



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Komatsu Dresser Company

File: B-255274

Date: February 16, 1994

J. A. Raveret for the protester.
Ronald M. Pettit, Esq., Defense Logistics Agency, for the agency.
William A. Roberts, III, Esq., Lee Curtis, Esq., and Brian A. Darst, Esq., Howrey and Simon, for Caterpillar, Inc.; and M. L. Baughman for Deere & Company, interested parties.
Susan Wachtel Irwin, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that scraper-tractor offered by low bidder does not meet the standard commercial product requirements in the invitation for bids because of the extent to which the unit will be modified, is denied where the low bidder certified in its bid the compliance of the machine with the specifications and the procurement history of this item shows that in the absence of a comparable commercial product, both past contractors for this item--including the protester--have had to make substantial modifications to their commercial products in order to meet the specification requirements.

DECISION

Komatsu Dresser Company protests the award of a contract to Caterpillar, Inc. by the Defense Logistics Agency (DLA) under invitation for bids (IFB) No. DLA730-93-B-4012, to satisfy a Navy requirement for scraper-tractors, a type of earthmoving equipment.¹ Komatsu alleges that the product

¹A scraper-tractor is made from two linked units: the power unit and the scraper. The power unit, consisting of a two-wheeled tractor with an engine, transmission, and an operator's cab, tows the scraper. The scraper essentially is a steel box or "bowl" incorporating a cutting edge on its bottom and into which scraped material is accumulated, then transported and ejected. The scraper is typically supported
(continued...)

offered by Caterpillar fails to meet the commercial product requirements of the solicitation, and that its bid, therefore, is nonresponsive.

We deny the protest.

BACKGROUND

This solicitation is for the supply of open-bowl type scraper-tractors in the 12 cubic yard heaped capacity, 28,000 pound minimum payload, size class. The IFB required the units to be built in accordance with Military Specification Mil-S-28632D(YD), dated February 25, 1985, for a 48,000 pound minimum payload scraper, as amended to describe the smaller unit here being procured, and to make other changes, especially the addition of air transportability requirements.² The contract provides for first article testing and an examination to verify compliance with the air transportability requirements.

The solicitation also required each bidder to identify the make or model of scraper-tractor it was offering, and to certify that it was the bidder's "standard commercial item which fully complies with requirements of paragraph 3.1 of Mil-S-28632D(YD)." Paragraph 3.1 provides:

"Standard commercial product. The scraper-tractor shall, as a minimum, be in accordance with the requirements of this specification and shall be the manufacturer's standard commercial product. Additional or better features which are not specifically prohibited by this specification but which are a part of the manufacturer's standard commercial product, shall be included in the scraper-tractor being furnished. A standard commercial

¹(...continued)

at its front by a "gooseneck" attached to the tractor and at its rear by wheels. Scrapers may be elevator-type or open bowl-type. Elevator-type scrapers incorporate a hydraulically-powered conveyor which lifts the scraped material and drops it into the bowl. Open bowl-type scrapers lack this mechanism and rely on physical force to push the scraped material back into the bowl for transport and disposal.

²The air transportability requirements placed dimensional and weight limitations which made it necessary for all bidders to modify their offered products in a number of ways. For example, the operator's cab on each tractor had to be lowered to meet the height limitations, and additional axles had to be included on the units to satisfy the per axle weight limitation.

product is a product which has been sold or is being currently offered for sale on the commercial market through advertisements or manufacturer's catalogs, or brochures, and represents the latest production model."

The IFB did not require bidders to submit descriptive product literature to establish conformity with paragraph 3.1.

Bids were received from Caterpillar, Deere & Company, and the protester, in order of ascending price. Caterpillar, Deere and Komatsu certified in their respective bids that their offered models, the "Caterpillar 613C with conventional bowl scraper"; the "John Deere 762B"; and the "Dresser Model 412B Tractor and ATI Model PS9L Open Bowl Scraper," complied with paragraph 3.1.

Although no descriptive literature was required or submitted with the bids, the information entered by the bidders in the IFB's "Place of Performance" clause indicated that Caterpillar's scraper would be manufactured by Eagle-Picher, Inc. (Caterpillar's regular supplier of this component for its commercial models) and that the Deere and Komatsu scrapers would not be manufactured by them but by the Rome Division of Marktill Corporation, which the record shows markets scrapers under both the "Rome" and "ATI" brands. These indications of each bidder's manufacturing approach are consistent with the information the bidders subsequently have provided, that is, that Caterpillar intends to supply its commercial 613C tractor with a modified scraper of its own manufacture, and that Deere and Komatsu would supply their commercial 762B and 412B tractors, respectively, with modified open-bowl scrapers made by Rome.

Komatsu has protested the agency's award to Caterpillar, the low bidder. Performance of Caterpillar's contract has been suspended pending our decision.

Komatsu maintains that the two lower bids are not responsive to the IFB's standard commercial product provisions because commercial literature for the Caterpillar 613C and Deere 762B shows those scraper-tractors to be equipped with elevator type scrapers, and not the open-bowl type scrapers required under the IFB. Komatsu also notes that Caterpillar is using a different scraper than it had provided under prior DLA contracts. The protester argues that as a result of this change in manufacturing approach, Caterpillar is no longer offering a standard commercial product.

