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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Sparton of Canada, Ltd.

File: B-242567

Date: May 17, 1991

Paul Shnitzer, Esq., Crowell & Moring, for the protester.
Leon J. Glazerman, Esq., Widett, Slater & Goldman, P.C., for Sippican, Inc., an interested party.
Philip F. Eckert, Jr., Esq., and Stephen Stastny, Esq., Defense Logistics Agency, for the agency.
Catherine M. Evans, David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's evaluation of protester's alternate product as unacceptable under "Products Offered" clause is denied where agency reasonably determined that objective performance test results were required to establish acceptability of alternate product, and results of performance test submitted by protester did not establish acceptability of offered item.

2. Protest alleging that agency failed to afford protester a reasonable opportunity to qualify its alternate product is denied where protester delayed offering to pay for additional testing of its product for 3 months after it learned agency required such testing.

3. Protest alleging that agency should have accepted protester's offered alternate product under Department of Defense regulation requiring agencies to consider "qualifying country" sources of supplies is denied where agency considered test results from qualifying country and found the test to be both flawed and inconclusive, and protester does not dispute the reasonableness of agency's determination.

DECISION

Sparton of Canada, Ltd. protests the award of a contract to Sippican, Inc. under request for proposals (RFP) No. DLA400-90-R-1396, issued by the Defense Logistics Agency (DLA), Defense General Supply Center (DGSC), Richmond, Virginia, for

bathythermograph probes.1/ The RFP specified an acceptable probe manufactured by Sippican and permitted offers of alternate products interchangeable with the referenced model. Sparton claims that the agency unreasonably rejected its proposed alternate product.

We deny the protest.

The solicitation requested proposals for various quantities of T-7 bathythermograph probes, national stock number (NSN) 6655-00-162-2479, Sippican part number 210883-1. The RFP included the "Products Offered" clause set forth in DLA regulations. The clause explains that the RFP specifies brand-name models that the government knows are acceptable and that the government lacks detailed specifications or sufficient data to determine the acceptability of other products. The clause therefore provides that, while offers of alternate products will be considered, offerors must furnish with their proposals "all drawings, specifications, or other data necessary to clearly describe the characteristics and features" of the alternate product, in order to establish that the offered item is "either identical to or physically, mechanically, electrically and functionally interchangeable with" the brand-name item.

Two firms submitted offers by the February 21, 1990 closing date. Sippican offered the specified probe, while Sparton offered an alternate product at a lower price. In accordance with the Products Offered clause, Sparton submitted with its proposal a technical data package, which included a technical drawing of the probe, company literature describing the probe's characteristics and specifications, a chart comparing the specifications of the Sparton and Sippican probes, graphs charting the results of various tests of the two probes, and descriptive literature from Sippican for comparison. Two months later, on April 26, Sparton also submitted results from a test that had been conducted by the Canadian government in connection with a contract Sparton had obtained as an approved source for the probes in Canada. DGSC forwarded the test results to the Naval Sea Systems Command (NAVSEA), which essentially determined on August 7 that the test was inconclusive as to the Sparton probe's interchangeability with the Sippican probe. Specifically, NAVSEA's review of Sparton's test data concluded that direct comparison of the test results for the Sparton and Sippican probes was not

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1/ The bathythermograph probe is a ship-launched, expendable sensing device that detects thermal gradients in seawater. The data obtained by the probe are used primarily by the ship's antisubmarine warfare specialists in making tactical decisions.

possible because (1) the test probes had been launched sequentially and not simultaneously; (2) a conductivity-depth-temperature standard--an extremely accurate device that is used to verify the accuracy of the data collected by the probe--was not used in the test; (3) the sample size--number of probes--used in the test was too small to yield conclusive results; and (4) the test did not consider stress factors such as shipping and handling, storage at extreme temperatures, and aging. According to NAVSEA, "in order to verify accuracy and reliability of the Sparton probes and determine suitability for Navy applications, additional testing of a[n] adequate sample of probes under controlled conditions is required."

Based on NAVSEA's August 7 findings, DGSC determined that Sparton's probe was not acceptable. Award ultimately was made to Sippican on December 31. Upon learning of the basis for its rejection, Sparton filed this protest. DGSC subsequently informed our Office, pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d)(2) (1988), that urgent and compelling circumstances affecting the interests of the United States, specifically the inadequate number of probes available to meet current and projected demand, did not permit waiting for a decision on the protest; Sippican's performance is now complete.

Sparton primarily asserts that the information it submitted with its proposal showed that its probe is identical in all respects to Sippican's, and that award to Sippican at a higher price therefore was improper. Sparton argues that since the RFP did not require submission of test data, the inconclusiveness of the Canadian test data should not have been a basis for rejection of its product. Alternatively, Sparton asserts that DLA, having found that the information Sparton submitted failed to demonstrate the interchangeability of its probe with Sippican's, was required to afford Sparton a reasonable opportunity to correct the deficiency.

The Competition in Contracting Act of 1984 (CICA) requires agencies to obtain full and open competition in their procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1). Accordingly, when a contracting agency restricts a contract award to an approved source, it must give nonapproved sources a reasonable opportunity to qualify. 10 U.S.C. § 2319(c)(3); Vac-Hyd Corp., 64 Comp. Gen. 658 (1985), 85-2 CPD ¶ 2. This includes the obligation to "ensure that a potential offeror is provided, upon request and on a reimbursable basis, a prompt opportunity to demonstrate its ability to meet the standards specified for qualification." 10 U.S.C. § 2319(b)(4).

