



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Daylight Plastics, Inc.
File: B-225057
Date: March 10, 1987

DIGEST

1. Where agency properly determined, due to urgent circumstances, that it must use noncompetitive procedures provided for under the Competition in Contracting Act, agency properly also may limit the procurement to the only firm it reasonably believes can promptly and properly supply the requirements, and is not required to solicit all firms interested in the acquisition.
2. Protest against agency determination that sole-source contract price was fair and reasonable is denied where record shows that prices obtained were lower than under prior contracts and were in line with prices obtained under the most recent competitive procurement.
3. In a negotiated procurement, a contracting officer need only establish a reasonable basis to support a decision to cancel a solicitation. A reasonable basis exists where the agency determines that there is an urgent need for the requirements and that need can only be met, within the time-frame required, by the reissuance of the solicitation to the only known source capable of meeting the delivery requirements.

DECISION

Daylight Plastics, Inc. protests the sole-source award of contract No. DAAA09-86-C-1551 to Proll Molding Co., Inc. under request for proposals (RFP) No. DAAA09-86-R-2066 and the cancellation of RFP No. DAAA09-86-R-0127, issued by the Department of the Army. The procurement is for the supply of 216,731 Plastic Magazines for Combat and 107,686 Plastic Magazines for Training. Both magazines are components of the M249 Squad Automatic Weapon System (SAWS). Daylight contends that the noncompetitive award to Proll was improper because

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the award cannot be justified on the basis of an urgent and compelling need for the items. Additionally, Daylight alleges that cancellation of solicitation -0127 was a "subterfuge" designed to deny the firm the award. For the reasons that follow, we deny the protest.

RFP -0127 was issued March 3, 1986, as a competitive procurement for the combat and training magazines. The solicitation invited firms to submit offers based on first article testing or based on waiver of the requirement. The RFP further provided that if first article testing was required, delivery of the magazines was to begin 210 days after award. If first article testing was waived, delivery was to begin 90 days after award. The protester was the low offeror on both items, with and without first article testing.

The agency reports, however, that the contracting officer was notified on August 18--4 days after receipt of proposals and before a preaward survey was requested on Daylight--that the magazines were urgently needed to avoid a line shutdown of SAWS ammunition production at the Lake City Army Ammunition Plant (LCAAP). The contracting officer determined that if an immediate award without first article was made, the shorter delivery schedule of 90 days would meet the delivery needs at LCAAP. The contracting officer therefore waived the first article testing requirement for Proll--the only prior producer of these items--and made award to that firm on August 29 (Contract No. DAAA09-86-C-1418). When Daylight learned that award was made at prices "significantly greater" than those offered by the firm and the reasons therefor, it protested the award to our Office on September 15.

Subsequently, on September 24, the Army terminated contract -1418 for the convenience of the government and issued sole-source solicitation -2066--an oral noncompetitive repurchase of the same requirements--to Proll. According to the Army's justification for use of noncompetitive procedures, the sole-source solicitation was issued to Proll under the authority of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(2) (Supp. III 1985), because a critical short supply of these magazines existed which would severely limit the SAWS ammunition production at LCAAP if delivery of these items did not begin by November 30, 1986. The justification statement, which was approved by the Competition Advocate, further identifies Proll as the only firm capable of meeting the urgent delivery requirements because only Proll was eligible for waiver of first article

testing. According to the statement, first article testing "would cause a minimum of 16 weeks delay . . . before delivery of production quantity could be achieved." On September 30 contract -1551 was thereafter awarded to Proll.

We dismissed Daylight's original protest B-224676 by notice dated October 29 upon a finding that the protest was academic in view of the termination action. Daylight filed the instant protest against the sole-source award and cancellation of the original solicitation with our Office on October 27.

Daylight protests that the Army's sole-source determination was improper because the factual bases upon which it was made were inaccurate. In this regard, Daylight specifically disputes the critical urgency of this procurement and the finding that only one firm was capable of meeting the agency's needs. Contrary to the agency's assertions that the magazines were in "critical short supply," the protester alleges that present inventory for these items reveals that a shortfall would not be experienced, if at all, until March 1987 and not November 1986, as alleged by the Army. Thus, the protester argues, there was ample time to procure these items competitively without any shutdown or line stoppage of ammunition production at LCAAP. In any event, the protester contends that if there was an "attendant urgency" for these magazines, the Army should have solicited Daylight as well as Proll since Daylight was a known potential offeror and agencies are required to "request offers from as many potential sources as is practicable under the circumstances." Federal Acquisition Regulation (FAR), 48 C.F.R. § 6.302-2(c)(2) (1986).

As indicated above, the Army relied on 10 U.S.C. § 2304(c)(2), to justify the expedited competition. That provision authorizes an executive agency to use noncompetitive procedures when:

"the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits the bids or proposals;"

In using noncompetitive procedures, however, the agency must request offers from "as many potential sources as is practicable under the circumstances." 10 U.S.C. § 2304(e).

