

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

27429

FILE: B-212847**DATE:** February 13, 1984**MATTER OF:** Bataco Industries, Inc.**DIGEST:**

1. Protester's private agreement not to compete for specified item, which places it at a competitive disadvantage, does not cause a specification which otherwise represents the legitimate needs of the procuring agency to be unduly restrictive of competition.
2. The protester has not met its burden of showing that the agency's specification was in excess of minimum needs or unduly restricted competition where the agency shows that only the specified design has been field tested and has features that maximize its effectiveness, even though the protester contends that its alternate design is equally effective and has been procured by the agency previously, albeit for reasons of urgency.
3. GAO will not question agency determination not to field test protester's proposed alternate to the specified design where testing is both extensive and expensive and where the protester's inability to compete is the result of its private agreement not to compete, rather than any restriction in the specification.

Bataco Industries, Inc., protests that the specification for barbed tape, concertina, in invitation for bids No. DLA700-83-B-0247 issued by the Defense Construction Supply Center (DCSC) is unduly restrictive of competition and does not reflect the government's minimum needs. We find that the protester's private business arrangements inhibit its ability to compete, not the specification, and that the specification otherwise reflects the government's minimum needs.

The solicitation sought 162,588 rolls of barbed tape, concertina,¹ to be manufactured in accordance with Military Specification MIL-B-52489D(ME) dated September 30, 1982, hereafter the specified barbed tape. Bataco protested the specification prior to bid opening. Then, despite its initial statement that it could not bid on the specified barbed tape because of its private agreement not to compete on that item, Bataco submitted one of six bids offering the specified barbed tape received by the October 31, 1983 bid opening date. DCSC subsequently advised that it needed to replenish its stock and proceeded to award despite the protest.

Bataco contends that its alternate design for barbed tape, called the bayonet barb, is as effective as the specified design in serving its intended purpose, the deterrence of intruders. Bataco argues that the two types of barbed tape, i.e., the bayonet barb and the specified barb, are manufactured from the same materials on the same equipment and differ only in the design of the barb, the bayonet barb being more pointed, and the number of barbs per foot, with the bayonet barb having less than the specified design. Bataco argues that, as a consequence of this similarity, its barb satisfies the same performance requirements as the specified design and should be considered an acceptable alternate to the specified design. Bataco further argues that the government's failure to conduct testing on Bataco's alternate design is not an adequate reason for restricting competition to the specified design; rather, Bataco contends, the procuring agency has a duty to test and evaluate alternate designs.

A protester who objects to the specifications in a solicitation bears a heavy burden. Washex Machinery Corporation, B-191224, July 20, 1978, 78-2 CPD 54. This is because the determination of the needs of the government and the methods of accommodating such needs are primarily the responsibility of the contracting agencies of the government. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. We recognize that government

¹This product, manufactured by crimping a barbed strip of metal along the length of a wire, is now commonly used in place of barbed wire. When packed in tight coils which can be readily spread out in the field to create a barbed tape barrier about waist high, it is known as barbed tape, concertina.

procurement officials who are familiar with the conditions under which supplies, equipment or services have been used in the past, and how they are to be used in the future, are generally in the best position to know the government's actual needs and, therefore, are best able to draft appropriate specifications. Particle Data, Inc.; Coulter Electronics, Inc., B-179762, B-178718, May 15, 1974, 74-1 CPD 257.

While specifications must be drafted so as to maximize competition, the adoption of any specification or requirement necessarily limits competition to some extent. The question is not whether competition has been restricted, but whether it has been unduly restricted. Big Bud Tractors, Inc., B-209858, February 4, 1983, 83-1 CPD 127. Consequently, we will not substitute our judgment for that of the contracting agency absent clear and convincing evidence that the agency's judgment is in error and that a contract awarded on the basis of the specifications would unduly restrict competition. Bowne Time Sharing, Inc., B-190038, May 9, 1978, 78-1 CPD 347.

The fact that a particular competitor is unable to compete does not establish that competition as a whole is unduly restricted. Big Bud Tractors, Inc., *supra*. It follows that where the protester has entered into a private agreement not to compete for the specified item, the private agreement does not constitute an undue restriction on competition by the government. In such circumstances, the procuring agency is not required to conduct extensive and potentially expensive testing of a product offered as an alternate to the specified item solely on the basis of an unsubstantiated allegation by the protester. See Castoleum Corporation, B-194906, October 29, 1979, 79-2 CPD 303. Rather, the burden of proving that the alternate satisfies the government's minimum needs, including the cost of any necessary testing, rests with the protester. See Electrical Conductors, Inc., B-201226, B-201308, B-201309, B-201310, B-201311, B-201312, B-205269.2, June 15, 1982, 82-1 CPD 580.

