

Matter of: Sargent & Greenleaf, Inc.; The Safemasters Co., Inc.

File: B-255604.3

Date: March 22, 1994

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Mark D. Colley, Esq., Davis, Graham & Stubbs, for the Mas-Hamilton Group, Inc., an interested party.
John P. Patkus, Esq., Department of Defense, for the agency.
Paul E. Jordan, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Department of Defense reasonably justified sole-source award, pursuant to 10 U.S.C. § 2304(c)(2) (1988), for limited quantities of urgently required security container locks, to qualified firm where no other source, including protester, is or will become an approved source of locks in time to meet the urgent requirement, and agency intends later competitive purchase of remaining quantities by which time other firms may become qualified.
2. Agency determination that only currently qualified manufacturer of item is capable of timely meeting agency's urgent requirement is unobjectionable where one protester had not submitted sample for qualification testing at time of award and other protester cited only its limited prior experience and bare assertion of ability to meet agency's requirement.
3. Nature of product solicited, rather than product offered, determines whether product procured is a Federal Information Processing resource requiring delegation of procurement authority (DPA) from General Services Administration. Thus, where lock specification does not require computer components, sole-source purchase of lock merely incorporating microcomputer does not require DPA.

DECISION

Sargent & Greenleaf, Inc. (S&G) and The Safemasters Co., Inc. protest the sole-source award of contract No. SPO500-94-C-0098, to Mas-Hamilton Group, Inc., by the Defense Logistics Agency (DLA) for 9,600 combination locks. S&G and

Safemasters contend that the sole-source procurement is not justified and that DLA was required to obtain a delegation of procurement authority (DPA) in order to purchase Mas-Hamilton's locks.

We deny the protests.

BACKGROUND

The combination locks being acquired in this procurement are to be used to retrofit obsolete and vulnerable locks on safes and other security containers used to protect classified information. The Department of Defense Appropriations Act of 1993, Pub. L. No. 102-396, § 9027A, 106 Stat. 1876, 1906 (1992), provided that no appropriated funds could be used to "purchase, install, replace, or otherwise repair any lock on a safe or security container which protects information critical to national security or any other classified materials" which had not been certified as passing the federal (security lock) specification FF-L-2740 and which had not passed all established testing criteria and procedures. The Senate Committee on Appropriations directed that the Department of Defense (DOD) establish a 2-year retrofit program to replace locks on existing containers that did not meet FF-L-2740. S. Rep. No. 408, 102d Cong., 2d Sess. 29-30 (1992). The House Conference Report, H.R. Conf. Rep. No. 1015, 102d Cong., 2d Sess. (1992), contained a further direction that DLA use \$15 million of 1993 appropriated funds to provide locks for such a retrofit program.

Since the Appropriations Act did not mandate a retrofit program, DOD initially sought to obtain FF-L-2740 locks only for new and replacement requirements. However, in June 1993, DOD changed its policy to follow the intent of Congress as set forth in the Senate and House conference reports and began to develop a retrofit plan with DLA. The retrofit program was to be limited to replacement of highest priority Top Secret, Sensitive Compartmented Information (SCI), and Special Access Program requirements. To this end, in July, DLA's Defense Industrial Supply Center (DISC) prepared an acquisition plan which required 120 days before the award of competitive contracts after the receipt of requisitions from customers. On August 26, DISC determined that it was necessary to purchase the required locks using other than full and open competition and identified Mas-Hamilton's X-07 lock as the only item on the applicable qualified products list (QPL) meeting specification FF-L-2740. In early September, the Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (hereinafter, C3I Office) directed the military departments and defense agencies to survey their

commands and activities to identify those locks to be replaced under the retrofit program.

In a September 20 memorandum, the Deputy Secretary of Defense announced the retrofit program and stated that DLA "shall acquire 24,000 locks at this time." The memorandum required DOD components to submit firm requirements to DLA by December 31. On September 28, 1993, DISC published a solicitation notice in the Commerce Business Daily announcing its intention to purchase a tentative quantity of 24,000 Mas-Hamilton combination locks meeting federal specification FF-L-2740 which are listed on the QPL. The notice advised that all responsible sources may submit offers. S&G, Safemasters, and 16 other firms requested the solicitation.

On September 30, the Principal Deputy Assistant Secretary of Defense for the C3I Office requested DLA's assistance in procuring the 24,000 locks on an expedited basis because there was an urgent need to replace the locks at "vulnerable activities containing extremely sensitive classified material." In response, DLA developed an acquisition strategy consisting of two contracts: an expedited purchase and a later competitive purchase. DLA also requested that the number of locks to be purchased on an expedited basis be quantified by estimating the number that can be installed between the date of the first expedited deliveries and the first deliveries under the later competitive contract. Based on meetings with the DOD components, the C3I Office determined that 12,000 locks should be acquired on an expedited basis. This figure was later lowered to 9,600.

