



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Everpure, Inc.
File: B-231732
Date: September 13, 1988

DIGEST

1. Protest that offeror of alternate product must submit test data proving that its product has the 24-month shelf life required by the RFP is denied where RFP did not require proven performance as a precondition of award.
2. Protester's contention that the product test it was required to conduct with respect to an earlier procurement should be required of alternate offeror on current solicitation is denied, because current solicitation contains no such testing requirement and proposals must be evaluated only on the basis of factors specified in the solicitation.
3. Protest concerning offeror's compliance with federal pesticide product registration requirements concerns a matter of responsibility, and is dismissed as premature where there is no determination of responsibility by the contracting officer.

DECISION

Everpure, Inc., protests the Defense Construction Supply Agency, Defense Logistics Agency's (DLA), approval of Bro-Tech Corporation T/A The Purolite Company (Bro-Tech) as an alternate source of supply for bromine cartridges under request for proposals (RFP) No. DLA700-87-R-0318. Everpure contends that Bro-Tech's product has not satisfied the RFP's 24-month shelf life requirement, and has not been registered with the Environmental Protection Agency (EPA).

We deny the protest in part and dismiss it in part.

The RFP, issued on April 29, 1987, requested offers for a requirements contract for bromine cartridges, described by reference to the original equipment manufacturer (OEM), Everpure Part Number 9540-01. The RFP stated that the bromine cartridges must have a shelf life of 24 months, and included the "Products Offered" clause permitting offers of

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alternate products physically, mechanically, electrically and functionally interchangeable with the Everpure part.

Bro-Tech submitted an alternate offer by the June 15, 1987, amended closing date, which was rejected as technically unacceptable when its sample cartridges failed a battery of laboratory tests conducted by DLA's engineering support activity (ESA). After obtaining 16 OEM cartridges from DLA in February 1988, Bro-Tech resubmitted samples which passed a second set of laboratory tests. The ESA determined that Bro-Tech's cartridge was interchangeable with Everpure's cartridge, and on May 11, DLA revised the RFP to, among other things, add the Bro-Tech cartridge as an approved source. DLA revised the RFP again on May 26 to provide that at the time of acceptance by the government inspector, the cartridge shall have a minimum of 20-months shelf life remaining.

By letter to the contracting officer dated May 24, Everpure protested DLA's approval of Bro-Tech as an alternate source for bromine cartridges. DLA denied the protest on May 27, and Everpure protested to our Office on June 15.

Everpure contends that DLA should not have approved Bro-Tech as an alternate source for bromine cartridges without test data proving that the Bro-Tech part has the 24-month shelf life required by the RFP. Everpure states that it was required on a previous procurement to conduct a 24-month test to demonstrate that its part has a 24-month shelf life, and argues that Bro-Tech must also conduct a 24 month test to insure that all offerors are competing on an equal basis. Everpure also argues that DLA is taking a serious risk in approving the Bro-Tech cartridge without a 24 month test of its shelf life, since the purpose of the part is to purify drinking water, and if it fails, there will be health related dangers for military personnel from insufficient disinfection of drinking water.

DLA replies that since Bro-Tech's cartridge has been determined to be physically, mechanically, electrically and functionally interchangeable with Everpure's cartridge, and Everpure's cartridge has met the 24-month shelf life requirement, it has determined that Bro-Tech's cartridge will meet the 24-month shelf life requirement. This conclusion, DLA notes, was reached despite the fact that Everpure and Bro-Tech cartridges recently failed a test at simulating long term storage prior to use (storage at 131 Fahrenheit for 7 days). DLA believes there was good reason to doubt the validity of the latter test since Everpure's cartridges have complied with the 24-month shelf life requirement on previous contracts. DLA's engineering

support activity is continuing its efforts to develop a reliable simulated shelf life test. DLA notes that Bro-Tech has not taken exception to the RFP's shelf-life requirement, and would be obligated to comply with the requirement if awarded a contract.

