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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: OTI America, Inc.

File: B-295455.3; B-295455.4

Date: August 10, 2005

William M. Weisberg, Esq., and Jeffrey H. Francis, Esq., Sullivan & Worcester LLP, for the protester.

Jennifer R. Seifert, Esq., U.S. Government Printing Office, for the agency.

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DIGEST

1. Where agency uses contract options under parallel contracts to include or exclude contractors from continuing consideration for the development and production of electronic passport covers, the agency is conducting a limited competition between the multiple contractors, so that a protest of the agency's determination to eliminate a firm from the competition is within GAO's jurisdiction.
 2. Agency has a reasonable basis to eliminate protester from competition where the electronic passport covers it delivered to the agency for testing did not meet material contract requirements.
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DECISION

OTI America, Inc. protests agency action under request for proposals (RFP)/contract No. EP-2004, issued by the U.S. Government Printing Office (GPO) for electronic passport book covers and related materials. OTI protests its elimination from a limited competition that the agency has been conducting among the firms that previously had been awarded contracts.

We deny the protest.

The Department of State (DOS), in cooperation with the GPO and the Department of Homeland Security (DHS), intends to issue a new type of passport to enhance the security of passports and to facilitate movement of travelers at ports of entry. The new "electronic passport" cover will contain an embedded contactless integrated circuit (IC) that will electronically store the personal information of the traveler to whom a passport is issued. The passport cover will also have an embedded antenna

that together with the IC will permit wireless transmission of the traveler's personal information to electronic readers that will be located at border inspection stations, which can speed the movement of travelers through the border inspection process. RFP § C1.1. The electronic passport program is being implemented consistent with principles of international reciprocity so that United States passports will comply with the same requirements that the United States will impose by October 2005 on citizens of foreign nations traveling to the United States. RFP, Abstract of Concept of Operations for the Integration of Contactless Chip in the U.S. Passport, at 1.

The IC and antenna will be embedded in "inlays," which will be adhered to cover stock to form a laminated passport cover. Inner pages are subsequently adhered to the laminated cover to produce a complete electronic passport that retains the appearance of a traditional passport book. GPO is tasked with providing DOS with complete electronic passports. GPO will do this by procuring electronic passport covers from contractors in "cover sheets" consisting of three laminated covers per sheet. At its own facilities, GPO will use its "UNO book fabrication process" to adhere inner pages to a contractor's laminated cover sheets using contractor-supplied adhesive. The assembled sheets are then cut into three complete electronic passport books per sheet and delivered to DOS. Agency Report at 2-3.

GPO issued the RFP on July 12, 2004, contemplating the award of multiple combined fixed-price, cost-reimbursable, time-and-materials contracts for a base period with 4 option years. The awards were to be made on a "best value" basis with price and technical considerations being equally important. The base period has 11 contract line item numbers (CLIN). Four of the CLINs are "mandatory," and the government is obligated to purchase at least the minimum prescribed amount. The remainder of the base period CLINs as well the option period CLINs are "optional."

The electronic passports were to undergo four stages of testing. Stage 1 was to determine whether technical proposals are compliant with the solicitation requirements. Stage 2 begins after the contract awards and involves a number of tests by several agencies. Most relevant to the current protest is the GPO Book Fabrication Process, during which GPO will observe and record how each offeror's product passes through and performs in the GPO UNO book fabrication process. GPO then sends the complete electronic passport books to DOS for personalization and other tests and inspections. Essentially, DOS will enter dummy data into the electronic passports, and will observe and record how the passports perform. DOS will also send electronic passports to the National Institute of Standards and Technology (NIST) for durability testing. Stage 3 will be field testing during a pilot program to be conducted in cooperation with DHS and a number of foreign governments. Stage 4 will be testing conducted when passports are in full production and used in normal operations. RFP § C7.2.3.1, § M.2.2.

The mandatory CLINs for 7 personalization system test kits, 700 electronic passport book cover sheets for test book production, and adhesive are needed for the Stage 2

testing. The optional base period CLINs and the option year CLINs correspond to the purchase of cover sheets and other items for Stage 3 and Stage 4 testing, as well as for the full production of passports with associated services and warranties. The RFP contemplated the exercise of the optional CLINs for participation in the Stage 3 pilot program based on whether a contractor's products delivered under the mandatory CLINs passed the Stage 2 tests, and contemplated the exercise of the remaining optional CLINs and option years of the contracts based on the contractors' performance during Stage 2 and Stage 3 tests. RFP § B2, § C1.2.6¹, § M.2.2. The RFP also stated:

Under the terms of this contract, GPO has the right to place orders for deliverables in any quantity, to any of the awardees, at any time. Furthermore, GPO is not obligated to order any quantities beyond the minimum quantities prescribed in this contract. It is GPO's intention, at its discretion, to make multiple awards to Offerors whose covers with embedded inlays, when integrated in passport books, have been determined to meet the technical and business needs of both GPO and the DOS. GPO plans to make a high volume purchase of book covers with inlays from one awardee and lower volume purchases of book cover inlays from the other awardees. Purchased quantities associated with this distribution will be made at the discretion of GPO.

