

Mr. JORDAN



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Saco Defense Inc.

**File:** B-240603; B-240891

**Date:** December 6, 1990

Steven L. Briggerman, Esq., and Sandra Lee Fenske, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester. William R. Medsger, Esq., Joseph M. Picchiotti, Esq., and David DeFrieze, Esq., Department of the Army, for the agency. Paul E. Jordan, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency delay in awarding a contract which resulted from initial determination of low offeror's nonresponsibility and reconsideration of that finding does not evidence preferential treatment where there is a material change in a principal factor on which the original determination was based.
2. Allegation that, based on protester's experience, awardee will be unable to meet a particular specification, therefore agency must have relaxed that specification for awardee, does not provide basis to sustain protest.
3. Contracting agency may accept a price reduction from the low-priced offeror who, having been found responsible, has submitted the proposal most advantageous to the government.
4. Highest priced offeror under request for proposals providing for award to the offeror whose price represents the best overall buy is not an interested party under the General Accounting Office Bid Protest Regulations to protest alleged preferential treatment of lowest offeror, where protester does not allege that second low offeror is not otherwise entitled to award.

### DECISION

Saco Defense Inc. protests the award of a contract to Jerico Precision Manufacturing under request for proposals (RFP) No. DAAA09-89-R-0976 and the amendment of RFP No. DAAA09-90-R-0148, both issued by the United States Army Armament, Munitions, and Chemical Command for the manufacture and supply

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of M-60 machine gun barrels. Saco alleges that Jerico has received preferential treatment from the Army through relaxed specifications and extensions of the solicitation period under both procurements.

We deny the protest of RFP No. -0976 and dismiss the protest of RFP No. -0148.

RFP No. -0976

On July 18, 1989, the Army issued RFP No. DAAA09-89-R-0976 for 10,349 M-60 machine gun barrel assemblies with bipod assemblies. The RFP was amended to adjust the delivery schedule and delete a performance risk evaluation factor. Offerors were required to provide unit prices for the assemblies with and without first article approval, with award to be made to the offeror whose price represented the best overall buy to the government.

Three offerors, including Saco and Jerico, submitted proposals by the September 1 closing date. Jerico's offer of \$4,653,634, was second low and Saco's \$11,025,100 offer was highest. On October 5, the contracting officer requested a preaward survey on the low offeror and on October 10, requested a preaward survey on Jerico. The survey resulted in a "no award" recommendation for the low offeror, who withdrew its offer from consideration.

In its December 12 preaward survey report of Jerico, the Defense Contract Administration Services Management Area--New York (DCASMA) found Jerico satisfactory in the areas of technical capability, quality assurance, financial capability, and accounting, but recommended "no award." DCASMA noted that "Jerico has a history of poor performance past and current" and "[u]ntil [Jerico] can demonstrate that [it] can effectively administer [its] manufacturing capacity, which has resulted in poor performance, 'No award' is recommended." Based upon the survey results, the contracting officer determined Jerico nonresponsible. On January 11, 1990, the contracting officer referred the matter to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures. On February 23, the SBA declined to issue a COC to Jerico.

During this same period, in January 1990, Jerico received conditional first article approval on M-60 machine gun barrels it was manufacturing under a different government contract (DAAA09-88-C-0287). The contracting officer contacted DCASMA on March 20 and learned that Jerico was making progress on all its contracts and that half would be complete in 2 to 3 months. Based on this information, the contracting officer determined that Jerico had the requisite

production capability and, on April 3, formally reversed her nonresponsibility determination and proposed to award the contract to Jerico. Her determination to override the negative preaward survey and award the contract was approved on April 12.

Due to the substantial difference between Jerico's and Saco's prices, an audit and a cost analysis were conducted on Jerico's proposal. Some of Jerico's proposed costs were questioned in both the audit and the cost analysis and Jerico lowered its unit prices from \$447.25 to \$441. In its proposal extension of July 3, Saco offered to lower its price on a quantity of 10,349 units based upon recent reduced overhead rates.<sup>1/</sup> The contracting officer determined Jerico's prices fair and reasonable, and awarded it the contract on July 13. That same day, Jerico made its first delivery of gun barrels under contract No. -0287. Upon learning of the award to Jerico, Saco protested to our Office.

