

DECISION

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

FILE: B-216484.2 **DATE:** March 12, 1985

MATTER OF: Heckler & Koch, Inc.

DIGEST:

1. "Request for technical samples" (RFTS)² informed potential offerors that a request for proposals (RFP) might be issued before testing was completed and indicated that a firm could be rejected on the basis of test results even after submitting a proposal under the RFP. Therefore, there is no impropriety in elimination of the protester from competition, 4 months after the RFP was issued, based on tests initiated under the RFTS.
2. Protest of the testing and evaluation of a firm's sample weapons is denied where the record shows that the testing and evaluation were performed according to criteria established by the RFP.
3. GAO is not the proper forum for appeal of an agency's refusal to release test and evaluation data to the protester. The protester's recourse is to pursue the disclosure remedies provided by the Freedom of Information Act.

Heckler & Koch, Inc. (H&K), protests the rejection of its proposal by the Department of the Army under request for proposals (RFP) No. DAAA09-84-R-8605 for 9-millimeter (mm) handguns. We deny the protest.

The solicitation was issued to procure a single 9mm "Personal Defense Weapon" to replace the M1911A1 .45-caliber pistol and various .38-caliber pistols currently in use. Issuance of the RFP was preceded by a test program conducted on sample weapons submitted in response to a "request for technical samples" (RFTS). Testing was still going on when the RFP was issued, and H&K's weapons were not rejected until after it had already submitted its technical proposal in response to the RFP.

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The RFTS invited interested firms to submit weapons for testing to determine if they conformed to specified characteristics. These characteristics were divided into four categories. The RFTS informed participants that if their sample weapons failed to meet the mandatory characteristics in categories 1 through 3, the weapons would be eliminated from further consideration. The weapons submitted by H&K did not meet two of the mandatory characteristics in category 2. These were corrosion resistance and reliability. H&K contends that the Army's rejection of its proposal based on the results of the corrosion resistance and reliability tests was untimely and improper.

Timeliness of H&K's Elimination
from Competition

H&K contends that the decision to eliminate it from the competition was taken at "an untimely moment" because it occurred more than 4 months after the RFP was issued and less than 1 week before price proposals were due, causing H&K to incur virtually all the expenses of proposal preparation. H&K also argues that the rejection of its price proposal prior to the price evaluation eliminated price competition. We find no merit to these arguments.

As noted above, the RFTS warned that a weapon's failure to meet mandatory characteristics would result in elimination from the competition. Further, the cover letter to the RFTS specifically stated:

"It is possible that the procurement action will be issued prior to completion of testing. In that event, the solicitation will be limited to those offerors whose weapons have not been eliminated from testing. If an offeror's weapon is subsequently eliminated from consideration, the offeror will be informed as soon as possible . . ."

Thus, H&K was clearly on notice that it could be eliminated from consideration on the basis of test results even after submitting a proposal under the RFP. If H&K considered this improper, it was required to protest no later than the due date for receipt of technical samples, which it did not do. See 4 C.F.R. § 21.2(b)(1) (1984). In addition, there is nothing in the record which suggests that the Army did not inform H&K of its elimination from

the competition as soon as possible after the pertinent test results were available. Therefore, we find no merit to H&K's assertion that the Army acted improperly by eliminating H&K from consideration after it incurred substantial proposal preparation costs.

Concerning H&K's contention that the rejection of its proposal prior to the price evaluation eliminated price competition, a proposal which is unacceptable from a technical standpoint cannot be considered for award and is of no value to the government regardless of price. See Duroyd Manufacturing Co., Inc., B-195762, Nov. 16, 1979, 79-2 CPD ¶ 359. Since the Army considered H&K's weapons unacceptable because they did not meet two mandatory requirements, the rejection of H&K's proposal prior to the price evaluation was proper.

Testing and Evaluation

H&K argues that the Army's testing and evaluation of its sample weapons was improper for several reasons. First, H&K asserts that the rejection of its weapons on the basis of corrosion and stoppages without parts damage or breakage was improper because these defects are easily correctable and do not affect the final cost to the government.

