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Decision

Matter of: Parmatic Filter Corporation

File: B-283645; B-283645.2

Date: December 20, 1999

Kevin M. Kordziel, Esq., Jenner & Block, for Parmatic Filter Corporation, the protester.

Jeffrey I. Kessler, Esq., and Joseph M. Picchiotti, Esq., Department of the Army, for the agency.

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DIGEST

Contracting officer reasonably determined that modification of ongoing contract was necessary to meet urgent requirements for a limited number of filters to protect against nuclear, biological and chemical threats, where the other potential source--which would have to pass first article testing requirements and establish a production line under severe time constraints--had recently experienced multiple testing failures in attempting to produce similar filters.

DECISION

Parmatic Filter Corporation protests the Department of the Army's modifications to contract No. DAAE20-96-C-0222 that had been previously awarded to Hunter Manufacturing Company for the production of certain 200 cubic feet per minute (CFM) filter sets to protect against nuclear, biological and chemical (NBC) threats at various military facilities. The required filters are designed to remove toxic gases and particles from contaminated air, and to provide breathable air for mobile and permanent shelters used by the U.S. Army, Navy and Air Force.¹ Parmatic protests

¹ The Army procures these NBC filters for the Air Force, Navy and Marine Corps, as well as for itself. The filters are used with the Army's Patriot missile system, the Navy's shipboard collective protection systems (CPS), and the Air Force's transportable collective protection equipment (TCPE) and chemically hardened air transportable hospitals (CHATH).

that it should have been afforded an opportunity to compete for the filter sets that were instead acquired without competition under the modifications.

We deny the protest.

BACKGROUND

The Army awarded contract No. DAAE-20-96-C-0222 to Hunter in May 1996, calling for the production of a base quantity of 2,207 filter sets with three option quantities of 2,207 each. Hunter is currently completing production and delivery of the final option quantity.

In the last half of 1998, the agency began planning for a follow-on procurement to meet the ongoing military requirements for NBC filters. A synopsis of that pending procurement was published in the Commerce Business Daily (CBD) in March 1999, stating that the estimated total requirements for 200 CFM filters under the follow-on contract were approximately 25,000 filters.

In February 1999, the contracting officer learned that unanticipated deployments of Navy ships and activation of Air Force units had depleted the inventory of 200 CFM filters below acceptable levels, requiring the immediate acquisition of 3,600 filters, over and above the quantities to be obtained under the follow-on procurement. Contracting Officer's Statement at 1; Contracting Officer's Supplemental Statement, Nov. 15, 1999, at 2. At that time, the contracting officer considered the capabilities of both Hunter and Parmatic, but concluded that only Hunter was reasonably capable of supplying the immediate, interim requirements. Accordingly, a justification and approval for other than full and open competition (J&A) was prepared and executed. The Justification portion of the J&A states:

This requirement is urgently needed for U.S. Navy and U.S. Air Force overseas deployments to NBC threat areas and non-availability could cause serious injury or death to troops.

Added deployments of U.S. Navy ships and additional activations of the U.S. Air Force's TCP[E] and CHATH have caused critical depletion of inventory available for issue. Due to the current backlog of 4,222 each 200 CFM Filter Sets an urgent requirement exists.

Hunter Mfg is the only current manufacturer to have passed First Article Test and be in continuous production. Hunter Mfg passed First Article Test [on] 4 June 1997 and has produced 4,499 units to date. As such they are the only manufacturer qualified for immediate production. Hunter could add 200 units per month to their current production schedule beginning in July 1999 and running through February 2000. Beginning with March 2000 Hunter could devote full

production to meeting this urgent requirement with completion by June 2000.

Agency Report, Tab C, Justification, J&A, 200 CFM Filter Set, at 1-2.

Consistent with this J&A, on March 29, 1999, the agency issued modification No. 19 to contract No. DAAE20-96-C-0222, requiring Hunter to deliver 1,800 filter sets (the first half of the total quantity contemplated under the J&A). However, the delivery schedule in modification No. 19 reflected deliveries commencing at a later date than that discussed above in the J&A; specifically, modification no. 19 provided that deliveries would begin in February 2000 rather than beginning in July 1999. Modification No. 19 to Contract No. DAAE20-96-C-0222, March 29, 1999, at 3. On September 1, 1999, the agency issued modification No. 20, calling for Hunter's production of a second quantity of 1,800 filter sets. Again, the delivery schedule in modification No. 20 reflected later delivery dates than the delivery schedule contemplated in the J&A by providing that deliveries were required between June and October 2000. Modification No. 20 to Contract No. DAAE20-96-C-0222, Sept. 1, 1999, at 3.

This protest followed.

