The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cheshire/Xerox; Miller/Bevco; Automecha, Ltd.

File: B-226939; B-226939.2; B-226939.3; B-227252

Date: August 31, 1987

DIGEST

1. Contracting officer's decision that item which protester proposed to supply did not meet request for proposals "commercial product" requirement was not unreasonable where record supports contracting officer's conclusion that proposed model, which had no commercial history, was not a "successor" to a product having an admitted commercial history since original product was made by third party, and not protester, and there is no indication that original manufacturer has authorized protester to represent proposed model as successor to original model.

2. Protesters are not interested parties for purpose of objecting to award to another, where neither protester would be eligible for award even if its protest was sustained.

3. Where from evidence it is clear that imprint of purported time and date of receipt of awardee's response to solicitation amendment was caused by contracting agency error, response may be considered since evidence otherwise shows that response to amendment was timely received.

4. Although manual for self-installation of label affixing machines initially submitted by successful offeror may have been "hard to follow" without formal training in the machine's use, in view of fact that this circumstance did not exclude the possibility of self-installation of a machine which the contracting agency describes as "extremely simple to assemble," agency's acceptance of awardee's proposal as technically acceptable does not appear unreasonable.

5. Where record shows that awardee's proposed machine was thoroughly tested before award, General Accounting Office has no basis to question contracting agency's position that machine complies with solicitation's operational requirements.

6. Allegation that solicitation was deficient for failing to require that offeror's machines to be used in live test demonstration be shipped directly from factory to demonstration site, presumably to preclude special preparation of the machine by a dealer, involves apparent solicitation defect which was not made subject of timely protest and, hence, will not be considered.

7. Record does not substantiate protester's allegation that contracting officer was either biased toward awardee or incompetent in evaluation.

DECISION

Cheshire/Xerox (C/X), Miller/Bevco (MB) and Automecha, Ltd., have protested the award of a contract to Scriptomatic, Inc., under United States Department of Agriculture (USDA) request for proposals (RFP) No. ASCS-R-105-87DC which was issued on January 5, 1987, for an indefinite quantity of "label affixer machines" to be supplied on a fixed-price basis to the Agricultural Stabilization and Conservation Service county offices around the country. The office machines being purchased are electrically-operated, table-top models which peel adhesive-backed labels from a paper carrier and affix them to various-sized documents and envelopes.

The RFP provided that the contracting officer would consider all evaluations, recommendations and test results provided and make award to the "lowest-price, responsive, responsible offeror" who met the government's needs, "cost and other factors considered." The RFP also provided for the submission and evaluation of technical and "cost" proposals. Technical proposals were to be evaluated to determine whether they offered to comply with all mandatory specifications. That item offered in the lowest-priced technical proposal which offered to meet all mandatory specifications was then to be subjected to a test demonstration to finally determine whether it met all the mandatory requirements.

USDA was to "provide an individual" who, after being trained by the offeror, was to conduct the demonstration "independent" of the offeror. If USDA determined that the offeror failed to meet any mandatory requirements at the test, the offeror was to be given 7 days to correct the deficiency under a retest of the demonstration. If the offeror then failed to pass the demonstration, the proposal would be excluded and that item to be furnished under the "second most advantageous" offer was to be selected for testing. As to the "cost" proposal, offerors were directed to submit "costs" (actual prices) for the machines as well as "contractor installation and training."

USDA reports that five proposals were received including those from the protesters and Scriptomatic. Several offerors submitted "alternate" proposals in which they suggested that the government could save money if it and not the contractor conducted the training. USDA concluded that the cost savings of the alternate proposals justified further consideration. Therefore, amendment A04, which allowed for alternate proposals based upon USDA installation and training, was issued on February 10, 1987. The amendment also stated that the offeror selected for participation in the test would be that offeror who proposed the lowest-priced, technically acceptable, responsive offer and that in order for a user installation and training proposal to be considered the offeror was to provide a detailed user installation and training manual which would be the subject of a technical evaluation. The amendment further stated that if a user installation and training proposal was accepted, the test would be conducted without offeror participation as the offeror was only to observe the test.

The contracting officer reports that all revisions to technical proposals received in response to amendment A04 on February 25, 1987, were evaluated and found by the technical evaluation team to comply with the mandatory specifications.

On March 13, 1987, C/X was chosen for the test as the lowest-priced, technically acceptable offeror. It was at this point, USDA explains, that USDA was informed by Rena Systems, Inc., that C/X's proposed model 763 should not be considered to be in compliance with other provisions of amendment A04 requiring information concerning "past history of volume sales" of the proposed model because C/X had not manufactured or sold the C/X model 763 in the commercial market. Rena went on to explain that it was the actual manufacturer of a prior machine which C/X marketed as the C/X model 762. Subsequently, a representative of C/X confirmed the allegation that the C/X model 762 had been manufactured by Rena for C/X. However, the C/X representative claimed that the commerciality of the C/X 762 (known also in the trade, according to USDA, as the Rena L325)1/ could be ascribed to the CX 763 even though C/X had not manufactured the C/X 762. USDA states that it did not consider the C/X 763 to be a commercial product and that without proof of commerciality USDA could not consider the C/X 763 for award.

