



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Mossberg Corporation

File: B-274059

Date: November 18, 1996

William A. Davis, Esq., Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, for the protester.

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DIGEST

Protest against solicitation requirements relating to construction and safety of shotguns is sustained where record does not establish that requirements are necessary to meet agency's minimum needs; although agencies properly may set requirements relating to human safety so as to achieve the highest possible reliability and effectiveness, the requirements must nonetheless be reasonable and withstand logical scrutiny.

DECISION

Mossberg Corporation protests the terms of request for proposals (RFP) No. HQ-96-19, issued by the United States Department of Justice, Immigration and Naturalization Service (INS), for a quantity of shotguns. Mossberg maintains that certain of the RFP's requirements unduly restrict competition and are unnecessary for the agency to satisfy its minimum needs.

We sustain the protest.

The RFP contemplates the award of a fixed-price, indefinite delivery/indefinite quantity contract for shotguns that will be used by the agency's border patrol agents. At issue in this protest are two aspects of the specifications: the construction of the guns' receiver, and the type of safety mechanism to be employed. Mossberg maintains that these aspects of the specifications preclude it from competing for the requirement.

ALUMINUM VERSUS STEEL RECEIVER

The receiver is the central component of any gun—it is the place where the shell or bullet is inserted into the gun, and where the firing explosion takes place. Virtually all of the gun's remaining parts, such as the barrel, stock, safety, firing mechanism, trigger mechanism, and ammunition magazine tube, are attached to the receiver. The receiver typically is constructed of metal that is coated or treated for protection from corrosion. The RFP here calls for the shotguns to have a nonreflective steel receiver that has been "parkerized"¹; the agency states that it has specified steel receivers because it is easier and less costly to reparkerize steel than it is to reanodize aluminum. Mossberg maintains that this requirement is unnecessary to meet the agency's minimum needs and that, in fact, the anodized aluminum receivers on its own shotguns will better meet the agency's needs, since they do not need to be refinished to maintain their nonreflective surface. The agency contends that, regardless of the type of shotgun purchased, the receivers will become scratched over time and will require refinishing because its guns need to have a nonreflective surface to ensure the safety of its agents during "interdiction by surprise" type operations.

Procuring agencies are required to specify their needs in a manner designed to promote full and open competition; agencies thus may include restrictive requirements only to the extent they are necessary to satisfy their legitimate minimum needs. CardioMetrix, B-259736, Apr. 28, 1995, 95-1 CPD ¶ 223. Where a protester challenges a specification as unduly restrictive, the agency must establish that the requirement is reasonably necessary to meet its minimum needs; we will examine the adequacy of the agency's position to ensure that it is rational and can withstand logical scrutiny. Id. While a solicitation provision relating to human safety or national defense may be written to achieve not just reasonable results, but the highest possible reliability and effectiveness, Acoustic Sys., B-256590, June 29, 1994, 94-1 CPD ¶ 393, the requirement must nonetheless withstand logical examination. Raymond Corp.—Recon., B-251405.2, Aug. 26, 1993, 93-2 CPD ¶ 124. Based on the record here, which includes substantial oral testimony taken during a hearing in this matter, we find that the steel receiver requirement does not meet this test.

First, the record does not establish that Mossberg's aluminum receivers will need to be refinished. The evidence shows that the anodic coating on aluminum is harder—and thus resists scratching longer—than the phosphate coating on steel, and that, in any case, there is a specialized paint, formulated in accordance with applicable

¹Parkerizing is a type of phosphate coating that is applied to the outside metal surfaces of the gun to protect it against rust or corrosion and to make the surface nonreflective.

military specifications, that is designed to cover scratches on anodized aluminum gun receivers, restoring the nonreflective quality of the surface without reanodizing. None of the expert witnesses who testified has ever actually reanodized aluminum receiver rifles or shotguns (all of the expert witnesses except one are armorers -- individuals skilled in the repair, construction, and maintenance of weapons; the other witness, an engineer specializing in the refinishing of metal surfaces, oversees a large metal refinishing facility for the Department of the Army). Moreover, INS has a large quantity of M-16 rifles and Baretta pistols that have aluminum receivers and INS states that it does not ever intend to refinish the receivers on these weapons.

In contrast, according to the hearing testimony, all steel receiver guns must periodically be rephosphated or reparkerized because, as the finish wears off, the steel becomes exposed and is subject to rust. It therefore must be refinished to ensure the weapon's continued operability. An aluminum receiver shotgun, on the other hand, will continue to function effectively, even if its anodized finish becomes scratched. The anodizing process essentially involves artificially inducing the formation of a layer of corrosion on the aluminum surface; even if the weapon becomes scratched, the aluminum does not rust, but instead forms a natural anodic coating that does not impair the functioning of the weapon as it corrodes. The record therefore shows that the agency will incur at least some cost in connection with the maintenance of steel receiver weapons, whereas there is no clear evidence that similarly significant costs will be incurred in connection with the maintenance of aluminum receiver weapons. There also is no evidence to show that the agency considered the viability or comparative cost of the painting option for aluminum receiver shotguns.

