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

Decision

Matter of: Red Wing Products, Inc.--Reconsideration

File: B-248601.4; B-248602.4

Date: April 14, 1993

David J. Kuckelman, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.
Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where protester repeats arguments made in its protest submissions and disagrees with original decision.

DECISION

Red Wing Products, Inc. requests reconsideration of our decision, Red Wing Prods., Inc., B-248601.3; B-248602.3, Dec. 30, 1992, 92-2 CPD ¶ 451, in which we denied its protests of the award of contracts under request for proposals (RFP) Nos. F09603-91-R-D1294 (D1294) and F09603-92-R-42201 (42201), issued by the Department of the Air Force on a qualified source basis for 30-inch and 14-inch shackles, respectively. Red Wing principally contended that the agency improperly refused to approve Red Wing as a qualified source under the solicitations.

We deny the request for reconsideration.

The shackles are used in the MAU-12 aircraft bomb racks to carry conventional or nuclear bombs.[1] RFP-D1294 (for 30-inch shackles) was issued on December 19, 1991, and, as amended, established March 30, 1992, as the closing date for receipt of initial proposals. The RFP contained a clause

[1]Red Wing did not dispute that the items were critical in nature. Indeed, Red Wing stated that "failure of the shackles . . . would be disastrous inasmuch as shackle failure [could result] in inadvertent release of the conventional or nuclear weapon being carried which could cause mass destruction of property, loss of lives, radiation poisoning, or nuclear war."

entitled "Urgent Requirement" which stated that "only known qualified sources" would be considered for award, including, as relevant here, offers from firms previously tested by the government or offers from firms that have previously supplied the item to the government. RFP-42201 (for 14-inch shackles) was issued on March 11, 1992, and established April 10, 1992, as the closing date for receipt of initial proposals. The RFP was partially limited to qualified ("proven") sources, and contained a clause entitled "Award of Mission Essential Quantity (MEQ)." The MEQ clause defined a "proven source" as an offeror which had previously produced the identical item or which proposed to provide an item manufactured by the previous prime manufacturer. The clause defined an "unproven source" as an offeror which had not previously produced the identical item to the government or which proposed to provide an item manufactured by other than the previous prime manufacturer. Thus, both solicitations were either partially or totally limited to qualified sources.

On March 13, 1992, prior to the time for submission of offers, Red Wing submitted a data package to the agency requesting approval as a qualified source.[2] Included in this package were the successful results of vibration tests, conducted by an independent laboratory, Dayton T. Brown, of two 30-inch shackles manufactured by the protester, as well as various certifications and documentation as to the source of the components of these shackles. More specifically, and as relevant here, the protester's documentation showed that the raw forgings used co manufacture the 30-inch shackles were purchased from the bankruptcy estate of a debarred firm, Patty Precision Products, which, in turn, had purchased the forgings several years earlier from Trinity Forge, Inc., the debarred firm's subcontractor.[3]

On April 20, 1992, the agency, after its evaluation of the protester's data package, replied as follows to its request for approval:

> "[W]e cannot accept any documentation which indicates Patty Precision Products . . . as a source of, or prior owner of, material submitted as a basis for qualification. . . . The purpose of qualification is to certify that the potential source demonstrates the current ability to

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[2]Red Wing subsequently submitted offers under both solicitations.

[3]Patty Precision Products was debarred because a principal of the firm was convicted of criminal fraud in the course of performing a government contract for aircraft bomb racks.

> develop, manufacture, test, and deliver a product which meets all government requirements. . . . Some of these functions may be accomplished by subcontractors but the 'prime' must also demonstrate the ability to contract, administer, and quality control those sources. In this instance, Patty Precision is not a viable entity, has not operated as a source of production for almost 2 years, and, based on recent experiences, does not represent a reliable source of documentation concerning any material."