DISCUSSION

Parmatic first questions the legitimacy of the agency's determination that an urgent requirement existed for the 200 CFM filters. Although acknowledging that noncompetitive procedures are permitted where an agency's needs are of such unusual and compelling urgency that the United States would be seriously injured unless the number of sources is limited, 10 U.S.C. § 2304(c)(2) (1994), Parmatic asserts that the later delivery dates contained in the contract modifications factually refute the J&A's representation of urgency.

The agency responds that the schedules contained in the modifications resulted from an erroneous entry by the automated system on which the agency relies to create contract documents, explaining that the system automatically added the additional requirements in the contract modifications to the end of Hunter's existing delivery requirements under the underlying contract, and that agency personnel failed to manually correct the error.

Based in part on the apparent discrepancy in the written record, our Office conducted a hearing to obtain testimony from agency personnel regarding, among other things, the inconsistency between the delivery schedules in the modifications and the schedule discussed in the J&A. At the hearing, the contracting specialist responsible for drafting modification No. 19 testified that the delivery schedule in the modification was created by automatically adding the additional requirements to the end of Hunter's existing delivery schedule, and that he inadvertently failed to

manually override the later delivery schedule and insert a schedule consistent with the J&A. Hearing Transcript (Tr.) at 136-38, 143-44, 152-53. Similarly, the contracting specialist responsible for drafting modification No. 20 testified that the delivery schedule in that modification was created by adding the delivery requirements to the end of the delivery schedule in modification No. 19. Tr. at 157-67. The agency's contracting personnel also testified that, notwithstanding the erroneous schedules contained in the contract modifications, Hunter has, in fact, delivered the filters consistent with the accelerated schedule contemplated by the J&A. Tr. at 152, 164, 166.

In summary, agency personnel responsible for documenting the procurement actions testified that the requirements for the additional filters being obtained under modification Nos. 19 and 20 were, in fact, necessitated by the Navy's unanticipated deployment of ships and the Air Force's activation of units requiring the NBC filters, that the need for the filters was an immediate one at the time the J&A was executed, that the delivery schedule contemplated in the J&A reflected the earliest possible deliveries the agency believed were attainable, and that the later delivery dates in modification Nos. 19 and 20 were the result of errors generated by the agency's automated contract documentation system which agency personnel failed to correct.

We found that the testimony by these agency witnesses was credible, and that it was consistent with the contemporaneous documentation prepared at the time the J&A was executed. Further, the record is simply devoid of any basis to challenge the accuracy of the contracting officer's statement that she was advised in February 1999 that higher than expected Navy and Air Force filter usage had depleted existing inventory to an unacceptable level. On this record, Parmatic's protest that the agency did not have an immediate requirement in February 1999 to purchase a limited number of 200 CFM filters, pending award of a follow-on contract, is denied.²

Parmatic next protests that it was unreasonable for the agency to conclude that only Hunter would be able to meet the urgent requirements, asserting that Parmatic would have been able to "pass the first article testing requirements on the first attempt . . . commence delivery on first article filters within 3½ months of award, and begin delivery of these 200 CFM filters within 5 months of award." Protest at 4.

² Parmatic also protests that the modifications resulted from a lack of advance planning by the agency. As discussed above, the record shows that the requirements were caused by actions outside the Army's control, that is, deployment of Navy ships and Air Force units, and that the agency moved expeditiously to fill the requirements as soon as they were identified. On this record, we find no merit in Parmatic's assertion that the modifications reflected a lack of advance planning by the procuring agency.

The agency disagrees with Parmatic's assessment of its capabilities.³ Specifically, the contracting officer states that she considered the fact that Hunter had already passed first article testing for the Army while Parmatic had not, that Hunter was in current production of the 200 CFM filters while Parmatic was not, and that Parmatic had experienced multiple difficulties and lot testing failures under two Army contracts for similar 100 CFM NBC filters that Parmatic was then performing.⁴

The record contains various documents reflecting Parmatic's performance problems under the 100 CFM filters contracts. For example, in a letter to Parmatic dated February 18, 1999, the contracting officer responded to Parmatic's prior assertion that its testing failures had been caused by [deleted] which Parmatic maintained was the [deleted]. The contracting officer stated:

Parmatic has a responsibility to assure that they use only material that [is] in full compliance with the drawings and specifications. . . . [Parmatic] had reason to suspect that they may have [deleted], but apparently did not verify by testing whether or not this was the case. [Parmatic] may also have made the [deleted] was or was not within the specification limits. There is no proof as to when the material became non-conforming, because Parmatic did not exercise adequate [deleted]. The [deleted] testing is a contractor responsibility for this contract. Parmatic had a contract [deleted], and Parmatic was responsible for assuring [deleted].