Concerning corrosion, the RFTS contained the following mandatory category 2 requirement: "The weapon must be designed to be corrosion-resistant under operational conditions to include complete salt water immersion comparable to the M1911A1 pistol." The test summary contained in the RFTS provided that the salt water immersion test would be conducted as follows:

". . . The weapons with safety on and with a fully loaded magazine inserted and 2 additional loaded magazines are submerged for 60 seconds into a defined salt water solution. After removal and draining of solution from the bore, all rounds are fired. Subsequently, a 10 day temperature-humidity test cycle subjects the same pistols and empty magazines to various combinations of 21 to 40 degrees C temperatures and 90 to 95% relative

humidity. In the third, fifth, eighth and tenth days a full complement of unconditioned ammunition will be fired for functioning."

The results of the salt water immersion test showed that the mean rounds between stoppages were 105 for the tested M1911A1s and 7.1 for H&K's tested weapons. After an analysis of the test data, the Army concluded that based on a statistical comparison, the protester's weapons exhibited a significantly higher malfunction rate than the M1911A1 and, therefore, were not comparable to the M1911A1 in corrosion resistance.

The RFTS also contained a mandatory category 2 requirement for reliability. This requirement provided that:

"When using 9mm NATO ammunition per STANAG 4090, the Reliability of the System over its service life will be superior to the .45 caliber pistol currently in Army stocks [the M1911A1]; however, the desired value is 495 Mean Rounds Between Operational Mission Failure. This allows a 98% probability of successfully firing a 10-round magazine. An operational mission failure is defined as any malfunction which results, or would result in any one or a combination of the following:

"(1) Cessation in weapon operation requiring corrective action.

"(2) Inability to commence or cease a mode of operation."

The test summary contained the following information concerning reliability testing:

"The most exhaustive test in the entire program is endurance . . . [E]ndurance establishes the reliability (mean rounds between operational mission failures) and durability (service life) information. . . . The endurance test is structured around 7 weapons each firing a total of 3,500

rounds and thereafter 3 randomly pre-selected weapons continuing through 7,000 total rounds fired. . . ."

The results of the endurance test showed that the mean rounds between operational mission failure were 162 for the tested M1911A1s and 158 for H&K's tested weapons. After statistically analyzing the data, the Army concluded that H&K's weapons were not superior to the M1911A1.

Based on the above, it is clear that H&K's weapons were eliminated from the competition in accordance with criteria set forth in the RFTS, that these criteria provided for rejection of weapons based on corrosion and stoppages, and that the RFTS clearly allowed for such rejection even where there was no parts damage or breakage. Accordingly, there is no merit to H&K's assertion that rejection of its weapon based on corrosion and stoppages was improper.

Moreover, as the Army points out, the protester was on notice that failure to comply with category 2 requirements could not be corrected. The cover letter to the RFTS stated that "failure to meet requirements in some categories will result in the weapon being dropped from further testing." This was clarified during a technical conference held to discuss a draft version of the RFTS, which had been furnished to the industry for comment.^{1/} During the conference, one question was whether offerors had until the end of the category 2 testing cycle to adhere to the category 2 characteristics and whether offerors could change their weapons after submission to bring the test samples within the specified requirements. The government answered that no such changes would be authorized under any circumstances.

Accordingly, H&K chose to undergo the RFTS testing procedures knowing that failure to meet category 2 requirements could not be corrected. It therefore waived its

^{1/}H&K attended the technical conference and received a copy of a letter from the contracting officer containing all questions and answers discussed there.

right to object to that procedure. See Cadillac Gage Co., B-209102, July 15, 1983, 83-2 CPD ¶ 96.

H&K also questions the degree of randomness employed in selecting the three weapons retained in the endurance test after completion of the initial phase of the test (which involved firing seven weapons for a total of 3,500 rounds each). The Army states that it arbitrarily chose the three weapons tested to 7,000 rounds from the seven selected for the first phase of the test. The agency emphasizes that this methodology had been explained to offerors during the technical conference when the agency was asked to define the term "randomly pre-selected" as used in the RFTS explanation of the endurance test.