Further, as noted, the record shows that INS currently has a large quantity of aluminum receiver weapons: the agency recently procured as its standard handgun a Baretta pistol with an aluminum receiver, and the agency also owns a large quantity of used M-16 rifles that were acquired from one of the military services in 1988 which also have aluminum receivers. INS's acquisition of a selection of aluminum receiver firearms shows that aluminum receiver guns have met the agency's needs in the past, and the agency has neither presented evidence showing, nor explained, why aluminum receivers are acceptable for its current guns, but not for the shotguns being procured here. INS has not shown, for example, that the safety of its agents has been compromised during "interdiction by surprise" operations because of an inability to maintain the nonreflective finish on these other aluminum receiver weapons. The record also shows that all branches of the military, as well as numerous law enforcement agencies throughout the United States, use aluminum receiver weapons and, further, that even the most prevalent model of steel receiver shotgun in INS's arsenal has an aluminum trigger guard that, consistent with the agency's position will either need to be replaced or reanodized periodically. The agency has not explained why this

additional cost associated with the steel receiver shotguns should not also be taken into account.

In sum, the record shows that the agency has a large quantity of aluminum receiver weapons with which it is satisfied; the anodic coating is stronger than the phosphate coating; unlike steel receiver weapons, the functionality of an aluminum weapon is not compromised by scratches that can rust; there exists an apparently low cost solution (the military specification paint) to any legitimate reanodizing need that INS did not consider; and even steel receiver shotguns have at least some aluminum that would require reanodizing or replacement based on INS's own position. We therefore agree with Mossberg that the steel receiver requirement is unduly restrictive.

PLACEMENT OF THE SAFETY

Mossberg also challenges the requirement concerning the placement of the safety on the shotguns. (The safety is a mechanism installed in the receiver that prevents the gun from firing when it is engaged.) The RFP calls for a "crossbolt" type safety, which operates by pressing a button located at the rear of the trigger guard; to disengage the safety (thereby rendering the weapon ready to fire), the operator slides the button from right to left (and from left to right to engage). Mossberg's shotguns are designed with a "top-of-the-receiver" type safety, which is a sliding switch located on the top of the receiver, underneath where the operator places his or her thumb when holding the gun in firing position. The mechanism is disengaged/engaged by sliding the switch forward or backward with the thumb.

Mossberg maintains that the requirement for a crossbolt type safety is unduly restrictive of competition because both types of safety effectively render the weapon inoperable when engaged. Further, Mossberg argues that its safety mechanism is superior to the crossbolt safety because it is ambidextrous--whether the shooter is left- or right-handed, he or she operates the safety with the thumb of the shooting hand, and the operation is the same for both left- and right-handed users (*i.e.* forward to disengage, backward to engage). In contrast, the crossbolt safety is essentially designed for right-handed shooters. A right-handed shooter can disengage the safety using the index finger of the trigger hand while keeping his or her hand in the firing position, whereas a left-handed shooter must either remove his or her hand from the firing position and reach under the trigger guard, or must tilt the gun away from the body to permit access to the safety. Mossberg maintains that permitting both right- and left-handed shooters to keep their hand in the firing position while engaging or disengaging the mechanism enhances safety because there is a greater likelihood that the user will leave the mechanism engaged when use of the weapon is not imminent, thereby minimizing the chance of an accidental

discharge.² In this regard, Mossberg notes that INS trains its agents to shoot from both left- and right-handed positions, and that, consequently, the superiority of its safety will benefit virtually all of the agency's users.

INS states that it specified the crossbolt type safety pursuant to its weapons standardization policy--because INS's current shotguns have crossbolt safeties, it maintains that it needs all of its shotguns to have crossbolt safeties. According to the agency, if it introduces a shotgun into its arsenal with a different type of safety, it runs the risk that its agents may become confused as to which safety disengagement procedure to use while operating the weapon during a high stress situation, resulting in an increased possibility of accident or injury.

