



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Ceradyne, Inc.

File: B-402281

Date: February 17, 2010

Michael A. Hordell, Esq., Stanley R. Soya, Esq., and Heather Kilgore Weiner, Esq., Pepper Hamilton LLP, for the protester.

Maj. Walter Dukes, U.S. Army Materiel Command, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's decision to set aside delivery order under a multiple award indefinite-delivery/indefinite-quantity (ID/IQ) contract for the small business ID/IQ contract holders was reasonable where both small business contract holders represented to the agency that they could meet the delivery order requirements.

DECISION

Ceradyne, Inc., of Costa Mesa, California, protests a decision by the U.S. Army Materiel Command to set aside for small business concerns, delivery order No. 9 for body armor, Small Arms Protective Inserts (SAPI). Ceradyne argues that the Army's set-aside decision was unreasonable.

We deny the protest.

BACKGROUND

SAPIs are ceramic plates designed to withstand and absorb ballistic impact. These plates are inserted into vests and other protective gear and used by military personnel and security forces as body armor. In March 2008, the Army issued a solicitation for the award of multiple indefinite-delivery/indefinite-quantity contracts to provide SAPIs in support of the government's foreign military sales program. On September 11, 2008, the Army made four awards under the solicitation to the following firms: (1) Armacel Armor Corp. (contract No. W91CRB-08-D-0060) (a small business concern); (2) ArmorWorks Enterprises, LLC (contract No. W91CRB-08-D-0061) (a small business concern); (3) Ceradyne, Inc. (contract No. W91CRB-08-D-0062) (a large business); and (4) Composix Co. (contract No. W91CRB-08-D-0063)

(a large business). Under the contracts, delivery orders are to be competed among the various contract holders.

On June 4, 2009, the Army received five purchase requests for 78,502 plates covering requirements for the countries of Lebanon, Tunisia, Senegal, and Afghanistan. All of the countries needed delivery 6 months after placement of the delivery order. The Army decided to set aside the Lebanon, Tunisia, and Senegal plate requirements, which had a combined requirement for 13,722 plates, for the two small business contract holders (Armacel and ArmorWorks) and solicited quotes for the plates from these firms on June 8. The Army ultimately awarded the requirement to Armacel in the amount of \$4,235,438.00.

The Army also issued a delivery order request on June 8 for the Afghanistan requirement (approximately 64,000 plates with an estimated value of \$17,704,631) and on July 14, the Army issued the delivery order to Ceradyne in the amount of \$18,681,710.00. While intending the requirement to be issued on an unrestricted basis, the Army mistakenly only solicited quotations from the two large businesses, Ceradyne and Composix (Composix did not submit a quotation because, as it explained to the Army, it did not have the necessary production capacity at that time). ArmorWorks filed a protest with our Office on July 24 arguing that it was improperly denied an opportunity to compete for the requirement.¹ The Army took corrective action, which included reopening the competition for all contract holders and modifying the selection criteria. Due to funding issues, the recompetition was based on a revised requirement for 61,000 plates. Prior to the closing date for the recompetition, ArmorWorks filed another protest, this time challenging the agency's decision not to set aside the Afghanistan requirement (order No. 9) for small business concerns, and arguing that even if a total set-aside was not appropriate, the Army failed to properly consider a small business partial set-aside as contemplated by Federal Acquisition Regulation § 19.502-3.²

On November 2, the Army contacted both Armacel and ArmorWorks to obtain information regarding their production capacity for the next 6 months and both confirmed that they could meet the 61,000 plate and 6-month delivery requirements

¹ On July 7, the Army sent ArmorWorks an e-mail message, which mistakenly asked ArmorWorks if it could meet the requirements of delivery order No. 9, but identified a 60-day delivery schedule as opposed to the 6-month delivery order actually required. ArmorWorks indicated that it could not meet the requirement for delivery order No. 9 as requested. E-mail Army to ArmorWorks, July 7, 2009 and ArmorWorks E-mail response, July 8, 2009.

² During the pendency of Armorwork's protest, the Army proceeded with the receipt and evaluation of quotations and, based on the results of the recompetition, Composix was identified as the apparent successful vendor.

for SAPI delivery order No. 9.³ Also on November 2, the Army informed our Office that it would take corrective action in response to the protest filed by ArmorWorks and sought dismissal of the protest as academic. E-mail from Army, Nov. 2, 2009. We dismissed the protest as academic on November 6. The Army then notified the contract holders on November 10 that requirement No. 9 would be set aside for the small business contract holders. Thereafter, Ceradyne filed this protest.

DISCUSSION

In its protest, Ceradyne principally argues that the agency's decision to set aside delivery order No. 9 for the small business ID/IQ contract holders (Armcel and ArmorWorks) was unreasonable because the Army failed to consider the capability of the small business concerns in making its set-aside decision.⁴ According to Ceradyne, neither firm has performed contracts of the magnitude required under delivery order No. 9. Specifically, Ceradyne alleges that both Armcel's and ArmorWorks' largest delivery orders under their SAPI ID/IQ contracts are, respectively, approximately 1/3 and less than 10 percent of the value for delivery order No. 9. In addition, Ceradyne suggests that both firms have had performance problems under their current ID/IQ contracts as reflected by the fact that the Army has, in some instances, extended delivery schedules for orders issued under these contracts.

