



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: O. Ames Company

File: B-283943

Date: January 27, 2000

D. C. Adams for the protester.
W. S. Spotswood, Jr., for Fiskars Inc., Gerber Legendary Blades Division, an intervenor.
Joshua A. Kranzberg, Esq., and Peter G. Tuttle, Esq., Department of the Army, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined to conduct durability testing of entrenching tool in pick-as opposed to shovel-mode where pick mode represented overwhelming majority of field failures.
2. Agency reasonably determined that awardee's entrenching tool would be fully operational in all terrestrial extremes where awardee represented in its offer that the tool would withstand temperature extremes from -40° to +120° Centigrade, and where agency's own testing of tool's plastic components—which protester alleges will fall in extremely cold temperatures--revealed no failures.

DECISION

The O. Ames Company protests the award of a contract to Fiskars Inc., Gerber Legendary Blades Division, under request for proposals (RFP) No. DAAD16-99-R-0100, issued by the Department of the Army for entrenching tools for use by the Marine Corps. The entrenching tool is a light-weight, collapsible tool that can be used in the field as a shovel, pick, hammer, and saw. The protester contends that Fiskars' entrenching tool is not equal to its own in durability, as required by the solicitation.

We deny the protest.

BACKGROUND

The Army explains that, in conjunction with the Marine Corps, it currently fields an entrenching tool typically purchased from a General Services Administration schedule contract and supplied by Ames. Despite material advances in many fields, the design of the Ames tool has remained essentially unchanged for a decade, leading agency engineers to question whether there might be other commercially available entrenching tools that would offer a better value to the Marine Corps by providing lighter weight, enhanced durability, or improved ergonomics. Through market research, the engineers were able to determine that newer commercial variants were available, but they were unable to determine whether the commercial variants represented a significant improvement over the currently fielded tool. Accordingly, the Army issued the subject solicitation, which was structured to permit the agency to evaluate alternative products for comparison with the currently fielded one.

In accordance with Federal Acquisition Regulation (FAR) part 12.6 (Streamlined Procedures for Evaluation and Solicitation for Commercial Items), the Army posted notice of a combined synopsis/solicitation for the entrenching tools on the Commerce Business Daily Online on January 4, 1999. The solicitation sought proposals for entrenching tools meeting the following requirements:

- capable of operating fully in all terrestrial extremes (jungle, arctic, and temperate environment) in all weather conditions;

- collapsible (folding or telescopic) with a curved blade capable of being used as a shovel when fully extended and as a pick when locked at a 90 degree angle from the handle;

- made of corrosion resistant materials and durable enough to withstand use in a military environment; and

- weighing less--and being no larger when folded--than the currently fielded entrenching tool made by Ames (which weighs 2.3 pounds) and having equal or greater durability as determined through materials evaluation than the Ames tool.

Offerors were required to submit a technical proposal of no more than three pages describing how their proposed item met these requirements, along with commercial product literature, past performance information, a price, and two product samples. The notice provided that each offeror with acceptable past performance whose proposal was evaluated as technically acceptable and whose price was fair and reasonable would be awarded a contract for 40 items. These items would then be tested in a simulated combat environment to assess performance, equipment compatibility, safety, ease of use, durability, and overall user acceptance. Based on

the results of the testing, the Army would determine whether, and to which contractor, to award a follow-on indefinite-delivery, indefinite-quantity contract.¹

Four proposals were received by the January 22 due date. In addition, Ames submitted a one-page letter (which it referred to as a proposal, but which did not include past performance or pricing information), in which it noted that it could not meet the delivery schedule or the requirement for a tool lower in weight than the currently fielded one given that its tool was the currently fielded one. Ames submitted two sample entrenching tools with its letter.

After receipt of proposals, but prior to operational testing, agency engineers concluded that it would not be cost effective to reduce the weight of the tool and amended the solicitation to permit tools weighing 2.3 pounds or less. Amendment No. 0004, Mar. 9, 1999.

Agency engineers evaluated the sample tools received to determine whether they satisfied the threshold requirements for technical acceptability.² The engineers determined that one tool represented other than off-the-shelf technology and that another was unsafe for use by the Marines due to the nature and shape of its handle; as a result, both tools were excluded from further consideration. The other three tools, including those of Ames and Fiskars, were determined technically acceptable and advanced to the operational testing phase of the evaluation.³

The operational testing was conducted by issuing each of 94 Marines one of the tools under consideration for use during extended field exercises at Camp Pendleton, California. At the conclusion of the 6-week test period, the Marines completed a seven-page questionnaire concerning the tools they had used, which addressed such matters as durability, ease of use, injuries, damage to the tool, and overall

¹ The agency explains that had it concluded that none of the commercial variants represented a better value than the Ames product, it would have canceled the solicitation and procured the Ames tool through existing contract vehicles, thereby reducing administrative costs to the Army and Marine Corps. Agency Legal Memorandum, Nov. 22, 1999, at 7.