RFP § C1.2.8.

A number of contract awards were made. Initially, GPO did not award a contract to OTI, and OTI protested to our Office on November 23, 2004. The agency subsequently decided to award a contract to OTI, and OTI withdrew that protest.

Contract performance then commenced and the multiple awardees, including OTI, delivered the 700 test cover sheets to GPO for Stage 2 testing. GPO has twice identified material defects in OTI's twice-submitted covers and for this reason eliminated OTI from the competition.

¹ RFP § C1.2.6 stated the following:

Based on the results of the testing conducted upon the test passports, GPO will determine to which awardees it will exercise [optional] CLIN 0005 . . . to supply passport cover material with embedded inlays for the purpose of producing passports for the Special Issuance Agency pilot. If more than one awardee's products pass the testing regimen, GPO may elect to exercise CLIN 0005 to more than one awardee.

In its first submission, OTI's covers were found to exceed the thickness requirement (*i.e.*, RFP § C7.2.1²), and also to have a software-related problem.³ The contracting officer notified OTI of these defects in a "cure notice," and provided the firm with the opportunity to resubmit revised cover sheets for the testing process within 10 working days. The letter also stated that, due to time constraints in the program schedule, continuous retesting would not be possible, and that "[i]f the adjusted product fails to pass testing a second time, GPO will no longer consider OTI's products for use" in the Stage 3 pilot testing. Letter from GPO to OTI (Mar. 16, 2005).

OTI subsequently submitted a revised batch of cover sheets. However, the laminated layers of the revised covers began to separate following GPO's fabrication of test passport books and submission to DOS for lab testing. As a result, DOS rejected and returned the test books to GPO prior to any DOS testing. GPO's inspection revealed that all but 8.49 percent of the covers on the passports were visibly separating. Agency Report at 5-6.

The contracting officer then notified OTI that, due to the separation of the layers, OTI's revised covers failed to meet contract requirements and that further testing would not be conducted. Citing OTI's repeated failure to deliver a product that complied with contract requirements and the government's needs to meet program goals for deploying electronic passports, the contracting officer stated that the agency's attention must focus on the remaining contractors' products and that "GPO does not contemplate any further orders will be forthcoming for the OTI product for use in . . . any future phases of the EP-2004 contract, as a result of your product's current and previous deficiencies." Letter from GPO to OTI (May 18, 2005). This protest followed.

² RFP § C7.2.1 stated the following:

The total thickness of the [electronic passport] Book Cover shall be 0.70 mm +/- 10%. The total thickness is the thicknesses of the . . . [c]over material, the inlay, and the adhesive to glue the cover material to the inlay. This thickness is specified so that [the Consular Affairs Division of DOS]'s several hundred Toppan printers can be modified to handle personalization of the [electronic passport] without major redesign.

³ The software-related item was that the electronic manifest program import was not in XML file format.

JURISDICTION

GPO alleges that, since this protest concerns agency action after the agency issued contracts to the protester and other offerors, the protest concerns a matter of contract administration not for consideration by our Office. We disagree.

Where, as here, an agency uses parallel contracts for the development and production of products to conduct a competition among the contractors resulting in the elimination of one or more contractors as sources for the agency's requirements for the duration of the contracts in question, we will consider protests concerning that competition and the decisions to eliminate contractors. Electro-Voice, Inc., B-278319, B-278319.2, Jan. 15, 1998, 98-1 CPD ¶ 23 at 5; Fermont Div., Dynamics Corp. of Am., B-257373.3, et al., Dec. 22, 1995, 96-1 CPD ¶ 78 at 1-2 n.1; Mine Safety Appliances Co., B-238597.2, July 5, 1990, 90-2 CPD ¶ 11 at 4; see Westinghouse Elec. Corp., B-189730, Mar. 8, 1978, 78-1 CPD ¶ 181 at 6. In the above cited cases, there was a "downselection" of a contractor based on a limited competition among the contract holders, as contemplated by the terms of the parallel contracts, and this downselection was implemented by issuing or not issuing delivery orders under the contracts, or exercising or not exercising contract options.

Here, the agency is using the options under these contracts to determine which firms will continue to be considered for GPO's procurement of electronic passport covers. Options corresponding to the pilot program would be exercised on a go/no-go basis based on passing the Stage 2 tests. RFP § C1.2.6. Ultimately, the agency would select one primary production contractor and secondary production contractors based on a best-value determination. Agency Report at 2, 8; RFP § C1.2.8. Thus, this is a limited competition between the firms awarded contracts under the RFP. While GPO argues that the decision protested is a matter of contract administration because OTI was eliminated from further consideration after it was awarded a contract, the substance of what is occurring—regardless of its contractual form—is a multi-step competition for a contract to produce electronic passport covers. Because OTI timely protested its elimination from that competition, we conclude that our Office has jurisdiction to consider the protest.