1/ The Rena L325, which is manufactured in West Germany, was offered by MB, whose protest is discussed below.

USDA then decided that an amendment "clearly requiring commerciality" would be issued. On March 25, 1987, amendment No. A05 was issued, which made a number of additional substantive changes to the RFP including a revision of the commercial product clause to read:

> "M.3.2.1 COMMERCIAL PRODUCT
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> In order for a product to be considered for award the product must be sold or traded to the general public in the course of normal business operations. Furthermore, this product must be either a commercial product or the successor to a product that has a history of sales and performance which support the reliability of the product as tested in the commercial market place. In order for a product to be considered the successor to a previously manufactured product the successor product must have the same basic design and construction, i.e. a model upgrade. The data required by Amendment A04 will be evaluated to determine that the product offered is a 'Commercial Product.' Offers which propose equipment which is not a commercial product will not be considered for award."

The amendment also provided:

> "All proposed equipment must be UL [Underwriters Laboratories] or equivalent approved. Offerors proposing equipment to meet the requirements of this Request for Proposals must provide proof of this independent testing and certification."

C/X responded to the amendment without protest. USDA says that C/X did not provide any evidence that its model 763 had commercial sales that would support a claim of commerciality in compliance with amendment No. A05. In a letter accompanying its signed amendment, C/X asserted that its product was a commercial product and that it was a successor product to the "762 which C/X had marketed." However, it was USDA's position that the "commercial reliability of a product designed, engineered and manufactured by one company [Rena] cannot be ascribed to a product designed, engineered and manufactured by another company [C/X]."

After finding C/X's proposal to be unacceptable for this reason, USDA then tested the proposed model of Scriptomatic, the next lowest-priced offeror, and found it to be acceptable. Once USDA announced its intention to award to Scriptomatic, these protests were filed.

C/X's Protest

C/X initially protested that USDA improperly rejected its offer because of C/X's alleged failure to comply with the commercial product requirements of the RFP. In supplemental protests filed with our Office (which essentially duplicate the contentions of the other two protesters), C/X protested the award to Scriptomatic on the bases that its product is not capable of user-installation as required by the RFP; that its unit cannot process the maximum size label required; that Scriptomatic's response to amendment No. A04 was received late; and that the manuals submitted by Scriptomatic were deficient.

It is C/X's position that USDA's rejection of C/X's offer was unreasonable because amendment No. A05 did not specifically require that the offered product and its predecessor be manufactured by the same company. Further, C/X argues, it "sold, serviced, advertised, and warehoused" the model 762, all of which shows that C/X's model 763 is "truly a successor to the 762" and therefore complies with the solicitation's commercial item requirements.

We will not disturb a contracting officer's discretionary decision concerning a commercial product requirement as long as there is evidence to support the determination. See Senstar Corp., B-225744, Apr. 2, 1987, 87-1 C.P.D. ¶ 373. C/X admits that its model 763 can qualify only as an alleged "successor" model to the 762. We think it is clear that the only "successor" product to be considered under the commercial product clause would be an authorized successor product of or authorized by the original manufacturer, and not a new product manufactured by a different company without authorization from the original manufacturer. C/X has not alleged nor shown that Rena, the original manufacturer of the product C/X marketed as its model 762, an item which has an admitted sales history, has ever authorized C/X to represent C/X's model No. 763 as a valid successor product to model 762. The only apparent relationship of the two products is that they are consecutively-numbered models which have been, or are now, marketed by the same firm. C/X has presented no evidence to establish that the two products are of "the same basic design and construction" as required by the RFP; in fact, drawings, photographs and manuals in the record suggest otherwise. Since the contracting officer reasonably considered C/X's proposed model 763 not to be a valid successor to its model 762, the proposal was properly excluded from award. C/X's protest is denied as to this ground.

Given this conclusion, we dismiss C/X's protest against the Scriptomatic award, since with C/X's proper exclusion from

consideration for award, the company no longer has the status of an interested party who can challenge the award. See Wilkinson Mfg. Co., B-225810, Mar. 23, 1987, 87-1 C.P.D. ¶ 333.

