



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Pasteur Milk Company, Ltd.; Dairy Maid Dairy, Inc.

**File:** B-251758.5; B-251758.6

**Date:** May 19, 1994

Michael W. Kauffman, Esq., and Craig A. Holman, Esq., Elliott, Vanaskie & Riley, for Pasteur Milk Company, Ltd., and Michael L. Sterling, Esq., and Howard W. Roth III, Esq., Vandeventer, Black, Meredith & Martin, for Dairy Maid Dairy, Inc.

Col. Riggs L. Wilks, Jr., Maj. Karl M. Ellcessor III, and Charles J. Wilder II, Esq., Department of the Army, for the agency.

Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest of award is denied where agency reasonably determined that awardee showed ability to perform contract requirements and firm was reasonably found to offer a reasonably priced, technically acceptable proposal under solicitation's general evaluation criteria.

### DECISION

Pasteur Milk Company, Ltd. and Dairy Maid Dairy, Inc. protest the award of a contract by the Department of the Army to Seoul Dairy Cooperative under request for proposals (RFP) No. DAJB03-93-R-0002, for the operation of the Eighth United States (U.S.) Army Milk Plant at K-16 Airbase, Songma, Republic of Korea.<sup>1</sup> The protesters contend that the Army changed material solicitation requirements without

<sup>1</sup>The RFP specifically requires the contractor to furnish all management, personnel, vehicular and equipment spare and repair parts, equipment and supplies (except for government-furnished utilities, property, equipment, supplies, and services listed in the RFP) to operate and maintain the milk plant.

amending the solicitation and advising all offerors, and improperly evaluated the awardee's proposal to conclude that the awardee was capable of performing the contract in accordance with the RFP's requirements.

We deny the protests.

The RFP, issued on November 23, 1992, and amended several times, contemplated the award of a firm, fixed-price requirements contract for a 10-1/2-month base period and 1-year option period. The RFP advises offerors that:

"[r]eceipt of a fair and reasonable technically acceptable proposal from a responsible local offeror [in possession of all licenses and permits required to perform in the Republic of Korea without Invited Contractor status] automatically will exclude offers by non-local sources from further consideration, pursuant to the [Republic of Korea-United States Status of Forces Agreement (ROK-US SOFA)] . . . ."

Section M of the RFP, which does not provide a detailed evaluation scheme for evaluating proposals for award or comparatively rating the qualitative merits of proposals, states that:

"[t]he Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, costs or price and other factors, specified elsewhere in this solicitation, considered . . . . Other factors will include but are not limited to Section C [regarding the statement of work and stating that the contractor shall comply with the RFP's provisions], Section D [regarding packaging and marking], [and] . . . Paragraph H-15 [regarding locally procured materials] . . . ."

In response to offerors' questions, including concern about the evaluation of proposals, the Army issued amendment No. 11 on July 6, 1993, which enclosed a series of agency answers to the offerors' questions, explaining that:

"[f]or this acquisition the Government decided that it would perform comparative evaluation only of the prices offered, since the technical aspects of the proposals would not require evaluation beyond the determination of technical acceptability or unacceptability. A specific evaluation plan is not required . . . . The technical acceptability of each proposal will be

determined by evaluating whether the proposal fulfills the requirements of the statement of work and the solicitation's terms and conditions."

Paragraph H-15 of the RFP, relating to locally procured materials, provides:

"Except as specifically approved in writing, in advance, by the Contracting Officer, Contractor shall not incorporate into Government property or the containers and/or products to be delivered under this contract any products or materials (except cocoa and vanilla) produced, grown, manufactured, or processed outside the United States or its possessions . . . ."

Four firms submitted proposals by the initial closing date of July 20, 1993, including Dairy Maid, Contact International Corporation, Pasteur (teaming with Contact), and Seoul.<sup>2</sup> Two of the proposals (Pasteur's and Seoul's) were submitted by local contractors.<sup>3</sup> To determine the technical acceptability of the local offers, the proposals were reviewed and pre-award surveys were conducted for Pasteur and Seoul by a team of government personnel including a veterinarian (authorized by Army regulations to evaluate contractor ability to meet the terms and conditions of the contract with respect to veterinarian-related responsibilities), a nutritionist, a quality assurance inspector, a safety inspector, the contracting officer's representative, and a pre-award survey monitor. Both of the local firms were found capable of performing the contract. The Army also determined that the local contractors' proposed prices were reasonable based upon Defense Contract Audit Agency (DCAA) audits of August 13, and comparison to the government's independent estimate and previous contract price data.

