



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Gentex Corporation--Reconsideration

File: B-271381.2

Date: August 28, 1996

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where, even assuming the protester's argument had merit, no prejudice inured to the protester as a result of the agency's alleged error.

DECISION

Gentex Corporation requests reconsideration of our decision Gentex Corp. B-271381, June 18, 1996, 96-1 CPD ¶ 281, in which we denied its protest of the Defense Logistics Agency's (DLA) award of a contract for pilot pressure-demand breathing oxygen masks and related equipment components to Scott Aviation under request for proposals (RFP) No. SPO920-95-R-X035.

We deny the request for reconsideration.

In its protest, Gentex challenged the contract award on the ground that the agency had improperly waived a mandatory qualification requirement for one of the oxygen mask's required components--the inhalation/exhalation valve--which was set forth on a qualified products list (QPL) maintained by Kelly Air Force Base, which is the cognizant qualifying activity for the valve component.

We denied Gentex's protest. Contrary to Gentex's interpretation of the solicitation, the RFP did not include any qualification requirement. The RFP did not incorporate any of the master solicitation's mandatory QPL provisions.¹ Nor did the RFP

¹DLA uses a master solicitation method; for these types of procurements, suppliers are given a lengthy master solicitation that contains standard contract provisions, to use in conjunction with subsequent individual solicitations--such as this RFP--which are streamlined documents that specifically incorporate by reference pertinent

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incorporate FAR § 52.209-1, "Qualification Requirements"--which is a mandatory provision to be included in all solicitations containing a qualification requirement. FAR § 9.206-2. The agency also did not prepare a written justification for a qualification requirement, FAR § 9.202(a)(1); provide offerors with all requirements they must satisfy to become qualified, FAR § 9.202(a)(2); and provide an opportunity for qualification before award via publication in the Commerce Business Daily, FAR § 9.205, all mandatory actions when a qualification requirement is imposed. Given the absence from the solicitation of any qualification reference or associated FAR provision, and since the agency had never publicized its intent to impose a qualification requirement, we concluded that there was no basis for Gentex's interpretation that the RFP required the awardee to provide an oxygen mask which complied with the QPL criterion.

On reconsideration, Gentex argues that our prior decision warrants reversal because of a legal error. Gentex contends that despite the solicitation's failure to incorporate the QPL requirements, DLA nevertheless must terminate the awarded contract and resolicit this requirement because the cognizant qualifying activity for the mask's QPL components--Kelly Air Force Base--never authorized DLA to conduct a procurement for the masks without enforcing the QPL requirements.

This argument is a variation on one of Gentex's initial protest challenges, and--for the same reasons discussed in our prior decision and reiterated below--does not warrant reversing our initial decision. In this regard, the record showed that after realizing that the qualification requirement had been omitted from the solicitation, DLA executed a post-award modification to Scott's contract to require satisfaction of QPL requirements through a first article testing provision. Although Gentex challenged the post-award modification as improper, and requested, as it has on reconsideration, that the awardee's contract be terminated and the requirement resolicited with the QPL provisions, we denied this ground of protest since there was no showing that in the event of a resolicitation with the qualification provision the results of the procurement would have been any different.

Specifically, the record unequivocally showed that at the time it competed for award, the protester mistakenly believed that the RFP contained the mask's QPL requirements. Thus, Gentex actually competed under the impression that the more restrictive terms applied--the same terms, which, in the event we sustained Gentex's protest against the post-award modification, would be incorporated in the ensuing resolicitation. Gentex never argued--nor did the record suggest--that the protester's

¹(...continued)

standard terms, paragraphs and conditions set forth in the master solicitation. See generally Federal Acquisition Regulation (FAR) §§ 14.203-3 and 15.408(d); Sonetronics, Inc., B-237267, Feb. 12, 1990, 90-1 CPD ¶ 178.

pricing or delivery schedule would change in the event of a resolicitation. Nor did the protester suggest that Scott's lower price resulted from its intention to furnish a non-QPL mask. Consequently, since competitive prejudice is an essential element of every viable protest, and since no reasonable possibility of prejudice was evident from the record, our Office denied Gentex's protest against the post-award modification. See EEV, Inc., B-261297; B-261297.2, Sept. 11, 1995, 95-2 CPD ¶ 107.

Gentex's argument on reconsideration that DLA was required to conduct its procurement in accordance with the Air Force's QPL provisions would call for the same remedy which Gentex sought during its initial protest when it challenged the post-award contract modification--termination of the awardee's contract and a resolicitation of the mask requirement using the QPL criteria. However, as discussed in our initial decision (and as repeated above), given the record in this case, and Gentex's failure--both in its initial protest and on reconsideration--to articulate how the results of the competition would change in the event of a reprocurement, we conclude that, even assuming DLA was required to adhere to the Air Force's QPL requirements, no prejudice inured to the protester as a result of this alleged error.

Consequently, since the award would not be overturned even if we were to sustain the protest on reconsideration, and since the protester has not otherwise demonstrated that our prior decision contains an error of fact or law as required by 4 C.F.R. § 21.14(a) (1996), we deny the request for reconsideration. See Wooten & Wilson Assocs.-Recon., B-244527.3, Feb. 19, 1992, 92-1 CPD ¶ 199; Lucas Place, Ltd.-Recon., B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180.

The request for reconsideration is denied.

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