Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mine Safety Appliances Company--Reconsideration

File: B-242379.4

Date: April 24, 1992

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DIGEST

1. Prior decision is affirmed where protester fails to establish that dismissal of one element of one argument as untimely was incorrect.

2. Protester's claim that prior decision reached the wrong conclusion on the issue of whether the solicitation's requirement for submitting test data was impermissibly restrictive is denied where the issue was considered in great detail, and protester, while urging a different conclusion, fails to show that prior decision was incorrect.

3. Prior decision dismissing protester's challenge to specifications is affirmed where protester, while claiming that agency tailored specifications to competitor's product, failed to make any showing that the specifications prejudice the protester or exceed the agency's minimum needs.

DECISION

Mine Safety Appliances Company (MSA) requests reconsideration of our decision, Mine Safety Appliances Co., B-242379.2; B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506, in which we denied its protest challenging the Department of the Navy's specifications, included in request for proposals (RFP) No. N61331-91-R-0019, for the design, development, testing, and fabrication of engineering and test service models of a Fire Fighters' Breathing Apparatus (FFBA) for shipboard use. MSA argues that our prior decision erred in three ways: (1) in concluding that one of MSA's issues was not timely raised; (2) in failing to recognize an unfair advantage to National Draeger, Inc. in the solicitation's requirement for submitting test data; and (3) in failing to

require the Navy to produce documents related to Draeger's performance under a prior FFBA procurement.

We affirm our prior decision.

In its protest--the third in a series of challenges by MSA to the Navy's program to procure a new generation of FFBA equipment--MSA argued that the Navy's solicitation for this equipment was improperly drafted to favor Draeger. In this regard, MSA argued that: (1) the time for responding to the solicitation, together with the requirement for a technical demonstration within 30 days and the accelerated delivery schedule, was so short that only Draeger would be able to prepare a successful proposal; (2) the FFBA specifications were improperly relaxed to give an unfair competitive advantage to Draeger; and (3) the Navy's actions both during and prior to the instant procurement show agency bias in favor of Draeger and its technical approach to building a new generation of FFBA device.

Our prior decision denied MSA's contention that the solicitation response time and the requirement for a technical demonstration within 30 days of proposal submission was unduly restrictive. In addition, we dismissed MSA's claims that the FFBA specifications were improperly relaxed and that the agency's actions evidenced bias in favor of Draeger. These issues were dismissed because our Office does not consider claims that specifications should be more, not less, restrictive, see Sea Containers Am., Inc., B-243228, July 11, 1991, 91-2 CPD ¶ 45, and because MSA failed to make any cognizable claim of injury in its protest as a result of the agency's alleged bias.

In its request for reconsideration, MSA first contends that our Office improperly dismissed one element of one argument in its initial protest as untimely. As explained in our decision, MSA's initial protest claimed that the specifications were impermissibly tailored to favor the Draeger device by including a requirement that the FFBA automatically replenish the breathing volume to 0.8 liters within 75 seconds after a collapse of the breathing bag during operation. However, rather than claim that this specification was overly restrictive, MSA argued that it was evidence of an improper relaxing of requirements to permit the Draeger device to compete. Only in its comments filed after receipt of the agency report--and after a conference call with all the parties where MSA was advised that our Office does not consider protester's claims that specifications should be more, not less, restrictive--did MSA argue that the breathing volume requirement was overly restrictive. MSA disputes our conclusion on this point and argues that its initial filing argued that this provision was overly restrictive.

Our review of MSA's initial protest in connection with this reconsideration confirms our earlier conclusion that MSA did not argue in its first filing that this requirement was overly restrictive. In fact, MSA's initial filing speaks for itself. Not only did MSA include the replenishment requirement in a discussion of specification provisions that were improperly relaxed to favor Draeger's FFBA, but the protest stated that "this requirement may not even reflect the user's actual needs." In addition, within the same paragraph, MSA listed two other areas of the specification which it claimed were impermissibly relaxed before concluding that "[t]he dilution of these performance requirements reflects [the Naval Coastal Systems Center's] effort to tailor the product being procured to Draeger's Phase 1B product. . . ."[1] Further, until MSA filed its comments on the agency report, neither our Office nor the Navy was on notice that MSA considered the replenishment requirement to be overly restrictive.[2] Since we could not read MSA's initial argument to include the assertion that the replenishment requirement was overly restrictive, this argument was dismissed as untimely. MSA has not shown our conclusion on this issue to be incorrect.

