1495 94 297

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

Decision

PR

Matter of: Ampex Recording Media Corporation; Defense Logistics Agency--Reconsideration

File: B-247722.2; B-247801.2

Date: January 28, 1993

Allen Samelson, Esq., Rogers, Joseph, O'Donnell & Quinn, for the protester.
Joseph Falzone for Memorex Corporation, an interested party.
Jeffery B. Greer, Esq., Defense Logistics Agency, for the agency.
Scott H. Riback, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency argues that protester's product was unacceptable for reason not addressed previous decision, decision is affirmed because agency knew before rejecting proposal, submitted in response to Products Offered clause in name brand procurement, that proposal could be readily modified to be acceptable without delaying the procurement.

DECISION

Ampex Recording Media Corporation and the Defense Logistics Agency (DLA) request reconsideration of our decision Ampex Recording Media Corp., B-247722; B-247801, July 2, 1992, 92-2 CPD ¶ 2. In that decision, we denied Ampex's protest against the award of a contract under request for quotations (RFQ) No. DLA900-91-Q-JA22 (RFQ-JA22) and sustained its protest under request for proposals (RFP) No. DLA900-92-R-0148 (RFP-0148).

We affirm the previous decision.

Both procurements were conducted on the basis of limited competition. RFQ-JA22 called for Ampex model 799 tape (or an interchangeable alternate), while RFP-0148 specified both Ampex 799 tape and Memorex model 897 tape (or an interchangeable alternate). Under RFQ-JA22, Ampex protested DLA's award of a contract to Memorex for its 897 tape, which it proposed as an alternate to the specified Ampex 799 tape; Ampex argued that the award was improper because the alternate Memorex product did not satisfy the requirement in the solicitation's Products Offered clause that any alternate be

interchangeable with the specified Ampex 799 tape. In its protest under RFP-0148, Ampex argued that the solicitation was ambiguous because the two specified products (Ampex 799 and Memorex 897 tape) were not equivalent. The focus of Ampex's protests in both cases concerned the two tapes' "drop out" rates;[1] the protester argued that the Memorex 897 tape was not tested to as stringent a drop out standard as the Ampex 799 tape.

Agency technical personnel testified at a hearing on the matter that the Memorex 897 tape is physically, mechanically, electrically and functionally interchangeable with the Ampex 799 tape; they concluded that neither the Memorex nor Ampex testing standard would result in tape that would more reliably record incoming data than the other. Agency technical personnel also testified that 100 percent testing of each reel is critical to assuring the tape would satisfy the agency's minimum needs; every reel of the Ampex 799 and Memorex 897 tapes (but not the Ampex model 797 tape proposed as an alternate under RFP-0148) is tested.

Based on this testimony, we denied Ampex's protest of the award to Memorex under RFQ-JA22, finding (1) that DLA reasonably determined the Memorex 897 tape to be an acceptable alternate to the specified Ampex 799 tape; and (2) that DLA was not required to apprise offerors of its determination that the Memorex product was an acceptable alternate, since the Products Offered clause already alerted all offerors that alternative, interchangeable products would be acceptable.

Regarding RFP-0148, we found that DLA had become aware that 100 percent testing was essential to satisfying its requirements during the pendency of the acquisition, since the agency had rejected Ampex's alternate offer of the firm's 797 tape because it was not 100 percent tested. Citing our decision Kitco, Inc., B-241868, Mar. 1, 1991, 91-1 CPD ¶ 238 (offeror proposing an alternate should be promptly informed as to why its product is not acceptable), we concluded that DLA had erred in failing to promptly inform Ampex of the reason for rejection of its 797 tape so as to provide it an opportunity to offer 100 percent testing in time to obtain agency approval prior to the award of a contract. We recommended that the agency amend the RFP or inform Ampex during discussions of the 100-percent testing requirement and provide the firm an opportunity to offer a modified product.

---

[1]Drop outs are flaws in the surface of the tape which result in an inability of the tape to record incoming data.