In that same letter, the agency requested Red Wing to submit a summary of the company's capabilities; a detailed description of its quality program plan; a certification of in-house or independent laboratory capability to perform magnetic particle inspection; a detailed manufacturing plan; and a certified test report. Finally, the agency specifically requested that Red Wing provide "two samples . . . for form, fit, and function, and conformance evaluation." Red Wing refused to provide the samples and filed its protests with our Office.[4]

The protester principally contended that it provided the Air Force with sufficient information regarding its technical capability to produce the shackles in its data package submitted on March 13, 1992. According to Red Wing, its documentation which showed its successful completion of the vibration tests performed by Dayton T. Brown[5] demonstrated that its shackles were manufactured properly in "every respect," including correct material, proper forging, machining, heat treating, plating, and pre-stressing.

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[4]Red Wing was only willing to provide the agency with the shackles which were the subject of vibration testing by Dayton T. Brown, and which were manufactured with the forgings purchased from the bankruptcy estate of Patty Precision Products. Red Wing, apparently for economic reasons, was unwilling or unable to provide the agency with sample shackles manufactured by Red Wing from components purchased from sources normally used in producing the items.

[5]The protester stated that the vibration tests were conducted in accordance with MIL-R-38953 which controlled the testing requirements for qualification of the MAU-12 bomb racks.

Red Wing also argued that the Air Force should not have required the firm to submit fresh samples for form, fit, function and conformance evaluation.[6]

In our decision, we stated that the contracting agency has the primary responsibility for determining its minimum technical needs and for determining whether a previously unapproved source will satisfy those needs, see Sony Corp. of Am., 66 Comp. Gen. 286 (1987), 87-1 CPD ¶ 212, and that an agency may reject a proposal from an unapproved alternate source in a noncompetitive procurement if that unapproved source does not demonstrate that it can meet the agency's technical requirements. See JTP Radiation, Inc., B-233579, Mar. 28, 1989, 89-1 CPD ¶ 315.

Based on the record before us, we found no merit to the protester's contentions. We stated that the parties did not dispute that the applicable specification governing qualification was MIL-R-38953 and that the purpose of qualification testing was self-evident--to show to the government that a particular source can actually produce the required item. Since MIL-R-38953 required that tested samples "shall have been produced with manufacturing equipment and procedures normally used in production," we found that the government reasonably determined that Red Wing did not meet this standard by reason of its purchase of components from the bankruptcy estate of a debarred firm because a bankruptcy estate was not an on-going source of material, and Red Wing's purchase of material was simply a one-time "auction" buy.

We found that the requirement to employ "procedures normally used in production" did not reasonably encompass auction purchases of critical components from bankruptcy estates; rather, we concluded that the government here reasonably required Red Wing to submit samples that were produced by manufacturing equipment and by purchasing procedures used in actual production.[7] Thus, we found that the protester's March 13 data package was defective because it was based on

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[6]While, as stated above, Red Wing was willing to submit its previously vibration tested samples for visual inspection, the protester also stated that, if it did so, the Air Force must "give due consideration to the normal wear caused by the [previous] testing of the samples . . . and such normal wear [must] not have a negative impact or prevent a positive result for the Air Force's visual evaluation of the samples."

[7]We also stated that the agency was reasonable in requiring fresh samples for inspection and testing of this item with a critical application.

sample shackles that were not manufactured by Red Wing from components purchased from sources normally used in producing the items. Accordingly, we found that the agency properly refused to qualify the firm based simply on its March 13, 1992, data package.

Red Wing also contended that the agency improperly approved Marvin Engineering Company, the awardee under one of these solicitations, as a qualified source based on the first article procedures of Marvin's previous contract for these items (which approval qualified Marvin as a source under these solicitations). Red Wing alleged that Marvin, during first article, failed certain tests of its shackles performed by the independent test laboratory, Dayton T. Brown, and that the Air Force relaxed specifications to permit Marvin to qualify.

