraded Barco 550 CRL may no longer be considered a commercial product under the RFP.

In sum, there is no credible evidence showing that TECO's offered commercial products satisfies the lifting capacity requirements.⁸ Even where a solicitation does not require

⁸After award and in response to the protest, TECO stated that its maximum lift capacity at full reach (55 feet) was 8,124 pounds at 87 percent hydraulic capacity and this would not exceed 75 percent tipping capacity. This would comply with the "maximum reach" lifting capacity salient characteristic. TECO has offered no explanation for this new increase in its maximum lift capacity, even though it is inconsistent with and greater than previous data submitted during the procurement regarding the Barco 550 CRL. Nor has TECO submitted any descriptive material or engineering data that demonstrates that its product's lift capacity complies with this requirement, even though it mentioned to DLA that it had engineering data that would support its claims. Finally, TECO did not detail what upgrades would have to be made to the Barco 550 CRL to comply with this requirement or
(continued...)

that a proposal demonstrate compliance with every aspect of the solicitation, a proposal that does not explicitly show compliance with a material requirement may not be accepted where, as here, there is reason to doubt that the offeror will satisfy that requirement. See Mine Safety Appliances Co.; Interspiro, Inc., B-247919.5; B-247919.6, Sept. 3, 1992, 92-2 CPD ¶ _____, record denied, National Draeger, Inc., B-247919.7, Oct. 6, 1992, 92-2 CPD ¶ _____ (award of a contract was improper where the awardee's proposal did not show that the offered product met a material requirement regarding the product's maximum weight and there was reason to doubt the offeror would comply with the weight requirement) see also Telemetrics, Inc.; Techniarts Eng'g, B-242957.7, Apr. 3, 1992, 92-2 CPD ¶ _____ (agency unreasonably accepted offeror's general representation of compliance of offered product in face of substantial evidence that the product did not comply with the requirement). Since TECO failed to demonstrate compliance with the salient characteristics or that it offered a commercial product in use for a minimum of 1 year that had not been subject to more than normal product improvement changes in accordance with the RFP requirements--which DLA states are its minimum needs--DLA could not properly accept TECO's offer.⁹ Tri Tool, Inc., supra; Calculus, Inc., B-234074.2, June 6, 1989, 89-1 CPD ¶ 529; see also E.C. Campbell, Inc., B-203581, Oct. 9, 1981, 81-2 CPD ¶ 295 (agency may not make award on the basis of a bid that does not demonstrate compliance with a commerciality requirement where the solicitation requires such a showing).

We recommend that DLA terminate TECO's contract for the convenience of the government and make award to Komatsu, as the second low-priced, technically acceptable offeror, if that firm is otherwise eligible. We also find that Komatsu is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). Komatsu should submit its certified claims for protest costs directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f)(1).

⁹(...continued)

present credible evidence that this product would still meet the commerciality requirements of the RFP if the upgrades were implemented.

⁹Since we have determined that TECO's offered product does not satisfy the lift capacity requirements of the RFP, we need not address the Barco 550 CRL's compliance with the other salient characteristics.

Komatsu's protest is sustained and Koehring's protest is dismissed.

for Milton J. Aroler
Comptroller General
of the United States