



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Smith & Wesson
File: B-232681.2; B-232681.3
Date: February 9, 1989

DIGEST

1. Where the 1987 Department of Defense Appropriations Act specifically directs the Army to conduct a new competition to acquire additional quantities of pistols, the Army may not properly assess all offerors except the incumbent contractor certain "generic" and other costs (costs related to changing from the incumbent contractor to a new contractor) in the evaluation of proposals for award, where: (1) the costs are so high (almost one-half million dollars) that full and open competition may not be realized; and (2) the incumbent was awarded the contract as the result of an evaluation that the General Accounting Office found was flawed.

2. An option in the incumbent's contract for pistols properly may be used for comparison to proposals received in a competitive procurement to decide whether it is in the government's interest to award a new contract under the procurement or to obtain additional pistols by exercising the option in the incumbent's contract, where the contracting agency essentially will be treating the incumbent contractor the same as all other offerors during the negotiation phase of the procurement.

DECISION

Smith & Wesson protests award of any contract pursuant to request for proposals (RFP) No. DAAA09-88-R-0793 and a related request for test samples (RFTS), issued by the Department of the Army to procure 142,292 9-millimeter (mm) pistols. In addition, this decision responds to a request from the Deputy Assistant Secretary of the Army for Procurement for an advance decision, pursuant to 31 U.S.C. § 3529 (1982), concerning the evaluation of certain "generic" and other costs the Army expects to incur if it purchases 9-mm pistols under this procurement from any

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offeror other than the incumbent contractor, Beretta USA Corporation. We sustain the protest based on our finding that the Army may not assess such costs against all offerors except Beretta.

BACKGROUND

In 1985, the Army awarded a 5-year contract (contract No. DAAA09-85-C-0275) to Beretta for supply of 315,930 9-mm pistols (later increased to 321,260 pistols), designated the M9 model. The award to Beretta was part of the Army's plan to acquire a new pistol which uses North Atlantic Treaty Organization standard 9-mm ammunition to replace the .45 and .38-caliber pistols used previously by the military. To be eligible for the production contract which ultimately was awarded to Beretta, interested firms had to submit a sample group of pistols for testing by the Army for compliance with specifications set out in an RFTS issued in November 1983. Eight firms submitted test samples under the RFTS. Two firms later withdrew. The samples submitted by two firms, including Beretta, were found to be technically acceptable; the samples submitted by four other firms, including Smith & Wesson, were found to be technically unacceptable. Smith & Wesson's pistol was eliminated for failing to meet two test requirements regarding the pistol's firing pin energy and expected service life.

Smith & Wesson filed a lawsuit, in which it ultimately did not prevail, challenging its elimination from the competition. Subsequently, our Office conducted an investigation of the procurement. Among other things, our Office concluded that Smith & Wesson had been unfairly eliminated from the competition, because the Army had made a mistake in converting the firing pin energy requirement used in testing from metric units to standard U.S. units of measurement, and because the Army had interpreted the RFTS's service life requirements and testing results erroneously. See "PISTOL PROCUREMENT: Allegations on Army Selection of Beretta 9-mm. as DOD Standard Sidearm," GAO/NSIAD-86-122, June 16, 1986.

In response to the controversy surrounding the procurement, Congress in the 1987 Department of Defense (DOD) Appropriations Act, Pub. L. No. 99-591, 100 Stat. 3341, 3341-128, § 9132 (1986), directed the Army to conduct a new procurement for acquiring additional quantities of the 9-mm pistols, as follows:

"During the current fiscal year [1987], the Department of Defense shall conduct a new competition for 9-mm handguns, with procurement starting in fiscal year 1988 in parallel with the current contract."

As a result, the Army issued a new RFTS in September 1987, calling for retesting to specified requirements of all potential offerors' pistols, except the Beretta M9, which was considered to be an already qualified candidate. The Army planned to decide whether to obtain the additional weapons from Beretta or another offeror, depending upon the results of the testing conducted under the RFTS.

Smith & Wesson, a potential offeror under the RFTS, filed a protest with our Office challenging various aspects of the procurement. We sustained Smith & Wesson's protest on the ground that it was improper for the Army to exempt Beretta from testing based upon its current contract while requiring Smith & Wesson, which the Army had evaluated as failing only two requirements in connection with testing under the earlier RFTS, to undergo complete retesting. We recommended two alternatives: (1) if the Army did not require the Beretta M9 to be retested in full, the Smith & Wesson pistol should be retested only on the two mandatory requirements it had failed previously; or (2) if considered necessary, the M9 should be retested as well. See Smith & Wesson, B-229505, Feb. 25, 1988, 88-1 CPD ¶ 194, aff'd on reconsideration, B229505.2, Apr. 14, 1988, 88-1 CPD ¶ 366.

