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DECISION



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

FILE: B-199690.2 DATE: October 8, 1981

MATTER OF: Sparklet Devices, Inc.--Reconsideration

DIGEST:

1. Decision that Air Force specification's 0.75-pound cylinder weight limitation does not unduly restrict competition, although the Navy buys the protester's heavier cylinder, is affirmed. The protester has not shown that the weight restriction was not reasonably related to the Air Force's particular needs under operating procedures and conditions different from those of the Navy.

2. Decision denying protest against solicitation which deleted product qualification requirement allegedly violating Department of Transportation regulations on hazardous materials is affirmed. Where agency which prepared the specification determined less rigorous tests would assure an acceptable product and the solicitation stated product qualification was not required, GAO will not object to an agency's determination that less restrictive specifications and tests meet its minimum needs.

Sparklet Devices, Inc. (Sparklet), requests reconsideration of our decision in Sparklet Devices, Inc., 60 Comp. Gen. ____ (B-199690, June 4, 1981), 81-1 CPD 446, denying the firm's protest against a contract awarded by the Defense Logistics Agency (DLA) to American Safety Flight Systems, Inc. (American), for aircraft survival kit inflation assemblies for the Department of the Air Force.

Sparklet's protest concerned the DLA invitation for bids (IFB) item description and specifications for carbon dioxide cylinders used to inflate the kit's life raft during pilot descent from the aircraft.

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We held that the Air Force assembly specification's 0.75-pound cylinder weight limitation, which precluded Sparklet from offering its 1.25-pound cylinder, did not unduly restrict competition, notwithstanding that the Navy buys Sparklet's heavier cylinder. We found no reason to object to the fact that the assembly specification eliminated the product qualification and fragmentation resistance testing requirements of the cylinder specification because the Air Force determined that first article and quality conformance inspection provisions of the specifications were adequate to assure acceptable assemblies. Contrary to Sparklet's assertions, we concluded that because DLA determined that the cylinders met or exceeded Department of Transportation (DOT) requirements for hazardous material containers, pursuant to 49 C.F.R. § 173.7(a) (1979), DLA complied with DOT regulations and was not required to apply for a DOT exemption for the cylinders.

In general, Sparklet asserts that our assessment of the record was in error, and that we failed to consider alleged violations of Department of Defense (DOD) Tri-Service Agreement and Standardization Programs.

Sparklet contends that we unfairly placed the burden of proof on Sparklet while DLA only needed to establish prima facie support showing that the specifications were reasonably related to the Air Force's needs. The protester argues that this standard is inappropriate where, as here, the crux of the protest is the parties' differing technical opinions. Sparklet asserts that although its allegations and supporting documents were easily verifiable, the agencies' mere prima facie showing was deemed more credible. The protester insists that absent legal and technical oversight, there can be no fair remedy when the contracting agency's technical experts are wrong.

We do not agree with the protester. Our requirement that a protester must affirmatively prove its case is consistent with judicial and administrative standards which require that the party seeking affirmative relief from the forum must produce sufficient evidence to support a favorable finding.

1 Jones, Evidence § 5:5 (1972); 4 id. § 30:6. In protests against allegedly restrictive specifications, however, that burden devolves on the protester only after the contracting agency has established prima facie support showing that the restrictions it would impose reasonably relate to the agency's actual needs. Federal Energy Regulatory Commission--Reconsideration, B-198448.3, June 24, 1981, 81-1 CPD 523.

We have consistently held that in technical disputes a protester's disagreement with the agency's opinion, even where the protester's position is supported by expert technical advice, does not invalidate the agency's opinion. Carolina Concrete Pipe Company, B-192361, March 4, 1981, 81-1 CPD 162; Tyco, B-194763, B-195072, August 16, 1979, 79-2 CPD 126. While Sparklet contends that we should independently assess and verify its allegations and supporting documents, it is not the practice of our Office to conduct an investigation to establish the validity of a protester's statements. Alan Scott Industries, B-197036, March 21, 1980, 80-1 CPD 212; M & H Mfg. Co., Inc., B-191950, August 18, 1978, 78-2 CPD 129.

Contrary to Sparklet's assertions, we not only evaluate the reasonableness of the contracting agency's rationale for specification restrictions, but also examine the analysis given in support of those reasons. Constantine N. Polites & Co., B-189214, December 27, 1978, 78-2 CPD 437. While we do defer to an agency's exercise of technical judgments within its discretion, its conclusions about the legal implications of those judgments carry no more weight than any other conclusions of law. American Air Filter Company--DLA Request for Reconsideration, 57 Comp. Gen. 567, 571 (1978), 78-1 CPD 443.

