



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Dash Engineering, Inc.; Engineered Fabrics Corporation

File: B-246304.8; B-246304.9

Date: May 4, 1993

Thomas G. Farrell; Douglas K. Olson, Esq., Kilcullen, Wilson and Kilcullen, the protesters.
David B. Dempsey, Esq., and Janet Z. Barsy, Esq., Akin, Gump, Strauss, Hauer & Feld, for Sekur S.p.A.-Pirelli Group, an interested party.
Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
John Van Schaik, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that Air Force improperly waived the Berry Amendment--a statutory prohibition on the expenditure of appropriated funds for certain foreign-manufactured items-- is denied where the waiver was based on the agency's urgent need to acquire helicopter fuel cells in order to minimize the dangers to flight crews and passengers from crashes that may occur during the high-risk missions for which the helicopter is used.

DECISION

Dash Engineering, Inc. and Engineered Fabrics Corporation (EFC) protest that the Air Force improperly waived a statutory prohibition on the expenditure of appropriated funds for certain foreign goods under a contract awarded to Sekur S.p.A.-Pirelli Group (Sekur-Pirelli) under request for proposals (RFP) No. F09603-92-R-30819, for fuel cells for Air Force helicopters.

We dismiss EFC's protest and deny Dash's protest in part and dismiss it in part.

The solicitation contemplated the award of a contract for engineering services and supplies necessary to design, develop and test crash-resistant, self-sealing main fuel tank assemblies. Additionally, the contractor was to provide a production quantity of fuel cells and data as well as modification kits necessary for installation.

The solicitation incorporated Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7009¹ which provides as follows:

"PREFERENCE FOR CERTAIN DOMESTIC COMMODITIES
(APR. 1990)

"The Contractor agrees that there will be delivered under this contract only such articles of food, clothing, tents, tarpaulins, covers, cotton and other natural fiber products . . . synthetic fabric, coated synthetic fabric . . . (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials, which have been grown, reprocessed, reused or produced in the United States, its possessions or Puerto Rico; provided, that (i) this clause shall have no effect to the extent that the Secretary has determined that a satisfactory quality and sufficient quantity of such articles cannot be acquired as and when needed at U.S. market prices. . . ."

This provision implements the Berry Amendment, which generally restricts the Department of Defense's (DOD) expenditure of funds for certain articles and items, including synthetic fabric and coated synthetic fabric, to American firms. The Berry Amendment has been included in various forms in DOD Appropriations Acts since 1941. The current version of the Berry Amendment is in section 9005 of the DOD Appropriations Act, 1993, Pub. L. No. 102-396, § 9005, 106 Stat. 1876, 1900 (1992).²

¹The current version of this clause is located at DFARS § 252.225-7012.

²This provision states in pertinent part:

"During the current fiscal year and hereafter, no part of any appropriation contained in this Act, except for small purchases covered by section 2304(g) of title 10, United States Code, shall be available for the procurement of any article or item of food, clothing, tents, tarpaulins, covers, cotton and any other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool (whether in the form of fiber or yarn or contained

(continued...)

The Air Force awarded the contract to Sekur-Pirelli, an Italian firm which proposed Italian made fuel cells, in May 1991. The total price of the Sekur-Pirelli contract was \$2,073,723; the total price proposed by Dash, the only domestic firm to submit a proposal, was \$5,783,915.

On July 31, 1992, in response to inquiries from members of Congress, this Office issued a decision concerning application of the Berry Amendment to the purchase of fuel cells by the Air Force. Department of Defense Purchase of Fuel Cells, B-246304.2 et al., July 31, 1992. We concluded that the Sekur-Pirelli fuel cells to be provided under the Air Force contract were "items of individual equipment manufactured from or containing synthetic fibers within the Berry Amendment restriction." Also, with respect to a proposed award of a contract by the Navy to Sekur-Pirelli for fuel cells, we concluded that such an award would result in a violation of the Antideficiency Act, 31 U.S.C. § 1341 (Supp. II 1990), which prohibits officers or employees of the United States from obligating agency funds in direct contravention of a specific limitation contained in an appropriations act. In response to our decision, the Air Force stopped payment on the Sekur-Pirelli contract on August 21, 1992, although the Air Force reports that Sekur-Pirelli continued work on the contract.