The agency stated that after Marvin's shackles failed the Dayton T. Brown testing, it determined that these shackles were nevertheless manufactured in accordance with, and within the tolerances of, the shackle part drawing, and that it therefore relaxed certain testing requirements for the benefit of all future submissions (either first article or "off-the-street" samples such as Red Wing). Since Red Wing had never submitted an acceptable sample for testing by the agency, and since the agency had relaxed the requirements for all future offerors, we found that the protester was not competitively harmed in any way by this relaxation of requirements. See, e.g., Holiday Inn Lakeside City Center, B-248040, June 17, 1992, 92-1 CPD ¶ 527. Finally, as explained below, we found various issues raised in the protester's comments to the agency reports and in subsequently filed correspondence to have been untimely filed protest grounds.

In its request for reconsideration, Red Wing advances numerous arguments--which are either repetitive arguments or which were initially untimely filed--in support of its position. We will only discuss its major arguments.

Red Wing argues that it successfully completed vibration test and visual inspection of two 30-inch shackles performed by the independent test laboratory, Dayton T. Brown, the same laboratory that found numerous discrepancies in the first article test of Marvin's shackles. Red Wing argues that its qualification package which it submitted to the agency on March 13, 1992, demonstrates that Red Wing is a responsible and qualified source for the shackles in accordance with MIL-R-38953. Red Wing also argues that the "fact that Red Wing purchased raw forgings at a bankruptcy sale is immaterial to Red Wing's capability to manufacture, test, and deliver shackles which meet contract requirements," since Trinity Forge, an established firm, was the

original source of the forgings. Concerning Marvin, Red Wing argues that the agency failed to treat Red Wing equally with Marvin because it required Red Wing to submit documentation and samples not required of Marvin which failed its first article test by Dayton T. Brown and which should therefore not have been considered a qualified source.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1992). Mere repetition of previous arguments or mere disagreement with our decision does not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. Here, Red Wing's arguments that it should have been considered a responsible source based on the testing by Dayton T. Brown, and its arguments against qualification of Marvin's shackles are a mere repetition of its previous arguments made in the initial protest. Accordingly, we will not reconsider our decision based on these repetitive arguments.

Next, Red Wing argues that the agency's determination not to consider Red Wing a qualified source constituted a de facto nonresponsibility determination which should have been referred to the Small Business Administration under the certificate of competency program. Red Wing points to the agency's April 20, 1992, letter which, among other things, stated that the "purpose of qualification is to certify that the potential source demonstrates the current ability to develop, manufacture, test, and deliver a product."

Protests based upon other than alleged improprieties in a solicitation must be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Red Wing first raised this issue concerning an allegedly improper de facto nonresponsibility determination in a September 14 supplemental filing. As we stated in our initial decision, Red Wing knew or should have known of this ground of protest no later than upon its receipt of the agency reports in June 1992. This protest ground was therefore untimely filed, and we therefore find no basis to reconsider our decision on this basis.[6]

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[6]Similarly, Red Wing for the first time argued in its comments on the June agency reports that the agency's April 20, 1992, letter failed to comply with the qualification requirements of 10 U.S.C. § 2319 (1988). These comments, however, due to an extension, were filed

Finally, Red Wing argues that in August 1992, the agency advised Red Wing that it required the shackles to be "newly manufactured." Red Wing argues that its shackles which were tested by Dayton T. Brown were newly manufactured and that the agency should not demand that Red Wing submit additional newly manufactured shackles. The agency's position is that it required shackles for visual inspection and qualification which were other than the shackles previously tested by Dayton T. Brown that could have been adversely affected by that testing. In our previous decision, we specifically stated that the agency was reasonable in requiring fresh samples for inspection and testing of this item with a critical application. Red Wing has not presented any new arguments which would warrant reconsideration of our finding.

The request for reconsideration is denied.

Robert P. Murphy

for James F. Hinchman
General Counsel

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more than 10 working days after its receipt of the agency reports, and therefore were also untimely filed.