



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mills Manufacturing Corp.
File: B-224004; B-224005
Date: December 18, 1986

DIGEST

1. Contracting agency has primary responsibility for determining its minimum needs and the method of accommodating them. This Office will not upset such determinations absent clear evidence that agency's decision is arbitrary or unreasonable.
2. Agency may issue requirements contract for periods of more than 1 year under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.503 (1985).
3. An agency is not required to compromise the government's needs in order to maximize competition for small businesses. With certain exceptions not pertinent to the instant case, there is no requirement that a particular solicitation be set aside for small businesses.
4. Agency is not prohibited by the FAR, 48 C.F.R. § 16.503(b) (1985), from entering into requirements contracts for parachutes, whether or not they are commercial or commercial-type goods.

DECISION

Mills Manufacturing Corporation (Mills), protests invitations for bids (IFB) Nos. DAAK01-86-B-C356 (-C356) and DAAK01-86-B-C333 (-C333), issued by the Army Troop Support Command for the procurement of personnel parachutes and personnel reserve parachutes. The solicitations call for the award of multi-year requirements contracts. Mills claims that the multiyear requirements contracts are unreasonable and violate applicable regulations. Mills asserts that the multiyear contracts effectively exclude from government contracts unsuccessful offerors for extended periods of time and thus erode the industrial base, and that multiyear contracts of this type are unfair to small businesses. We deny the protests.

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IFB -C356 called for the issuance of a requirements contract for personnel reserve parachutes in a total estimated quantity of 28,027 with a 3-year ordering schedule. The solicitation called for separate line-item prices for each of the 3 years during which orders could be placed. The solicitation also indicated that the agency intends to place an initial order of 8,027 units simultaneously with the award of the contract. Bids were opened on August 15, 1986. Prior to bid opening, on August 7, the protester filed a protest with the agency which was denied by the contracting officer by letter dated August 14. Bids were opened but no award has been made.

IFB -C333 was issued on July 23, and called for the issuance of a requirements contract for personnel parachutes in a total estimated quantity of 9,536 with a 2-year ordering schedule. The solicitation called for separate line-item prices for each of the 2 years during which orders could be placed. This solicitation also advised bidders of the government's intent to order an initial quantity of 4,536 units simultaneously with the award of the contract. Bid opening was scheduled for August 26, but has been postponed pending resolution of this protest. Mills also filed a protest regarding this solicitation with the agency on August 7, which was denied by the contracting officer by letter dated August 14. With respect to both solicitations, Mills filed protests with this Office on August 22.

Initially, Mills alleges that the contracting officer abused her discretion in issuing the solicitations which called for multiyear requirements contracts rather than single year fixed-quantity contracts. Mills submits that "no intelligent bid" can be formulated for the products in question for any length of time because of fluctuations in the price of raw materials, and that multiyear contracts have the effect of "freezing out the competition" for an extended period.

The Army responds that it was within the discretion of the contracting officer to employ the type of contract determined to be in the best interests of the government and thus she reasonably issued solicitations calling for multiyear requirements contracts.

We have held that the contracting agency has the primary responsibility for determining its minimum needs and the method of accommodating them, and that this principle applies to the contracting format used to purchase the quantities of items which the agency has determined are necessary. Kings Point Mfg. Co., Inc., B-220224, Dec. 17, 1985, 85-2 C.P.D. ¶ 680. This Office will not upset the agency's determination

in this respect absent clear evidence that those decisions are arbitrary or unreasonable. Kings Point Mfg. Co., Inc., B-220224, supra. We therefore will uphold an agency's rationally based decision to procure on a multiyear basis unless the protester shows that the decision is clearly unreasonable. Id.

In this connection, the agency reports that its primary rationale for using a multiyear requirements contract format is that the agency has a continuing/recurring need for the items in question, but is unable to predetermine the quantities needed for a given period of time. The agency states that it is unable to predict demand for the parachutes because the agency buys them for virtually all branches of the armed services and for sale to foreign governments. The Army also advises that the useful life of any given parachute is impossible to forecast because its useful life is a function of its shelf life and service life. The agency states that after a certain number of jumps the parachute's use is discontinued, but when that number of jumps will occur varies. The purchasing activity reports it cannot project usage precisely and thus cannot project demand with any certainty. The agency also advises that different commanders prefer a mix of different models of parachutes because various models have different safety and maneuverability features and the needs of any given group of commanders are difficult to predict.

The protester provides letters from various suppliers indicating that they believe it is impossible to submit rational firm-fixed-price quotations for raw materials for a contract of this duration. Thus, the protester argues that the government will incur the risk of grossly inflated prices or risk of contractor defaults. The agency contends that bidders can forecast reasonably the market for the raw materials and that the multiyear contract permits a bidder to allocate its costs over the contract term and permit better long term planning to realize economic efficiencies.

Mills also contends that these solicitations are inconsistent with the requirements of Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.1 (1985), pertaining to the issuance of multiyear contract solicitations, primarily because they do not contain price adjustment clauses.