In our opinion, the Air Force engineering and design experts' finding--that the lightweight cylinder was necessary to decrease overall kit weight, to alleviate ejection system balance problems and to minimize possible aircrew injury--adequately supported DLA's contention that the cylinder weight restriction was reasonably related to the Air Force's needs. Moreover, DLA explained that Air Force requirements

differ from those of the Navy because the agencies' ejection altitudes and raft inflation procedures are different. Sparklet did not, however, show that the Air Force's insistence on the lightweight cylinder was unreasonable.

In reasserting its contention that the weight limitation is unduly restrictive, Sparklet has merely stated that the Navy and the Air Force have similar ejection operations. The protester has not shown that this is the case, nor would such evidence necessarily suffice to show that the Air Force requirement is unreasonable. Security Assistance Forces & Equipment International, B-199757, November 19, 1980, 80-2 CPD 383; Constantine N. Polites & Co., supra.

Similarly, the Air Force's prior use of Sparklet's heavier cylinder when the lightweight cylinder was not available does not, as the protester insists, show that the firm's cylinder meets the agency's minimum needs. We note that in addition to heavier weight, Sparklet's cylinder has an internal volume of only 20 cubic inches rather than the 21-cubic inch volume specified in paragraph 3.7.2 of the Air Force assembly specification. We have held that acceptance of non-conforming articles under prior contracts does not compel contracting officials to accept nonconforming items under a subsequent solicitation. Lasko Metal Products, Inc., B-182931, August 6, 1975, 75-2 CPD 86.

Sparklet asserts that we misunderstood the testing provisions of the assembly and cylinder specifications and that first article and quality conformance tests demonstrate reduced levels of product reliability inadequate to comply with DOT regulations. The protester again contends that applicable procurement regulations do not allow an agency unilaterally to waive specifications' product qualification requirements.

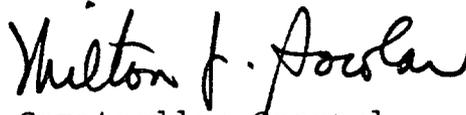
DLA, however, advised that the Air Force base which prepared the assembly specification determined that first article and quality conformance inspection requirements were sufficient to assure the quality

of the assemblies. Where the preparing activity has reviewed and granted a waiver of product qualification and the solicitation indicates that the qualification requirement does not apply, the regulatory requirements prerequisite to procurement without the qualification restriction have been met. Defense Acquisition Regulation § 1109(a)(2) (1976 ed.); Defense Standardization Manual 4120.3-M, ch. IV, § 2, para. 4-211 (August 1978). Because we have recognized that the qualified product system of procurement is inherently restrictive of competition, D. Moody & Company, Inc., et al., 55 Comp. Gen. 1, 31-34 (1975), 75-2 CPD 1, we will not question an agency's determination that less restrictive specifications and testing requirements will meet its needs. Constantine N. Polites & Co., B-198089, June 23, 1981, 81-1 CPD 518; American Safety Flight Systems, Inc., B-189923, January 12, 1978, 78-1 CPD 30; Marion Health and Safety, Inc., B-186731, October 6, 1976, 76-2 CPD 313.

Sparklet complains that our recitation of The Bendix Corporation's experience in obtaining DOT permits for lightweight cylinders in the past is irrelevant because those cylinders were manufactured to superseded specifications. We do not agree. Our discussion pertained to the fact that DOT recognizes DOD determinations pursuant to 49 C.F.R. § 173.7(a) (1979), that DOD determinations obviate alternate recourse to DOT, and that DLA and the Air Force, therefore, complied with DOT regulations. DOT advised our Office that American was given the same advice when it sought a permit for cylinders made to the current specification. In addition, Sparklet has not shown that DLA's determination was not made in accordance with DOD regulations.

In conclusion, we have been advised that, as a result of the protest, cognizant DOD standardization officials have requested that the Air Force justify the deviations from the cylinder specification. To date, the matter has not been resolved. In any event, this does not affect our conclusion that the IFB reflected the Air Force's minimum needs when it was issued.

Our decision of June 4, 1981, is affirmed.

A handwritten signature in cursive script that reads "Milton F. Fowler".

Acting Comptroller General
of the United States