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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-194479 DATE: October 19, 1979

MATTER OF: Methods Research Products Company DLG 03118

Protest of Bid Rejection for Failure to Satisfy IFB Requirements

DIGEST:

1. Essential needs of Government are for end item being procured rather than for containers holding end item so that QPL status of qualified product should not generally be regarded as being affected by nonmanufacturing step such as repackaging end item. That repackaging generally should not be considered "manufacturing" is seen from analysis of term "manufacturing" taken from case interpreting Buy American Act.

2. Although care must be taken to avoid contamination of adhesives in repackaging process, GAO doubts whether care required would convert repackaging into manufacturing process so as to affect QPL status of adhesive brand being offered.

3. GSA's professed concern about quality of process involved in repackaging QPL product is contradicted by solicitation which requires packaging in accordance with "normal commercial practice" without reference to applicable Federal Specification against which product was tested under QPL procedures.

4. GAO fails to see why GSA does not accept apparent Department of Defense (DOD) position which stresses responsibility of QPL manufacturer for integrity of QPL product when bid by distributor. DOD position seems to constitute adequate protection against defective repackaging by distributor of qualified product in that if QPL manufacturer tolerates defective repackaging QPL status would be jeopardized.

5. To extent GSA reasonably finds that concern does not have capacity to effectively repackage qualified product in accordance with "normal commercial practice" or has prior history of unsatisfactory repackaging, finding would serve as basis for decision that concern is not responsible.

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6. Although GSA alludes generally to prior "problems" involving repackaging of qualified products by non-QPL distributors giving rise to repackaging restriction, there is nothing in record which explains what "problems" were or extent of such problems. Further, there is no evidence supporting current validity of repackaging restriction--which is waived in certain circumstances--even if there may have been some justification, not revealed to GAO, for original restriction adopted in 1968.

7. Repackaging restriction which either increases cost of delivered product to Government or eliminates some concerns from bidding absent separate QPL listing is seen, based on present record, to be inconsistent with statutory requirement for "full and free" competition. Therefore, GAO recommends corrective action under Legislative Reorganization Act of 1970.

Methods Research Products Company (MRP) has protested the rejection of its low bid on certain items under invitation for bids (IFB) No. 6PR-W-J0437-W6-F issued by the General Services Administration (GSA) for "adhesive" requirements from April 1, 1979, through March 31, 1980. GSA rejected the bid because of what it considered to be MRP's failure to satisfy the requirements of the "Qualified Products List" (QPL) clause of the IFB. For the reasons set forth below, we sustain the protest.

The QPL clause of the IFB reads as follows:

"(a) With respect to products described in this solicitation as requiring qualification, awards will be made only for such products as have, prior to the time set for receipt of offers, been tested and approved for inclusion in the qualified products list identified below. Manufacturers who wish to have a product tested for qualification are urged to communicate with the office designated below. Manufacturers having products not yet listed, but which have been qualified, are requested to submit evidence of such qualification with their offers, so that they may be given consideration.

"Item Number	Qualified Products List	Direct Communication to
GROUP I	MMM-A-121	NAV. SHIP ENG. CTR DEPT OF NAVY
GROUP II	MMM-A-139	NAV. AIR SYSTEMS COMMAND, WA. DC. 20360

"(b) The offeror shall insert, in the spaces provided below, the manufacturer's name and product designation, and the QPL test or qualification reference number of each qualified product offered. If the offeror is a qualified distributor, he also shall insert his product designation. Any offer which does not identify the qualified product offered will be rejected.

Item Number	Manufacturer	QPL Test or Reference No	Offeror's/Distributor Product Designation
	* * * * *		
See Paragraph (b), above			

"(c) Products delivered under a contract resulting from this solicitation shall be in either (1) the manufacturer's container showing the manufacturer's identifying label or markings or (2) if the name of a distributor of the product is listed (or has been found eligible for listing) in the applicable qualified products list identified under (a), above, in the distributor's containers showing the distributor's identifying label or markings."