The agency's position essentially is that the requirement for a crossbolt safety relates to human safety. As a general rule, the determination of the government's needs and the best method for accommodating them are matters primarily within the agency's discretion, and our Office will not question a restrictive requirement unless it is shown to be unreasonable. Moreover, agencies may properly set minimum requirements relating to human safety or national security so as to achieve not just reasonable results, but the highest possible reliability and effectiveness; an agency is not required to show an instance of actual damage or injury under a prior contract before imposing a requirement that reduces risks to life or property, so long as the agency's position can withstand logical scrutiny or is supported by, for example, statistical data or evidence that is unrebutted by the protester. LIPS Propellers, Inc., B-256713, July 15, 1994, 94-2 CPD ¶ 26; Acoustic Sys., supra. On the other hand, a potential perceived risk must be reasonable in the sense that there is at least some support in the record for the agency's position. Where a protester effectively refutes the agency's assertion that a particular requirement is necessary for human safety reasons, we will find the requirement unreasonable. Raymond Corp.-Recon., supra.

We find that the record does not adequately support the need for the crossbolt safety requirement. The record contains no evidence--besides the agency's unsupported theoretical assertion--that properly trained users will become confused regarding the operation of the safety. INS's expert witness testified that he had never trained individuals in the use of both types of safeties, or that he was aware of any instances where properly trained officers experienced the problem

²The protester maintains, and the record demonstrates, that current INS training requires officers to place their weapons in a "hot standby" status, with the safety off, but the chamber of the gun empty, when engaging in a search or entering a potentially dangerous situation. Mossberg maintains that its mechanism permits agents to leave the safety on in these types of situations, thereby reducing still further the chance of accidental discharge.

envisioned by the agency. INS also has presented no other evidence—either empirical or anecdotal—that either its trained agents or law enforcement or military personnel in other organizations have experienced confusion regarding the operation of the gun they are using during stressful situations. This is significant because the record shows that INS trains each agent to use at least three different weapons (the agent's handgun, a shotgun, and an M-16 rifle), each with a different type of safety mechanism; that, as a matter of policy, agents are authorized to use more than one type of handgun as well as more than one type of rifle; and that some of its agents are authorized and trained to use as many as 11 different manufacturers' firearms. The agency has not reported any incidents of confusion arising from the use of these different weapons. Moreover, an agency witness testified that the agency never discussed its concern with any other military or law enforcement user to see whether these other users may have experienced such difficulties.³

On the other hand, the record shows that other shotgun users are able to use more than one type of shotgun without experiencing the problem envisioned by the agency. In this regard, the record includes extensive testimony from two expert witnesses presented by Mossberg, both of whom are engaged in training law enforcement or military personnel. These witnesses testified that there is little difficulty or cost associated with training individuals in the use of more than one type of shotgun, and that the design of the two safety mechanisms is such as to present little confusion to the user. The experts explained that the two mechanisms are different, and that the user would be well aware of the type of safety on the gun being used as soon as they pick up the gun. The experts testified on the basis of their past training experience that, assuming that the user had been trained in the use of both types of safety, they would respond appropriately under stressful situations; the experts also were unaware of any incidents involving the type of confusion alleged by the agency. (One of the experts testified that he had recently been involved in training law enforcement personnel to "transition" from using

³ The record shows that all four branches of the military use three different models of shotgun, and the training materials for all four services include information showing that the difference in operation of the three types are considered minor. The Marine Corps training materials, for example, which outline the procedures for using three different shotguns, provide that:

"All [three] are pump-type shotguns and are operated basically the same way. Differences do exist between the individual shotguns, but they are only minor. Differences such as in the location of the safety . . . require only slight modification in the placement of the hands and fingers. . . ."

crossbolt type safety mechanisms to using top-of-the-receiver type safety mechanisms, and that this transition occurred without incident.)

The record shows that the agency intends to acquire as many as 5,000 new weapons during this procurement, and that it has only approximately 2,500 shotguns in its current arsenal, some of which are scheduled to be retired from service; it is thus clear that, over time, the shotgun purchased during this procurement will become the standard for agency purposes. In essence, INS decided to standardize to the crossbolt safety based solely on the fact that it currently has a number of weapons that use this type of mechanism, regardless of whether top-of-the-receiver type safety mechanisms may adequately meet the agency's needs. In this regard, the testimony shows that INS never actually considered in detail the relative merits of the Mossberg shotgun (or any other shotgun that has a top-of-the-receiver type safety) and did not consider whether the Mossberg-type shotgun would be adequate for satisfying the agency's policy of standardization over time. In short, the record does not adequately establish that the challenged requirement is necessary to satisfy the agency's minimum needs. Raymond Corp.-Recon., *supra*. We therefore sustain the protest.

We are recommending by separate letter of today to the Attorney General that the agency revise the RFP in accordance with our decision. We also recommend that the agency reimburse Mossberg for the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. Mossberg should submit its certified claim, detailing the time expended and the costs incurred, directly to the INS within 60 days of its receipt of this decision. Bid Protest Regulations, section 21.8(f)(1), 61 Fed. Reg. 39,039, 39,046 (1996) (to be codified at 4 C.F.R. § 21.8(f)).

The protest is sustained.

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