



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Jay Dee Militarywear, Inc.

File: B-243437

Date: July 31, 1991

Joel R. Feidelman, P.C., and James M. Weitzel, Jr., Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester. John M. Logue, Esq., Defense Logistics Agency, for the agency.

Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against the sole-source award of a contract for ground troop protective vests is denied where the contracting agency reasonably determined that only one known firm was capable of expeditiously meeting the urgent supply requirement caused by Operation Desert Storm.

DECISION

Jay Dee Militarywear, Inc. protests the Defense Logistics Agency's (DLA) sole-source award of contract No. DLA100-91-D-0385 to Isratex, Inc. for a type of body armor known as ground troop fragmentation vests. Jay Dee contends that DLA cannot justify the noncompetitive award because other capable sources, including Jay Dee, were available and known to the agency at the time Isratex was selected. The protester also contends that the agency's decision not to allow Jay Dee to compete for the award was essentially an improper determination that Jay Dee was not responsible to perform the contract.

We deny the protest.

The acquisition was for protective vests to be issued to all combat and support troops for protection against grenade and shrapnel fragments. In December 1990, DLA's Defense Personnel Support Center (DPSC) issued a purchase request and synopsized the requirement for approximately 300,000 vests in the Commerce Business Daily (CBD), with deliveries projected from January 1992 through June 1992. The agency expected to be

able to meet its requirement through a competitive procurement, and requested technical proposals with production lead time of approximately 7 months which the agency reasonably believed permitted competition. In the meantime, however, the Operation Desert Shield buildup, in response to the Iraqi invasion of Kuwait in August 1990, was progressing in the Middle East. The fragmentation vests were issued extensively to Operation Desert Shield personnel, and continued to be needed for regular armed forces training requirements.

The contracting officer also considered making multiple awards to fill the requirement pursuant to Federal Acquisition Regulation (FAR) § 6.302-3, which permits restricting the competition to industrial mobilization base producers, and initiated a source development effort to locate firms to participate in the procurement. While these efforts identified a number of small potential manufacturers, they revealed none whose production capacity was great enough to satisfy the government's rapidly increasing requirements, and none who would be able to produce the vests without first purchasing equipment and hiring personnel.

By mid-January, the United States began the full-scale military campaign against Iraq, known as Operation Desert Storm. The deployment of troops to the Middle East was depleting the government's supply of the vests, and DPSC determined that the requirement was now critical. The contracting officer attempted to identify any firm that could produce and deliver the potentially large number of vests that would be required with an expedited delivery date.

A number of firms had responded to the CBD notice, including Isratex and Jay Dee. Jay Dee was obligated under two current contracts for body armor, one for combat vehicle crewman vests and one for ground troop vests. It had fallen behind in deliveries under each of these contracts. In a series of letters to the contracting officer discussing the delinquencies under each of these contracts and requesting delivery date extensions, Jay Dee conceded that none of its reasons (such as its inability to receive timely deliveries from its suppliers, its own decisions concerning the use of subcontractors, etc.) represented an excusable delay. The letters, which date from September 1990 through March 1991, reveal a pattern of proposing a revised delivery schedule, failing to meet it, and promising to deliver by another date. At the time the contracting officer was attempting to find a reliable contractor to meet its exigency requirement for the vests, Jay Dee held a contract for ground troop vests for which delivery was scheduled to be completed by October 1990. In September, 17,000 units remained outstanding; Jay Dee delivered no vests between September and the following February, when deliveries resumed in relatively small quantities.

As Jay Dee received the requested extensions for its delivery schedules, it remained bound to deliveries under these contracts. The contracting officer considered the firm not to be a source under the larger exigent requirement while it remained still committed under the previously awarded contracts.

Isratex, responding to the CBD notice, identified itself as a potential supplier with a much larger production capacity than any other firm known to DPSC. It proposed to begin delivering vests 120 days after receipt of an order and provided production schedules indicating that it could produce 25,613 vests per month. Under a hypothetical contract for 300,000 vests, it indicated it would deliver 25,000 vests 120 days after date of award, with delivery amounts increasing by approximately 5,000 vests every 30 days thereafter.

In February, DPSC Clothing & Textiles Supply Operations requested that an exigency procurement be conducted for 150,000 vests. This quantity was determined to be the smallest amount that could satisfy the immediate requirement that was caused by Desert Storm. However, because the political and military situation was unpredictable, future supply requirements were also uncertain. The agency, therefore, decided to award an indefinite-delivery type contract with a minimum quantity of 150,000 and maximum of 450,000.^{1/} The normal production lead time of 7 months for this item was reduced to 4 months.

The contracting officer determined that Isratex was the only known, practicable source that could reliably deliver the large quantity of vests within the time frame required by events in the Middle East. Although Jay Dee's letters claimed that Jay Dee would be able to produce more vests if it were awarded a larger contract (because it would then be in a better position with its suppliers), the firm remained delinquent under its existing contract.^{2/}

^{1/} After award, and after a formal cease-fire went into effect in early April, the agency determined that the vest requirements remaining beyond the initial 150,000 delivery order were no longer needed on an urgent basis. The agency advises that future procurements will be conducted under full and open competition.

^{2/} In February, DLA awarded a contract on an exigency basis to a Canadian firm for 11,166 vests to cover requirements on which Jay Dee was delinquent.

After determining that only Isratex could fill the agency's urgent requirement, the contracting officer confirmed the government's critical need for the vests immediately prior to awarding a sole-source contract to Isratex on March 25. The agency justified its decision to employ noncompetitive procedures based on the exception to full and open competition granted in the Competition in Contracting Act of 1984 (CICA) for unusual and compelling urgency, 10 U.S.C. § 2304(c)(2) (1988). The requisite justification and approval was prepared in February and was approved by the DLA Senior Procurement Executive in April.