² The tools were weighed and subjected to compression testing in their pick mode to determine their threshold level of durability. They were also evaluated for safety and compared to current ergonomic standards. Memorandum Regarding Phase I Downselection, Mar. 11, 1999, ¶ 2.

³ Although the agency did not consider Ames to have submitted a proposal, it included the protester's entrenching tool in all testing as a benchmark. The two samples submitted by Ames with its letter were subjected to the same compression testing as other offerors' samples; 40 additional samples then were obtained for operational testing.

impressions. The survey respondents rated the Fiskars tool higher than the other two with regard to durability, performance in the field, and usefulness in the field; in addition, the Fiskars tool received the highest overall rating. User Evaluation of the Improved Entrenching Tool, June 23, 1999, at 6.

Upon completion of the operational testing, the engineers conducted a final round of materials testing, which involved a dynamic swing test. They found that although the Fiskars tool failed earlier in the test than the Ames tool (i.e., after 790 cycles, as opposed to 958 cycles for the Ames tool), the failure was at a designed weak point, i.e., a field repairable nut and bolt, and the tool sustained no damage at any other point. The Ames tool in contrast suffered a catastrophic failure that rendered it unusable. Contracting Officer's Statement, Nov. 21, 1999, at 4; Materials Test Two (Swing Test) for USMC Entrenching Tool, June 22, 1999, at 1-2.

Upon completion of all testing, the contracting officer determined that the only firm in the competitive range was Fiskars. Contracting Officer's Determination of the Competitive Range, Sept. 13, 1999, at 2. The Army entered into discussions with Fiskars to resolve issues regarding pricing, the country of origin of the Fiskars tool, and the company's subcontracting plan. Upon completion of the discussions, the contracting officer determined that the Fiskars tool offered enhancements over the currently fielded entrenching tool manufactured by Ames at a fair and reasonable price. Contracting Officer's Statement, at 5. On September 16, the Army awarded a contract to Fiskars.

ANALYSIS

Ames argues that the solicitation improperly excluded its entrenching tool by requiring, at the time offers were submitted, that the item sought weigh less than the currently fielded entrenching tool made by Ames. In this regard, although the solicitation was amended after closing to change the requirement for lesser weight to a requirement for equal or lesser weight, the competition was not reopened; thus, the protester was not given an opportunity to submit a proposal in response to the revised requirement.

The protester's complaint is untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of initial proposals must be filed prior to that closing time. 4 C.F.R. § 21.2(a)(1) (1999). Accordingly, any objection which Ames had to the requirement for a tool weighing less than its currently fielded one should have been raised prior to the initial closing date. In any event, it is clear from the record that the protester was not prejudiced by the weight requirement--competitive prejudice being an essential element of every viable protest⁴--because Ames' tool was in fact included in all phases of testing.

⁴ Lithos Restoration, Ltd., B-247003.2, Apr. 22, 1992, 92-1 CPD ¶ 379 at 5.

The protester next argues that the Fiskars entrenching tool is not equal to its own in durability, as demonstrated by the fact that the Fiskars item fails certain strength and blade function tests required by MIL-I-43684B that the Ames tool passes.⁶ In this regard, the protester maintains that it conducted its own testing of the Fiskars tool and found that:

–50 percent of the Fiskars samples failed the specification's "set test" (which measures the deflection in the tool resulting from application of a 150 pound weight);

–100 percent of the Fiskars samples failed the specification's "failure test" (which involves the application of a 300 pound weight to determine whether the tool fractures); and

–75 percent of the Fiskars samples failed the "blade function test," which tests the weight necessary to fold the tool's blade.

The Army responds that it did not perform the tests which the protester cites, nor was it required to do so, because the solicitation did not invoke MIL-I-43684B. The agency notes that the strength tests cited by the protester are to be performed on the entrenching tool in its shovel mode, and that it elected to test the tool in its pick mode instead based on its belief that the pick mode represented the overwhelming majority of field failures. The agency maintains that even a cursory review of the former test methodology reveals the soundness of the newer approach. The Army notes, for example, that:

[g]iven the size and intended uses of the entrenching tool, it is highly unlikely that a 300 pound load would be applied to the shovel blade in the shovel mode, as required by the former test. However, the static and dynamic loads that might be applied to the pick handle during excavation were approximated by the [Army laboratory] methodology, which employed repetitive 300 and 450 pound static loads as well as a dynamic swing test.

