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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Apex Foot Health Industries

File: B-293088

Date: January 23, 2004

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Maura C. Brown, Esq., Department of Veterans Affairs, for the agency.
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DIGEST

Agency's decision to eliminate proposed diabetic socks from competition on basis that the seams on the socks were too prominent was based on medical judgments of evaluators with substantial expertise in the field; GAO will not question such medical judgments where there is no showing that product testing was unfairly administered.

DECISION

Apex Foot Health Industries protests the rejection of three different diabetic socks it proposed in response to request for proposals (RFP) No. 797-NC-03-0024, issued by the Department of Veterans Affairs (VA) for diabetic socks.[1] VA evaluated the socks as medically unacceptable for diabetic patients.

We deny the protest.

The RFP, issued as a small business set-aside on July 3, 2003, contemplated the award of a fixed-price requirements contract for a base year, with four 1-year options, for quantities of diabetic socks. Offerors were required to submit product samples. The evaluation was to consist of an initial determination of whether the offered items met the minimum requirements and, for those found acceptable, an

[1] The solicitation defined a diabetic sock as "hosiery specifically designed to reduce pressure or friction to the foot. They should be devoid of large seams or creases that could impart clinically significant pressure to an insensitive foot and should be loose fitting proximally, as not to restrict circulation." RFP at 4.

evaluation under three factors, technical, price and quality/past performance, (listed in descending order of importance). The specifications and evaluation factors were developed by a "sock workgroup" within VA's Prosthetic Clinical Management Program. Award was to be made, without discussions, to the responsible offeror whose offer conforming to the solicitation would be most advantageous to the government, price and other factors considered.

The RFP stated that the initial evaluation was to be "subjective," with "significant weight . . . given to actual performance of the socks during an evaluation at the National Acquisition Center," and noted that the "first and most important evaluation will be of the socks seams."[2] RFP at 28. If the evaluation team determined that seams or creases of an offered sock would cause pressure or irritate the diabetic foot, the sock would be rejected without further evaluation.[3] Id.

The agency received 45 offers from 32 offerors, including the protester, which submitted offers for seven different socks. The three-member technical evaluation panel (TEP), which included two Doctors of Podiatry and a Chief of Prosthetics trained as an orthotist, evaluated each sock by visually inspecting them and then walking in them with shoes. AR, exh. 6, Declaration of TEP Chairperson, at 2.

The TEP rejected three of Apex's offered socks under the initial evaluation based on the finding that they would cause pressure on or irritate the diabetic foot.[4] Specifically, the TEP found that the seams on the various socks were "prominent" or "somewhat prominent," that the knots at the ends of seams were "prominent" or "too

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[2] A prior solicitation, issued March 10, 2003, had called for "seamless" socks. After several contractors contacted the agency to complain that it was impossible to have a truly seamless sock, and after receiving confirmation from VA's doctors that this was the case, the agency canceled the solicitation on May 28.

[3] The agency explains that no additional evaluation was necessary because VA would not purchase a sock that would cause pressure or irritate the diabetic foot; such a sock "may cause our veteran patients at risk for limb threatening foot pathology due to sensory neuropathy and/or peripheral vascular disease to be subjected to microtrauma from any prominent area of the sock. This microtrauma could lead to skin irritation, blister formation, tissue necrosis, wounds and/or ulcers, infections and ultimately, in the worse case, gangrene." AR, exh. 6, Declaration of TEP Chairperson, at 1, 2-3.

[4] The agency initially rejected five of Apex's socks, Protest, Tab G, but following Apex's protest, reexamined the socks and reversed its position on two of them. These two socks will be further evaluated by the agency and considered for award. AR, at 1, n.1. The protest concerns the agency's rejection of the remaining three socks.

prominent," and that the heel seams were "too prominent" or "somewhat prominent." AR, exh. 10, Technical Evaluation Score Sheets, at 2, 6, 10. After VA notified Apex that the socks were rejected without further consideration, Apex filed an agency-level protest. That protest was denied, and Apex then filed this protest in our Office.

Apex argues that the agency improperly evaluated the three socks, asserting that the socks have the feel of a seamless sock; they are designed and manufactured without seams or creases that would cause pressure on or irritation to the diabetic foot; [DELETED] and therefore no raised seam, Protest at 1, 7; and there are no heel seams because the material at the heel of the sock is "one continuous piece of fabric in which the direction of the knitting changes to create the curve of the sock around the heel." Comments at 5. Apex further asserts that its socks are designed by a team of podiatrists, orthotists, and pedorthists; are constructed of special materials, including [DELETED], that cause the socks to lie flat and smooth against the foot, minimizing bunching and wrinkling; and that, as a result, its socks do not pressure or irritate--but, rather, protect--diabetic feet. Id. at 5, 12; Protest at 8.