Evaluating offers of alternative products pursuant to the Products Offered clause essentially involves a determination of the offer's technical acceptability (that is, compliance with the technical requirement to describe clearly the characteristics of the product and to establish its interchangeability with the brand-name product). The contracting agency is responsible for evaluating the information supplied by an offeror and ascertaining whether it is sufficient to establish the technical acceptability of its offer, since the contracting agency must bear the burden of any difficulties incurred by reason of a defective evaluation. See Sony Corp. of America, 66 Comp. Gen. 286 (1987), 87-1 CPD ¶ 212. We will not disturb the agency's determination unless it is shown to be unreasonable. Hose Co., Inc., B-224122, Mar. 6, 1987, 87-1 CPD ¶ 258.

Everpure has not shown that DLA's approval of the Bro-Tech cartridge was unreasonable. Contrary to Everpure's assertion that test data proving that the Bro-Tech cartridge has a 24-month shelf life is required for approval of Bro-Tech's cartridge, there is no absolute requirement that an alternate offeror have previously produced or tested the item unless the RFP expressly requires proven performance of the alternate as a precondition of award (as, for example, in a requirement for acceptance on a qualified product list). Valcor Engineering Corp., 66 Comp. Gen. 613 (1987), 87-2 CPD ¶ 143. The RFP here had no such requirement.

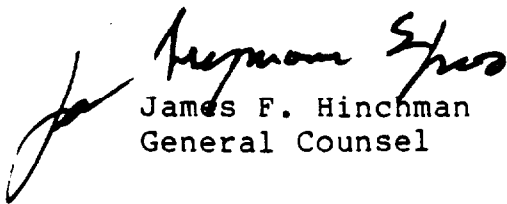
Concerning Everpure's argument that, to insure that all offerors are competing on an equal basis, Bro-Tech must conduct a 24-month shelf life test similar to that previously required of Everpure, the equal treatment principle must be interpreted to accommodate the principle that each procurement is a separate transaction and that the acceptability of a proposal depends upon the facts and circumstances of that particular procurement and not upon prior procurements. Ingersoll-Rand Co., B-224706, B-224849, Dec. 22, 1986, 86-2 CPD ¶ 701. Since an agency must evaluate proposals only on the basis of the factors and requirements specified in the solicitation in response to which they were submitted, Id., any requirement under which Everpure previously conducted a 24-month shelf life test cannot be carried over to this procurement because that requirement was not specified in the RFP.

Everpure also protests that DLA should not have designated Bro-Tech as an approved source because its cartridge has not been registered with the EPA in accordance with the provisions of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. Everpure asserts that the Bro-Tech cartridge is a pesticide product which, under FIFRA, must be registered with the EPA prior to sale. Since, according to Everpure, registration is a lengthy process, generally 12-18 months, Everpure argues DLA should not have designated Bro-Tech as an approved source until its cartridge was registered with EPA.

DLA replies that registration of Bro-Tech's cartridge does not relate to the technical acceptability of Bro-Tech's offer, but to the ability of Bro-Tech to sell the cartridge in accordance with federal law. DLA argues that since registration relates to Bro-Tech's ability to perform the contract, it is a matter of responsibility which will be considered in a determination of Bro-Tech's responsibility. DLA notes that Bro-Tech has applied for registration of its cartridge.

We agree with DLA that Bro-Tech's compliance with EPA registration requirements under FIFRA is a matter of responsibility. See Chemical Compounding Corp., B-227333, June 15, 1987, 87-1 CPD ¶ 596; Ace Van & Storage Co., B-210083, Dec. 28, 1982, 82-2 CPD ¶ 586. Since the record shows that there has been no determination of responsibility by the contracting officer, a protest on this ground is premature and is dismissed. ECS Metals Limited, B-229804, Feb. 10, 1988, 88-1 CPD 136. In any event, our Office does not review an affirmative responsibility determination absent a showing of possible fraud or bad faith or that definitive responsibility criteria were not applied. 4 C.F.R. § 21.3(f)(5) (1988). Contracting officials are presumed to act in good faith and, in order to establish otherwise, there must be virtually irrefutable proof that the agency had a malicious and specific intent to harm the protester. Hugo's Cleaning Service, Inc., B-228396.4, July 27, 1988, 88-2 CPD ¶ 89. There is no indication in the record of any such intent on the agency's part.

We deny the protest in part and dismiss it in part.


James F. Hinchman
General Counsel