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<sup>2</sup>Dairy Maid is the incumbent contractor having held the most recent base period contract for these services. Contact had operated the milk plant for many years prior to the 1993 award to Dairy Maid.

<sup>3</sup>Dairy Maid and Contact performed prior contracts in Korea (which procurements did not include the ROK-US SOFA limitations regarding competition with local contractors) under Invited Contractor status; neither firm submitted information in their proposals showing local contractor status for this procurement.

On September 3, Dairy Maid and Contact were informed of the Army's receipt of technically acceptable proposals from local sources and that, under the terms of the ROK-US SOFA, Invited Contractor status could not be granted to those firms to continue participation in the procurement; proof of local contractor status was requested of the firms. Although stating continued interest in the procurement in the event no local source was found to be acceptable, Dairy Maid and Contact acknowledged that they did not possess the required licenses to compete as local contractors. With Dairy Maid and Contact excluded from further competition, the Army received best and final offers from the two local contractors remaining in the competitive range, Pasteur and Seoul. Further revised proposals were requested from Pasteur and Seoul and pre-award survey reviews were conducted. Finding that Seoul had shown the ability to perform in accordance with the RFP's requirements, the Army awarded a contract under the RFP to Seoul on December 10 for \$6,620,989.88. These protests followed.

Dairy Maid initially protested the evaluation of the awardee's proposal, and later supplemented its protest to include a challenge to the agency's evaluation of Pasteur's proposal. Dairy Maid essentially contests the adequacy of the agency's price and technical evaluation of the local firms and the determination that the local firms could meet the performance requirements at the time of contract award. On this basis, Dairy Maid concludes that its proposal was wrongfully excluded from the competitive range.<sup>4</sup>

Further, both Pasteur and Dairy Maid challenge the agency's determination of Seoul's technical acceptability, namely, Seoul's ability to meet the required performance schedule. Specifically, the protesters contend that the agency improperly relaxed for Seoul the mandatory solicitation requirement, at paragraph H-15 of the RFP, prohibiting the contractor's use of certain locally procured materials

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<sup>4</sup>Dairy Maid contends that solicitation amendments, which primarily reduced the length of the base period and corresponding estimated quantities, required cancellation and resolicitation of the procurement. These amendments represent nonsubstantial alterations to the RFP's terms which do not constitute major revision of the solicitation; cancellation therefore was not required. Federal Acquisition Regulation § 15.606(a) and (b). Moreover, Dairy Maid was not entitled to receipt of these amendments since the firm had previously been excluded from the competitive range on an unrelated basis (*i.e.*, lack of local contractor status). See Adams Corp. Solutions, B-241097, Jan. 9, 1991, 91-1 CPD ¶ 24; The MAXIMA Corp., B-222313.6, Jan. 2, 1987, 87-1 CPD ¶ 1.

without prior written approval by the contracting officer. The protesters contend that Seoul improperly was permitted to use packaging materials composed of U.S. origin materials which will be pressed into shape and printed in Korea; the Army allegedly has previously found this packaging process to violate paragraph H-15's local materials restriction unless prior written approval was obtained. (Dairy Maid contends that the Army also allowed Pasteur to offer similarly nonconforming packaging and thus improperly concluded that firm could also meet the performance schedule at the time of award.) The protesters state that, absent this specification relaxation, Seoul would not be able to meet the performance schedule. Seoul's inability to perform upon award, the protesters note, is demonstrated by the fact that shortly after the scheduled date for the start of performance, Seoul sought and was granted, pursuant to paragraph H-15 of the RFP, permission to use packaging composed of U.S. origin packaging materials pressed into shape and printed in Korea.<sup>5</sup>

In reviewing a protest against the propriety of an evaluation, it is not our function to independently evaluate proposals and substitute our judgment for that of the agency. See General Servs. Engr'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. Rather, we will review an evaluation only to assure that it was reasonable and consistent with the evaluation criteria in the RFP. Id.

