



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: Henschel, Inc.

File: B-275390.5

Date: May 14, 1997

D. Whitney Thornton II, Esq., and Joel Freid, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.

Sam Zalman Gdanski, Esq., for Dynalec Corporation, an intervenor.

Benjamin G. Perkins, Esq., and Amalia Evola, Esq., Defense Logistics Agency, 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

Where request for proposals (RFP) designates a specific brand name part, but permits consideration of an alternate product that is physically, mechanically, electrically, and functionally interchangeable with the product identified in the RFP, protest of award to offeror of alternate product is sustained where agency failed to reasonably confirm that alternate product met material characteristics of named part number.

DECISION

Henschel, Inc. protests the award of a contract to Dynalec Corporation under request for proposals (RFP) No. SPO430-96-R-2173, issued by the Defense Logistics Agency (DLA) for digital airflow panels. The panels are used in airflow monitoring systems in ships; the panel is an integral part of the system and interfaces with an airflow sensor (not procured under this RFP) located in the ventilation duct of the monitored compartment. Henschel contends that the agency improperly determined that the panel offered by Dynalec was interchangeable with the named Henschel panel requested by the solicitation; the protester states that there are material differences between its named part and Dynalec's part. The protester contends that the agency improperly relaxed material, more costly performance specifications of its named part.

We sustain the protest.

BACKGROUND

The RFP requested offers on digital airflow panels, Henschel Part No. (P/N) 20-300, but did not specify any functional or other characteristics of the named P/N item. The RFP included DLA's "Conditions for Evaluation and Acceptance of Offers for Part Numbered Items" (similar to DLA's former "Products Offered" clause) which allows firms to offer alternate products which are physically, mechanically, electrically, and functionally interchangeable with the product identified in the solicitation. The RFP informed offerors that a technical data package was not available from the agency for the specified Henschel P/N; offerors were required to submit sufficient technical data on any alternate product offered as well as the named P/N to enable the agency to evaluate the alternate product to determine whether it is interchangeable with the named P/N. Award was to be made on the basis of the offer of an acceptable product determined to be most advantageous to the government considering price and offeror past performance information. Two offerors responded to the RFP--Henschel offered its named product (at a unit price of \$[deleted]) and Dynalec offered its panel (Dynalec P/N 62413-100, at a unit price of \$[deleted]). Dynalec did not submit any technical data with its offer but stated in its offer's cover letter that its offered panel is "form, fit and function interchangeable and is currently being accepted by the Navy as an equal."

After the closing time for the receipt of proposals, the contracting officer made a series of requests to Dynalec for additional technical data necessary for an evaluation of the Dynalec alternate product offer. Dynalec submitted summary data and narrative information regarding its offered product in response to those requests. DLA determined that Dynalec failed to provide adequate data, particularly pertaining to the Henschel P/N, to evaluate the firm's offer. On October 22, 1996, the agency awarded a contract to Henschel. On the same day, the contracting officer received additional data from Dynalec regarding the Henschel part. After reviewing the data submitted by Dynalec and conferring with a Navy engineer who advised DLA that he was familiar with the two companies' panels, a DLA technician on November 5 approved the Dynalec part as interchangeable and acceptable.¹

Following a protest filed by Dynalec with our Office on November 7, challenging the award to Henschel at a higher price than that offered by Dynalec for its panel, the

¹The technical data submitted by Dynalec prior to award includes summary data sheets on both firms' panels, drawings of the Dynalec part, a copy of Henschel's technical manual, and a copy of what Dynalec states is its technical manual (which is a verbatim copy of chapter two (operating manual) of Henschel's manual with all references to company name, P/N, and drawings changed to substitute references to the Dynalec product).

agency reopened the competition and requested best and final offers (BAFO) from the two offerors. We dismissed as academic Dynalec's protest on December 17 in light of the agency's corrective action.² An award was subsequently made to Dynalec on January 27, 1997 (at the firm's BAFO unit price of \$2,499, for a total contract price of \$157,437); Henschel's BAFO unit price was \$[deleted]. The initial award to Henschel has been terminated.