Although Bataco downplays the issue, it is apparent from the record that the major consideration inhibiting Bataco from competing is its private agreement not to compete within the United States for the specified barbed tape. In this regard, Bataco itself argues that the same materials and equipment needed to produce one design can produce the other and that before it entered into this private agreement it successfully competed on the basis

of the specified design. Moreover, the record indicates that Bataco markets both the bayonet barb and the specified barb outside the United States, and that its competitors also produce both designs, although without marketing restrictions. Consequently, we do not believe that a procuring agency is obliged to broaden competition simply because the protester, otherwise fully capable of producing the specified item, has entered into a private business arrangement that restricts its ability to furnish the specified item and would prefer to market another item. Stated differently, the sale of one's right to produce the specified design to one's competitor has little to do with the question whether the specification itself is restrictive.

Moreover, the records show that DCSC has a reasonable basis for distinguishing between the two designs. According to the engineering support activity responsible for the development of barbed tape, the U.S. Army Mobility Equipment Research and Development Command, only the specified design has been field tested and, based on this testing, the specified barbed tape is the most effective design for the application intended here, movable concertinas. They report that deterrence in this application is accomplished by snagging an intruder's clothing and that both the shape and the spacing of the barbs on the specified tape are optimum for this purpose. Further, the agency believes that the shorter barbs on the specified design are less likely to entangle other barbs when the concertina is being put in place or removed. Accordingly, even though the two designs may appear similar, DCSC has a valid basis for designating the specified design as its minimum requirement, to the exclusion of alternate designs which have not been shown to have equal deterrent capability.

Bataco is unable to identify any field testing or other thorough evaluation to substantiate its claim that its alternate is equal to the specified barbed tape. Instead, it relies upon the arguments that DCSC previously procured bayonet barbed tape in concertina form and that the barb on the bayonet barbed tape is similar to the barb on general purpose barbed tape obstacle (GPBTO), only smaller in scale.

DCSC replies that it procured bayonet type barbed tape, concertina, just one time, for reasons of urgency when its stocks were exhausted, and that it has since reviewed its needs and reconfirmed the specified barbed tape as representing the government's minimum needs. As to

the similarity in the shape of the barb on bayonet barbed tape and GPBTO, DCSC points out that GPBTO is a much larger, heavier type of barbed tape used primarily in fixed installations and that it operates on a different principle of deterrence, i.e., piercing limbs as opposed to snagging clothes. Consequently, DCSC does not agree that the shape of the barb on GPBTO is relevant to the design of the barb for concertina barbed tape. In these circumstances, we do not believe that Bataco has met its burden of presenting clear and convincing evidence that the agency's judgment is in error and that a contract awarded on the basis of the specification would unduly restrict competition. Bowne Time Sharing, Inc., supra.

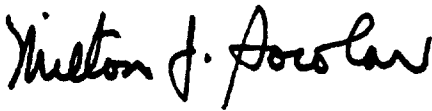
Further, we do not agree with Bataco's contention that DCSC is obliged to test Bataco's alternate design in order to broaden competition. Here, the specified barbed tape could be produced by any firm capable of producing barbed tape; in fact, Bataco itself has supplied the specified barbed tape to DCSC under prior contracts. Its agreement not to compete aside, Bataco remains fully capable of producing the specified barbed tape and it did in fact submit a bid on that basis. As stated previously, the only restriction on competition is Bataco's private agreement not to compete, not the DCSC specification, and any testing of the alternate design should be at Bataco's expense. See Castoleum Corporation, supra.

Finally, Bataco contends that the specification is defective because it does not adequately reflect the government's minimum needs. In this regard, Bataco argues that the specified type of paint is inappropriate because it will chalk when exposed to the weather and that the rolls of barbed tape should be painted after the rolls are compressed for transport, rather than before as specified, in order to avoid scratching the paint during compression. Bataco also complains that because salt spray testing is required for each lot shipped, the amount of testing required is not fixed since the size of the shipping lots can vary.

DCSC replies that while the specified paint may chalk slightly, it believes the paint is suitable for its intended use. DCSC also advises that painting before compaction is required because it would not be possible to achieve full paint coverage after the coils are tightly compressed. With regard to salt spray testing, DCSC advises that it desires testing of each lot submitted for inspection, which may or may not be the same number of items as contained in a shipment.

Here, Bataco has not alleged that the specification is restrictive with respect to these requirements, or that it is ambiguous, or that the work itself is unnecessary; rather, Bataco simply argues that, in its judgment, there are better methods for accomplishing these objectives. It is the contracting agencies, however, that must determine the needs of the government and the methods of best accommodating those needs. Maremont Corporation, supra. In other words, what the protester objects to is within the decision making function of the agency and is not subject to the type of objection raised by Bataco.

The protest is denied.

for 
Comptroller General
of the United States