Ampex's Request

Ampex argues that the record does not support DLA's determination that the Memorex 897 tape is interchangeable with the Ampex 799 tape. Ampex maintains that the record shows that the agency did not find that the tape was interchangeable with the Ampex tape, but only that the Memorex tape was satisfactory for its use. According to the protester, DLA essentially relaxed its requirements by accepting the Memorex 897 tape because it is tested to a less stringent, analog-based standard, instead of the digital-based standard to which the Ampex 799 tape is tested. Ampex contends that DLA was required to inform all prospective offerors that a lesser quality tape than specified in the solicitation would satisfy its needs.

This argument was addressed in our prior decision, and Ampex has presented no new evidence to show that our initial conclusion that DLA reasonably found the Memorex item interchangeable was incorrect. That conclusion was based on the entire record, including hearing testimony establishing that all of the tapes under consideration were manufactured to the same standard (although the nature and extent of testing for each tape differed), that no particular test method was more probative of a tape's reliability than another, and that the user agency's engineers reasonably deemed the Memorex 897 tape physically, mechanically, electrically and functionally interchangeable. Ampex's position on reconsideration amounts to no more than disagreement with our conclusion that DLA reasonably determined the Memorex 897 tape to be interchangeable with the Ampex 799 tape. Such disagreement, without more, is insufficient to serve as a basis for reconsideration. American Diesel Eng'g Co., Inc.--Recon., B-245534.2, June 16, 1992, 92-1 CPD ¶ 522.

Ampex also argues that our denial of its protest against the award to Memorex under RFQ-JA22 was erroneous. Ampex maintains that, had the agency amended the RFQ to indicate that the Memorex tape was an acceptable alternate and that 100 percent testing was a critical element of its minimum requirements, it could have offered an acceptable alternate item.

This argument essentially is an extension of Ampex's position that the Memorex 897 and Ampex 799 tapes are not interchangeable, since it is based on Ampex's view that it could have offered some lesser item had it known the Memorex item was considered acceptable. As discussed above, however, DLA's acceptance of the Memorex item was based on its reasonable determination that it was interchangeable with the Ampex item; DLA's acceptance of the Memorex product did not represent a change in the agency's minimum needs

that had to be communicated to Ampex. Absent the information on the acceptability of the Memorex item, it does not appear that knowledge of the 100 percent testing requirement would have affected Ampex's offer, since the item Ampex offered already satisfied that requirement. (In any case, although Ampex argues otherwise, we found in our prior decision no evidence that the agency was aware of the requirement during the RFQ procurement, such that the agency could have disclosed it to Ampex.)

DLA's Request

DLA argues that our decision sustaining Ampex's protest under RFP-0148 was erroneous because Ampex's 797 tape (the alternate product offered by Ampex and rejected by DLA in that acquisition) was technically unacceptable for an additional reason beyond the fact that the tape is not 100 percent tested. Specifically, DLA states that the technical data sheet submitted by Ampex with its alternate offer indicated that the firm's 797 tape was tested to a lesser drop out standard than either the specified Ampex 799 or Memorex 897 tapes. Ampex submitted during the protest proceedings a revised data sheet for its 797 tape which showed that Ampex now agreed to test its 797 tape to the drop out standard for the Memorex 897 tape. DLA maintains that the revised data sheet making this change in its tape amounted to an improper late proposal modification which the agency was not required to consider. Thus, according to DLA, even if Ampex had known of the 100 percent testing requirement, its offer would have been technically unacceptable.

DLA's argument would have merit if the unacceptable Ampex alternate offer had been submitted in response to a solicitation that included specifications or salient characteristics of a name brand item.[2] This procurement, however, was restricted to approved products. While offerors could supply data to establish that an alternate product was "physically, mechanically, electrically and functionally interchangeable" with the specified products, they were not provided any details regarding the agency's needs. We believe that in such noncompetitive procurements, once the agency receives an offer for an alternate product

---

[2]This was not a "name brand or equal" procurement, which may not be used unless a more detailed purchase description "cannot feasibly be made available" in time for the acquisition, Federal Acquisition Regulation (FAR) § 10.004 (b)(2), and must include those salient physical, functional and other characteristics which "equal" products must meet. Department of Defense FAR Supplement §§ 210.011-70(a)(1), 252.210-7000.

that can be readily modified to meet its needs, it must provide the offeror an opportunity to conform its product, so long as doing so does not interfere with the agency's acquisition schedule. This view is consistent with the "Products Offered" clause in the solicitation, which advised offerors that "the Government will make every reasonable effort to determine, prior to award, the acceptability of any products offered which are within the range of consideration," if this can be accomplished "by the expected contract award date." It is also consistent with the limitations on using noncompetitive procurement procedures. See FAR §§ 10.004(b)(2); 6.302-1(b)(1) and (2).