We have held that matters involving medical judgments and policies are inappropriate for review under our bid protest function. GlaxoSmithKline, B-291822, Apr. 7, 2003, 2003 CPD ¶ 77 at 5. The scope of the evaluation here, and the agency's determination that certain of the proposed diabetic socks will irritate the diabetic foot, and therefore not meet the agency's needs, involve such medical considerations. While Apex asserts, for example, that the seams on Apex's socks in fact are not "too prominent," and that the socks in fact will not cause an unacceptable amount of irritation to the diabetic foot, these amount to disagreements with VA's medical judgment as to the amount of irritation a diabetic foot can withstand. The testing here was conducted by, and the evaluation conclusions were those of, three evaluators with substantial expertise in the area: the TEP Chairperson, who is a podiatrist as well as a member of the Prosthetic Clinical Management National Workgroup on Diabetic Socks; a Chief of Prosthetics who was trained as an orthotist; and a podiatric physician. In order for our Office to find in favor of Apex, we necessarily would have to adopt Apex's judgments about its own socks and reject as incorrect or unreasonable the medical judgments of these experienced practitioners. Under the above standard, we will not question such agency judgments.[5]

[5] Although we will not make an independent determination of the performance of an offeror's product even where we will consider the reasonableness of an agency's product sample testing conclusions, Pride Mobility Products Corp., B-291878, Apr. 8, 2003, 2003 CPD ¶ 80 at 2, we did conduct a visual and tactile examination of Apex's three rejected samples (furnished by VA). This examination confirmed that, notwithstanding the protester's assertions to the contrary, the material at the toe and heel of all three socks have detectable raised areas.

As for the approach used by the agency to evaluate the proposed socks, we find it unobjectionable. The RFP did not set forth a scientific process that would be used in testing offered socks; rather, as noted above, it specifically advised offerors that a "subjective evaluation of the socks" would be performed. RFP at 28. The agency reports--and there is no basis for concluding otherwise--that all socks were evaluated using the same testing procedure. Specifically, they were visually inspected, with special attention given to the seams, and the evaluators then walked in the socks, with shoes, on carpeted and concrete floors, for approximately 10 minutes. The evaluators wore shoes "to simulate actual usage and to assist in determining whether pressure was placed on the foot from any seam or crease." AR, exh. 6, Declaration of TEP Chairperson, at 2. There is no indication that the agency applied different procedures or standards in evaluating different socks, or that the agency's methodology in testing Apex's socks was otherwise unfair. We conclude that, although Apex questions the results of the testing, the evaluation was consistent with the terms of the RFP.

Apex argues that the evaluation documentation is inadequate to support the rejection of Apex's socks, since it consists of only a score sheet for each rejected sock, and conclusory statements that the socks possess, for example, "prominent" or "somewhat prominent" seams or knots. Comments at 1, 2, 9. The protester contends that the declaration of the TEP chairperson, submitted with the agency report, does not "fill the void of support for [the evaluation]" because it was prepared in response to the protest and "simply quotes the Score Sheets." Id. at 9-10. This argument is without merit. An agency's evaluation of proposals should be documented in sufficient detail to allow for the review of the merits of a protest. G&N, L.L.C., B-285118 et al., July 19, 2000, 2000 CPD ¶ 3 at 6. While the contemporaneous evaluation materials are limited, consisting of the evaluators' score sheets, they are sufficient to capture the evaluators' conclusions regarding the socks in question; the score sheets show that testing did occur and that, when tested, the three Apex socks were irritating to the testers' feet. AR, Tab 10, Technical Evaluation Score Sheets, at 1-2, 5-6, 9-10. Further, while we generally accord greater weight to contemporaneous evaluation documentation, we will consider all information provided to our Office in the course of a protest, including post-protest explanations, so long as those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16. Although the chairperson's declaration was prepared in response to the protest, it provides further explanation of the manner in which the

original evaluation was conducted--it does not merely quote the score sheets--and thus is appropriate for consideration in our review. We conclude that the evaluation is adequately documented.

The protest is denied.

Anthony H. Gamboa
General Counsel