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DECISION



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

FILE: B-220237.2 **DATE:** December 20, 1985
MATTER OF: Ballantine Laboratories, Inc.

DIGEST:

1. GAO denies protest where the protester offered an alternate product in lieu of the approved source item specified in the solicitation and, as a result, was not considered for the award because the alternate could not be analyzed and approved in time. The solicitation notified all offerors that the length of time needed to approve an alternate product could prevent consideration for the current contract award.
2. Fact that an agency's procedure for approving alternate products takes more time than protester believes is necessary does not indicate that the procedure lacks a reasonable basis.
3. Where protester's offered alternate product was previously approved under another company's name, but protester failed to point this out in its offer, agency properly rejected protester's offer.

Ballantine Labs, Inc., protest the award of a contract to Tektronix, Inc., under request for proposals (RFP) DLA900-84-R-1668 issued by the Defense Electronics Supply Center (DESC), Defense Logistics Agency (DLA), Dayton, Ohio. Ballantine states that DLA should not have rejected the alternate product it offered because first article testing was not required by the solicitation and, in any event, its product had first article approval.

For the reasons which follow we deny the protest.

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The RFP was issued on April 11, 1984, for replacement spares of a certain test lead. The RFP described the item as follows:

"NSN 6525-01-040-0714
Test Lead
Tektronix (80009)) P/N 010-6105-03."

This test lead is used with certain Tektronix oscilloscopes for testing and adjustment of numerous types of military electronic equipment. The Tektronix item was specified as the required item of supply because the Tektronix (the original equipment manufacturer) part number for the item was the only description available which adequately described the government's requirements.

The solicitation, however, did provide for the submission of alternate items. Provision H-2, "Products Offered" clause, permitted firms to offer alternate items that were either identical to or physically, mechanically, electrically, and functionally interchangeable with the Tektronix test lead. Offerors were required to furnish all of the necessary information and data to establish that the alternate product offered was equal to the Tektronix test lead. If the product offered had previously been furnished to the government or otherwise previously evaluated and approved, the offeror was to indicate the contract and/or solicitation number under which the product was furnished or approved. Finally, the clause warned offerors proposing alternate items:

"Failure to furnish complete data and information required to sufficiently establish acceptability of the product offered may preclude consideration of the offer. In addition, offerors are hereby advised that the Government will make every reasonable effort to determine, prior to award, the acceptability of any products offered which are within the range of consideration. However, if such determination cannot be accomplished by the expected contract award date, the products may be considered technically unacceptable for this award. . . ."

Ballantine offered its Model 10662A MOD 115 test lead by the May 11 due date. Ballantine states that it repeatedly inquired with DESC as to the status of the solicitation, but received no information. On September 12, 1985, more than a year later, Ballantine was notified by DESC that its offer was not eligible for award "because

technical requirements have been revised to require First Article Testing of all alternate offers." An award was made to Tektronix for 1,332 test leads at a unit price of \$58.59. Ballantine's unit price offer for that quantity was \$57.75.

Ballantine protests that the solicitation did not require first article testing. Moreover, Ballantine contends that the contracting officer should have informed it of the first article test requirement. Because he did not do so, Ballantine asserts that it lost the opportunity to show DESC that its item had indeed received first article approval.

The RFP did not provide for first article testing. The DLA explains that in the past, this test lead had been procured on a sole-source basis from Tektronix, but more recently had been purchased competitively under a data package which was developed around the approved Tektronix item. This competitive data package not only contained the technical criteria that had to be met, but also included a first article testing requirement. The testing was to assure that the test leads were compatible with the oscilloscopes. This was critical since any deficiencies in test leads furnished by alternate sources could result in erroneous oscilloscope readings.

As a result of previous competitive procurements which had incorporated the first article data package, Avex Electronix Corp. (Avex) and Hickok Electrical Instruments (Hickok) had become approved sources for the test lead. However, prior to this procurement, the competitive data package was canceled because the Navy determined that it had been developed from Tektronix data which the government neither owned nor had the rights to utilize.