On December 14, 1992, the Deputy Assistant Secretary of the Air Force (Acquisition) signed a "Determination for Waiver of Restrictions on Acquisition of Fuel Cells Applicable to MH-53J Helicopter." Pursuant to the Berry Amendment clause in the solicitation, the waiver determination states that the fuel cells "cannot be acquired when needed in sufficient quality and sufficient quantity grown or produced in the United States or its possessions at U.S. market prices." It states that the Sekur-Pirelli fuel cells were tested and proven to be crash resistant under an earlier contract and that the fuel cells are needed as soon as possible.

²(...continued)

in fabrics, materials, or manufactured articles), or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials . . . not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of [such] articles or items . . . grown, reprocessed, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices. . . ."

Specifically, the determination explains that the fuel cells are newly designed, not currently produced in the United States and are needed for MH-53J helicopters used to support special operations forces mission requirements. According to the determination, the MH-53J helicopter is used on high priority, national security missions that frequently involve high risk, clandestine night operations and long range, low level flights carrying very high gross weights. The determination explains that accidents are to be expected on these types of flights, and a minor mishap involving a fuel cell leak can result in infernos and loss of life.

According to the determination, the Sekur-Pirelli fuel cells will have self-sealing and crash-resistant features, such as breakaway valves, and can be installed on the aircraft without major modifications; Sekur-Pirelli's fuel cells have passed a drop test, a slosh test and a gun fire test; and the fuel cells are needed immediately and it is not feasible to forgo the acquisition from Sekur-Pirelli in order to acquire a domestic substitute. In this respect, the determination states that deliveries under the Sekur-Pirelli contract were to have been completed in March 1993 and that, based on Dash's proposal, the fuel cells would not be available until 665 days after award of a contract to Dash. According to the determination, "[a]ny unnecessary delay could cause unconscionable and needless deaths." The determination also states that the fuel cells are not currently produced in the United States and that, although there is no established United States market price for the items, acquiring the fuel cells from a domestic source would cost at least \$3.7 million more than purchase from a foreign source.

Dash and EFC argue that the Air Force's determination to waive the Berry Amendment prohibition is improper since it is based on a series of false and misleading propositions. First, the protesters maintain that, contrary to the Air Force's determination, there is no urgency to the requirement for the fuel cells since, if they were urgently needed, they would have been purchased on a sole-source basis directly from EFC 2 years ago. In addition, the protesters contend that the Air Force's waiver determination understates the ability of Sekur-Pirelli's domestic competitors to meet the required delivery schedule. Second, the protesters argue that the waiver determination exaggerates the price difference between Sekur-Pirelli and its domestic competitors since the difference would be less if Sekur-Pirelli were forced to comply with the Berry Amendment.

We dismiss EFC's protest. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1993). A prospective subcontractor does not have the requisite interest to be an interested party because it is not a prospective or actual offeror. Nasatka Barrier, Inc., B-234371; B-234578, Mar. 31, 1989, 89-1 CPD ¶ 349.

Here, EFC did not submit an offer under the solicitation but was a subcontractor to Dash, which did submit an offer. Although EFC states that it could have offered Dash a lower price had it known that the Berry Amendment would not be enforced, the firm does not explain how it is a potential offeror, that is, why it would become an offeror should the requirement be resolicited. Under the circumstances, EFC is not an interested party and its protest is dismissed.

The Air Force and Sekur-Pirelli also argue that Dash's protest is untimely. According to the agency and awardee, although Dash focuses on the December 1992 waiver, its argument actually is that the fuel cells being provided by Sekur-Pirelli under the contract are subject to the Berry Amendment and this contention could have been, but was not raised 18 months earlier, when the contract was awarded.

To the extent that Dash contends that the contract should not have been awarded to Sekur-Pirelli because that firm's proposal was inconsistent with the terms of the solicitation, including the Berry Amendment restriction, this contention is untimely. Under our Bid Protest Regulations, protests not based on improprieties in a solicitation must be filed not later than 10 working days after the protester knew or should have known the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Here, since the contract was awarded in May 1991 and Dash protested in December 1992, any allegations concerning the award to Sekur-Pirelli are untimely and will not be considered.³

³Dash argues that, if we find any of its allegations untimely, we should consider those issues under the significant issue exception in our timeliness rules. 4 C.F.R. § 21.2(c). We decline to do so. In order to prevent the timeliness rules from becoming meaningless, exceptions are strictly construed and rarely used. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. The significant issue exception is limited to untimely protests that raise issues of widespread interest to the

(continued...)