MRP says that prior to bid opening it requested the Naval Ship Engineering Center--the activity designated in the IFB to respond to QPL questions--to add MRP to QPL-MMM-A-121 as an "authorized repackager of H. B. Fuller's approved adhesive SC-849." Although MRP did not receive a formal Navy reply until after bid opening, MRP submitted a bid under the apparent

understanding that it could repackage the Fuller adhesive in MRP's own containers marked with the Fuller brand name. Thus, MRP's bid for the items described by QPL MMM-A-121 shows the following insertions in paragraph "b" of the QPL clause: "[Manufacturer] H. B. Fuller[:] [product Designation] SC 849[;] [QPL test No.] MMM-A-121[;] [Distributor's Product Designation] SC 849." And, in the "Production and Inspection Points" clause of its bid, MRP listed H. B. Fuller's address as the "production point" and listed MRP's address as the "inspection point."

The contracting officer reports events subsequent to the opening of bids, as follows:

> "After bid opening and before award was made, Steven Industries [the second low bidder] by letter dated January 23, 1979, to the contracting officer * * * protested against any award to the apparent low bidder, Methods Research Products Company. Steven Industries [Steven] contended that the H. B. Fuller Company, whose material was being offered by Methods Research, did not package this material in the size containers required in the solicitation. They further stated that Methods Research was not conforming to the requirements of [the QPL clause] and should not be considered for award.
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> "The contracting officer requested plant facility surveys be performed by the appropriate Regional Quality Control Divisions on both Methods Research Products Company and Steven Industries, with the specific request that it be confirmed whether the material being offered would be supplied in the manufacturer's original containers as required by [the QPL clause] page 10, of the solicitation. The Plant Facilities Report * * * completed by the GSA, Region 2, Quality Control Division, confirmed that Methods Research Products Company was receiving the material from the H. B. Fuller Company in 55 gallon drums and repackaging it in the protestor's own containers.

> "The Plant Facilities Report * * * completed by GSA, Region 2, Quality Control Division, * * * confirmed that Steven was offering material that would be furnished in the manufacturer's original containers. Clifton Adhesives, whose material was being offered by Steven for Group I of the solicitation, is on the QPL for material in accordance with MMM-A-121. [The Plant Facilities report also noted that H. B. Fuller Company had authorized MRP to repackage the material so long as the 'quality of the material is maintained and * * * the proper labeling exists.']
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> "By letter dated February 28, 1979, * * * the contracting officer [then] advised the protestor that their offer could not be considered for award. It was pointed out that their bid did not qualify as being responsive since it did not meet * * * [paragraph(c) of the QPL clause] of the solicitation, requiring that products be furnished in either the manufacturer's containers or by a distributor listed on the applicable qualified products list."

Because of this analysis the contracting officer awarded a contract for the items in question to Steven on February 28, 1979.

After bid opening, MRP received a formal reply from the Navy Ship Engineering Center concerning its previous QPL inquiries. The letter reads:

> "* * * There are no provisions for listing repackagers on qualified products lists. Defense Standardization Manual DOD 4120.3-M dated August 1978 states the following:
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> * * * * *
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> "4-202.3 Furnishing Products Not Requiring Additional Listings. A supplier, to be eligible for award of contract to furnish a qualified product manufactured by a firm

other than the supplier and marked with the brand designation of the manufacturer, is required to state in his bid the name of the actual manufacturer and address of the plant where the product was manufactured, the brand designation, and the qualification test reference. Additional listing of the product on the QPL is required only when the product is rebranded with the brand designation of a distributor (see 4-202.2). In either case, the responsibility for continued conformance of a qualified product with the requirements of the specification remain with the manufacturer whether the product is furnished by him or his distributor. [Emphasis supplied.]

"If * * * the only change made by the distributor in the approved product is to repackage it in smaller containers marked with the manufacturer's brand designation, it would not affect the qualified status of of the product." (Emphasis supplied.)

MRP's grounds of protest may be stated, as follows:

(1) MRP followed Navy's instructions as to the appropriate QPL requirements for a distributor-repackager who intends to mark the supplied product with the manufacturer's brand designation and, therefore, inserted only qualified products listing information concerning the qualified brand name product to be supplied; thus, it was improper for GSA to reject MRP's bid which only conformed to the advice furnished by the Navy--the agency which the IFB instructed bidders to contact in regard to QPL matters.