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³ The agency states that it normally contemplates 6 to 7 months for a new producer to pass first article testing and another 3 to 4 months to begin deliveries. Tr. at 15. As discussed below, the agency did not believe that Parmatic was capable of performing in substantially less than the normal lead time.

⁴ Parmatic asserts that its performance under the 100 CFM contracts should not have been considered when assessing its capabilities to produce 200 CFM filters because of various differences in the way the two filters are manufactured and tested. However, Parmatic itself refers to the two filters as "similar," Protest at 5, and, in expressing an interest in competing for the pending, follow-on procurement, Parmatic specifically referenced its experience in producing the 100 CFM filters. Letter from Parmatic to the Army 1 (Apr. 14, 1999). Accordingly, Parmatic's own submissions support the relevance of its experience under the 100 CFM filter contracts with regard to assessing its capabilities to manufacture and deliver the 200 CFM filters.

Parmatic has not yet identified the root cause of the [deleted], and has looked mainly at characteristics that in so far as can be determined are the same for the filters that passed [testing] as for the filter that failed.

Parmatic has not shown any defective specifications to exist, and has failed to ensure compliance with the specifications which do exist. They have based their arguments on the factors that apply equally to the majority of their items which have passed the testing requirements a[s] to those few that have failed.

Letter from Contracting Officer to Parmatic 1-2 (Feb. 18, 1999).

Although Parmatic continues to assert that its testing failures under the 100 CFM contracts are caused by defects in the specifications regarding the fines retention media and carbon specification, Declaration of Parmatic's Contract Manager, Oct. 29, 1999 at ¶ 12, Parmatic acknowledges that the same allegedly defective specifications regarding the fines retention media and carbon are also applicable to the 200 CFM filters. Second Declaration of Parmatic's Contract Manager, Nov. 30, 1999, at ¶¶ 16, 17. Further, while Parmatic asserts that the effect of the common, allegedly defective specifications would be different under the 200 CFM filter contract due to various other differing specifications and testing requirements, it has shown neither that the contracting officer's concerns, discussed above, were unreasonable, nor that Parmatic's performance under the "similar" 100 CFM filter contract was not relevant to the contracting officer's assessment of Parmatic's capabilities to meet the agency's urgent requirements.⁵

As noted above, the Competition in Contracting Act of 1984 (CICA) permits use of noncompetitive procedures where an agency's need is of such urgency that the United States would be seriously injured unless the number of sources is limited. 10 U.S.C. § 2304(c)(2). While CICA requires that the agency request offers from "as many potential sources as is practicable under the circumstances," 10 U.S.C. § 2304(e), an agency may properly limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. Datacom, Inc.--Protests and Request for Costs, B-274175 et al., Nov. 25, 1996, 96-2 CPD ¶ 199 at 6; Electro-Methods, Inc., B-250931, Feb. 26, 1993, 93-1 CPD ¶ 181 at 4.

⁵ Indeed, in September of this year, Parmatic acknowledged that "[Parmatic has] at the present time in our factory [deleted] currently awaiting disposition," and that the problems associated with these failed lots has "obviously made it impossible to meet delivery schedules." Memorandum from Parmatic to TACOM-Rock Island 2 (Sept. 20, 1999). Parmatic further states that, [deleted] its experience in unsuccessfully attempting to perform the 100 CFM contracts [deleted]. Id. at 3.

Based on our review of the record here, the agency clearly had a reasonable basis to conclude that only Hunter would be able to meet the urgent requirements for a limited, interim quantity of the 200 CFM filters. Based on the contracting officer's reasonable consideration of a variety of factors, including the fact that Hunter had already passed first article testing of the filters for the Army and was in production of the filters while Parmatic would have to successfully pass the Army's first article testing and establish a production line, and that Parmatic had experienced multiple testing failures and tardy deliveries under its ongoing 100 CFM filter contracts--which Parmatic attributes to allegedly defective specifications common to both the 100 CFM filters and the 200 CFM filters--we find no basis to question the reasonableness of the contracting officer's determination.⁶

The protest is denied.

Comptroller General
of the United States

⁶ Parmatic also complains about a portion of the contracting officer's documentation supporting the J&A which stated, "no other sources have expressed an interest in writing," arguing that this statement fails to properly reflect the fact that Parmatic was interested in being a source for these filters acquired under the modifications and had verbally advised the contracting officer of that interest several months before the J&A was executed. While this portion of the J&A's supporting documentation could have more fully discussed the contracting officer's consideration of Parmatic as a potential source, and the reasons for concluding that Parmatic could not meet the urgent requirements, based on our review of the record, as discussed above, we do not view this as a basis to sustain the protest.