We find that the evaluation was reasonable. First, despite the protesters' contentions that the Army failed to adequately evaluate the awardee's costs or adjust for cost realism, the record shows that the Army reviewed Seoul's price (this was a fixed-price, not a cost, contract) in accordance with the solicitation's terms. Offerors were advised that prices would be comparatively evaluated for price reasonableness; the Army received favorable information from the DCAA audit of the proposal, then compared the proposed price to the other offerors' prices, the independent government estimate, and historical procurement data. Seoul submitted the low offer, largely due to its operation as a not-for-profit firm (lowering

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<sup>5</sup>As to Dairy Maid's and Pasteur's allegations that Seoul has not performed in accordance with the contract's terms since it started performance under the contract, to which the Army responds that Seoul's performance has been fully acceptable, these contentions involve matters of contract administration not for our review. 4 C.F.R. § 21.3(m)(1) (1993). Further, since we find the Army's evaluation of Seoul's proposal reasonable, and thus have no basis to question the award determination, we need not discuss Dairy Maid's protest of the Army's evaluation of Pasteur's proposal.

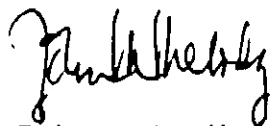
profit and general and administrative expenses compared to other offerors), and the record supports the determination of the reasonableness of the proposed price. Moreover, the record shows the agency's price review was conducted prior to Dairy Maid's exclusion from the competitive range and was confirmed again prior to award. A detailed cost realism analysis of the proposal was not required by the RFP for this fixed-price, requirements-type contract. See Crestmont Cleaning Serv. & Supply Co., Inc.; Scott & Sons Maintenance, Inc.; Son's Quality Food Co., B-254486 et al., Dec. 22, 1993, 93-2 CPD ¶ 336; Culver Health Corp., B-242902, June 10, 1991, 91-1 CPD ¶ 556.

Second, the evaluation scheme set forth in the RFP did not identify any specific evaluation criteria to be used in evaluating offers. Rather, the RFP contemplated review of the offeror's compliance with the statement of work and other contract provisions. The record provides no basis to question the reasonableness of the determination of Seoul's technical acceptability or the selection of the firm for award. Shortly after the receipt of proposals, and prior to the exclusion of nonlocal contractors from the competition, the Army engaged a multi-disciplined team to review the proposal to determine the firm's ability to perform the contract in accordance with the RFP's terms (*i.e.*, to review technical acceptability and the firm's responsibility). The record supports the finding by cognizant Army authorities that the firm, among other things, has substantial experience in dairy production (two of Seoul's key personnel have managed the milk plant under prior contracts, Seoul has substantial prior military contract experience, and the firm is one of the largest dairy producers in Korea), maintains favorable sanitary and safety standards, and provided in its proposal quotations from U.S. sources for the required supplies.

We also cannot conclude that the agency improperly relaxed requirements for Seoul without amending the RFP. Despite the fact that Seoul experienced delays in the arrival of its packaging materials from the United States at the start of contract performance, the firm had explained in its initial proposal, and confirmed shortly before award, that the required materials were to be supplied by the U.S. sources and that many of the materials were ready for shipment. The firm had already started the art work process and proposed to transport its packaging by air and ocean carrier to perform as required. We have no basis to question the reasonableness of the Army's pre-award assessment of the contractor's ability to comply with the RFP requirements. The post-award approval for temporary use of U.S. packaging material formed in Korea does not demonstrate that the Army otherwise improperly evaluated prior to award Seoul's ability to meet the contract's performance schedule.

Although Pasteur contends that the Army was required to again assess the awardee's performance ability immediately prior to award, there is nothing in the record to show that the Army's review was not reasonable or that the Army should have questioned the information received by the pre-award survey team in August and November which served as the basis of the recommendation for the December 10 award.<sup>6</sup>

The protests are denied.

  
for Robert P. Murphy  
Acting General Counsel

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<sup>6</sup>Dairy Maid's and Pasteur's protests include several other contentions which do not warrant detailed discussion here since they are not supported by the record before us; nor have the protesters shown the requisite element of prejudice as a result of the alleged violations to support the protest contentions. For instance, Dairy Maid alleges that Seoul was improperly found to be able to perform even though it did not possess its own 5-ounce filler machine and filler heads. The record shows, however, that operational filler heads were available to the awardee pending resolution of ownership of the filler heads recently used by Dairy Maid at the milk plant. Also, Seoul had obtained a lease for the same machine Dairy Maid used during its contract, which, historically, has been left at the milk plant for the successor contractor's use (and which would have been in place at the start of contract performance if Dairy Maid had not shipped it out of the plant as a result of what the protester contends were conflicting communications from the machine owner). In any event, the record supports the reasonableness of the agency's determination that Seoul did not even need the machine immediately upon award since hand packing the ice cream, although more labor intensive, was reasonably found to be acceptable to meeting the performance requirements.