



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Container Products Corporation

**File:** B-280603.2

**Date:** November 4, 1998

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Joel Hughes for the protester.

Timothy F. Noelker, Esq., Linda L. Shapiro, Esq., and Steven E. Kellogg, Esq., Thompson Coburn, for Keco Industries, Inc.; David R. Wall for Charleston Marine Containers Inc.; James R. Bomberger for AAR Cadillac Manufacturing; and Richard A. Lidinsky Jr., Esq., for Sea Containers America Inc., intervenors. Samuel J. Galbo, Jr., Esq., J. Page Turney, Esq., and Maj. Jeffery P. Colwell, U.S. Marine Corps, for the agency.

John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest against solicitation requirement that cargo containers be certified prior to the submission of proposals is sustained where record does not establish that requirement is necessary to meet the agency's needs.

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## DECISION

Container Products Corporation protests the terms of request for proposals (RFP) No. M67854-98-R-3005, issued by the U.S. Marine Corps for cargo containers. Container Products argues that the RFP is unduly restrictive of competition because it requires that prospective offerors obtain certification of their containers prior to submitting proposals.

We sustain the protest.

## BACKGROUND

The RFP was issued to acquire quadruple containers (QUADCONs), container racks, and horizontal connectors to meet Marine Corps and Army requirements. QUADCONs are intermediate size cargo containers designed to allow shipment and ground transportation of military supplies and equipment. Agency Report at 2. The contractor is to fabricate, produce, and field cargo containers meeting standards set forth in 49 C.F.R. §§ 450-453 (1996). RFP Attachment 4 (statement of work (SOW)) at 1. The SOW and the RFP purchase description, as well as 49 C.F.R. §§ 450.5 and 453.1, also require the QUADCONs to be certified to meet the requirements of the International Convention for Safe Containers (CSC). RFP Attachment 1 (Purchase

Description) at 2, SOW at 4. Moreover, section L-6.1.1 of the RFP states that "[t]he required CSC certification must be successfully obtained, in full, for the proposed QUADCON container(s) prior to submittal of the offeror's proposal."

The RFP contemplates the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for 5 years. RFP at B-2, F-3. The RFP specifies a minimum of 4,000 and a maximum of 34,000 QUADCONs, as well as minimums and maximums for connectors and racks, with the first production delivery scheduled no later than 180 days after the first delivery order. *Id.* at B-2, B-3, B-4, F-2, F-3.

The RFP closed on July 23 and the Marine Corps received six proposals, but no proposal was received from Container Products. Agency Report at 8. The agency reports that four of those six proposals offered CSC-certified containers. *Id.*

## PROTEST ALLEGATIONS

Container Products notes that the RFP was issued on June 11 and proposals were due on July 10, and argues that due to the complexity of the CSC certification process, it is impossible to obtain certification in the 30 days between issuance of the RFP and proposal submission. Protest, Attachment 1 at 1-2. The result, according to Container Products, is that the RFP is open only to those firms whose containers had been certified prior to issuance of the RFP. *Id.*; Comments at 2. Container Products argues that this practice is unduly restrictive, establishes a preference for a few offerors and prevents qualified offerors, such as Container Products, from competing.

Container Products acknowledges, however, that the government may need a portion of the QUADCONs as quickly as possible. In recognition of this possibility, Container Products argues that the agency should acquire under this solicitation only the quantity of QUADCONs it needs immediately and that the remainder of the solicited 34,000 units should be acquired under another contract allowing a realistic time for sources whose containers are not presently certified to obtain the certification and to compete. Protest, Attachment 1 at 1-2; Comments at 3.<sup>1</sup>

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<sup>1</sup>The Marine Corps argues that the protest did not include information required by our Bid Protest Regulations at 4 C.F.R. §§ 21.1(c)(4), (5), (7), (8) (1998), such as a detailed statement of the factual and legal grounds of protest, information establishing that the protester is an interested party, a specific request for a ruling, and the form of relief requested. Agency Report at 18 n.15. We disagree. In its protest to this Office, Container Products attached its agency level protest and the Marine Corps's response to that protest and disagreed with that response. A fair reading of the protest and its attachments establishes that it meets the requirements of our regulations.

## ANALYSIS

Procuring agencies are required to specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies' legitimate needs (or as otherwise authorized by law). 10 U.S.C. § 2305(a)(1)(B) (1994); see Mossberg Corp., B-274059, Nov. 18, 1996, 96-2 CPD ¶ 189 at 2. Where a protester challenges a specification as unduly restrictive, the agency must establish that the requirement is reasonably necessary to meet its needs; we will examine the adequacy of the agency's position to ensure that it is rational and can withstand logical scrutiny. Mossberg Corp., *supra*.