ANALYSIS

Henschel contends that the agency had no reasonable basis for its decision that the Dynalec part is interchangeable with its part as defined in the RFP's alternate product evaluation clause. In particular, the protester asserts that the Dynalec part is inferior to its part with respect to several material characteristics, including operating temperature range and drip-proof enclosure. Henschel argues that its panel has been fully tested in accordance with more stringent military specifications contained in MIL-E-16400G to operate in a temperature range of -28°C to 65°C and to be drip-proof to an angle of 45°. The panel proposed by Dynalec, however, is described in the technical data submitted by Dynalec as operational from 0°C to 60°C and drip-proof to an angle of 15°; Dynalec's data shows that the firm intends compliance with the less stringent requirements of MIL-STD-108, apparently based upon a draft specification for the product prepared by a different contractor and distributed by the Navy almost 10 years ago.³ Henschel further argues that its panel is superior to Dynalec's, among other things, in terms of vibration, visual alarm configuration, system expansion, battery protection, and fault clearing.⁴ Henschel

²On December 17, we dismissed as premature Henschel's protests of the agency's corrective action in reopening the competition and canceling the award to Henschel since the contract had not yet been terminated. Henschel has requested reconsideration of that decision, however, we find no reason to change our position and deny the reconsideration request. Henschel also has urged that corrective action was improper because the corrective action was taken in response to an allegedly untimely protest filed by Dynalec. However, an untimely protest does not bar an agency from taking corrective action upon a finding of an improper procurement action. See HDL Research Lab, Inc., B-254863.3, May 9, 1994, 94-1 CPD ¶ 298 at 7 n.5.

³Given the fact that product performance failure would affect the health and safety of personnel, and in light of the environmental conditions which could arise on the ship, we agree with the protester that certain of the identified characteristics, such as temperature range and drip-proof angle, are material both in terms of product performance and in evaluating whether the products are interchangeable.

⁴For many of these characteristics, Dynalec to date has only submitted blanket
(continued...)

contends that if Dynalec is permitted to propose on less stringent performance capability standards, it too should be allowed to propose a panel meeting similarly lower performance standards which would be substantially lower in cost to manufacture.⁵

In response, the agency argues that the more stringent temperature and drip-proof specifications of the Henschel unit were tested in response to testing requirements in that firm's prior contracts which are not contained in this RFP. The agency, which does not address the relevancy to the current procurement of the more stringent military specification which the Henschel unit meets, states that no testing is required under this RFP and thus Dynalec need not be evaluated against Henschel's test results. The agency argues that its technician reasonably decided that the Dynalec panel was physically, mechanically, electrically, and functionally interchangeable with the specified Henschel panel based upon the technical data submitted by Dynalec and the general verbal confirmation he received from a Navy engineer.

An agency may properly express its needs by specifying a particular product and affording other firms an opportunity to submit offers for alternate products where, as here, the agency has insufficient technical information to more adequately describe its requirements. Hilti, Inc., B-265662, Dec. 19, 1995, 95-2 CPD ¶ 275 at 4. When using this method of describing its needs, agencies may not relax a solicitation requirement that an alternate item be physically, mechanically, electrically, and functionally interchangeable with the named product. Id. This means that an agency does not have the discretion to accept an item that is not interchangeable with the named item based on a finding that it otherwise satisfies the agency's minimum needs. Hobart Bros. Co., B-222579, July 28, 1986, 86-2 CPD ¶ 120, modified, B-222579.2, Sept. 19, 1986, 86-2 CPD ¶ 323. The obligation to demonstrate the acceptability of an alternate offer is on the offeror, and

⁴(...continued)

statements of compliance which does not meet the RFP clause requirement for data. Centroid, Inc., B-265951, Jan. 22, 1996, 96-1 CPD 15 ¶ at 3.

⁵Henschel also contends that the Dynalec digital airflow panel is not interchangeable with the Henschel panel because the Dynalec part will not operate properly with the Henschel sensor (which has been purchased separately by the Navy). The agency reports that although the Navy considers such mutual operation desirable, it is not a requirement of the RFP. Nonetheless, the agency reports that since Dynalec was given reverse engineering information by the Navy regarding the interface operation between the Henschel panel and sensor units, which Dynalec proposes to adopt along with its own embedded software, the claimed proprietary Henschel software reasonably should not be an impediment to communication between the system units.

consequently an offeror must submit sufficient information to enable the agency to evaluate its alternate product. See Julie Research Labs., Inc., 70 Comp. Gen. 159, 161 (1990), 90-2 CPD ¶ 526 at 4.