MB's and Automecha's Protests

The third and fourth-low offerors, MB and Automecha, respectively also have raised grounds of protest against the award to Scriptomatic. Specifically, the companies argue that Scriptomatic's response to amendment No. A04 was late, and, in any event, should have been considered unacceptable because the proposal did not contain a suitable response to the amendment's requirement that the offeror provide "detailed user installation and training manual(s)" in responding to the amendment. Finally, these two offerors contend that USDA's "live test demonstration" of the Sriptomatic machine was deficient in several respects.

USDA argues that MB's protest should be dismissed because MB would not be eligible for award, in USDA's view, even if its protest against the Scriptomatic award were to be upheld. As noted above, in amendment No. A05, USDA required that offerors proposing equipment to meet the requirements of the RFP were to provide proof of independent testing and certification from "UL or equivalent." Although MB was originally determined to be technically successful, USDA notes the only proof of this independent testing and certification was a letter from Rena, MB's West German supplier, indicating that the unit was tested and certified by Verein Deutscher Engineure e.V (VDE). USDA insists that VDE listing does not constitute proof of acceptable independent testing and certification since equipment manufactured to European standards can not operate in the United States without major modifications. Specifically, USDA notes that: (1) Europe operates on 220V/50 cycle power while the United States operates on 110V/60 cycle power, thus requiring a different motor or a transformer; (2) the standards that VDE would be testing against require nongrounding while the standards which UL test against require grounding; (3) the internal wiring requirements between United States and European standards are different because of the differences in the type of electrical power used.

In reply, MB argues that it was told by USDA's contracting officer that a "letter from MB's manufacturer clarifying U.L. or equivalent approval would be sufficient" and that it supplied the letter showing the model had VDE approval. Rena has recently informed us that, while its model supposedly complies with United States standards, VDE approval is not tantamount to UL's approval since it is true that a "unit meeting European Standards could not operate in

the United States without major modification"--thus VDE only tests to European standards which are not the same as United States standards. Further, MB and its manufacturer admit that the proposed model does not currently have UL or other acceptable approval. Given this admission, we conclude that MB's proposal was properly found not to be in compliance with this RFP requirement even though USDA failed to detect this deviation in USDA's proposal evaluation. Consequently, MB is not an interested party to protest the award to Scriptomatic, and its protest will not be considered.

If MB, by virtue of its failure to satisfy the solicitation requirement for UL or equivalent approval, is not for consideration for award, then Automecha, the fourth-low offeror, becomes next in line to Scriptomatic and is an interested party for the purpose of protesting the award to that firm.

In responding to Automecha's protest, USDA reports that the offerors were required to submit their responses to amendment No. A04 so that they arrived at the designated USDA location by 3:00 p.m., February 25, 1987. The Scriptomatic response showed an imprint from the USDA time stamp which read "1987 Feb 26 A12:12." USDA comments that it is reasonable to conclude that there was something wrong with the time stamp machine since the imprint shows that the response was stamped in at 12 minutes after midnight, a time when the contracting staff office is closed and mail deliveries are not made. Upon investigation, USDA has concluded that what happened was that the time stamp machine was improperly set and the error was not discovered until sometime later. Further, USDA states that while this improper setting does not provide evidence of when the amendment was actually received, it does explain how the amendment came to have the erroneous time stamp imprint. USDA has offered as "evidence" of the timely receipt of Scriptomatic's response to amendment No. A04 the abstract, dated February 25, 1987, signed by the contracting officer, and the express mail receipt which shows that delivery occurred on February 25, 1987, at 11:41 a.m.

In our view, USDA's explanation shows that the imprint was caused by USDA error in the process of receiving Scriptomatic's response to amendment No. A04 and in the absence of other evidence which would establish that it was received late, the response may be considered. See The Standard Products Co., B-215832, January 23, 1985, 85-1 C.P.D. ¶ 86.

Automecha also alleges that Scriptomatic failed to submit a "detailed installation and training manual." Scriptomatic's

response to amendment No. A04 contained the following statement concerning this requirement:

> "Attached are the operating instructions for the series 1000 labeling system, however, previously all installations have been done using either our own personnel or factory trained service personnel at our dealer base. Should the bid be accepted or progressed on the basis of government installation, Scriptomatic would like the opportunity of providing a more detailed user operating instructions manual, along with a simplified user maintenance book, to ensure efficient installation and basic operator maintenance."