MSA next contends that our Office failed to consider MSA's factual allegations regarding the submission of test data and thus incorrectly concluded that the specification's requirement for a technical demonstration did not result in an unfair advantage for Draeger. In this regard, MSA does not submit any new facts or raise new arguments; rather, it repeats the facts discussed in detail in our prior decision, and argues that these facts support a different conclusion.

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[1]Other parts of MSA's initial filing also indicated that MSA was claiming that the breathing replenishment requirement was too lax. As quoted in our prior decision, MSA argued that the requirement "does not reflect a user's actual needs at one of the most critical moments for the user and the system. In the event of a loss of system volume, the user would actually require several liters more than that specified in the solicitation."

[2]MSA complains in its request for reconsideration that the Navy never responded to this issue, and never showed that this requirement in the specification was necessary to meet its minimum needs. In our view, given the comprehensive nature of the Navy's response to every other issue raised by MSA in its initial protest, the fact that the Navy did not respond on this point is further evidence that MSA's initial filing failed to indicate that MSA considered the replenishment requirement overly restrictive.

Although MSA points to no facts that it claims were overlooked, we have reconsidered whether the facts support a different conclusion and see no basis for reversing our prior decision. Simply put, MSA's contentions regarding the requirement for a technical demonstration do not withstand scrutiny when viewed in light of the RFP's instructions that offerors may demonstrate their products at the component level (and thus, are not required to have already produced a working FFBA to participate in this procurement), and in light of MSA's participation in FFBA technology and procurements for more than 40 years. In fact, our prior decision explains in detail the reasons why MSA appears uniquely placed to provide all of the testing information required by the Navy. MSA has not shown that those conclusions were inaccurate or unreasonable.

MSA's third and final, contention in its request for reconsideration is that our Office erred in refusing to require the Navy to produce documents related to Draeger's performance under an earlier development contract. Generally, a protester's disagreement with our decisions regarding document release during the course of a protest is not per se a ground for reconsideration of the decision on the merits. Since the issues involved in document disputes usually do not relate directly to claimed errors of law or fact in the prior decision, or information not previously considered, the standard for reconsideration set out in our Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1992), does not include such disputes. In this case, however, we will consider MSA's contention to the extent MSA argues that our prior decision was in error because the record on which it was based did not include the documents regarding Draeger's prior performance.

MSA sought documents relating to Draeger's performance under the initial contract to develop the FFBA because it believed that these documents would show that the specifications in this solicitation were improperly relaxed to match the capabilities of Draeger's FFBA. Since MSA only argued that the specifications were improperly relaxed (with the exception of MSA's challenge to the RFP's response time and requirement for test data), and since our Office does not consider such contentions, we decided that documents detailing Draeger's performance under prior contracts were not relevant to MSA's current protest.

MSA apparently believes it has been denied an opportunity to make a further showing of areas where the specification might have been tailored to permit Draeger to compete in the procurement. However, both during the earlier protest and now, MSA persists in a flawed understanding of a valid challenge to a solicitation's specifications.

In its claim that our Office made an incorrect decision regarding the Navy's document production, and throughout its request for reconsideration, MSA essentially argues that the outcome in this protest should have been the same as in our prior decision in Hewlett-Packard Co., 69 Comp. Gen. 750 (1990), 90-2 CPD ¶ 258, where we sustained a protest against certain salient characteristics set forth in an agency's brand name or equal procurement because the specifications exceeded the agency's minimum needs. In that case, after determining that the agency had incorporated several provisions in the specification from another offeror's data sheet, and that the record failed to establish any independently articulated need for these provisions, we concluded that the provisions were overly restrictive.

MSA's reliance on the Hewlett-Packard decision, as well as its prosecution of this protest, ignores the most basic underpinning of any challenge to restrictive specifications: a showing that specific provisions are restrictive in an unwarranted way. See id.; Infection Control and Prevention Analysts, Inc., B-238964, July 3, 1990, 90-2 CPD ¶ 7. Simply arguing that the specifications are tailored to a competitor's product--as MSA does here--is not enough to raise a viable challenge to the specifications; instead, the protester must make an initial showing that the specifications unduly restrict competition by excluding or otherwise prejudicing the protester without fulfilling a bona fide need of the agency.

MSA made no such showing here. Accordingly, the documents relating to Draeger's prior performance which MSA sought were properly not made part of the record on which our prior decision was based because at best they would support only MSA's claim that the specifications closely tracked Draeger's performance capability as established under the earlier development contract, a claim which, as noted above, is not sufficient to constitute a viable challenge to the specifications.

The prior decision is affirmed.

for James F. Hinchman
General Counsel