Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sturm, Ruger & Company, Inc.

File: B-235938

Date: October 25, 1989

DIGEST

Protest is sustained where agency did not provide protester with a reasonable opportunity to demonstrate the acceptability of its weapons prior to, or in conjunction with, a procurement limited to four brand name semi-automatic pistols.

DECISION

Sturm, Ruger & Company, Inc., protests its exclusion from competition under request for proposals (RFP) No. DEA89-B-1036, issued by the Drug Enforcement Administration (DEA), United States Department of Justice, for 9mm semi-automatic pistols. The protester principally alleges that it was not provided an opportunity to demonstrate the capabilities of its weapons in contravention of the Competition in Contracting Act of 1984 (CICA).

We sustain the protest.

In early April 1988, DEA's Firearms Training Unit identified a need for a definite quantity of 9mm semi-automatic pistols for use in special agent training classes, and forwarded the requirement to the contracting officer stating that the agency's firearms standardization policy and the unit's current training needs required pistols from any of four preapproved manufacturers whose 9mm models had been pretested.1/ Sturm, Ruger was not one of the preapproved manufacturers.

1/ Notice to this effect was published in the July 1988 Commerce Business Daily (CBD), and subsequently amended in the March 1989 CBD to eliminate reference to the standardization policy.

On May 12, 1989, the subject solicitation was issued as an invitation for bids (IFB), containing a brand name or equal purchase description based on two Smith & Wesson models. The salient characteristics required that the pistols be made by one of four designated preapproved firms (including Smith & Wesson). On June 7, the IFB was amended to convert it to an RFP; the amendment retained the restricted purchase description, added provisions pertaining to negotiated procurements, and set a June 22 date for receipt of proposals.

Sturm, Ruger principally argues that DEA's failure to provide the firm with an opportunity to demonstrate the capabilities of its pistols constituted an unreasonable restriction on full and open competition.

DEA states that it must restrict its purchase of firearms to those which it has tested and has found to be reliable and effective. Further, the agency maintains that it must use more than one brand of weapon to insure that its agents do not become identified with a particular pistol, but that for consistency in training and for maintenance purposes, it must limit the number of different brand weapons in its arsenal; consequently, the subject solicitation was limited to the four manufacturers whose pistols had passed DEA's tests. Although the agency does state that it would accept an offer from the protester if its pistols pass the required tests, it notes that the protester did not avail itself of the opportunity to do so.

The protester argues that it produces a pistol which will meet all of the salient characteristics other than the requirement that it be manufactured by one of the four listed firms. In this regard, the protester states that it was not notified, nor given any reasonable opportunity to have its weapons tested by DEA so that it could compete for the agency's present requirements. In fact, the protester points out that neither the solicitation nor its accompanying CBD notice mentions anything at all about a testing requirement.

As a general matter, we have held that the existence of procedures which are reasonably calculated to provide potential offerors with an opportunity to demonstrate that their products meet an agency's minimum needs at some stage of the planning process or of the procurement process itself is a necessary precondition to the valid imposition of solicitation restrictions which limit the extent of

competition to the products of one manufacturer or a group of manufacturers. See generally Rotair Indus. et al., 58 Comp. Gen. 149 (1978), 78-2 CPD ¶ 410.2/

Subsequent to the above-cited decision, the Competition in Contracting Act of 1984 was enacted to generally require agencies to obtain full and open competition through the use of competitive procedures in accordance with the provisions of the Act and its implementing regulations. 41 U.S.C. § 253(a)(1)(A) (Supp. IV 1986). The procurement statutes were also amended to formalize agencies' responsibilities with respect to the use of qualification requirements; for example, 41 U.S.C. § 253c(b) now requires agencies to ensure that potential offerors are provided with an opportunity to meet product qualification requirements, and 41 U.S.C. § 416(b) generally requires that notice of such opportunity be publicized in the CBD for each solicitation expected to result in a contract exceeding $10,000. See TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700. Additional requirements relating to the establishment, publicity and use of product qualification requirements are contained in Federal Acquisition Regulation (FAR) Subpart 9.2.