Nevertheless, we think that Dash has timely protested that the Air Force improperly waived the Berry Amendment restriction since it received a copy of the waiver on December 17, 1992, and protested to this Office on December 28, within 10 working days. 4 C.F.R. § 21.2(a)(2). Accordingly, this contention is timely.

The agency and Sekur-Pirelli maintain that we should not review the agency's decision to waive the Berry Amendment since the waiver occurred during contract performance--not during the evaluation or at award--and therefore is a matter of contract administration which we do not have jurisdiction to review. Dash replies that the waiver of the Berry Amendment constituted a cardinal change, or an improper modification of Sekur-Pirelli's contract, and our Office should review it because it goes beyond the scope of the original contract.

We do not agree with either view. On the one hand, the Berry Amendment waiver does not constitute a cardinal change to Sekur-Pirelli's contract. The crucial question to be answered in determining whether a cardinal change has occurred is whether the work, as modified, is essentially the same work the parties bargained for when the contract was awarded. Shihadeh Carpets and Interface Flooring Sys., Inc., B-225489, Mar. 17, 1987, 87-1 CPD ¶ 295. Since the solicitation provision which implemented the Berry Amendment restriction, DFARS § 252.225-7009, allowed waiver of the restriction, the waiver did not change the work called for under the contract into something different than the parties bargained for when the contract was awarded.

On the other hand, the waiver was not a matter of contract administration, which would place it outside our bid protest jurisdiction. 4 C.F.R. § 21.3(m)(1). While the Berry Amendment waiver was signed 18 months after the Sekur-Pirelli contract was awarded, it was a precondition for award. The sole purpose of the waiver was to correct the award whose impropriety was called to the agency's attention through our decision in Department of Defense Purchase of Fuel Cells, supra, and its timing resulted from that decision, not contract performance.

³(...continued)

procurement community which have not been considered on the merits by this Office in a previous decision. Herman Miller, Inc., B-237550, Nov. 7, 1989, 89-2 CPD ¶ 445. In our view, Dash's allegation that Sekur-Pirelli's proposal was unacceptable does not meet this standard.

The Air Force and Sekur-Pirelli also argue that this Office should not review the waiver decision since the Berry Amendment vests waiver authority in the head of the agency concerned and, in this case, the restriction was waived by an appropriately designated official. In addition, according to the agency, the waiver decision involves balancing the goals of the legislation and foreign policy concerns to determine the public interest and, citing our decisions Oceanic Elec. Mfg. Co., Inc., B-249432; B-249432.2, Aug. 19, 1992, 92-2 CPD ¶ 114; SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; and Schlick Am., Inc., B-242165, Apr. 4, 1991, 91-1 CPD ¶ 350, the agency argues that this Office will not review this type of discretionary decision involving foreign policy considerations.

We find the waivers at issue in the cases cited by the Air Force distinguishable from the Berry Amendment waiver at issue here. The Buy American Act, at issue in SeaBeam Instruments, Inc., supra, and Schlick Am., Inc., supra, may be waived where the head of the agency determines that application of those restrictions "is inconsistent with the public interest." 41 U.S.C. § 10a (1988). The implementing regulations have interpreted this broad grant of discretion to include consideration of foreign policy issues in the waiver decision and, on that basis, the regulations exempt purchases of defense equipment originating in certain countries from the Buy American Act restrictions. See DFARS § 225.872-1. Similarly, in Oceanic Elec. Mfg. Co., Inc., supra, the statute at issue permitted the waiver of a prohibition on the purchase of certain foreign products where the designated officials determined that the prohibition "[i]s not in the national security interests of the United States." In each of these cases, foreign policy or national security concerns were at issue in the waiver decision, and it is for that reason that we declined to review that decision.