In its protest, Saco first alleges that the Army provided preferential treatment to Jerico by delaying award until Jerico had established its responsibility by making a delivery of gun barrels under contract No. -0287.<sup>2/</sup> We find no merit to this assertion. Here, 6 months (September through February) were consumed with the conduct of preaward surveys on Jerico and the low offeror and the COC review process. Then in March and April Jerico's responsibility was reviewed in light of new information, and the next 2-1/2 months were taken up with an audit and cost analysis of Jerico's proposal. In our view, the delay in award was attributable to administrative matters incident to the agency's attempt to fairly consider Jerico's responsibility and to verify the accuracy of its pricing. Once the contracting officer had before her information concerning the material change in Jerico's production capability, a principal factor on which the original nonresponsibility determination was based, she acted properly in reconsidering that finding based on the most current available information, since even after the SBA refuses to grant a COC when new information becomes available

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<sup>1/</sup> During the course of the procurement, the agency obtained proposal extensions from Jerico and Saco in November 1989, and in March, April, May, and July 1990.

<sup>2/</sup> Saco further argues that the extension of time before award, when combined with the alleged specification relaxation, and conduct of discussions with Jerico alone, represent a pattern of improper favoritism. In view of our finding that none of these allegations warrants sustaining Saco's protest, we are not persuaded that their combination makes the protest any more meritorious.

which affects the offeror's responsibility it may be taken into account. Cosmodyne, Inc., B-224009, Nov. 18, 1986, 86-2 CPD ¶ 623. It is appropriate to allow an offeror a reasonable time to cure a problem related to its responsibility. See Westec Air, Inc., B-230724, July 18, 1988, 88-2 CPD ¶ 59. Thus, under the circumstances, the fact that award was delayed does not itself evidence preferential treatment of Jerico.

Saco next alleges that the Army relaxed the barrel rifling specifications for Jerico. Saco bases this allegation on its experience with the electrochemical machining process it believes Jerico uses, which Saco has found is inadequate to meet the rifling tolerances required by the specifications. The Army denies any relaxation of specifications. From our review of the record, we find no evidence of relaxed specifications or of any intent to relax the specifications in the future. Jerico's proposal promises to comply with all requirements and a preaward survey indicates that Jerico has the technical capability to meet the requirements. Further, Jerico has passed first article test requirements and made deliveries of a similar item, and there have been no reports by the user activity of nonconformance.

Saco challenges the first article test report on the rifling as inadequate because, in Saco's experience, only magnification of 100X will conclusively establish whether rifling is compliant, and the Army visual inspection was not so magnified. The contracting agency has the discretion to determine the testing necessary to assess compliance with solicitation specifications, and we will only disturb the agency's determination where it is shown to be unreasonable. Crest-Foam Corp., B-234628.3, June 20, 1990, 90-1 CPD ¶ 572. We have no basis here to question the contracting officer's reliance on the first article test results. Saco has not submitted any evidence beyond its bare assertion that supports its contention that the tests used by the agency are inadequate to determine if Jerico's barrels meet the rifling specifications. Its speculation is insufficient to provide the basis for sustaining a protest. Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275.

Saco also contends that the Army improperly conducted discussions with Jerico without providing the same opportunity to Saco. Since all offerors must be treated equally, the conduct of discussions with one offeror generally requires that discussions be conducted with all offerors whose offers are within the competitive range and that the offerors have an opportunity to submit revised offers. Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227, aff'd, B-237486.2, May 17, 1990, 90-1 CPD ¶ 482. Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by

an offeror is essential for determining the acceptability of its proposal. FAR § 15.601; Motorola, Inc., B-225822, June 17, 1987, 87-1 CPD ¶ 604.

