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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: McRae Industries, Inc.

File: B-287609.2

Date: July 20, 2001

Alan M. Grayson, Esq., and James A. McMillan, Esq., Grayson & Kubli, for the protester.
Andrew Starr, Esq., Dykema Gossett, for Wolverine World Wide, Inc., and Thomas C. Wheeler, Esq., and Sheila C. Stark, Esq., Piper, Marbury, Rudnick & Wolfe, for Belleville Shoe Manufacturing Company, intervenors.
Michael Trovarelli, Esq., Sharif T. Dawson, Esq., and Mike McGonigle, Esq., Defense Logistics Agency, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is an interested party to challenge contracting agency's alleged waiver of solicitation testing requirements notwithstanding that it did not submit a proposal where, if protest were sustained, the protester would have an opportunity to compete under a revised solicitation.

2. Allegation that in connection with a procurement for boots agency improperly waived solicitation's strict sample test requirements is denied where the agency reasonably determined that all offerors' samples would have passed the omitted tests, the end items will be subjected to the solicitation's strict field performance requirements, and the protester was not prejudiced by the agency's actions.

DECISION

McRae Industries, Inc. protests the award of contracts to Belleville Shoe Manufacturing Company and Wolverine World Wide, Inc. under request for proposals (RFP) No. SPO100-00-R-0050, issued by the Defense Supply Center Philadelphia (DSCP) for intermediate cold/wet boots with removable insulated booties. McRae, who did not submit a proposal, contends that DSCP improperly waived required tests of the boots.

We deny the protest.

BACKGROUND

The RFP, issued as a partial set-aside for small businesses, contemplated the award of two indefinite-delivery/indefinite-quantity contracts for a base period with up to four 1-year option periods. Section C of the RFP required that the boots be manufactured in accordance with Purchase Description CRFD/PD 99-09 (Apr. 19, 2000) (PD 99-09). The RFP listed several technical evaluation factors including, as relevant here, product demonstration models (PDM). In this connection, offerors were required to submit several pairs of PDMs for testing in accordance with PD 99-09. The RFP contemplated that the agency would subject the PDMs to three end-item tests on a pass/fail basis for leakage, bond strength, and toe adhesion. If a PDM failed any of these three tests, that offer would be eliminated from the competition.

The agency states that since it did not own the required leakage testing equipment, it purchased a machine from the Satra Technology Center, the only known commercial manufacturer of this equipment. During a practice run on the newly-acquired equipment, the Satra machine stopped functioning after only a few cycles. The agency states, however, that all offerors proposed PDMs constructed with a Gore-Tex membrane, a material which the contracting officer (CO) states has historically been found to effectively provide waterproof protection. In addition, the CO states that contractors that have used Gore-Tex in their boots have successfully performed on similar DSCP contracts. In view of DSCP's inability to perform the Satra leakage test, and given that Gore-Tex has proven effective in preventing water infiltration in the past, the CO determined "with a high degree of certainty" that all PDMs submitted would have passed the test, would meet the PD 99-09 requirements, and would satisfy the agency's field use performance standards. Agency Report (AR) exh. 6, CO's Memorandum to DSCP-CRFA, Dec. 7, 2000, at 1. After considering several alternatives, the agency decided the PDM leakage test was not needed.

At about the same time that the Satra machine stopped functioning properly, the CO learned that the agency could not perform the toe adhesion test because a separate machine needed for this test was inoperable and not scheduled for repairs, and DSCP did not have access to the equipment necessary to perform this test. In this connection, DSCP states that the toe adhesion test was developed to augment the bond strength test and that when it prepared the RFP, it believed that this test would be performed using government-owned equipment. The record indicates that historically, there have been no failures of this test. According to the CO, since the requirements for passing the toe adhesion test are less strict than the bond strength test, and since all PDMs tested passed the more rigorous bond strength test, the CO concluded that the toe adhesion test was not necessary. Based on the evaluations of proposals under the other factors, including price, the CO determined that Wolverine's and Belleville's proposals offered the best value and awarded contracts to those two firms on April 12, 2001.