USDA notes that, while Scriptomatic stated in its proposal that it was not furnishing a detailed manual, Scriptomatic did provide a manual that USDA's technical team determined to be acceptable, even though lacking in detailed information and hard to follow without formal training. Nevertheless, USDA argues, it would have been able to run the demonstration test with the original manual since the label affixer is considered to be an extremely simple machine to assemble, requiring no mechanical knowledge and little mechanical aptitude. USDA says this conclusion is supported by the lack of assembly instructions provided by any of the three protesters. MB provided no instructions on the assembly of its label affixer, only the offer to provide a VCR tape that explains installation. The only instruction provided by Automecha was that one should "assemble the unit [and] install the components from the accessory box." While Automecha did provide a VCR tape, this tape, along with the promised MB VCR tape, would have been useless as a practical matter since county offices do not have VCR machines or television sets at their disposal. C/X provided a single sheet of instructions that further attest, in USDA's view, to the simplicity of assembling a label affixer. The only other offeror, Data Card Corporation, provided similarly brief assembly instructions. Finally, USDA says that if it had considered the assembly of a label affixer to be a complicated operation, it would have had to consider all offerors "nonresponsive" to amendment No. A04 and issued another amendment requiring more detailed manuals. USDA says it did not do this because of its knowledge of the simplicity of the assembly of a label affixer machine.

We are persuaded by the agency's arguments. What constitutes a sufficiently "detailed" manual to satisfy its needs is primarily for the contracting agency to decide. Since it was possible to follow Scriptomatic's initial manual without formal training, we have no basis to question

the agency's assertion that the test demonstration could have been run by employees without formal training with Scriptomatic's manual as originally submitted. Thus, we deny this ground of protest.

Automecha further argues that: (1) the Scriptomatic model should have been clearly recognized as a dealer-installed, rather than a "self-installed" model; (2) Scriptomatic's model does not have a required maximum label height of three inches, and this fact shows Scriptomatic's model was inadequately tested; (3) the RFP's test demonstration procedure was deficient by not "requiring commercial shipment to the demonstration site"; and (4) USDA's contracting officer was biased in favor of Scriptomatic and was unqualified to make a technical evaluation.

On the question of "self," compared with "dealer," installation, USDA reports that the unit presented for the test was in the original shipping container with the factory-installed staples still in place. Two USDA employees, who had no previous experience with label affixers, removed the unit from the shipping container, assembled the unit, and operated the unit with no problems.

Automecha has not contested USDA's report of the above installation procedure. Nevertheless, Automecha insists that Scriptomatic's machine "cannot be installed by a customer" by virtue of Scriptomatic's corporate policy as evidenced by a statement printed on each of Scriptomatic's shipping containers to the effect that the machines are to be dealer-installed.

USDA points out that Scriptomatic has advised that the instructions were initially put on the containers entirely at the request of its dealerships, who wanted the opportunity to sell a maintenance agreement and solicit further business during the installation visit. In response to these protests, Scriptomatic provided a statement from its General Manager, British operations, that in the United Kingdom and in Europe Scriptomatic has successfully provided label affixers on a self-installation basis. It would appear, therefore, that the legend printed on Scriptomatic's shipping container has a commercial purpose other than as to who should perform the installation. In any event, Automecha has not contradicted USDA's statement that the Scriptomatic model was successfully "self-installed" during the test demonstration. Therefore, we deny this ground of protest.

As to Automecha's allegation that Scriptomatic's model was inadequately tested, USDA concedes that the requirement for testing 3-inch high labels on the Scriptomatic model had

been overlooked during the test. The test team leader then stated that he could test the 3-inch label with a local dealer. He was directed by USDA's contracting officer to do so. The test team leader reported back to the contracting officer on April 30, 1987, that the Scriptomatic unit had successfully completed the test, and the evaluation team leader certified that the label affixer operated without problem. According to the agency, during the test the Scriptomatic model applied labels to over 8,000 different envelopes. During the retest, conducted on April 29, 1987, 1,000 9-1/2 x 12-1/2-inch kraft envelopes were processed and the Scriptomatic unit worked properly in all respects, including label affixing, backing paper roll-up and automatic feeding. Based on the above, we see no basis in the record to question USDA's position that the Scriptomatic model operated properly.

Next, Automecha insists, in effect, that the RFP was deficient for not requiring the unit to be used in the live test demonstration to be shipped directly from the factory to the "demonstration site," presumably to avoid special preparation by a dealer of the tested unit. Since this objection involves an apparent RFP defect which was not made the subject of a protest prior to the RFP's closing date, this ground of protest is untimely filed and will not be considered. See 4 C.F.R. § 21.2(a)(1) (1987).

Finally, as to the allegation of bias and incompetency against USDA's contracting officer, the protester has the burden of proving its case, and we will not attribute unfair or prejudicial motives to contracting agency employees on the basis of inference or supposition. Sage Diagnostics, B-222427, July 21, 1986, 86-2 C.P.D. ¶ 85. The facts of this case on the record presented to us do not show bias or incompetency in our view and, hence, the allegation is speculative.

We deny in part and dismiss in part C/X's protest; dismiss MB's protest; and deny in part and dismiss in part Automecha's protest.

for Harry R. Van Cleve
General Counsel