Concerning its application of the standard commercial product clause to this item, DLA states that no contractor has been able to provide an open-bowl scraper-tractor in this size class, and which meets the air transportability

requirements, through the provision of its standard commercial product. In this regard, DLA has provided the commercial descriptive literature not only for the Caterpillar 613C and the Deere 762B, but for the Komatsu 112B. The literature of all three bidders, including the protester, depict an elevator type scraper. In order to meet the requirements of this solicitation, however, each of the bidders must instead provide an open-bowl scraper, and that scraper must be further modified to conform to the air transportability requirements. We note that Komatsu concedes that it does not manufacture its own open-bowl scraper in this size class because of the limited commercial market for such an item. Similarly, Deere states that "[n]o manufacturer [including Komatsu Dresser] currently offers, nor do we believe has offered in the last 20 years, an open bowl scraper in this size class."

DLA also observes that the procurement history of this item reflects this situation. This is the fourth procurement of scraper-tractors to this specification. Two prior contracts were awarded to Caterpillar and one was awarded to Komatsu. The record shows that in the past, Caterpillar's and Komatsu's strategy for meeting the specifications was not to supply their own scraper, but to supply a Rome scraper modified to properly connect to the Caterpillar or Komatsu tractor, and to meet the air transportability requirements.

ANALYSIS

As noted above, DLA's approach with respect to this item has been to take a 1985 military specification written for an open-bowl scraper-tractor, and to amend that specification to describe a machine with approximately 40 percent smaller capacity, as well as air transportability, which requires additional dimensional and structural changes. At the same time that it made these significant technical changes, however, DLA did not amend the 1985 specification's standard commercial product clause, which continues to require that the scraper-tractor both satisfy "the requirements of this specification" and be a standard commercial product.

Since there is no commercial market for these downsized, open-bowl, air transportable scraper-tractors, however, prior contractors have been able to meet the specification's requirements only by substantially modifying their commercial products. Nothing in the record suggests that when Caterpillar and Komatsu were awarded their initial contracts, they had on the commercial market an open-bowl scraper-tractor in this size class which could meet the military's needs with relatively minor modifications.

Rather, DLA permitted both contractors to substitute for the scrapers normally furnished with their tractors, an open-bowl scraper manufactured by another company and modified to connect to their tractors and meet the air transportability requirements.

Komatsu argues that its own bid is responsive to the IFB's standard commercial product requirement because it is offering the identical configuration of equipment which it previously sold to the government under its prior DLA contract, and which is based on a commercially-available Rome scraper. (In this regard, we think Komatsu is inclined to minimize the significance of the modifications which were necessary to adapt the Rome scraper in its own case, such as those needed to meet the air transportability's maximum weight per axle limitation.) Nevertheless, Komatsu argues that this procurement is distinguishable from the prior ones in that here, Caterpillar intends to convert its own elevator type scraper in order to meet the IFB requirements, rather than substitute a modified Rome unit. The protester argues that this will entail the redesign of so many aspects of the scraper that the scraper-tractor no longer qualifies as a standard commercial product.

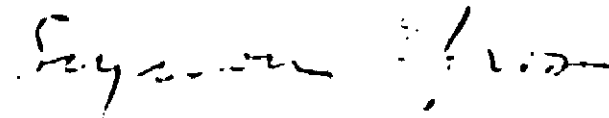
While Caterpillar does not deny that it will need to make dimensional and structural changes to its scraper, it does argue that it is moving to a "simplified" product, in that the bowl will no longer be loaded through an elevator mechanism, but will essentially be an open box into which the scraped material is pushed. Caterpillar's commercial literature for the 613C elevator scraper shows the elevator to be a hydraulically-powered, chain-driven, conveyor mechanism approximately 7 feet wide by 8 feet long. Caterpillar's modifications would include the removal of this mechanism and its associated hydraulic system (pump, hydraulic motor, gearbox). The contracting agency has determined that Caterpillar's approach is an acceptable alternative method of meeting the IFB's specification requirements.

The determination of whether a product is a commercial item is largely within the discretion of the contracting agency, and will not be disturbed by our Office unless it is shown to be unreasonable. See, e.g., Trojan Indus., Inc., B-220620, Feb. 10, 1986, 86-1 CPD ¶ 143. The specifications used here were adapted from those which described a substantially larger, commercially available, non-air transportable machine. Even though the record shows that there was no product on the commercial market comparable to the revised item, the original specification's requirements for a standard commercial product were not made correspondingly more flexible. Therefore, in three prior procurements during the past 8 years the contracting agency has permitted its two prior contractors--including the protester--to make

substantial modifications to their standard commercial products in order to meet the military's requirements. Under these circumstances, we are not prepared to disturb the contracting agency's decision that it is acceptable for Caterpillar to modify its own scraper normally supplied with its commercial 613C tractor. We recommend, however, that DLA consider revising its specification for this item to more accurately reflect the types of modifications to the scraper which are acceptable.

Komatsu also has alleged that Deere's bid is nonresponsive and therefore ineligible for award. We need not address these arguments, however, since we have upheld the award to Caterpillar.

The protest is denied.



52 Robert P. Murphy
Acting General Counsel