The protester maintains that DSCP improperly waived the RFP's test requirements for leakage and toe adhesion without informing potential offerors of the waiver.

Although McRae did not submit a proposal, McRae contends that it was prejudiced by the agency's action because it "would have submitted a proposal, but for the requirement to produce boots that could pass the restrictive tests required by the Specification." Protest at 8.[1]

DISCUSSION

Procedural Issues

Interested Party Status

Belleville argues that since McRae did not submit a proposal, the firm lacks the required "interested party" status under our Bid Protest Regulations to maintain the protest. See 4 C.F.R. 21.0(1). As already noted, the protest raises the question of whether the agency improperly waived the RFP's end-item test requirements without amending the solicitation and giving McRae an opportunity to submit an offer on the allegedly relaxed requirements. McRae is essentially alleging that those requirements deterred it from submitting a proposal. Inasmuch as the appropriate relief, if our Office were to sustain the protest, would be for the protester and other offerors to be given an opportunity to compete based on a revised RFP, we consider the protester to have a sufficiently direct economic interest in the outcome to be deemed an interested party, notwithstanding the fact that it did not submit an offer. Navajo Nation Oil & Gas Co., B-261329, Sept. 14, 1995, 95-2 CPD ¶ 133 at 3 n.2.

Timeliness

DSCP and Belleville request that we dismiss the protest as untimely filed. These parties state that on May 15, 2001, representatives from DSCP and private industry, including McRae, attended a meeting of the Footwear Industries of America/ Department of Defense Modernization Committee, as part of a broad conference covering other matters. DSCP further asserts that although the CO did not address the specifics surrounding the Satra leakage test, the topic was raised and open for dialogue among the meeting attendees. The agency also points out that other conference events gave McRae opportunities to learn of the agency's inability to conduct the tests at issue--for example, during a dinner on May 14, and during a reception on May 15. DSCP and Belleville thus argue that since McRae must have learned of the agency's inability to conduct the leakage test at the latest on May 15, its protest, filed on May 29, is untimely and should be dismissed pursuant to 4 C.F.R. § 21.2(a)(2) (protests other than those based upon alleged improprieties in a

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[1] To the extent that McRae argues that these test requirements were unduly restrictive of competition, this allegation, raised more than 7 months after the time set on October 31, 2000 for receipt of proposals, is untimely. 4 C.F.R. § 21.2(a)(1) (2001).

solicitation must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier).

McRae does not deny attending the May 15 meeting, but disputes having learned of the basis of its protest at that time. McRae contends that the discussion at the meeting concerning the leakage test was so vague that McRae learned no information that formed the basis of its protest. Instead, McRae states that it learned that DSCP had not performed the leakage and toe adhesion tests based on a conversation with a representative of Wellco Enterprises, Inc. (an unsuccessful offeror under the RFP) on May 18. McRae thus argues that its protest is timely because it was filed within 10 days after May 18.

The minutes of the May 15 meeting--which the parties do not question are an accurate official recording of the proceedings--state, in relevant part, as follows:

> [A Wolverine representative] addressed a question to the committee concerning the SATRA leakage test and whether or not any changes could be made to it. [An Army representative] deferred to [the CO] who stated that if [Wolverine's] questions specifically had to do with the Intermediate Cold Wet Boot w/removable bootie awards that were recently awarded, then the issue would not be discussed as there was an outstanding GAO protest against the two awards that had been made. [The CO] indicated that if Wolverine wanted to discuss their contract that they should meet with her separately.[2]

In our view, there is no evidence in the record supporting DSCP's and Belleville's positions that the discussion during the May 15 meeting provided McRae with sufficient information upon which the firm could have reasonably based its protest. Indeed, the minutes reflect the CO's decision, correctly in our view, to defer answering Wolverine's questions concerning the leakage test due to Wellco's then pending protest. The minutes further suggest that the toe adhesion test--the other PDM test eliminated--was not specifically raised at all during the meeting. Although DSCP and Belleville question the specific information McRae learned during its conversation with Wellco, when that conversation actually took place, and the circumstances surrounding the exchange, we have no reason to doubt McRae's representation that it learned of the basis of its protest on May 18. Accordingly, its protest, filed on May 29, is timely (May 28 was a federal holiday). 4 C.F.R. 21.2(a)(2).