The record shows that offerors were informed that the three weapons to be retained in the endurance test after firing 3,500 rounds would be arbitrarily chosen from among the original seven, and that this would be done before the endurance test began. Nothing in the record suggests that the selection was not conducted as described in the conference. Further, there is no evidence that H&K complained of this approach to randomly preselecting the weapons at any time prior to the testing, and it is not entitled to do so after participating in the testing without complaint. Id. Accordingly, we find no merit to this basis of protest.

H&K argues that its weapons reflect a new technology and, therefore, that they should not have been tested in the exact same way as the "other old technology contestants." The testing procedures used by the Army were set forth in the RFTS and further clarified during the technical conference. Again, if H&K considered these procedures inadequate, it was required to protest before participating in the tests and is not entitled to protest now.

H&K also contends that as part of the salt water immersion test, a "null set test" should have been performed between all offerors' sample weapons. We are unclear as to what the protester means by a null set test between all sample weapons in the context of this procurement. The RFTS clearly provided for testing of each offeror's sample weapons in comparison with the M1911A1 control weapons. The RFTS clearly did not contemplate that the offerors' weapons would be tested against one another.

The purpose of the salt water immersion test was not to determine which weapon was best, but rather to determine whether the sample weapon met a minimum performance standard established by the M1911A1 control weapon. Therefore, a "null set test" between all candidate weapons was not relevant to the purposes of the salt water immersion test, and there was no necessity for the Army to conduct one.

H&K emphasizes that its weapons have passed previous Army corrosion resistance tests, and that the samples delivered for testing under the RFTS were factory tested through 10,000 rounds and performed satisfactorily. H&K also notes that the same model weapon has been satisfactorily tested by the Federal Armed Forces of Germany and is used by the German police and border patrol under conditions including exposure to salt water. It states that the same weapons are used by the New Jersey state police, who tested the weapons using procedures obtained from the Army.

The mere fact that H&K's weapons were considered acceptable under prior procurements does not establish that the Army's rejection of the weapons was unreasonable under the facts and circumstances of the present procurement. See Ensign-Bickford Co., B-211790, Apr. 18, 1984, 84-1 CPD ¶ 439. Similarly, the fact that the weapons performed satisfactorily during factory testing does not invalidate the results of later tests conducted under different conditions. We therefore find no merit to H&K's contentions in this regard.

H&K asserts that its own evaluation of all competitors shows that no offeror can meet all category 2 requirements. It argues that, as a result, all offerors should be eliminated from the competition.

The Army states that some competitors did in fact meet all of the category 2 requirements. It asserts that the protester's alleged evaluation of the other offerors' weapons is irrelevant since it was outside the test program established by the RFTS. We agree. H&K's own evaluation of its competitors' weapons was not conducted on the same weapons or under the same conditions as the Army tests and must be viewed as at least potentially self-serving. Therefore, H&K's testing results provide no basis for concluding that the Army's test results are invalid.

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Refusal to Release Test Data

The Army has refused to release any of the test and evaluation data to H&K. The firm protests this refusal and complains that another participant in the competition was given this information.

The Army asserts that the test and evaluation data are not releasable since they relate to an ongoing negotiated procurement. See Federal Acquisition Regulation, 48 C.F.R. § 15.413 (1984). The Army states that such information has not been released to any competitor, although, pursuant to a court order, one competitor was permitted to examine its weapons after testing.

We have consistently honored agency-imposed restrictions on documents since the documents are those of the agency, not GAO. JGMA Development Corp., B-200754, Mar. 30, 1981, 81-1 CPD ¶ 234. Therefore, GAO is not the proper forum for appeal of the Army's refusal to release the test results to H&K. Its recourse is to pursue the disclosure remedies provided by the Freedom of Information Act, 5 U.S.C. § 552 (1982). A-B Emblem, B-209634, Apr. 8, 1983, 83-1 CPD ¶ 375.

Conclusion

We find no merit to any of the allegations raised by H&K's protest. The protest therefore is denied.

Harry R. Van Cleve
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General Counsel