Jay Dee filed its protest on March 28. Since it was filed within 10 days of the award, the agency was required under CICA to suspend performance of the contract. However, on April 2, DLA determined pursuant to FAR § 33.104(c)(2)(ii) that urgent and compelling circumstances required the continued performance of the contract notwithstanding the protest.

Jay Dee argues that the agency could not justify procuring these vests without soliciting Jay Dee, since Jay Dee had informed DPSC of its willingness and ability to produce the required items and had offered lower prices and earlier delivery than Isratex. Jay Dee characterizes DLA's determination not to award any contract for this requirement to Jay Dee as a premature determination of nonresponsibility, and contends that any such determination would have to be referred to the Small Business Administration (SBA) under its certificate of competency procedures. In addition, the protester challenges the determination that Isratex could perform the contract, pointing out that the firm had not previously produced this particular vest.

Under CICA, an agency may use noncompetitive procedures to procure goods or services where the agency's needs are 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 bids or proposals. 10 U.S.C. § 2304(c)(2); see also FAR § 6.302-2(a)(2). This authority is limited by 10 U.S.C. § 2304(e), which requires agencies to request offers from as many sources as practicable. See also FAR § 6.302-2(c)(2). An agency using the urgency exception to restrict competition to the firms it reasonably believes can perform the work promptly and properly, see Indust. Refrigeration Serv. Corp., B-220091, Jan. 22, 1986, 86-1 CPD ¶ 67, and we will object to the agency's determination only where the decision lacks a reasonable basis. See Servrite Int'l, Ltd., B-236606, Dec. 6, 1989, 89-2 CPD ¶ 520. In this regard, a military agency's assertion that there is a critical need having an impact on military operations carries considerable weight.

Greenbrier Indus., Inc., B-241304, Jan. 30, 1991, 91-1 CPD ¶ 92. Underlying this policy is the simple fact that under wartime conditions, the government must procure items quickly and urgently to meet compelling military needs.

We are persuaded that the determination to award the contract on a sole-source basis was reasonable. It is undisputed that the item at issue is a critical life-support item, and that the vests were urgently needed in the supply system. The reasonableness of the contracting officer's judgments must, of course, be considered in the context of the time when they were made and the information that was available to her at the time. Given the possibility of the situation in the Persian Gulf requiring a continuing supply of the vests in potentially even greater quantities, the contracting officer's actions were reasonable; the agency legitimately needed to take quick action to ensure its needs would be met. In such instances, the agency need only consider those sources which can immediately satisfy its requirements and not those which have the potential to do so. See Federal Labs Sys., 66 Comp. Gen. 228 (1987), 87-1 CPD ¶ 111.

The record before the contracting officer showed that under current contracts with less critical conditions, normal lead time and smaller quantities, Jay Dee had been unable to meet delivery schedules. This record alone provided support for the contracting officer's view that Jay Dee could not properly and promptly perform the urgent requirement which had a tighter schedule. Further, we consider the representations made by Jay Dee in its correspondence with the agency, promising an increased production capability if a high-volume contract were awarded, to reflect a potential rather than proven ability. Jay Dee had advised DPSC that its production line could only be sustained if it received an award for an additional quantity of vests. While we recognize the difficulties that businesses--particularly small business firms such as Jay Dee--may encounter in receiving supplies and maintaining adequate staff levels, we do not believe a contracting agency is required to accept the risks or conditional ability to perform that this statement represents, particularly when the agency's needs are urgent and the firm's recent performance record does not provide any reason to believe the firm can perform as promised.3/


3/ The protester also claims the sole-source action based on urgency was the result of lack of advance planning and, pursuant to 10 U.S.C. § 2304(f)(5)(A), could not be properly justified under CICA. The record does not show any lack of advance planning. While aware of a requirement of the Department of the Army for 353,000 vests in October 1990, the agency

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Regarding Jay Dee's contention that by determining that the firm was not a practicable source under the urgent procurement, the agency was in effect making a determination of nonresponsibility and that the agency was required to refer the matter to the SBA for a certificate of competency determination under 15 U.S.C. § 637(b)(7)(A) (1988), we find no legal merit to this argument. We discussed this question in Industrial Refrigeration Serv. Corp., B-220091, supra, finding that under the urgency justification for use of noncompetitive procedures under CICA, an agency can limit the sources solicited to those it reasonably believes can perform the work and to which it could expect to make a prompt award and is not required to refer the issue of an excluded source's apparent nonresponsibility to the SBA.

Jay Dee also protests that it was improper for DLA to award the contract to Isratex because the firm has never produced this particular item before. To the extent Jay Dee is arguing that it was unreasonable for the contracting officer to conclude that Isratex could meet the required delivery schedule because its vests would have to first meet first article testing requirements, we disagree. Notwithstanding any lack of experience, Isratex agreed to be contractually bound by the delivery schedule that DLA required and to meet the agency's testing requirements accordingly. To the extent Jay Dee is arguing that Isratex does not have adequate experience to perform this contract, the protester is challenging the agency's general determination that Isratex is a responsible contractor. See DTM Inc., B-241270.2, Feb. 15, 1991, 91-1 CPD ¶ 178. Our Office will not review an agency's affirmative determination of responsibility, which is largely a business judgment, unless there is either a showing of fraud or bad faith on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. 4 C.F.R. § 21.3(m)(5) (1991). Neither exception is applicable here.

The protest is denied.


for James F. Hinchman
General Counsel

3/ (...continued)

considered a competitive acquisition and a mobilization base acquisition. It executed the urgency award only when the war had begun and its stock was being rapidly depleted.