We believe the Army's decision that there was sufficient urgency to use noncompetitive procedures and to exclude the protester under these procedures was reasonable. The Production Directorate whose office is charged with the responsibility to assess the requirements needed to sustain production at the Army's ammunition plants made a specific finding that SAWS ammunition "is in critical short supply," thereby requiring delivery of the stated quantity of combat and training magazines within 90 days. The Production Directorate further stated that component inventories were required to "be maintained at approximately 60 day levels, and pass through normal material handling at the plant," and concluded that delivery of these magazines should begin by November 30.

The protester argues that the Army has overstated the projected monthly requirements to support an adequate inventory of combat and training magazines. Daylight states that based upon data furnished it by the Army relative to present inventory, projected requirements and actual usage, the inventory available as of January 1987 "would be adequate" to support SAWS ammunition production "until late January 1987." Consequently, the protester argues, the facts do not support the conclusion that November 30, 1986 was the critical date which had to be met to avoid a shutdown of the load lines and possible furlough of personnel at LCAAP. -

The protester's argument fails to address the agency's concern that its supplier under the prior contract, Fabrique Nationale, had as of early November delivered only 11,628 magazines of the 48,000 due under its contract and that the agency anticipated further delays due to a labor strike at Fabrique Nationale's Plant. This delivery delay under the prior contract was apparently a primary reason for the Army's anticipated shortage. Thus, the Army's delivery projections, which were relied on by the protester were no longer valid. Under these circumstances, the Army's determination that award of a new contract was urgently needed was reasonable.

We also find that the record supports the view that only Proll was capable of timely meeting the agency's urgent need based on its prior established production of the product which would permit waiver of the first article requirement. Thus, the Army's decision to limit the noncompetitive award to Proll was reasonable. Since Daylight had never produced the product, Daylight was subject to first article approval which necessarily would have unacceptably prolonged the delivery schedule. In addition, the agency states that Daylight could not be considered for award until a thorough

preaward survey was conducted to ensure Daylight could meet delivery schedules. The contracting officer believed that given the urgency for the requirements, the time needed to determine Daylight's responsibility and to grant first article approval would result in unacceptable delays which would severely impair the government's ability to maintain the production of SAWS ammunition.

Daylight also argues that the agency could have made a noncompetitive award of a shorter duration, of 2 months, to satisfy the agency's urgent need and continue with the competitive procurement. The basic contract award to Proll was for deliveries from November to February. The agency also indicates that it has issued a competitive solicitation for its 1987 needs. We cannot say that an award for 4 months was unreasonable here in view of the anticipated shortage of the item, and since the record shows that the Army needs at least 4 months lead time to award a new contract including the conduct of a complete preaward survey and to permit a contractor to comply with first article requirements once the contract has been awarded.

Next, Daylight contends that the award price is unreasonable. Essentially, the protester asserts that the agency has not clearly demonstrated that the award was made at a fair and reasonable price as required by regulation. In accordance with FAR 48 C.F.R. § 6.302-4, the justification for use of noncompetitive procedures contains the contracting officer's finding that the anticipated cost to the government of Proll's contract was fair and reasonable. The record shows that the sole-source contract prices are the same as those offered by Proll under RFP -0127. Furthermore, the contracting officer reports that sole-source contract prices are 43.9 and 23 percent lower for combat and training magazines, respectively, than the prices paid to Proll under two previous contracts for the same items. Daylight does not rebut these statements.

We consistently have held that a determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer. We will not question that determination unless it is clearly unreasonable or there is a showing of bad faith or fraud. See Reyes Industries, Inc., B-219348.3, Apr. 3, 1986, 86-1 C.P.D. ¶ 316.

Daylight, in arguing that Proll's price is unreasonable, relies on a comparison of Proll's item prices with its own

and its contention that adequate price competition was not obtained under RFP -0127. The parties have requested that we not disclose the prices obtained under RFP -0127. The abstract of proposals indicates that adequate price competition was obtained under RFP -0127. Six offers were received for delivery of combat magazines without first article, FOB origin and FOB destination, and Proll was the second low offeror. Of six offers received for delivery of training magazines without first article, FOB origin and FOB destination, Proll was again the second low offeror. The record thus shows that adequate price competition was obtained and that the award was made at a fair and reasonable price.

Finally, Daylight protests the cancellation of the original solicitation (-0127) stating that the cancellation was an attempt by the Army to "deny Daylight the award" and to avoid "its obligation to conduct its procurements" in accordance with applicable procurement regulations. Since we have found the Army's decision to make a noncompetitive award to Proll was proper, based on an urgent need, we conclude that a reasonable basis existed which supports the cancellation of RFP -0127.

Daylight requested that it be awarded its proposal preparation costs and the costs of pursuing the protest. Recovery of costs is allowed only where a protest is found to have merit. 31 U.S.C. § 3554(c)(1) (Supp. III 1985); 4 C.F.R. § 21.6(d) (1986). Since we have denied the protest, we also deny Daylight's claim for recovery of costs.

for *Sydney E. Evans*
Harry R. Van Cleve
General Counsel