We recognize that under a "Products Offered" type clause, the agency has broad discretion to accept offered equivalent products and that acceptance of lower-priced alternates is the preferred result since it promotes competition. Id. However, the agency must determine that no material differences exist between the alternate product and the referenced product with respect to those characteristics essential to the proper performance of the item. Id. at 5. The record does not establish that DLA met its obligation in this regard.

The record contains absolutely no documentation regarding any pre-approval technical evaluation or comparison by either the Navy or DLA regarding whether the Dynalec panel is interchangeable with the specified Henschel panel. Rather, the record shows that a Navy engineer's statement that the Dynalec product is interchangeable (which the DLA technician relied on in approving the Dynalec panel) apparently was based mostly upon his knowledge that Dynalec was to supply digital panels under a subcontract awarded by another contractor. There also is no technical evaluation or source selection documentation in the record, however, of the Navy's alleged "acceptance" of the same Dynalec panels as interchangeable with Henschel's panel under that contract. This engineer's statement that the parts are interchangeable was also based on his opinion that Dynalec had the technical capability to supply acceptable digital panels since Dynalec has been producing various electronic parts for Navy vessels for 40 years and has supplied numerous older-type analog panels to the Navy in the past. However, statements obtained from this individual after the protest was filed show that he had only limited involvement (prototype testing) in the Henschel panel performance tests and that he had no meaningful knowledge of the specific performance characteristics of the Dynalec panel. Consequently, the agency's reliance on this Navy engineer's statements without seeking supporting documentation was unreasonable.

With regard to the protester's assertion that the Dynalec part is inferior to the named Henschel part with respect to operating temperature, drip-proof enclosure, and other functional aspects, the agency simply did not meaningfully evaluate whether the Dynalec part was interchangeable with the Henschel part in these areas. The record shows (based upon the technical data submitted to date for each firm's proposed panel) that, in fact, there are material differences between the products in these performance areas which were not recognized or considered at the time of the approval.⁶ Further, while DLA now asserts that certain Henschel

⁶The agency argues that the Henschel part's characteristics at issue were established through prior contract required testing of the Henschel panel and the Dynalec part
(continued...)

panel characteristics may not be essential to the agency's needs, DLA's position was certainly not made clear to Henschel during the procurement. As a result, Henschel could not meaningfully respond to the agency's precise relaxed needs.

In requesting only parts physically, mechanically, electrically, and functionally interchangeable with the specified Henschel part, but accepting an alternate product on the basis of only general technical data which specifically shows noncompliance with material functional aspects of the named P/N, the agency may have overstated its minimum needs.⁷ Hilti, supra. This resulted in prejudice to Henschel which claims that had it realized that the agency did not require the full performance capabilities of its P/N 20-300, it would have offered a lower performance, lower-priced panel. Id. at 4-5. Given the RFP's "most advantageous" offer criterion for award, Henschel's higher past performance rating, and the higher cost incurred by that firm in meeting the RFP's stated requirements, the protester has adequately demonstrated that but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, No. 96-1148, slip op. ____ (Fed. Cir. Dec. 19, 1996).

Accordingly, we sustain Henschel's protest. We recommend the agency identify its material requirements and if the higher performance characteristics of the named Henschel panel are in fact required, perform an evaluation of the alternate product offered by Dynalec for compliance with all material characteristics of the named P/N prior to approval. If Dynalec is not approved, we recommend that the agency terminate the award to Dynalec. If the agency's needs are less than those stated in the RFP, the agency should resolicit the requirement on a basis which reflects its actual needs. We also recommend that Henschel recover its costs of pursuing its protest including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R.

⁶(...continued)

has not yet been tested under similar environmental conditions. The agency reports that the Dynalec panels will be tested under that firm's subcontract with a Navy prime contractor, but emphasizes that, in any event, no testing was required under the current RFP. Nonetheless, regardless of the lack of testing requirements in the current RFP, the superior temperature, drip-proof, and other characteristics of the named Henschel P/N remain material characteristics of the named product that relate to the proper performance of the part. Dynalec's technical data, however, shows that its panel does not meet these material characteristics.

⁷The record shows that after Henschel filed its current protest, the agency specifically requested information from the Navy, the user agency, as to the agency's actual requirements. However, no response from the Navy is included in the record.

§ 21.8(d)(1) (1997). The protester should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.8(f).

The protest is sustained.

Comptroller General
of the United States