On May 10, 1988, the Army issued the current RFTS inviting all interested firms to submit sample weapons for testing by August 17. In response to the recommendation in our decision on Smith & Wesson's protest, the present RFTS provides as follows:

"The current standard M9, 9-mm pistol will be tested along with weapons submitted in response to this RFTS. In the event the current producer of the M9, Beretta USA, does not offer the M9 as its candidate, then the Government will provide test weapons from its own resources."

The RFTS further states that based on fixed-price proposals to be submitted pursuant to the present RFP (ultimately issued on September 14, 1988), the Army will decide whether to make award under the current procurement or to exercise the option for additional quantities under Beretta's

existing contract. Thus, the Army's intent was to evaluate Beretta's M9 handgun and the option terms of its existing contract against the samples and price proposals of other offerors.

Beretta chose not to submit sample weapons by the August 17 due date. As a result, under the terms of the RFTS the Army itself submitted the M9 currently being produced by Beretta as a candidate for testing. Beretta then filed a protest with our Office contending that the Army had deprived it of a meaningful opportunity to decide whether to submit a sample weapon under the RFTS by failing to inform Beretta that the option under Beretta's existing contract would not be exercised unless the M9 submitted by the Army for testing passed all the mandatory tests in the RFTS. We dismissed the protest, finding it to be without merit since the RFTS clearly advised Beretta that the M9 would have to pass the mandatory tests and that Beretta's existing contract was tied to the performance of the M9 under the RFTS testing. See Beretta USA Corp., B-232681, Oct. 26, 1988, 88-2 CPD ¶ 395, aff'd on reconsideration, B-232681.4, Jan. 9, 1989, 89-1 CPD ¶ ____.

PROTEST GROUNDS

The protester argues that the Army improperly intends to add the amount of "generic" and "other" costs to the proposed prices of all offerors (except Beretta) before comparing those proposed prices to Beretta's option price; thus, the protester believes that Beretta will be given an unfair competitive advantage over all other offerors. Smith & Wesson also argues that the Army cannot properly make an award to Beretta by exercising the option contained in the present contract with Beretta, because the option provision is not valid. In a related argument, Smith & Wesson charges that comparison of all other offerors' proposals with Beretta's option is unfair, because Beretta's contract contains performance requirements that are different from the performance requirements contained in the RFP's statement of work. Additionally, Smith & Wesson contends that the testing procedure is not fair, because while all offerors other than Beretta will be rejected if their sample pistols fail to pass a mandatory test requirement, the Army may exercise its option with Beretta in the event that the samples of all offerors and the Beretta M9 samples fail a mandatory test requirement.

Generic and Other Costs

The protester contends that the Army intends to evaluate cost proposals in a manner that improperly favors Beretta. The RFP states that the Army will compare Beretta's option

price under the M9 contract to the proposed prices of all other offerors, designated the XM10 candidates. However, the RFP states that the Army will first add an amount to each XM10 candidate's proposal to cover "generic" and other costs before making the comparison. Smith & Wesson charges that the addition of generic and other costs to each XM10 candidate's proposed price will give Beretta an unfair competitive advantage.

The RFP lists the evaluation factors for award as: technical suitability, cost, logistics, quality assurance, production and management. Regarding evaluation of cost, the RFP states that:

"The overall cost to the Government of each XM10 offeror under this solicitation will be evaluated. The overall cost of each XM10 shall include total contract cost, other costs, and "generic" costs. Generic costs are those which would be incurred by the Government in fielding a second 9mm pistol regardless of the XM10 candidate. . . . Any other costs to the Government, including transportation costs, modification costs, if any, to ancillary equipment, and any other logistics/repair part support cost impact of the candidate XM10 9mm pistol will be evaluated to determine additional cost impacts of the offeror's pistol. . . ."

The Army reports that the only "other" cost that will be evaluated is transportation cost, because the Army has determined that none of the XM10 pistol candidates will require any substantial modifications to ancillary equipment such as arms racks, holsters, or ammunition pockets. Regarding "generic" costs, the Army reports that the total evaluation factor that will be added to each XM10 offeror's proposed price will be \$454,222.30. This amount is comprised of five elements:

1. engineering support of initial production;
2. fixtures and gauges for the overhaul or rebuild of XM10 pistols;
3. quality assurance (first article, initial production, and comparison tests);
4. manuals and training materials; and

5. preparation of video tapes used to instruct personnel on proper maintenance procedures for the XM10 pistol.

