



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Racal Corporation

File: B-235441

Date: September 6, 1989

DIGEST

1. Protest against agency determination to modify prior contract rather than conduct a competitive procurement to fill urgent requirement for gas mask filter canisters is denied, where agency had previously issued and made award under a competitive solicitation to meet its future requirements, but the scheduled deliveries would be delayed as a result of a bid protest and the consequent stop work order and reopening of negotiations, and only the prior awardee could cover the expected shortfall.

DECISION

Racal Corporation protests award of a contract, and its subsequent modification for an increase in quantity, to Mine Safety Appliances, under request for proposals (RFP) No. DAAA15-87-R-0097, issued by the U.S. Army Materiel Command for gas mask filter canisters, known as C-2 canisters. Racal alleges that (1) the contract was improperly awarded because Mine Safety had failed to obtain the required written permission for its proposed rent-free use of government-furnished equipment (GFE); and (2) the modification was an improper noncompetitive award which resulted from a lack of advance planning. We deny the protest.

BACKGROUND

The C-2 canister is the filtration device for a new generation of military protective gas masks. Since the canister provides protection against chemical and biological toxic agents and radioactive dust particles, it is a critical component of a life support system and has been accorded the highest acquisition priority. The canisters previously procured by the agency were first built to a Canadian technical data package (TDP) prepared by the

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Canadian Department of National Defense, and then later to an American military TDP issued in 1987.

The contract Racal protests was awarded to Mine Safety for 400,000 canisters on February 22, 1988 (but not synopsisized in the Commerce Business Daily until May 8, 1988). This contract then was modified on March 31, 1989, to provide for an additional 360,000 canisters. The Army treated the modification as the award of a new contract. See Techplan Corp., B-232187, Dec. 12, 1988, 88-2 CPD ¶ 580. The agency's justification and approval for the modification involved the exception permitting use of noncompetitive procedures under the authority of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). According to the justification, there was a projected period of no available supply between July and December 1989 if production did not continue after deliveries on Mine Safety's original contract were completed in June 1989, and Mine Safety was the only firm capable of producing the minimum needed quantity of 60,000 per month in the available time frame, because only it would be eligible for waiver of first article testing.

The justification, approved by the requisite authority on March 31, 1989, explained that commencement of deliveries under a prior procurement had been delayed 6 months due to a protest filed with our Office. That procurement, under a solicitation issued on September 9, 1988, led to the award of two contracts, one to Mine Safety on January 27, 1989, and another to Turner Engineering on February 23. While the agency had planned for deliveries of canisters to commence in May 1989 under the 1989 Mine Safety contract, protests filed with our Office, including one filed by Racal on February 6, resulted in a stop work order and the reopening of negotiations. Further, deliveries under the Turner contract will not commence until November 1989.

According to the justification, the lack of the required allotment of canisters could result in risk to the lives of the troops in the event of chemical agent attack, shutdown of Government Chemical Surety Installations, and costly claims against the government for delays in providing the filters as government-furnished material. Accordingly, due to the agency's lack of available supply, it was determined imperative to continue production uninterrupted by means of the noncompetitive modification of Mine Safety's 1988 contract.

AWARD

Racal maintains that the original 1988 award to Mine Safety was improper because, as it recently learned, Mine Safety did not obtain prior to award agency permission to use certain GFE in its possession in performing this contract; in this regard, the protester notes that the standard clause incorporated in the solicitation provided that "no use of Government production and research property is authorized unless such use is approved in writing by the Contracting Officer having cognizance over the property." The solicitation, however, expressly provided that the specific listed government property in Mine Safety's possession would be available for use by any awardee in performing the contract. According to the Army, this constituted the required permission to use the GFE. We find the agency's conclusion in this regard reasonable and see no reason to question the agency's action in this respect.

MODIFICATION

With respect to the noncompetitive modification of Mine Safety's contract, Racal essentially maintains that the agency improperly created any urgency by failing to take prompt action to address canister shortfalls when its needs first became known. In this regard, the protester alleges that by October 31, 1988, the agency should have realized that it would encounter a shortfall in supply because Mine Safety was then seriously in arrears on scheduled deliveries under the 1988 contract and backorders were extensive. Racal contends that the agency had ample opportunity to competitively procure the needed canisters in the 5-month period between October 1988 and March 1988, when it issued the modifications. It attributes any ultimate urgency to agency delay and a lack of advance planning, and notes that CICA provides that agencies may not justify the use of other than competitive procedures on the basis of urgency resulting from a lack of advance planning. 10 U.S.C. § 2304(f)(5).

Moreover, Racal argues that it was a proven supplier that could have met the agency's needs notwithstanding any urgency. Racal maintains that its predecessor company, Pall Limited, had successfully supplied the agency with canisters under a 1985 contract. According to the protester, although this previous contract was for canisters built to the Canadian TDP, before promulgation of the American TDP in 1987, the TDPs were virtually identical and any differences could have been waived here as they were waived for Pall under its 1985 contract.