(2) On a previous GSA solicitation (6PR-W-J0254-WF-F) in which the same QPL clause was present, MRP was awarded the contract even though it bid with the intent of repackaging the required items in its own containers, as here, thus showing a conflict in GSA's approach.

(3) Even though GSA states the purpose of the "container" requirements of the QPL clause is to ensure the "integrity" of the item--thus suggesting that an "un-qualified" distributor can alter the product or contaminate it in repackaging--a qualified distributor or manufacturer could also alter or contaminate the product. In any event, the manufacturer of MRP's distributed product lists MRP as a qualified distributor and repackager.

(4) The Navy's statement that repackaging in smaller containers marked with the manufacturer's brand designation would not affect the qualified status of the offered product shows that MRP's bidding intent was proper.

GSA-Navy Replies

GSA and the Naval Sea Systems Command have responded to the above-numbered grounds of protest, as follows:

GSA

(1), (3), (4) The purpose of requiring that qualified products must be delivered in the manufacturer's containers or in the distributor's containers providing the distributor's product is also qualified is to ensure product integrity and to prevent problems which previously developed under 1960's procurements when bidders obtained products from QPL manufacturers and repackaged them.

Distributors may qualify under GSA's QPL clause (found in the General Services Administration Procurement Regulations (GSPR) at 41 C.F.R. § 5A-1.1101-70 (1978)) by either obtaining qualification of their own product or by offering a qualified product which the manufacturer has packaged in its own containers. MRP did not elect either qualifying option but, instead, chose to offer a repackaged product in its own containers--an approach which does not qualify under the GSA clause.

Although the Department of Defense (DOD) does allow the repackaging of a product in nonmanufacturers' containers under DOD regulations, GSA, as the issuing activity for the procurement, must follow its own regulations in this case notwithstanding the conflicting DOD approach. Moreover, since the clause affected bidders' prices--as shown in a letter received from the awardee after bid opening--it would be unfair not to enforce the requirements of paragraph (c) of the QPL clause. Nevertheless, GSA is working with the DOD to resolve the inconsistency so that this situation does not recur. (GAO understands that the only agreement resulting from the GSA-DOD attempts to "resolve the inconsistency" was a joint decision that the Navy would inform bidders to contact GSA if inquiries similar to MRP's questions are received in the future.)

(2) On the prior solicitation referenced by MRP only two bids were received, neither of which was on the QPL for the material. Since a demand existed for that material, GSA had no choice but to award to a firm that was not on the QPL.

Naval Sea Systems Command

(1)&(4) There is no inconsistency between the regulations contained in the Defense Standardization Manual regarding QPL distributors and the GSA clause simply because the manual does not address the question "whether a supplier other than a QPL manufacturer or QPL distributor can offer supplies packaged in its own containers." The Navy never told MRP that MRP could "offer QPL products * * * in its own containers" or that MRP was "qualified to perform the contract." Consequently, MRP was not misled by Navy's advice.

Analysis

FPR § 1-1.1101 (1964 ed., FPR circ. 1) provides that "(a) Whenever qualified products are to be procured only bids or proposals offering products which have been qualified prior to the opening of advertised bids shall be considered for award." In conformity with this requirement, paragraph (b) of the above QPL clause, after calling for insertion of the

manufacturer's name and product designation, and distributor's name and product designation if applicable, states only that an offer "which does not identify the qualified product will be rejected." This clause does not, in itself, require the rejection of a qualified product bid by a non-QPL distributor. Nevertheless, it is clear that paragraph (c) of the above QPL clause effectively requires the rejection of a non-QPL distributor's bid unless the qualified product offered is to be packaged by the manufacturer.

In interpreting a similar QPL clause involved in a prior GSA procurement, we rejected GSA's argument that only QPL manufacturers or QPL distributors would be authorized--under paragraph (b) of the QPL clause--to bid in QPL procurements. As we said in our letter, B-174350, June 16, 1972, to the Administrator of GSA:

> "It is clear that neither the provisions of the IFB nor the Federal Procurement Regulations require rejection of a bid from an unlisted bidder. Furthermore, we think any such requirement would be unduly restrictive of competition. In this respect, we have recognized that the use of a qualified products list, while proper in certain circumstances, is inherently restrictive of competition, 36 Comp. Gen. 809 (1957), and we have objected to the improper use of the QPL requirement. 43 Comp. Gen. 223 (1963) and cases cited. We have also stated that:
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> > "'* * * Since the best interests of the Government require maintenance of full and free competition commensurate with the Government's need, we are of the opinion that while regulations implementing the use of qualified products lists should be interpreted to insure procurement of products meeting the Government's needs they should not be interpreted in such a manner as to place unnecessary restrictions on competition.' 51 Comp. Gen. 47, 49 (1971).