The Army argues that it is justified in assessing each XM10 offeror's proposal with these additional costs because each of these cost elements represents actual costs that will be incurred by the government as the result of fielding a 9mm pistol other than Beretta's M9 model. While the Army acknowledges that evaluation of generic and other costs in this manner will afford a competitive advantage to Beretta, the Army believes that such costs can properly be assessed against XM10 offerors as these costs have already been incurred under the M9 contract.

We find that the Army's intended evaluation of price proposals is improper. The 1987 DOD Appropriations Act (quoted above) specifically directed that the Army conduct a new competition for any additional quantities of pistols the military would need beyond the basic quantity to be purchased under the M9 contract. It is clear that Congress was attempting to eliminate the controversy regarding the 1985 award to Beretta by directing the Army to conduct a new competition.

In our opinion, because the Army's plan to add almost a half million dollars to each of the XM10 offeror's proposals would give Beretta a considerable advantage in the evaluation of price proposals and might actually become the determinative factor in selecting a contractor, it is inconsistent with Congress' desire that the Army conduct a new competition to purchase additional pistols above the quantity specified in the basic M9 contract. Moreover, as the "generic" costs the Army intends to add to the proposed price of any offeror other than Beretta are so high, it is conceivable that potential offerors may be discouraged from competing for this contract because the incumbent contractor will have such a significant advantage in the cost evaluation.

We recognize that contracting agencies need not eliminate an incumbent contractor's competitive advantage in the evaluation of proposals, where the competitive advantage the incumbent contractor may enjoy has not resulted from preferential treatment or unfair action by the government. See, e.g., Diagnostic Equipment Services, B-228050.2, Dec. 3, 1987, 87-2 CPD ¶ 541. However, as stated earlier, our investigation found that Smith & Wesson was unfairly eliminated from the procurement that resulted in award of the M9 contract to Beretta in 1985. See "PISTOL PROCUREMENT: Allegations on Army Selection of Beretta 9-mm. as DOD

Standard Sidearm," supra. We believe it would be unfair to accord Beretta the competitive advantages of incumbency in these circumstances, because any competitive advantage Beretta may enjoy is the direct result of the Army's prior flawed procurement. See Kaufman Lasman Assocs., Inc., B-229917.9, Oct. 21, 1988, 88-2 CPD ¶ 381, aff'd on reconsideration, B-229917.10, Jan. 13, 1989, 89-1 CPD ¶ ___.

Furthermore, while transportation costs may be evaluated in a procurement, the Army has not explained why transportation costs will be incurred only if an XM10 candidate rather than Beretta is selected. Therefore, we also find that assessment of transportation charges against all offerors except Beretta is not justified.

Accordingly, we sustain Smith & Wesson's protest insofar as it contends that the evaluation of generic and other charges will accord Beretta an unfair advantage.

Validity of the Beretta Option

Smith & Wesson principally argues that the option provision in Beretta's M9 contract is not valid because it does not contain a definite price as required by Federal Acquisition Regulation (FAR) § 17.207(f). The protester contends that, in effect, the M9 contract does not contain an option that can be exercised, and, therefore, Beretta should be required to submit cost and technical proposals responding to the RFP's statement of work just as all other offerors do. The protester also contends that comparison of Beretta's option price with other offerors' proposed prices is unfair, because Beretta's option price is based upon a statement of work that includes less work than required in the RFP's current statement of work.

The Army first argues that Smith & Wesson's protest against the option provision is untimely. The Army points out that the option clause was contained in the solicitation that resulted in the contract award to Beretta in 1985, and that Smith & Wesson participated in that procurement. Accordingly, the Army believes that Smith & Wesson should have protested the provisions of the option clause prior to the closing date for submission of proposals in that earlier procurement.

We find Smith & Wesson's protest to be timely. As noted previously, Smith & Wesson was excluded from the competition that ultimately led to the award to Beretta on the basis of testing that was completed by the Army in late 1984. The procurement that resulted in award to Beretta was restricted to the two candidates whose pistols had been determined

acceptable, and, therefore, Smith & Wesson was not allowed to submit a proposal and have it considered for award. As the option provisions applied equally to all offerors, and Smith & Wesson was not eligible for award of the 1985 contract in any event, Smith & Wesson had no reason to protest against the option clause at that time. See 4 C.F.R. §§ 21.0(a), 21.1(a) (1988).

The Army next argues that Smith & Wesson's protest regarding the option provisions of the Beretta contract is premature, because the Army has not yet decided whether it will even exercise the option. The Army reports that it will not make any decision until it has tested all candidate pistols (including the M9) and evaluated all offerors' proposals and compared them to the terms negotiated with Beretta under the option clause of its contract.