Neither the Berry Amendment nor the implementing regulations mention foreign policy or national security concerns. The restriction may be waived upon an essentially factual determination concerning the quality, quantity and price of materials produced in the United States. The Competition in Contracting Act of 1984 requires this Office to decide protests alleging "violation of a procurement statute or regulation." 31 U.S.C. § 3502. The Berry Amendment is clearly a procurement statute, and we determine if it was consistent with the statute and the implementing regulations.

The waiver determination states that the fuel cells, which are crash resistant and self sealing, are needed to lessen the danger to flight crews and passengers caused by the high risk missions performed by the MH-53J helicopter. Dash, however, argues that the waiver was improper since United States firms also could supply the fuel cells to the Air Force. Dash notes that EFC, its subcontractor, has previously manufactured crash-resistant fuel cells for the H-53 and was originally listed in the RFP as the only qualified source for the solicited fuel cells.

Dash also maintains that there was no urgency for the fuel cells since, according to the protester, the Air Force would have simply purchased them on a sole-source basis from Dash in 1991 if the need had been urgent. In addition, Dash argues that no urgency was expressed in the solicitation and as a result it offered a schedule which maximized engineering improvements at the expense of schedule. According to Dash, it would have offered a shorter schedule had it known that urgency was more important than technical improvements. Dash states that in September 1992 it offered an accelerated delivery schedule for the fuel cells, but the Air Force refused to discuss it. Dash contends that, contrary to the waiver determination, which states that Dash could not deliver until 665 days after award, if it were treated as Sekur-Pirelli was, it could deliver the fuel cells in 210 days.

We have no basis to question the agency's position that it needs to acquire self-sealing and crash-resistant fuel cells in order to minimize the dangers to flight crews and passengers from crashes that may occur during the high risk missions for which the MH-53J helicopter is used. To the extent that these items are available much sooner from a foreign source than a domestic source, we think that the agency reasonably waived the Berry Amendment. Our position here is consistent with our general view that where a solicitation requirement relates to human safety or national defense, an agency has the discretion to set its minimum needs so as to achieve not just reasonable results, but the highest possible reliability and effectiveness. See [XID Corp.](#), B-228052, Nov. 23, 1987, 87-2 CPD ¶ 505.

In this respect, although Dash argues that there was no urgent need for the fuel cells, the protester does not dispute that MH-53J helicopters perform dangerous missions, and that accidents, at least minor ones, are a likely consequence of these missions. The protester also does not dispute that the addition of self-sealing fuel cells with crash-resistant features would lessen the likelihood that such accidents would result in fuel spills, fires and loss of life.

According to Dash, since EFC, its subcontractor, has previously manufactured crash-resistant H-53 fuel cells and was listed as a qualified source under the RFP, there was a domestic source for the fuel cells. The MH-53J helicopter has different fuel tankage than the aircraft for which EFC previously supplied fuel cells and that without modification the crash-resistant fuel cells manufactured by EFC will not fit the MH-53J. Although Dash states that in September 1992, it offered to produce fuel cells for the Air Force on an accelerated schedule, we think it was reasonable for the Air Force to doubt Dash's ability to meet the schedule in Sekur-Pirelli's contract since Dash's proposal--the most reliable indication of its capability--took exception to the mandatory delivery schedule required by the solicitation. Although the RFP required delivery of trial installation kits in 270 days, Dash offered to deliver the kits in 425 days. After the successful completion of the trial installation, according to the RFP, delivery of the basic production quantity is to be completed in 240 days. Thus, based on Dash's proposal, delivery of the basic quantity by Dash would take 665 days, as stated in the waiver determination.⁴

More important, however, the urgency of the requirement for the fuel cells and the ability of any particular vendor to meet that requirement, in our view, should be assessed as of December 1992, when the Air Force waived the Berry Amendment prohibition, rather than from May 1991, when the contract was awarded. We recognize that the greater urgency that existed at the time of the waiver was largely a result of the Air Force's incorrect view that the Berry Amendment did