Six firms submitted proposals; four of them offered alternate items of their own manufacture. After receipt of proposals, the Navy determined that before alternate items could be considered acceptable, the offerors of such items would have to agree to submit first article samples for testing and approval. The Navy took this position because of the prior cancellation of the data package. The offered product and technical information submitted with Ballantine's proposal did not demonstrate to the Navy that Ballantine's alternate product was acceptable absent first article testing. Since provision for first article testing was not included in the RFP, the Navy decided to delay taking action under the RFP in order to await the development of a ongoing attempt to develop a military specifica-

In May 1985, however, the contracting officer received notice that to timely meet the users' needs, because of declining stock levels, he would have to make an award under the RFP. The Navy projected that if procurement action was delayed, the item would be out of stock for 6 months. This projection was based on the fact that it would be another 6 months before the military specification, which would contain time consuming first article testing for nonapproved sources, could be finalized. The award to Tektronix followed.

Our Office has recognized that, in appropriate circumstances, the procurement of items on a source-controlled basis is permitted. JGB Enterprises, Inc., B-218430, Apr. 26, 1985, 85-1 C.P.D. ¶ 479. Contracting agencies have considerable discretion in the establishment of testing procedures and in the absence of a showing that the agency's actions lack a reasonable basis, we will not substitute our judgment for that of the agency. T.G.L. Rubber Co., Ltd. B-206923, Sept. 20, 1982, 82-2 C.P.D. ¶ 239. However, we have also held that the authority to solicit from an approved source does not preclude the submission and consideration of proposals from unapproved sources that can otherwise qualify their products under suitable testing procedures. Hill Industries, B-210093, July 5, 1983, 83-2 C.P.D. ¶ 59.

Although this solicitation did not contain a first article test provision, it clearly warned offerors that while the government would make every reasonable effort to determine the acceptability of products offered which are within the range of consideration, if such determination could not be timely made, the product might be considered technically unacceptable. We have held that where standardized performance testing criteria have yet to be developed and the agency cannot evaluate the alternate item until such criteria are developed, the contracting officer's rejection of the item is not improper. Compressor Engineering Corp., B-206879, Oct. 29, 1982, 82-2 C.P.D. ¶ 383.

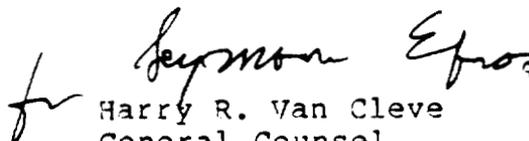
With respect to Ballantine's argument that its product, which it supplied to Hickok under the prior contract, has been approved under first article testing, the Navy points out that the item submitted by Hickok received first article approval on March 23, 1984, more than 1 month prior to the submission of Ballantine's proposal, but that Ballantine did not indicate in its proposal that its Model 10662A MOD 115 was the item which was submitted by Hickok for first article approval. As indicated above, the solicitation places the burden on the offeror to show that its alternate item is

approved. Since Ballantine did not point out that its test lead was the same as the Hickok item, the Navy had no way of knowing that Ballantine's item had received first article approval.

Finally, we accept the Navy's explanation of the long delay in conducting this procurement. From the inception of this procurement, the Navy was attempting to qualify more offerors and, thus, broaden competition. During that time the new military specification had not been developed, so the standards or any first article tests required for approving products from nonapproved sources had not been established. It was only when the Navy's inventory position became critical that the Navy made an award based on the information before it as to which offerors had first article approval. In this case since the RFP clearly required offerors which proposed alternate products to furnish data on these products, we do not think it was unreasonable for the Navy to rely on the information which Ballantine itself had submitted that did not show its product had been previously furnished and approved. Thus, even though the protester complains that the Navy never queried it about its product during this lengthy period, we think that under these circumstances the Navy had no duty to communicate with Ballantine regarding first article testing and product approval requirements.

We note that the Navy is presently considering the information submitted by Ballantine as part of its protest that the Ballantine test lead was one which was approved by the Navy under the Hickok first article contract. The Navy states that its review of this information will determine whether Ballantine will be eligible for a waiver of first article test requirements under future procurements.

The protest is denied.


for Harry R. Van Cleve
General Counsel