In our view, Smith & Wesson's protest is not premature because, while the Army apparently does not intend to make a final decision on whether it will exercise the option until some future date, the Army has made the option a critical part of the present procurement. We believe that, before it expends the money and effort to have its weapons tested and to prepare its proposal, Smith & Wesson has a right to have our Office determine whether the Army's method of procurement (negotiating with Beretta under the option clause while making other offerors prepare proposals) unfairly favors Beretta.

The option clause (clause H.8) in the Beretta contract states in pertinent part:

"Option to Increase Quantity (CLIN 0001)

1. The government may increase the quantity of XM9 9mm Pistols to be delivered under this contract by an additional 305,580 Pistols on an incremental basis upon written notice by the contracting officer to the contractor subject to the following conditions:

a. This option must be exercised no later than 120 days prior to the last scheduled delivery. . . .

b. Delivery of the option quantity shall be as directed by the contracting officer, but will not increase monthly delivery rates more than 100% of that required for the basic

contract quantity. . . . In any event, final delivery of option quantities will not exceed 12 months beyond final delivery under the basic contract at time of award.

c. The unit price for the option quantity/quantities will be negotiated in accordance with the procedures of the 'Changes' provision of the contract but shall not exceed a ceiling price computed as follows:

(1) The unit price set forth in the basic contract for CLIN 0001.

(2) Adjusted for definitized and undefinitized change orders, if any, and;

(3) [Foreign Military Sales Support adjustments, if applicable].

2. The final negotiated price for any option quantity will reflect only the recurring cost to produce additional items and specifically exclude those costs of a start-up and non-recurring nature."

Essentially, Smith & Wesson argues that the option provision is not valid because it is too indefinite. We recognize that the option provision does not state a specific price for purchasing additional pistols. However, in the context of this competition, we believe the option properly may be used for comparison purposes to decide whether it is in the government's interest to award a new contract to one of the offerors pursuant to the RFP or to exercise the option in Beretta's contract, since it appears that the Army essentially will be treating Beretta the same as all other offerors during the negotiation phase of the procurement.

The protester has cited several of our prior cases (for example, Varian Assocs., Inc., B-208281, supra) as support for its argument that an option that requires additional negotiations to determine the price or other important terms is invalid and amounts to an improper sole-source award. However, the present situation differs markedly from the circumstances in our prior decisions, because, here, the

Army is conducting a competitive procurement concurrent with its price negotiations with Beretta. Accordingly, the present procurement lacks the trappings of improper sole-source negotiations involved in previous option clauses which were rejected by our Office as invalid.

Smith & Wesson also claims that comparison of the M9 contract option price with prices proposed by offerors in response to the RFP is inherently unfair, because the scope of work required by the RFP is greater than that required of Beretta under the option. The protester specifically alleges that the RFP requires delivery of training aids, first article tests, warranties, and a number of technical data items. However, the Army has reported that all of these performance requirements were included in Beretta's contract, but separate prices were not required for each item. There is nothing in the record to refute the Army's assertion. Accordingly, though the pricing format in the RFP may be different from the format used in Beretta's contract, it appears that Beretta had to include the cost for the cited performance requirements in its total fixed price for the pistols. Thus, it also appears that the scope of work required of offerors under the RFP is basically the same as the scope of work that has already been or will be required of Beretta under its contract.

For the reasons set forth above, we find the protester's arguments on these issues to be without merit.

Testing Procedures

Smith & Wesson alleges that the testing requirements are not equal for all offerors, because XM10 candidates will be rejected if they fail a mandatory requirement while the Army maintains that it may exercise Beretta's option even if all XM10 candidates and the M9 pistol fail a mandatory requirement. We have already addressed this argument in previous decisions involving this procurement. See Beretta USA Corp., B-232681, supra. In our most recent decision, B-232681.4, issued on January 9, 1989, we stated:

"More important, assuming that either the M9 alone or all the candidate pistols failed the mandatory tests in the RFTS, the Army could not, as Beretta suggests, procure the follow-on quantity of pistols through exercise of the option under Beretta's existing contract.

Given that the mandatory tests in the RFTS were included as an expression of the Army's minimum needs for the 9-mm. pistol, exercise of Beretta's option under these circumstances would constitute selection of a pistol which did not meet the Army's minimum needs."

Accordingly, we need not address this argument further.

RECOMMENDATION

We sustain the protest on the basis that the RFP improperly allows the Army to add "generic" and other costs to the price proposals of all offerors except Beretta in evaluating proposals for award. Therefore, by letter of today, we are recommending to the Secretary of the Army that the solicitation be amended to omit "generic" and other costs from the evaluation of price proposals. In addition, we find that Smith & Wesson is entitled to the cost of filing and pursuing the protest, including attorneys' fees. See 4 C.F.R. § 21.6(d)(1).

The protest is sustained.



Acting Comptroller General
of the United States