Here, since award was to be based on price, we think it is clear that Jerico, once it was determined to be responsible in April, was in line for award as the offeror having submitted the proposal most advantageous to the government on the basis of the RFP evaluation factors. That being so, we find no basis to object to Jerico's lowering of its price in response to the audit and cost analysis, since it is well-settled that the proposal most advantageous to the government may always be made more advantageous without any prejudicial effect on competing offerors. See, e.g., Brizard Co., B-215595, Oct. 11, 1984, 84-2 CPD ¶ 399.

The protest of RFP No. -0976 is denied.

RFP No. -0148

On February 28, 1990, the agency issued RFP No. DAAA09-90-R-0148 for 5,000 M-60 machine gun barrels with bipod assemblies. By the closing date of March 30, Jerico, Saco, and A.M. Precision Manufacturing, Inc. submitted offers. As with RFP No. -0976, offerors provided unit prices both with and without first article approval, with award to be made to the offeror whose price represented the best overall buy to the government. Jerico's offer was the lowest, A.M. Precision's was second low, and Saco's was highest.

In April, DCASMA conducted preaward surveys on both Jerico and A.M. Precision, recommending complete award to A.M. Precision, and no award to Jerico, based upon unsatisfactory financial and production capability. On May 23, the agency requested all offerors to extend their offers until June 29. On June 22, the contracting officer determined Jerico nonresponsible and referred the matter to the SBA for consideration under the COC procedures.

Also on June 22, the item manager responsible for coordinating supply and demand of M-60 barrel assemblies expressed concern that delays in awarding contracts and delivery delays under existing contracts could require expedited delivery of 4,000 units. In response, the contracting officer obtained a price quote of \$1,025 per unit from Saco, which at the time was the only concern that had produced and delivered the item. In addition, offerors were requested again to extend their offers to August 31.

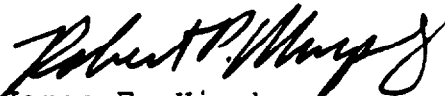
In mid-July, after receipt of Saco's quote, Jerico was awarded the contract under RFP No. -0976, discussed above. Jerico's contract included an option for additional quantities, up to

100 percent of the basic award at a unit price of \$427.25, but with a delivery schedule commencing in 1992. Because of the significant savings which appeared potentially available under this option, the contracting officer contacted the item manager to ascertain whether delivery of the RFP No. -0148 requirements was required within the shorter delivery schedule set forth in that RFP. Upon review of anticipated deliveries under existing contracts with Jerico and Saco, the item manager concluded that any urgently needed items could be acquired under those existing contracts. Thus, the RFP No. -0148 quantities could be accepted under the schedule in Jerico's contract option.

After conducting another review of Jerico's responsibility, based upon the extended delivery schedule and its improved production and financial capability under its new parent company, the contracting officer concluded that Jerico would be able to perform if the option were exercised. However, rather than simply canceling RFP No. -0148 and exercising the Jerico option, the agency determined that the change in delivery schedule was so significant that all offerors should be provided an opportunity to submit revised pricing. Accordingly, on August 8 the agency issued Amendment 0001, revising the delivery schedule, and inviting all offerors to submit BAFOs. In addition to submitting a BAFO, Saco protested the propriety of the amendment to our Office.

Saco contends that the extended delivery schedule permitted under Amendment 0001 of RFP No. -0148 constitutes a continuation of the preferential treatment afforded to Jerico under RFP No. -0976. We will not consider this allegation since Saco would not be in line for award of the contract if its protest against the amendment were sustained. Saco's existing offer is the highest of three which were received in a competition where award is to be made to the offeror whose price represents the best overall buy. If the amendment had not been issued, both Jerico's initial low offer, and the second low offer of A.M. Precision, which has also been recommended as responsible and eligible for award by DCASMA, would have been in line for award ahead of Saco. Saco has also not alleged that A.M. Precision would not otherwise be entitled to an award. Thus, Saco lacks the requisite economic interest to pursue this protest. 4 C.F.R. § 21.0(a); Ahtna, Inc.--Recon., B-235761.7, July 17, 1990, 90-2 CPD ¶ 38.

Accordingly, we dismiss the protest of RFP No. -0148.

  
for James F. Hinchman  
General Counsel