The solicited QUADCONs are to be used by the Marine Corps and the Army to ship military cargo and equipment, as quickly as possible, to support their military missions. As the Marine Corps reports, the International Safe Container Act, 46 U.S.C.A. App. §§ 1502-07 (West Supp. 1998), and its implementing regulations, at 49 C.F.R. §§ 450-53, require compliance with the International Convention for Safe Containers. Those regulations also require that a container that is not CSC-certified cannot be used in international transport. 49 C.F.R. §§ 450.5, 453.1. Thus, to the extent Container Products challenges the certification requirement itself, we conclude that CSC certification of QUADCONs is necessary to satisfy the needs of the Marine Corps and the Army.

Regarding the requirement that proposed QUADCONs be certified prior to proposal submission, Container Products contends, as noted above, that there was not sufficient time after release of the RFP for it and other firms to obtain certification of their QUADCONs. The result, Container Products argues, is that the competition is unjustifiably limited to firms whose QUADCONs had been certified prior to issuance of the RFP. Protest, Attachment 1 at 1-2; Comments at 2.

The Marine Corps argues that it was necessary to require offerors to propose containers that had already been certified. The agency reports that it previously awarded three QUADCON contracts that did not require CSC certification when proposals were submitted; rather those contracts permitted containers to be certified up to the time of delivery. Agency Report at 7-8. Two of those contracts were terminated and the containers that had been delivered were removed from inventory because they were never able to be certified and, on the third contract, certification was not obtained until almost 2 years after award, which significantly delayed delivery. Agency Report at 7-8; Enclosure 9 at ¶¶ 2-4. Further, as the agency notes, one company that expressed interest in this acquisition described its certification efforts over an 18-to 24-month period and stated that "unless a company has been CSC-certified prior to responding to the RFP, there is simply no way they can deliver production units within six months." Enclosure 12 at 2. In addition, the agency reports that an official at the CSC certification authority who approved QUADCONs for the incumbent contractor and another firm informed the

contracting agency's project officer that the peculiarities of the QUADCON, particularly the fact that a QUADCON is made up of four side opening containers connected together, offer a significant challenge to CSC certification. Agency Report at 6-7; Enclosure 9 at ¶ 6c.

Due to the problems previous contractors have experienced obtaining certification of their QUADCONs after award, we conclude that the Marine Corps reasonably decided that CSC certification at the time of delivery would not meet its needs. The RFP delivery schedule calls for delivery to start no later than 180 days after the first order is issued under the contract and the record shows that the agencies need a reliable source of supply for certified containers. It would not be reasonable to require the Marine Corps to once again take the chance that a firm that has been awarded a contract could not obtain certification of its containers in time for required delivery.

Nonetheless, the record does not support the Marine Corps's decision to require CSC certification prior to proposal submission. None of the concerns expressed by the Marine Corps provide support for that requirement and, in fact, all of the agency's concerns would be satisfied by simply requiring certification by the time of award. Because the agency's legitimate need for timely delivery of CSC-certified QUADCONs would be satisfied by requiring certification by time of award, the requirement for certification by the closing date for receipt of proposals exceeds the agency's needs.<sup>2</sup>

Container Products also argues that the Marine Corps should solicit at this time only the quantity of QUADCONs which it urgently needs, and solicit the remaining quantity at a later date to allow firms that do not have the required certification to obtain it and compete. Container Products, in effect, is arguing that we should recommend the Marine Corps delay a portion of the procurement. We have no basis to do so. As discussed above, the Marine Corps has a reasonable basis for requiring CSC-certified containers, and we have no grounds to conclude that the failure of Container Products (and other potential offerors) to obtain certification by the time of award will be attributable to any improper government action. Moreover, agencies generally need not delay a procurement in order to provide a potential offeror with an opportunity to demonstrate that it meets approval standards. See OPS, Inc., B-271835, July 31, 1996, 96-2 CPD ¶ 50 at 3.

We therefore recommend that the Marine Corps amend the RFP to permit certification of proposed containers by time of award, and resolicit the requirement. We also recommend that Container Products be reimbursed the costs of filing and

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<sup>2</sup>While Container Products may not succeed in having its containers certified by the date of award, there is no reasonable justification for denying the firm the opportunity to try to do so.

pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). In accordance with 4 C.F.R. § 21.8(f)(1), the protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

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