

A. Perry



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hershey Foods Corporation *Mars*

File: B-245250

Date: December 18, 1991

C. Stanley Dees, Esq., Thomas C. Papson, Esq., and Alison L. Doyle, Esq., McKenna & Cuneo, for the protester.
Robert H. Koehler, Esq., Mary Beth Bosco, Esq., and Curtis V. Gomez, Esq., Patton, Boggs & Blow, for M&M/Mars, Inc., an interested party.
Terry McGinnity, III, Esq., Edward C. Hintz, Esq., and Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contract award is not improper because agency inadvertently failed to test and approve awardee's product demonstration models (PDMs) prior to award where solicitation does not require any specific testing, and the awardee is otherwise obligated to supply a product that meets the solicitation specifications.
2. Allegation that awardee's product does not comply with Food and Drug Administration's (FDA) standard for identity of chocolate is a matter within the jurisdiction of the FDA which is not for review by the General Accounting Office.

DECISION

M&M
FOR
Hershey Foods Corporation protests the award of a contract to M&M/Mars, Inc., under request for proposals (RFP) No. DLA13H-91-R-2242, issued by the Defense Logistics Agency (DLA) for 6,929,004 Type VIII heat resistant milk chocolate bars to be included in ready-to-eat meals. Hershey alleges that the Mars product does not meet the RFP specifications.

We deny the protest.

[Part of ...]

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The specifications under section C of the RFP require that the candy bar have the taste and "mouthfeel" of a commercial chocolate bar, withstand 140 degrees Fahrenheit for 24 hours without losing its shape, and test salmonella negative. Section C also provides that the chocolate bar:

"SHALL MEET THE FDA STANDARD OF IDENTITY FOR MILK CHOCOLATE, EXCEPT THAT IT MAY CONTAIN MINIMAL AMOUNTS OF EGG WHITES."

Under evaluation criteria provided at section M of the RFP, offerors were required to submit product demonstration models (PDMs) with their proposals, with respect to which the solicitation provides that:

"[p]roducts delivered under this contract shall conform to the approved PDM as to the characteristics cited and to the product description set forth in section C above. The product description takes precedence over the approved PDM in the event of a discrepancy. Contract production shall begin only after approval of PDM samples."¹ (Emphasis added.)

The RFP also informs offerors that award will be made "to the responsible offeror whose offer conforming to the solicitation will be the most advantageous to the [g]overnment, cost or price or other factors, specified elsewhere in this solicitation, considered."

Hershey and Mars submitted the only proposals by the August 1, 1991, amended closing date for receipt of proposals, and on August 6, the agency awarded the contract to Mars as the low-priced offeror. Hershey protested this award on August 16, alleging that the Mars product is technically unacceptable because it does not comply with the FDA standard for the identity of milk chocolate. The protester stated that it tested what it believed to be the product offered by Mars, and found that the ratio of total milk solids to milk fat and other aspects of the tested product did not meet requirements of the FDA standard. Hershey argued that DLA waived a material requirement of the solicitation in awarding a contract to Mars. Performance has been stayed pending resolution of this protest.

¹The RFP initially also required the submission of bid samples, but this requirement was deleted in amendment 3, accompanied by the statement that the PDMs "are sufficient."

In response to the protest, the agency reviewed its procurement file and discovered that it had never tested the PDMs submitted by Mars. As a result, prior to submitting its report, the agency suggested that it should terminate Mars's contract and resolicit the requirements. We disagree.

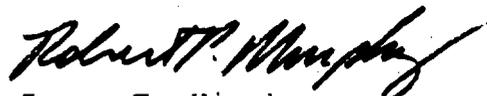
The solicitation required PDM's for agency testing and approval, but did not state what tests the agency would conduct or which specification provisions the PDM's would be measured against. In fact, the agency only tested the Hershey chocolate bar for taste, texture, salmonella, and heat resistance, and had intended to test the Mars chocolate bar for the same qualities. We find no requirement in the RFP for DLA to test PDM's for compliance with the FDA standard of identity for milk chocolate and do not believe that it was required to do so. The agency's decision not to conduct such tests did not relieve the successful offeror of its obligation to meet the RFP specifications. The RFP stated that in the event of a discrepancy, the product description takes precedence over an approved PDM.

We are not aware of any rule of law making an award improper where an offeror certifies that its product conforms to the specification, there is no affirmative requirement in the RFP that the offeror demonstrate such conformance, and the contracting officer has no evidence that the offeror cannot or does not intend to provide a conforming product. (Cf. Tri Tool, Inc., B-241703.2, Mar. 11, 1991, 91-1 CPD ¶ 267; Polar Prods., B-242079, Mar. 27, 1991, 91-1 CPD ¶ 331 (blanket offer of compliance insufficient where solicitation requires more detailed information or evidence contradicts promise of compliance)). Here, the solicitation imposed no affirmative obligation on the agency to conduct any particular tests to determine whether a product met the product description; Mars certified that its product was compliant; and DLA had no evidence that Mars' product was unacceptable. Therefore, DLA's failure to test the Mars product to determine if it met the FDA standard of identity for milk chocolate did not make the award to Mars improper. Hershey is concerned that because DLA did not determine whether the Mars chocolate bar complied with the FDA standard before award, Mars had until delivery in order to produce a conforming product. The protester is correct, but this possibility was inherent in

the evaluation scheme set forth in the RFP, and that scheme does not violate any procurement statute or regulation and is not otherwise improper.²

With respect to the agency's discovery that it failed to test the Mars product for taste, texture, salmonella, and heat resistance, we do not believe that contract termination is a proper response. The protester has not suggested and there is no evidence in the record to show that the Mars PDM would not have met these requirements or that Hershey was otherwise prejudiced by the DLA error. After all, the agency's failure to test the Mars product was not the offeror's fault. If the firm's delivered chocolate bar conforms to the RFP specifications and otherwise meets the government's needs, we do not believe that Mars should be penalized for the agency's error by having its contract terminated.

The protest is denied.


James F. Hinchman
General Counsel

²To the extent that Hershey is alleging that specific tests are required to determine compliance with the specifications, its protest is untimely. Since the RFP clearly did not state that DLA would conduct any particular tests, any protest challenging this alleged lack of testing requirements should have been filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991); Romer Labs, Inc., B-243027, June 25, 1991, 91-1 CPD ¶ 602.