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

FILE: B-215032 **DATE:** July 5, 1984

MATTER OF: E.A.R., Division of Cabot Corporation

DIGEST:

1. GAO will not question an affirmative determination of responsibility absent a showing that the contracting agency acted fraudulently or in bad faith, an allegation not raised here, or that definitive responsibility criteria in the solicitation were not met. Assuming that the required submission of pre-award samples demonstrating conformity with a particular military specification constituted such a criterion, and therefore was a prerequisite to award, the record shows that the awardee in fact met that criterion by furnishing conforming samples.

2. Protests alleging infringement of patent rights are not for GAO's consideration, since the law provides that the patent holder's exclusive remedy for any potential infringement resulting from performance under a government contract awarded to another firm is by a suit in the United States Claims Court against the government for money damages.

E.A.R., Division of Cabot Corporation, protests the award of a contract to Plasmed, Inc. under invitation for bids (IFB) No. DLA120-84-B-0114, issued by the Defense Personnel Support Center (DPSC) for the acquisition of 8.4 million pairs of hearing protection earplugs. E.A.R. complains that the product furnished by Plasmed may not comply with specification requirements, and further alleges that Plasmed might be infringing the firm's patent. We deny the protest in part and dismiss it in part.

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The IFB informed bidders that the earplugs desired were to be produced in accordance with Military Specification MIL-P-37407A (January 5, 1977), incorporated by reference into the solicitation. Section M, clause 22 of the IFB provided that any offeror who had previously furnished its product to the government would be required to furnish samples for testing, and an analysis that demonstrated conformity with the specifications concerning test results and material and design characteristics. The stated purpose for the samples was to establish the bidder's capability, if awarded the contract, to produce conforming items.

Two bids, those of Plasmed and E.A.R., were received in response to the IFB, with Plasmed the apparent low bidder. Plasmed submitted its pre-award samples as requested. DPSC determined that the samples were acceptable, after noting certain deficiencies relating to packaging and the lack of enclosed instructions. With the condition that these deficiencies be corrected during production, DPSC awarded the contract to Plasmed.

E.A.R. contends that Plasmed's pre-award samples did not sufficiently indicate that the production items would be furnished in accordance with the Military Specification. In this regard, E.A.R. alleges that Plasmed's earplugs may be manufactured of polyurethane, rather than of "vinyl plastic foam" as required by clause 3.1 of the specification. Additionally, E.A.R. complains that the skin sensitivity or insult patch test conducted on Plasmed's product to assure a negative allergic or dermatological reaction in users of the product was not performed with the same thoroughness as the test performed on E.A.R.'s product under an earlier Department of Defense procurement, and points out that no military facility has been given the opportunity to evaluate Plasmed's product. E.A.R. states that DPSC has denied its request to obtain Plasmed's samples so that it can conduct its own evaluation. Lastly, E.A.R. alleges that Plasmed might infringe E.A.R.'s patent in its attempt to furnish a product conforming to the Military Specification. We find no merit to the protest.

The sample requirement clearly related, by its terms, to a bidder's responsibility, that is, the firm's ability to meet the contractual obligation. See Mark II, Inc., B-203694, Feb. 8, 1982, 82-1 CPD ¶ 104. Based upon an evaluation of Plasmed's pre-award samples and related analysis data, DPSC has made a determination that the firm is capable of furnishing its offered

product in full compliance with the requirements of the solicitation. This Office will not question such an affirmative determination of responsibility absent a showing that the contracting officer acted fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met. Sargent & Greenleaf, Inc., B-212701, Oct. 20, 1983, 83-2 CPD ¶ 470. Definitive responsibility criteria involve specific and objective special standards of responsibility, compliance with which is a necessary prerequisite to award. See Power Systems, B-210032, Aug. 23, 1983, 83-2 CPD ¶ 232. Fraud or bad faith has not been alleged here. Assuming that the submission of preaward samples conforming to the Military Specification constitutes a definitive responsibility criterion, the record clearly shows that Plasmed in fact met that criterion.

When it submitted the samples, Plasmed represented the composition of the material as polyvinyl chloride, and DPSC's own laboratory test report states that the "sample earplugs appear to be fabricated from vinyl plastic foam." The testing officer therefore concluded that Plasmed's product complied with clause 3.1 of the specification. (The samples also complied with the requirements for compression recovery, sound attenuation, and workmanship, none of which are at issue here.) Two requirements that Plasmed's samples did not meet were those relating to individual and unit packaging and the enclosure of instructions for use. DPSC, however, determined that these deficiencies were only minor ones that did not affect Plasmed's apparent capability to furnish the earplugs as specified. The protester has the burden of proof, and we see nothing in the record that supports E.A.R.'s assertion that Plasmed's product is made of nonconforming material.

E.A.R. believes that the skin sensitivity test conducted on Plasmed's product, which utilized 10 human subjects over a period of 3 days, in no way approaches the extensive testing conducted on E.A.R.'s product under an earlier Department of Defense procurement. E.A.R. points out that that test was much more thorough, involving 200 subjects over a period of 10 days. E.A.R. essentially argues that the testing conducted on Plasmed's product does not serve to establish conclusively that the firm's product will not cause adverse allergic or dermatological reactions, and regards DPSC's acceptance of such allegedly limited test results as fundamentally unfair.

Plasmed furnished the test result as part of the analysis data accompanying its pre-award samples, even though neither the IFB nor the Military Specification contained an express requirement for skin sensitivity test results. As DPSC states, the test was performed in accordance with the procedures required under a related Military Specification for earplugs. Plasmed's test result was favorable, and we see no prejudice occasioned to E.A.R. simply because Plasmed's testing method might have employed fewer subjects over a shorter period of time. Nothing indicates that a more extensive test would have revealed adverse reactions in the use of the earplugs.

Regarding E.A.R.'s complaint that no military facility has evaluated Plasmed's product, DPSC states that the specification is not new to the military, and therefore that field testing is not necessary, given the existing evaluative procedures under the IFB. As to E.A.R.'s requests to obtain Plasmed's pre-award samples in order to conduct its own evaluation, DPSC states that it is the agency's responsibility, not a competing bidder's, to assure compliance with specification requirements. We have no basis to dispute the agency on the first point, and we concur with DPSC on the second. In this respect, we also point out that whether Plasmed actually furnishes complying earplugs is a matter for consideration by DPSC, not our Office, in administering the contract, and does not affect the validity of the award. Tenavision, Inc., B-209261, Dec. 15, 1982, 82-2 CPD ¶ 533.

E.A.R. further alleges that Plasmed might infringe the firm's patent in developing earplugs to meet the Military Specification and indicates that it is considering legal action. The issue is not encompassed within our bid protest function, and is accordingly dismissed. A patent holder's exclusive remedy for any potential infringement of its patent rights resulting from performance under a government contract awarded to another firm is by a suit in the United States Claims Court against the government for money damages. 28 U.S.C. § 1498 (1982); see Environmental Container Systems, Inc., B-201739, Feb. 9, 1981, 81-1 CPD ¶ 83; Nautel Maine, Inc., B-186326, May 4, 1976, 76-1 CPD ¶ 301.

The protest is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States