Evaluating offers of alternate products pursuant to the Products Offered clause essentially involves a determination

of the technical acceptability of the proposal (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), and not an evaluation of the alternate item itself. Julie Research Laboratories, Inc., B-240885, Dec. 31, 1990, 70 Comp. Gen. __, 90-2 CPD ¶ 526. The procuring agency is responsible for evaluating the data supplied by the offeror on a case-by-case basis and ascertaining whether it provides adequate assurance that the product will perform properly, taking the nature and function of the item into account. Sony Corp. of Am., 66 Comp. Gen. 286 (1987), 87-1 CPD ¶ 212. Whether an offeror has presented sufficient information to convince the agency that the alternate item meets the agency's requirements is a technical judgment committed to the agency's discretion. Id. We will not disturb the agency's technical determination unless it is shown to be unreasonable. Rotair Indus., Inc., B-219994, Dec. 18, 1985, 85-2 CPD ¶ 683.

Although Sparton argues that its alternate item should not have been rejected based on the absence of acceptable test results because the RFP does not require submission of test data, as indicated above, the Products Offered clause does require that the offeror establish the acceptability of the alternate product, that is, establish that it is "physically, mechanically, electrically, and functionally interchangeable" with the specified product. In this regard, the clause provides that the data submitted "must cover design, materials, performance, function, interchangeability, inspection and/or testing criteria." While an agency need not require testing prior to finding an alternate product acceptable, see Everpure, Inc., B-231732, Sept. 13, 1988, 88-2 CPD ¶ 235, testing requirements may be necessary to assure that items with no proven reliability do not contain latent weaknesses relative to the qualified product. Kitco, Inc., 67 Comp. Gen. 110 (1987), 87-2 CPD ¶ 540. In view of the inconclusiveness of the Canadian test results, we think NAVSEA and DGSC reasonably determined that further testing was necessary to assure the acceptability of this integral component of a tactical antisubmarine warfare weapons system.

While Sparton asserts that the agency failed to notify it that the inconclusive test data and other technical information it submitted were insufficient to establish the acceptability of its probe, the record shows that, in fact, Sparton was aware of the need for additional testing of its probe and that its product would be rejected if acceptable test results were not provided. Further, Sparton was aware of the government's lack of funds to pay for such testing. In an August 15 letter from Sparton to Navy competition advocate officials, Sparton stated that it understood that no Navy funds were available for testing, and expressed concern that

it would be excluded from competition for the DGSC contract if not qualified "within the next month or so." Sparton therefore urged the Navy "to arrange some method by which the Navy can support a test program that will allow Sparton to be a qualified supplier of this product."

Under 10 U.S.C. § 2319, potential offerors, in order to become qualified, generally must bear the cost of testing and evaluation. See Castoleum Corp., 69 Comp. Gen. 130 (1989), 89-2 CPD ¶ 549. Thus, where an offeror refuses to bear the costs of properly required qualification testing, its alternate item may be rejected. Id. While Sparton maintains that it offered to absorb certain of the costs associated with testing, it is clear from the August 15 letter that it was not at that point offering to absorb the testing costs. Rather, the first documentary evidence in the record of a Sparton offer to conduct testing at its own expense is a letter to the Navy dated November 5. An agency is not required to delay a procurement in order to provide a potential offeror an opportunity to demonstrate its ability to become approved, see Tura Mach. Co., B-241426, Feb. 4, 1991, 91-1 CPD ¶ 114, especially where the offeror substantially contributes to its failure to obtain source approval in time for award. See Texstar, Inc., B-239905, Oct. 9, 1990, 90-2 CPD ¶ 273. Although the record does not indicate how long the parties expected qualification testing to take, it appears that by delaying extending an offer to pay for the reasonably required testing for 3 months, until November 5, Sparton at least substantially contributed to its ineligibility for the current procurement.

Sparton argues alternatively that DGSC should have accepted its probe because it has been accepted by the Canadian government, citing Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 225.7403(a)(1)(vi), which requires agencies to consider "qualifying country" sources of supplies that have been tested and accepted for use by a qualifying country (e.g., Canada), and to conduct confirmatory testing if necessary. Sparton argues that DGSC violated this provision by refusing to consider the results of the Canadian test, which was conducted in connection with a contract awarded Sparton by the Canadian government, and by failing to conduct confirmatory testing.

Sparton's argument is without merit. The DFARS provision does not require an agency to accept a product on the sole basis that the product has been accepted by a qualifying country, without considering the validity of any tests performed by the foreign government. Rather, the provision states that "sufficiency of participating country service testing should be considered on a case-by-case basis." The record clearly shows that NAVSEA evaluated the results of the Canadian test

but found the test to be inconclusive. Sparton does not dispute the reasonableness of this determination. Under these circumstances, the regulation did not require DGSC to accept the results of the earlier testing.

We conclude that the agency afforded Sparton a reasonable opportunity to establish the acceptability of its probe, and reasonably concluded that Sparton failed to do so.

The protest is denied.

for James F. Hinchman
General Counsel