"We have uniformly held that a bid offering a product that either is not listed on the QPL or cannot be identified from the information in the bid itself as a QPL product is nonresponsive to an IFB containing a QPL requirement. 51 Comp. Gen. 415 (1972). However, the February 16 letter cites our decision in B-171536(1), August 6, 1971, to support finding the Air and Tool bid nonresponsive. In that case, the IFB contained language identical with that in Paragraph 6(b) of the instant solicitation, and we said that since the protestor was not listed on the QPL as a manufacturer or authorized distributor, its bid was properly rejected pursuant to the provisions of the IFB. However, the facts of that case reveal that the protestor planned to assemble the finished product from component parts to be acquired from a QPL manufacturer. This final assembly process had not been part of the QPL qualifying test. Under those circumstances, it was clear that the protestor was neither the QPL listed manufacturer, as was claimed, nor an authorized distributor of a QPL product. In view of the preceding discussion, any language in that case suggesting that a bid offering a QPL product is nonresponsive if the bidder is not listed on the QPL must be regarded as limited to the circumstances therein.

"In the instant case, it is evident from the face of the bid that Air and Tool offered a QPL product and correctly designated a QPL manufacturer and plant. It appears that the bid was an offer to provide the exact item called for in the invitation, and had it been accepted, Air and Tool would have been bound to perform in accordance with all the provisions of the IFB. Accordingly, we cannot agree with the administrative conclusion as to the [non]-responsiveness of the Air and Tool bid."

The situation involved here is somewhat different from the circumstances of B-174350 in that GSA is excluding MRP's bid under authority of paragraph (c) rather than paragraph (b) of GSA's QPL clause only on the grounds that the QPL product bid would not be packaged by the QPL manufacturer. Nevertheless, some of the observations quoted from the letter are helpful in analyzing MRP's exclusion.

The supposition on which paragraph (c) rests is GSA's apparent notion that repackaging is a final assembly or manufacturing process per se; therefore, the rationale of B-171536(1), supra, which upheld the rejection of a bid offering a product assembled from components of a qualified product, is for application.

Generally, we do not think that mere packaging or repackaging constitutes assembly or manufacturing. In considering the meaning of "manufacturing" for purposes of the Buy American Act, 41 U.S.C. § 10a-d (1976), for example, we concluded that the "process of packaging or packing previously manufactured end articles to be used by the Government, or the placing of such articles into storage containers which do not serve a special function in the actual use of the article by the Government, should not be regarded as an additional 'manufacturing' or 'assembly' process." 46 Comp. Gen. 784, 790 (1967). We see no reason why this analysis should not apply here.

The essential needs of the Government are for the end item being procured rather than for the containers, so that the QPL status of the qualified product should not generally be regarded as being affected by a nonmanufacturing step such as repackaging. Nevertheless, it is clear that paragraph (c) of the QPL clause erroneously purports to establish a general rule that repackaging is a manufacturing or assembling process.

Although we do not have information as to the steps involved in repackaging adhesive or the nature and extent of any chemical changes experienced by the adhesive during the repackaging process, it is our informal understanding that care must be taken to avoid

contamination of the repackaged product. Nevertheless, we doubt whether the care required would convert a repackaging process into a manufacturing or assembling process of the kind noted in B-171536(1), supra. Consequently, we reject the above supposition.

In any event, GSA's professed concern about the quality of repackaging is contradicted by the packaging requirements of the IFB which merely required that the adhesives be packaged in accordance with "normal commercial practice" without reference to the applicable Federal Specification against which products were tested under QPL procedures. Under the IFB, therefore, packaging does not relate to the QPL status of the offered products. Thus, both QPL manufacturers and distributors may deviate from any packaging requirements of the applicable Federal Specification so long as the adhesive is packaged in accordance with "normal commercial practice."