DEA describes the evolution of its decision to limit the number of approved manufacturers of 9mm semi-automatic pistols; however, so far as the record shows, what DEA calls its "standardization program" was principally developed at a time when the agency was authorizing the field use of pistols which its agents themselves were purchasing. Once the agency elected to purchase weapons itself, there is no indication in the record that the "program" was ever formalized for government procurement purposes to set forth, for example, a definitive set of qualification criteria which were, in turn, publicized in a manner to permit potential offerors a meaningful opportunity to have their weapons tested in anticipation of competing for the agency's requirements (as should be the case with a qualified products list (QPL), for example), or to have them tested

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2/ More recently, we have not objected to the concept of limiting a procurement to only those manufacturers whose product samples, submitted in response to a request for technical samples made available to all potential offerors, passed agency tests to determine compliance with published technical criteria. See Smith & Wesson, B-229505, Feb. 25, 1988, 88-1 CPD ¶ 194 (protest involving 9mm pistols, sustained in part on other grounds), aff'd, Smith & Wesson--Request for Reconsideration, B-229505.2, Apr. 14, 1988, 88-1 CPD ¶ 366.

during the course of an individual procurement (e.g., by submitting samples to be tested against salient characteristics listed in a solicitation).

Here, the amended CBD notice indicated that DEA's "standardization program" would not apply, yet soon thereafter the restricted solicitation was issued. When Sturm, Ruger requested an explanation of the basis for the solicitation limitation on competition, DEA contracting officials admittedly provided incorrect information regarding the role of earlier weapons testing conducted by the Federal Bureau of Investigation (FBI) as the basis for the restriction. Further, the solicitation itself does not describe any type of on-going testing program.

Against this background, the agency, in essence, submits that Sturm, Ruger was not prejudiced by any lack of formal notification concerning its "program" to pretest pistols. In this regard, DEA suggests that, by virtue of an October 1984 conversation between its technical staff and the protester's representative concerning unrelated weapons, Sturm, Ruger should be charged with actual knowledge of a need and an opportunity to have its 9mm semi-automatic pistols tested by DEA for future procurement purposes. The record does not support this suggestion--the conversation took place almost 2 years prior to any decision to limit the number of approved pistol manufacturers; and the contents of the conversation, as reported by DEA, simply do not reflect that it was linked to anticipated procurement requirements for the pistols in question.

Likewise, we are unpersuaded by the agency's suggestion that Sturm, Ruger should be charged with constructive notice of an on-going testing program for 9mm semi-automatic pistols because, in DEA's view, knowledge of such a program was widespread in the firearms industry. The only documented evidence submitted in support of this premise is a privately published magazine article which, although it lists the four "approved" manufacturers, does not describe a testing program for product qualification in conjunction with the procurement process. In our view, the record does not support a conclusion that Sturm, Ruger was ever, in fact, extended a reasonable opportunity to demonstrate the capabilities of its pistols at any stage of the procurement process; we, therefore, sustain the protest because of DEA's failure to solicit offers in a manner designed to achieve full and open competition so that all responsible sources were permitted a reasonable opportunity to compete. Cf. Engine & Generator Rebuilders, 65 Comp. Gen. 191 (1986), 86-1 CPD ¶ 27.

DEA also suggests that the "brand name" documentation executed by the contracting officer can properly be viewed as satisfying the requirements for a "sole-source" justification and approval (J&A) pursuant to 41 U.S.C. § 253(f). We disagree. The document does not purport to be a J&A for sole-source purposes: for example, it is not certified as to accuracy and completeness as required (and even contains admitted misinformation concerning the role of the FBI in the pretesting of weapons); it does not contain the approval of the competition advocate for the procuring activity as required for contracts exceeding $100,000; it does not identify the statutory exception from the use of competitive procedures; and, it contains no demonstration or description of the uniqueness of the "approved" pistols it mentions. See Audio Intelligence Devices, 66 Comp. Gen. 145 (1986), 86-2 CPD ¶ 670.

Likewise, we disagree with DEA's suggestion that the document can properly be viewed as satisfying the requirements for a J&A to limit competition based on a need of "such unusual or compelling urgency that the government would be seriously injured" without limited competition. 41 U.S.C. § 253(c)(2). As indicated above, it is not certified or approved and does not identify a statutory exception as required by law. Also, no compelling urgency of the type set forth in the statute is described in the document.

On October 12, we were notified that an award was made on October 11, in the amount of $122,417.48, with delivery scheduled in 45 days. The award was made pursuant to a determination approved by the Administrator of DEA in accordance with FAR § 33.104(b)(1), based on urgent and compelling circumstances which significantly affect the interest of the United States that will not permit awaiting a decision by our Office. In view of this circumstance, we believe that recommending termination is not feasible; however, we are recommending that DEA review its weapons procurement practices and take prompt measures to insure that all prospective bidders or offerors are given an opportunity to have their products tested in conjunction with future procurements. We also find that the protester

is entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States