Agency Legal Memorandum, Dec. 7, 1999, at 2.

As a preliminary matter, the Army was not required to perform tests required by MIL-I-43684B given that the specification was not part of the solicitation. With regard to the Army's choice of testing procedures, procuring agencies have the primary

⁶ Although the protester does not explain why MIL-I-43684B is relevant to this procurement, the agency provides some background, noting that it is a design specification with which the protester was required to comply under a previous GSA contract. The agency further notes that MIL-I-43684B was superseded by Commercial Item Description A-A-59337 in September 1998.

responsibility for establishing the testing procedures that they will use to evaluate products, and we will not question an agency's determination as to the particular tests to be employed unless the record shows that the determination is unreasonable. Acoustic Sys., B-256590, June 29, 1994, 94-1 CPD ¶ 393 at 9. Here, the record shows that the Army reasonably determined that testing of the tool in its pick mode (as opposed to its shovel mode) would furnish a more realistic assessment of the item's durability.

Ames also argues that the Army has not conducted sufficient testing to establish that the Fiskars tool will be fully operational in all terrestrial extremes, as required by the solicitation. The protester asserts that the plastic handle of the Fiskars tool will shatter when subjected to a 35 pound impact at 0°, a force which snow shovels with plastic D-handles are required to be able to withstand, according to the protester.

The Army responds that it did not perform environmental testing of the candidate tools, but instead relied on the representations made by offerors in their proposals regarding the capabilities of their tools. In this regard, Fiskars represented in its offer that its entrenching tool would "withstand temperature extremes from -40° C (-40° F) to +120° C (248° F) and all weather conditions," and that it would "operate fully in all terrestrial extremes . . . in all weather conditions." Fiskars Offer, attach. A, 2. The agency further notes that although environmental tests were not conducted during this particular competition, as an element of market research conducted in 1998, the project officer subjected candidate tools, including a Fiskars sample, to impact tests at -40° and -60° F in order to evaluate the suitability of plastic components in extremely cold weather. The testing involved dropping a 10-pound weight from a height of 18 inches onto different parts of the equipment, including the handles of the entrenching tools. The project officer reports that the Fiskars tool passed both tests, with no breakage or other apparent problems observed. Affidavit of Entrenching Tool Project Officer, Dec. 7, 1999; Agency Legal Memorandum, Dec. 7, 1999, at 1.

We think that it was reasonable for the agency to rely on Fiskars' representations regarding the operational capabilities of its entrenching tool in extreme temperatures, particularly given that the agency's own testing, performed during the market research phase of the procurement, yielded results compatible with those representations. To the extent that the protester is arguing that the agency's testing was not sufficiently rigorous because it involved the application of 10—as opposed to 35—pound weights, we again note that it is the responsibility of the agency to determine the tests that it will employ to evaluate products. Here, the entrenching tool project officer determined that the suitability of the tool's plastic components could be assessed by dropping a 10 pound weight from 18 inches onto different parts

⁶ The protester does not indicate whether it is referring to 0° Centigrade (C) or Fahrenheit (F).

of the equipment, and we have no basis upon which to conclude that this was not an appropriate test.

Ames also argued in its initial protest that although the solicitation incorporated by reference Defense Federal Acquisition Regulation Supplement § 252.225-7015, pursuant to which "[t]he contractor agree[d] to deliver under this contract only hand or measuring tools produced in the United States or its possessions," Fiskars' tools would not be produced in the United States or its possessions. In addition, the protester argued in its initial protest that Fiskars would be unable to comply with the solicitation requirement for a small business subcontracting plan.

The Army responded to these arguments in its report, noting that although Fiskars had acknowledged during discussions that its entrenching tool was currently produced in Finland, it had offered to produce the items to be furnished under this contract in Oregon by shipping component parts there for assembly. The agency further noted, with regard to the protester's second argument, that Fiskars intended to produce its tool entirely from in-house raw materials, and thus no subcontracting plan was required.

In responding to the agency report, the protester has neither taken issue with nor attempted to rebut the positions taken by the agency. Accordingly, we consider it to have abandoned these grounds of protest. DIT-MCO Int'l, B-261976, Oct. 31, 1995, 95-2 CPD ¶ 200 at 2 n.4.

The protest is denied.

Comptroller General
of the United States