From a practical standpoint, moreover, we fail to to see why GSA does not accept the apparent DOD position which stresses the responsibility of the QPL manufacturer for the integrity of its qualified product when bid by a distributor. This position would seem to constitute adequate protection against defective repackaging by a distributor of a qualified product in that if the manufacturer tolerated defective repackaging it would jeopardize its QPL status. Further, to the extent that GSA reasonably finds that a concern does not have the capacity to effectively repackage in accordance with "normal commercial practice" or has a prior history of unsatisfactory repackaging, the finding would serve as a basis for deciding that the concern is not responsible.

Finally, although GSA alludes generally to "problems" involving repackaging which gave rise to paragraph (c), there is nothing in the record which explains what these "problems" were or the extent of these "problems." Further, there is no evidence in the record supporting the current validity of the repackaging restriction of clause (c) even if there may have been some justification--which is not contained in the

present record--for the original restriction adopted in 1968. On this point, GSA admits that the packaging requirements of paragraph (c) are waived when bids are not received from distributors who offer QPL products packaged by manufacturers. To the extent that waivers of paragraph (c) are granted, and in the absence of any information that the waivers resulted in a pattern of defectively repackaged items furnished under QPL contracts, these circumstances further undercut, as a practical matter, the reasonableness of the GSA regulation. Moreover, it is clear that the clause as apparently used now covers all QPL requirements even as to items for which there is no conceivable possibility for "contamination" in the repackaging process such as the pneumatic hammers procurement involved in B-174350, June 16, 1972.

Conclusion

There is no question that paragraph (c) effectively either increases the cost of products to the Government (when a non-QPL supplier is forced to pay for "special order" packaging from a QPL manufacturer) or restricts competition by requiring the rejection of a bid from a non-QPL repackager-distributor even though the repackager-distributor is otherwise committed in its bid to supply a QPL product. GSA has affirmed the increased pricing effect caused by the paragraph in its March 13, 1979, letter to MRP which rejected the company's protest. The letter reads:

> "It has been verified by GSA's Quality Assurance Inspector, Region 2, that Steven Industries, the awardee of the contract, is supplying the material in accordance with Federal Specification MMM-A-121 in the manufacturer's original containers for all sizes. If Steven Industries were permitted to buy the material in drums from their supplier and repackage in the required container sizes, as you are offering to do, it is obvious they could have bid lower prices on these items." (Emphasis supplied.)

Steven has affirmed the restrictive effect of the paragraph on non-QPL suppliers--such as MRP--whose manufacturers do not special package QPL products for a given solicitation. As Steven recited in its January 23 letter of protest to GSA:

> "* * * Methods Research is not on the QPL list for specification MMM-A-121. Their supplier, H.B. Fuller, does not package the material in the size containers requested in the solicitation."

It is beyond question that the validity of any requirement which necessarily tends to result in the submission of higher bids, or restricts competition, depends on whether the restriction is reasonable and serves a bona fide need of the Government. See Rotair Industries; D. Moody & Co., Inc., 58 Comp. Gen. 149 (1978), 78-2 CPD 410; 42 id. 1 (1962); 17 id. 585 (1938).

Based on the present record and our above views, we consider that paragraph (c) unreasonably increases the cost of products to the Government or restricts competition and, therefore, is inconsistent with the statutory requirement (41 U.S.C. § 253(a) (1976)) for "full and free competition."

Notwithstanding our analysis, the facts remain that paragraph (c) clearly conveyed the restriction intended and that Steven says it bid higher than it otherwise would have bid because of the restriction; also, it is unclear whether other companies decided not to bid because of the paragraph. Because of this conclusion, we are recommending that GSA rebid the requirement in question without paragraph (c) and with an appropriately reworded paragraph (b) which makes it clear that a non-QPL manufacturer or distributor can bid provided the bidder offers a qualified product. In the event a bidder other than Steven submits a bid lower than the current contract price, Steven's contract should be terminated and award made to the successful bidder. In the event Steven is the successful bidder at a price lower than its contract price, the current contract should be appropriately amended.

We are bringing this decision and our recommended action to the attention of the Administrator of GSA under the authority of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Protest sustained.

Deputy Comptroller General
of the United States