The Army states that it anticipated and undertook steps to meet its requirements for the July-December 1989 period as far back as September 9, 1988, when it issued the previously discussed solicitation to competitively procure a continued supply of canisters. It explains that deliveries under the resulting contract providing for the earliest delivery were delayed for 6 months due to unforeseen delay resulting from the stop work order and the reopening of negotiations following Racal's February 1989 protest of the award to Mine Safety; as a result, the canisters could not be competitively procured and the agency was forced instead to modify the prior Mine Safety contract to meet its needs for that period.^{1/} The agency reports that it acted to procure additional canisters as soon as additional funds became available in March 1989. Further, the agency points out that while Racal's predecessor company had produced canisters to the Canadian TDP, prior to promulgation of the American TDP, the American TDP differed from the Canadian by requiring nerve gas testing, which was not required or conducted under the Canadian TDP. In any event, the agency maintains that even if the American and Canadian TDPs were identical, Racal would not be entitled to a waiver of first article testing because there had been a break in production of the Canadian canisters of at least 8 months; in this regard, Federal Acquisition Regulation § 9.303(b)(2) provides that first article testing may be appropriate when production has been discontinued for an extended period of time.

Under 10 U.S.C. § 2304(c)(2), an agency may use noncompetitive procedures to procure goods or services where the agency's need is of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits proposals. This authority does not automatically justify a sole-source award due to urgency; rather, the agency is required to request offers from as many potential sources as is practicable under the circumstances. 10 U.S.C. § 2304(e); see IMR Systems Corp., B-222465, July 7, 1986, 86-2 CPD ¶ 36. Consequently, a sole-source award is proper only where due to urgent circumstances the agency reasonably determines that only one firm can promptly and properly can perform the required work. Freedom Marine,

^{1/} The agency also reports that Racal's belief that Mine Safety was seriously in arrears on scheduled deliveries under the prior contract is erroneous, because the delivery schedule had been modified and Mine Safety had completed delivery within 3 weeks of the modified delivery schedule.

B-229809, Apr. 20, 1988, 88-1 CPD ¶ 389. In this regard, we have not objected to limiting competition to offerors qualifying for waiver of first article testing where waiver was essential to fulfillment of the required delivery schedule. See Honeycomb Co. of America, B-225685, June 8, 1987, 87-1 CPD ¶ 579.

Applying this standard here, we find reasonable the Army's determination that only Mine Safety was capable of timely meeting the agency's urgent need for a continuous supply of canisters without a break in delivery based on its prior production of the canisters to the American TDP and its consequent eligibility for waiver of the first article requirement. Since the gas filter canister is a critical life safety item which Racal had never produced to the required American TDP, and in any case substantial time had passed since production of the Canadian canister by Racal's predecessor, the agency did not act unreasonably in finding that Racal would be subject to first article approval. Discount Machinery & Equipment, Inc., B-231068.2, Jan. 25, 1989, 89-1 CPD ¶ 73 (determination to waive or not to waive first article approval for a particular offeror is subject to question only where it is shown to be unreasonable).^{2/} Further, notwithstanding Racal's contention that Mine Safety lacked the ability to meet the agency's minimum needs of 60,000 canisters per month, the contracting officer specifically determined that Mine Safety would be able to satisfy the agency's requirements based on the firm's steadily increasing capacity, the firm having attained production of 52,650 canisters in February 1989 and 58,266 canisters in March. In any case, to the extent that Mine Safety's capacity to meet 60,000 per month requirement may have been somewhat in question, the record clearly indicates that the alternative of awarding to Racal would have unacceptably prolonged the delivery schedule and severely impaired the government's ability to maintain production and satisfy its requirements for the canisters during the July-December 1989 period.

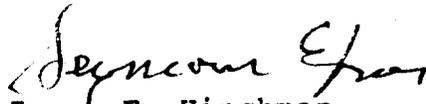
We do not agree with Racal that the urgency here was caused by a lack of advance planning. Rather, the record appears to support the Army's position that it planned to satisfy its needs by award under the competitive solicitation issued

^{2/} While Racal alleges that the nerve gas testing required in canisters built to the American TDP has been waived of the past, prior to promulgation of the American TDP, we have no indication that canisters built to the Canadian TDP without nerve gas testing would meet the agency's current needs.

in September 1988, and that this was no longer possible following Racal's protest in February 1989, which resulted in issuance of a stop work order and reopening of negotiations, delaying deliveries for 6 months.^{3/} Moreover, only in March did funds become available for additional canisters to cover the period from July to December 1989, which the 1989 award to Mine Safety was to have covered. As indicated above, by that time it was too late to solicit Racal for the additional units.

Racal also argues that Mine Safety's unit price of \$8.59 (FOB destination) for the 360,000 canisters under the modification was unreasonable because it was significantly more than Racal's offered unit price of \$6.98 under the 1988 solicitation. However, Racal's price was for a quantity of 1,355,000 canisters; Mine Safety's unit price for 400,000 canisters under the same 1988 solicitation was \$8.59 (FOB origin). We thus find no basis to question the Army's determination that the modification price was a fair and reasonable price for the quantity procured. See Daylight Plastics, Inc., B-225057, Mar. 10, 1987, 87-1 CPD ¶ 269.

The protest is denied.

for 
James F. Hinchman
General Counsel

^{3/} Although the Army has characterized the 360,000 canisters to be procured under the modification to be an additional quantity, not merely a replacement quantity, it appears that the delay caused by Racal's protest was the primary cause of the urgency.