Our opinion is also grounded in the statutory requirement that, where a procurement is restricted to an approved product, offerors proposing alternative products must be given a reasonable opportunity to meet any quality assurance requirements. 10 U.S.C. § 2319(b)(4) (1988); BWC Technologies, Inc., B-242734, May 16, 1991, 91-1 CPD ¶ 474; see Sony Corp. of America, 66 Comp. Gen. 286 (1987), 87-1 CPD ¶ 212. This opportunity to qualify includes ensuring that an offeror is promptly informed of whether qualification has been attained; if not, the agency must promptly furnish specific information as to why qualification was not attained. 10 U.S.C. § 2319(b)(6); Advanced Seal Technology, Inc., B-249859, Dec. 7, 1992, 92-2 CPD ¶ ___. While a procurement need not be delayed to permit an offeror to qualify, 10 U.S.C. § 2319(c)(5), it is implicit in this specific information requirement that offerors should be permitted to remedy easily correctable deficiencies where no delay will result. See also 10 U.S.C. § 2319(c)(3) (offeror of alternate item cannot be denied consideration of offer where it can meet qualification standards "before the date specified for award of the contract").

As already discussed, we sustained Ampex's protest based on our finding that (1) DLA had failed to advise Ampex promptly that qualification was being denied due to its failure to offer 100 percent testing; and (2) it was undisputed that Ampex could have remedied this, and thereby qualified for the award, without interfering with the award schedule. The same rationale and conclusion would apply to the drop out standard deficiency DLA now raises. The record clearly shows that, to the extent that the Ampex 797 tape was unacceptable, it was only because the type and extent of testing was inadequate. As noted in our first decision, the agency's engineers testified that all of the Ampex tape models are manufactured to the same standard and are distinguishable only in how they are tested. Thus, in order for Ampex to modify its tape to meet DLA's requirements, it had only to agree to test all reels of its 797 tape to the drop out criteria used by Memorex for its 897 tape. In

fact, DLA was in receipt of Ampex's revised technical data sheet for the 797 tape no later than June 8, 1992, the date on which we conducted a hearing in this case. DLA's rejection of Ampex's alternate offer did not occur until June 16, by which time the agency had actual knowledge of the Ampex 797 drop out rate. Video transcript 13:42, 13:50. In other words, to the extent that DLA rejected Ampex's tape for this reason, it did so knowing that Ampex could cure this deficiency in its offer without delaying the award (DLA concedes that the data shows that the item actually conforms to the drop out standard of the Memorex tape). Thus, the agency was required to afford Ampex an opportunity to correct this deficiency. See Classic Mfg., B-249776, Dec. 14, 1992, 92-2 CPD ¶ ___.

DLA argues that it is an undue administrative burden to allow offerors in source-approved acquisitions to demonstrate, where time allows, that their technically unacceptable alternate items can be readily modified to meet the agency's requirements. The requirements of FAR § 10.004(b) and 10 U.S.C. § 2319 impose a number of administrative burdens where agencies seek to procure items without disclosing more than the identity of an item that meets the agency's needs. Agencies need only act reasonably in accordance with the procurement statutes and regulations. Our decision addressed a noncompetitive procurement in which (1) the agency knew it had a specific requirement that had not been disclosed to potential offerors; (2) it did not promptly notify the protester of a deficiency that the agency knew could easily be corrected (by an agreement to test every reel of tape) in order to be eligible for the award; and (3) allowing correction of the deficiency would not have delayed the procurement.

Our previous decision is affirmed.

Milton J. Socolar

for Comptroller General
of the United States