In considering protests against an agency's evaluation resulting in a downselection, we do not evaluate competing technical solutions anew in order to make our own determinations as to their acceptability or relative merits. Instead, we examine the record to determine whether the evaluation was fair, reasonable, and consistent with stated evaluation factors. Electro-Voice, Inc., supra, at 5-6.

DISCUSSION OF PROTEST

The agency eliminated OTI from this limited competition because it twice failed to deliver passport cover sheets that complied with material solicitation requirements. The first was the thickness requirement clearly stated at RFP § C7.2.1. The second—

the separation of the layers of the cover--failed to comply with the durability requirement stated at § C7.2.2.2:

The inlay protective envelope shall be of a material that will securely and durably adhere to the book cover stock and book end sheets so that the finished [electronic passport] maintains its physical integrity as well as or better than the current book.

While OTI offers no justification for its initial failure to deliver covers that complied with the thickness requirement, the protester states that the separation in its second submission was caused by the fact that its adhesive supplier provided it with defective adhesive that weakened as it cured; OTI attributed this problem to a chemical labeling error.⁴ OTI further states that this defect has been identified and resolved, and is not a systematic problem in OTI's product. The protester alleges that it is unreasonable for the agency to use the second defect as the basis to eliminate OTI, because the problem was the result of a "clerical error," and OTI has since corrected it and would be able to submit a new batch of compliant cover sheets for Stage 2 testing.

Here, the agency had a reasonable basis for eliminating OTI from the competition, given that OTI twice delivered a product that was materially defective. We do not agree with OTI's contention that its deviations were not material, given that they can only be addressed by remanufacturing the 700 passport cover sheets.⁵ While OTI

⁴ The protester attempts to shift the responsibility for the adhesive defect to OTI's supplier. While the ultimate source of that defect may be significant to OTI, it does not affect the reasonableness of the agency's decision to eliminate OTI for twice delivering a defective product.

Also, OTI initially alleged that the separation of its cover was due, at least in part, to improper operation of GPO equipment by GPO personnel. Protest 2-3. The protester now "concedes that the adhesive, compounded with the mislabeled chemical, failed to adhere properly." Protester's Supplemental Comments at 1-2. In any event, the record provides no support for the allegation that GPO actions contributed to the separation problem. A small number of OTI's coversheets were damaged during the agency's calibration process (required for each new product), but the agency replaced the damaged sheets and did not consider them in evaluating OTI's cover sheets. Agency Report, Tab 20, Declaration of GPO's Printing Services Specialist, exh. 2. Additionally, the agency reserved some cover sheets from each contractor that were never run through GPO machinery, and the adhesive on the reserved OTI cover sheets also failed. *Id.*; Agency Report, Tab 22, Declaration of GPO's Chief Technology and Evaluation Officer, at 2.

⁵ While OTI alleges that agency personnel assured OTI that the separation issue was a minor problem that would not be cause for elimination, the agency denies that any
(continued...)

states that it has provided the agency with samples that correct the problem, these samples have not been tested, and even if they are compliant, they are not a substitute for the delivery of 700 compliant coversheets--a task on which OTI has twice failed. Given the fair warning that GPO gave OTI concerning repeated failure, we believe the agency was justified in eliminating OTI from the competition.⁶

OTI finally alleges that GPO treated contractors unequally because it has allowed other contractors to cure more significant defects or has given other contractors more than two chances to cure defects. However, the record shows that while the agency could not even test OTI's product because of the material nature of its defects, it was able to proceed with testing of those products that remained in the competition. The record also shows that the agency has eliminated all contractors that have twice submitted non-compliant products, or products that have failed to pass the same test twice. Agency Report, Tab 17, Testing Matrix. Thus, we find that OTI was not treated unfairly by not receiving more chances to submit a product that could be tested.

The protest is denied.

Anthony H. Gamboa
General Counsel

(...continued)

such statement was made. However, even if such a statement were made, it would not render unreasonable, for the reason stated above, the agency's decision to eliminate OTI from the competition. Oral statements by government employees generally do not bind the government; a competitor relies on oral statements at its own risk. Crown Support Servs., Inc., B-287070, Jan. 31, 2001, 2001 CPD ¶ 33 at 3 n.1.

⁶ The agency's Electronic Passport Selection Guide--an internal agency document outlining among other things the plan for evaluating the products--stated that the agency would eliminate a product from further consideration if it failed more than once in the same test phase. The protester states that this constitutes an undisclosed evaluation criterion. The policy to eliminate products with multiple failures in the same phase is not in itself a testing standard or an evaluation criterion, but only the agency's policy that, while it may allow correction of one product failure, it would not continue to keep in the competition firms with multiple failures in the same test phase. As noted above, the agency gave fair warning in the cure notice advising OTI that its product would be eliminated from the competition if its resubmission was not acceptable.