The Army states that it issued the solicitations under FAR, 48 C.F.R. § 16.503 (1985), not FAR, 48 C.F.R. § 17.1. The Army argues that FAR, 48 C.F.R. § 17.1, is inapplicable to the instant solicitations since that section requires the contracting agency to issue best estimates of quantity (BEQ)

in connection with a solicitation and the agency's needs in the case of parachutes and reserve parachutes are not susceptible of a reasonably certain estimate with respect to quantity. The Army further points out that the FAR, 48 C.F.R. § 16.503, does not prohibit the use of requirements contracts for multiple years.

In our view, while FAR, 48 C.F.R. § 17.1, provides for one method of multiyear requirements contracting, it does not indicate it is the exclusive procedure for issuing requirements contracts on a multiyear basis. Therefore, it was not improper here for the agency to solicit and issue a requirements contract under FAR, 48 C.F.R. § 16.503, even though performance of the contract may extend over a number of years.

FAR, 48 C.F.R. § 17.103-1(a), states:

"Except as limited in 17.103-1(b), multiyear contracting may be used when one or more of the objectives in 17.102-3 can be met, and the following criteria are present: . . . (2) The minimum need for the item to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, acquisition rate, and total quantities."

Since the Army has demonstrated that the minimum need for the item to be purchased is not expected to remain the same during the contract period, the general criteria the use of FAR, 48 C.F.R. § 17.1, is not met by these solicitations. This view is reinforced by FAR, 48 C.F.R. § 17.104-4(a), which states:

"Multiyear acquisition of supplies and/or services may be accomplished using a requirements contract, modified from the type discussed in 16.503 as described below. This type of contract will only be used when anticipated annual requirements, expressed as the Best Estimated Quantity (BEQ), can be projected with reasonable certainty. The modified requirements contract differs from the contract discussed in 16.503 in the following respects: (1) Contract quantities anticipated to be acquired are set forth in the contract as the BEQ. . . ."

In the agency report, the contracting officer indicates that, because of the nature of the demand for parachutes, BEQ's cannot be predicted with reasonable certainty, and hence the use of a modified multiyear requirements contract format was

inappropriate for these procurements. We are of the opinion that this determination was not arbitrary or unreasonable.

Furthermore, we find that contrary to the protester's assertion, under FAR, 48 C.F.R. § 16.503 (1985), a requirements contract can be for a period of more than 1 year. Section 16.503(a) states that "[a] requirements contract provides for filling all actual purchase requirements . . . for specific supplies or services during a specified contract period." Section 16.503(a) does not state that the "specified contract period" be of a particular duration.

Additionally, the contract format outlined in section 16.503 appears to be particularly well suited to the procurements in question since the demand for the goods in question is subject to considerable fluctuation. Section 16.503(b) provides that:

"[a] requirements contract may be used when the government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated government activities will need during a definite period."

Thus, we find the agency's use of FAR § 16.503(b) proper under these circumstances.

We therefore hold that the contracting agency did not act arbitrarily or unreasonably in choosing the contract format which it ultimately settled upon for the subject procurements. A mere difference of opinion between the protester and the agency concerning the agency's needs is not sufficient to upset an agency's determination, see Kings Point Mfg., Co. Inc., B-220224, supra. We therefore deny this basis of the protest.

Mills also argues that the multiyear contract is unfair to small businesses because it would be difficult for small businesses to absorb the risk of an extended contract. Even assuming that the use of a requirements contract instead of individual procurements effectively excludes small businesses, an agency is not required to compromise the government's needs in order to maximize competition by small businesses. International Security Technology, Inc., B-215029, Jan. 2, 1985, 85-1 C.P.D. ¶ 6. We have also held that, with certain exceptions not relevant here, there is no requirement in the Small Business Act, 15 U.S.C. § 637 et. seq. (1982), or the federal procurement regulations that any particular procurement be set aside for small businesses. Id.; Interior Steel Equipment Co., B-212253, Nov. 14, 1983, 83-2 C.P.D. ¶ 556. We therefore deny this basis of the protest.

Finally, Mills claims that the items to be procured under the subject solicitations are not commercial or commercial-type goods within the meaning of FAR, 48 C.F.R. §§ 16.503(b) and 11.001, and, therefore, that the solicitations should not have been issued pursuant to these regulations. However, we have held that the limitation on the use of requirements contract under FAR, 48 C.F.R. § 16.503(b), that the goods being procured are commercial or commercial-type goods is permissive in nature and should not be construed as an absolute prohibition against the purchase of items that are not commercial or commercial-type products. Sentinel Electronics, Inc., B-221914.2, et. al., Aug. 7, 1986, 86-2 C.P.D. ¶ 166. Since, as indicated previously, the Army has advanced valid reasons for using requirements contracts, whether or not the items being procured here are commercial or commercial-type products, the Army is not prohibited from using requirements contracts. Id.

For the reasons stated above, the protests are denied.

for *Seymour E. Eason*
Harry R. Van Cleve
General Counsel