Pursuant to FAR § 19.502--2(b), a procurement with an anticipated dollar value of more than \$100,000 must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market

³ In response to an earlier inquiry, Armcel informed the Army on August 6 that it would not be able to meet requirement No. 9 at that time. On November 2, when asked to provide its production capacity for the next six months, Armcel confirmed that it "is currently in position to produce 10,000 units per month" and could "ramp up as necessary." Agency Report (AR) Tab B, E-mail from Armcel to Army, Nov. 2, 2009.

⁴ Ceradyne also argues that the Army has "breached its implied covenant of good faith and fair dealing." Protest at 11. As a general matter, a breach of contract claim is a matter of contract administration and therefore outside the scope of our bid protest jurisdiction. 4 C.F.R. § 21.5(a) (2009). To the extent Ceradyne's allegations are premised on the unreasonable nature of the agency's decision to set aside delivery order No. 9 for small business concerns, thereby denying Ceradyne the opportunity to perform order No. 9 as originally awarded under its ID/IQ contract, that argument does fall within our protest jurisdiction because it concerns the proposed issuance of a delivery order in excess of \$10 million, see 41 U.S.C. § 253j(e) (West 2009), and is subsumed within our decision below.

price. Often referred to as the “rule of two,” these set-aside provisions apply to competitions for task and delivery orders issued under multiple-award contracts, such as the ID/IQ contracts at issue in this protest. See Delex Sys., Inc., B-400403, Oct. 8, 2008, 2008 CPD ¶ 181 at 5-10. Agencies are not required to use a particular method to assess the availability of small businesses; rather, an agency need only undertake reasonable efforts to locate responsible small business competitors. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer’s discretion, our review generally is limited to ascertaining whether that official abused his or her discretion. ViroMed Laboratories, B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3-4. We will not question a small business set-aside determination where the record shows that the evidence before the contracting officer was adequate to support the reasonableness of the conclusion that small business competition reasonably could be expected. Id.

Here, Ceradyne’s arguments essentially challenge the responsibility of Armacel and ArmorWorks. As noted above, Ceradyne questions the capability of the small business ID/IQ contract holders to successfully perform requirement No. 9. According to Ceradyne, given the size of requirement No. 9, as well as concerns regarding the ability of Armacel and ArmorWorks to timely perform other delivery orders, the Army should not have set aside requirement No. 9 based solely on the representations of these firms regarding their respective production capacity. Ceradyne’s arguments, however, are misplaced under the circumstances here.

Generally, responsibility is a contract formation term that refers to the ability of a prospective contractor to perform the contract for which it has submitted an offer, and, by law, a contracting officer must determine that an offeror is responsible before awarding it a contract. See 41 U.S.C. § 253b(c), (d); FAR § 9.103(a), (b), Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 5. Once an offeror has been determined to be responsible and is awarded a contract, as is the case with Armacel and ArmorWorks, both of which were found responsible when they were awarded their underlying ID/IQ contracts, there is no requirement that an agency make additional responsibility determinations during contract performance, i.e., when placing individual delivery orders under an existing ID/IQ contract. See FAR § 16.505; ESCO Marine, Inc., B-401438, Sept. 4, 2009, 2009 CPD ¶ 234 at ___; Advanced Tech. Sys., Inc., supra.

Moreover, in making set-aside decisions, agencies need not make actual determinations of responsibility or decisions tantamount to determinations of responsibility; rather, they need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. ViroMed Laboratories, supra. In the context of a multiple-award ID/IQ contract, where there are at least two small business contract holders, as in this case, the agency’s inquiry properly may be of limited scope, since the agency has already identified responsible small business concerns for award of task or delivery orders under the umbrella ID/IQ contract.

Thus, where an agency receives expressions of interest from the small business contract holders and they represent their ability to perform requirements that the agency intends to order, the agency has a reasonable basis upon which to conclude that the “rule of two” has been met. While Ceradyne maintains that the Army should not have relied on the production capacities claimed by Armacel and ArmorWorks, in the absence of evidence of misrepresentation by these firms, we do not think the Army had a duty to subject these representations to a greater level of scrutiny.⁵ ViroMed Laboratories, supra.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁵ Ceradyne asserts that the capability statements made by the small business contract holders were unreliable because they were inconsistent with prior indications by these firms that they could not meet the production requirements associated with delivery order No. 9. The most relevant benchmark for ascertaining the performance capability of ArmorWorks and Armacel, however, would be the Army’s recent inquiries of these firms as opposed to the performance capability statements referenced by Ceradyne. In this regard, Armacel’s initial indication that it would not be able to meet delivery order No. 9 was made several months ago and prefaced with the statement “at this time.” ArmorWorks’ initial representation regarding delivery order No. 9 was similarly made several months ago and is unreliable since the representation was based on the mistaken 60-day delivery period, rather than the longer 6 month period actually required for delivery order No. 9. Moreover, ArmorWorks’ prior response identified a future delivery capacity of 10,000 plates per month by October 2009, which is consistent with the most recent projections ArmorWorks has provided to the Army. E-mail from ArmorWorks to Army, July 8, 2009.