⁴Dash also argues that the fuel cells are available in the United States because it has offered to subcontract with Sekur-Pirelli and manufacture them using the Sekur-Pirelli design. According to Dash, it could manufacture the fuel cells under Sekur-Pirelli's design "with no significant delay in delivery." It is unclear to us what Dash considers to be "no significant delay" and Dash does not explain how it could manufacture fuel cells using Sekur-Pirelli's design and meet the required delivery schedule when, as indicated by its proposal, it could not do so using its own design. In any event, the record includes no indication that Sekur-Pirelli would be willing to subcontract the manufacture of the fuel cells with a United States firm. Under the circumstances, and since we are aware of no means for the Air Force to compel Sekur-Pirelli to subcontract the manufacturing, we do not see how this theoretical possibility refutes the Air Force's determination that the fuel cells "cannot be acquired when needed in a satisfactory quality and sufficient quantity grown or produced in the United States. . . ."

not apply and the agency's lack of promptness in responding to our July 1992 decision; nevertheless, since the waiver was primarily based on safety considerations, we do not think that any concerns about the Air Force's prior actions provide grounds for deciding that the waiver was improper.

The record supports the Air Force's determination that Sekur-Pirelli is closer at this time than Dash or any other known vendor to being able to supply the fuel cells. The Air Force reports that Sekur-Pirelli has made significant progress in designing, fabricating and testing the modification kits, that preliminary design review was completed in January 1992, and that trial installation of the kits was completed in July 1992. The Air Force could reasonably conclude, when the waiver was signed in December 1992, that Dash would need 425 days for the trial installation alone. Under the circumstances, because of the substantial progress made on the Sekur-Pirelli contract, we do not see how the fuel cells could become available from any other source as soon as from the Sekur-Pirelli.

As explained above, where agency requirements relate to human safety or national defense, an agency has the discretion to set its minimum needs so as to achieve not just reasonable results, but the highest possible reliability and effectiveness. Since nothing in the record contradicts either the agency's concerns about safety or the agency's judgment that the safety of MH-53J crews and passengers would be enhanced by the prompt availability of these fuel cells, we have no basis to challenge the Air Force's decision to waive the Berry Amendment in this case.⁵

The protester also argues that the waiver of the Berry Amendment constituted a violation of the Antideficiency Act, 31 U.S.C. § 1341, which prohibits officers or employees of the United States from obligating funds in direct contravention of a specific limitation contained in an appropriations act. See 60 Comp. Gen. 440 (1981). The Berry Amendment itself permits the waiver of the prohibition on the expenditure of appropriated funds for foreign

⁵Dash argues that the difference between its price and Sekur-Pirelli's price does not provide a basis to justify the waiver because the approximately \$3.7 million price difference was primarily due to the agency's failure to enforce the Berry Amendment and below-cost pricing by Sekur-Pirelli. Since the waiver was justified based on the need for the fuel cells for safety reasons, we do not need to decide whether the waiver was separately justified by the lack of availability of the fuel cells domestically at "U.S. market prices."

articles and items. Since the waiver in this case was permitted by the Berry Amendment, there has been no Antideficiency Act violation.⁶

Finally, Dash argues that the Air Force waived safety and performance tests for Sekur-Pirelli in spite of the fact that such tests were required in order to become an approved source eligible for award of the contract. The contract was awarded to Sekur-Pirelli in May 1991 and Dash should have known at that time that Sekur-Pirelli was considered to be an approved source. If Dash had any questions about the Air Force considering Sekur-Pirelli to be an approved source, those concerns could have been raised at that time. Since the protest was not filed until December 31, 1992, more than 18 months after award, this basis of protest is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

The EFC protest is dismissed and the Dash protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel

⁶Dash also argues that Sekur-Pirelli has engaged in lobbying in order to change the Berry Amendment and, according to Dash, although such lobbying is not illegal, Sekur-Pirelli's failure to disclose such lobbying has resulted in a violation of the Byrd Amendment. 31 U.S.C. § 1352 (Supp. III 1991). The Byrd Amendment generally prohibits a contractor receiving appropriated funds from using those funds to pay any person for "influencing or attempting to influence" an agency employee in connection with the award of a federal contract. The record shows that Sekur-Pirelli has engaged in lobbying to attempt to have the Berry Amendment changed rather than to influence anyone in connection with the award of the contract. Efforts to have the Berry Amendment changed, regardless of how those efforts are funded, do not trigger the provisions of the Byrd Amendment.