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[2] The "GAO protest" refers to a challenge to the awards Wellco filed with our Office. Following receipt of the agency report, Wellco withdrew its protest.

Analysis

As a preliminary matter, contrary to McRae's assumption, the agency did not waive or relax the actual toe adhesion or leakage requirements here. Although DSCP did not conduct the leakage or toe adhesion tests on the PDMs, the CO determined, based on the agency's experience with similar products, that all PDMs would have passed these tests. Further, the production boots or "end items" must still satisfy the RFP's field performance requirements. In other words, the contractors' boots will be subject to the same quality standards and construction requirements contained in PD 99-09 for the PDMs. See Le-Don Computer Servs., Inc., B-225451.2, B-225451.3, Apr. 28, 1987, 87-1 CPD ¶ 441 at 3.

The record does show that the agency waived the testing requirements relating to toe adhesion and leakage. We will sustain a protest objecting to a relaxation or waiver of test requirements only where the protester demonstrates that items meeting the relaxed standards will not satisfy the agency's needs, or that the protester was prejudiced by the changed standard. See Hi-Shear Tech. Corp., B-258814.2, May 17, 1995, 95-1 CPD ¶ 250 at 4, aff'd, B-258814.3, Oct. 6, 1995, 95-2 CPD ¶ 167. McRae has demonstrated neither element of this standard here.

With respect to the toe adhesion test, the record reflects that, historically, there have been no failures of this test, and there is no evidence in the record suggesting that the test results here would have differed. Further, since the bond strength test is more stringent than the toe adhesion test and all PDMs passed this test, the CO reasonably decided that the toe adhesion test could be waived. Similarly, we think it was reasonable for the CO to waive the leakage test in view of the unexpected unavailability of the testing machine and the CO's conclusion, based on experience with the Gore-Tex membrane used in constructing the boots, that all the PDMs would have passed the leakage test. In sum, the record reasonably supports the CO's decision that the tests were not necessary to ensure that the agency will obtain items meeting its needs. See OAO Corp.; 21st Century Robotics, Inc., B-232216, B-232216.2, Dec. 1, 1988, 88-2 CPD ¶ 546 at 6. Moreover, as explained below, McRae was not prejudiced by DSCP's decision to eliminate the two tests at issue.

Prejudice to the protester is an essential element of a viable protest, since our Office will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). For the agency's actions to be prejudicial here, McRae must show that had the agency announced that it would omit the toe adhesion and leakage tests on the PDMs, McRae would have submitted a compliant proposal. There is no such showing here.

McRae claims in its protest letter that it would have submitted a proposal, "but for" the requirement to produce boots that could pass the required tests. The protester

reaffirms in its comments on the agency report that "McRae did not submit a proposal because it did not believe at that time it could submit a proposal that would meet the testing requirements of the RFP and still be priced competitively." Protester's Comments at 3. Since the agency did not waive or otherwise relax the RFP's performance specifications (as opposed to the tests), we fail to see, and the protester does not explain, how McRae could propose an acceptable, competitive proposal had the agency announced that it had eliminated the two tests at issue here. On the contrary, the only reasonable interpretation of McRae's statement that it could not offer a boot that met the challenged tests is that McRae could not offer a boot that conformed to the underlying specifications--since it was the boot's conformance to the specifications that the tests at issue were designed to measure. Under these circumstances, we fail to see how McRae was prejudiced by the agency's waiver of the two tests.

The protest is denied.

Anthony H. Gamboa
General Counsel