On October 25, DISC executed the justification for other than full and open competition required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f)(1) (1988). The justification was based on an "unusual and compelling urgency" under 10 U.S.C. § 2304(c)(2). In this regard, the justification noted that the vulnerability of existing mechanical locks placed at risk DOD classified information, including "information and material of such sensitivity that a compromise would subject the United States to exceptionally grave damage." While Mas-Hamilton was the only known source, the justification stated that the General Services Administration (GSA) was currently making every effort to qualify additional sources and indicated that two firms were working on locks for qualification. One of those firms is S&G.

¹This quantity and a listing of the different styles was developed by the Naval Civil Engineering Laboratory, Port Hueneme, California, the DOD central management office for the retrofit initiative.

On October 27, the contract was awarded to Mas-Hamilton at a not-to-exceed price of \$5,664,000 and S&G protested to our Office. Although DISC initially suspended performance of the contract, pursuant to 31 U.S.C. § 3553(d)(2) (1988), the agency subsequently authorized performance notwithstanding the protest based upon urgent and compelling circumstances significantly affecting the government's interests. On December 8, S&G submitted its lock sample for testing. According to the government, a minimum of 120 days is required to conduct the necessary tests.

DISCUSSION

S&G and Safemasters first contend that there is no urgency justifying the sole-source award. CICA provides for the use of noncompetitive procedures where 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 proposals. 10 U.S.C. § 2304(c)(2). While CICA requires that the agency request offers from "as many potential sources as is practicable under the circumstances," 10 U.S.C. § 2304(e); see Federal Acquisition Regulation (FAR) § 6.302-2(c)(2), an agency may still limit the procurement to the only firm it reasonably believes can properly perform the work in the available time, provided the limitation is justified. Silco Eng'g & Mfg. Co., B-250012.6, May 7, 1993, 93-1 CPD ¶ 372; Environmental Tectonics Corp., B-248611, Sept. 8, 1992, 92-2 CPD ¶ 160. We will object to the agency's determination only where the decision lacks a reasonable basis. 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 which impacts military operations carries considerable weight. Id.

We conclude that DISC has a reasonable basis for awarding the sole-source contract on an urgency basis. The urgency is based on the vulnerability of classified information stored in containers currently secured by mechanical locks which are vulnerable to computer enhanced neutralization techniques which make it possible to defeat a lock without leaving evidence of an unauthorized entry. Only locks meeting specification FF-L-2740 eliminate the vulnerability, only Mas-Hamilton's lock is on the QPL, and DLA's stocks of these locks have been exhausted. The information at risk includes Top Secret, Special Access, and SCI and is such that a compromise would subject the United States to exceptionally grave damage. A study by the Defense Intelligence Agency reveals that at least 27 countries have a "high physical and technical penetration capability," and the Assistant Secretary of Defense for the C3I Office determined that it was "imperative that the retrofit program

begin now to eliminate this problem for our high priority programs. . . ."

The protesters do not challenge the need to better protect this information, rather, they contend that there is no urgency involved because the September 20 memorandum from the Deputy Secretary of Defense does not mention "urgency." While the protesters are correct that the word "urgency" does not appear in the memorandum, the document does indicate that time is of the essence. In this regard, the memorandum targeted "all facilities securing TOP SECRET information" for installation, directed DLA to acquire 24,000 locks "at this time," and directed DOD components to submit firm requirements for the locks.

Further, the urgency is not based on this memorandum alone. For example, after the September 20 memorandum was issued and a number of meetings were held to quantify the agency's needs, the C3I Office issued an October 19 memorandum to the Military Department Secretaries, Joint Chiefs of Staff, and Directors of Defense Agencies. This memorandum provided guidance for "immediate implementation" of the September 20 memorandum, and reiterated the "highly vulnerable" status of older locks and the need to replace locks in more vulnerable areas first. That memorandum also stated that DLA had been directed to procure approximately half of the total number of locks directed in the September 20 memorandum on an urgent basis, "consistent with the supplier production capability."

While the protesters contend that DOD created a "false sense of urgency out of thin air," the record does not support this conclusion. Rather, a fair reading of the record demonstrates that in September and October 1993, DOD officials with responsibility for top secret and other highly classified information decided that such information was vulnerable and that all locks protecting that information need to be upgraded as soon as possible.

In addition, DLA has taken steps to ensure that it procures only the number of locks it currently requires, leaving the balance to be procured competitively. Beginning with the identification of 217,000 classified containers, of which some 20 percent, or 43,000, contained the most sensitive information, DOD personnel further identified approximately 25 percent, or 12,000 locks, as representing the number of locks which could be installed between the time of the first delivery under the expedited acquisition and the first anticipated delivery under a competitively awarded contract. This figure was further reduced to 9,600, which represents the number of security container locks. The remaining

2,400 locks represent personnel door locks which are to be obtained in a separate procurement.

The protesters also challenge the agency's failure to request offers from any firm other than Mas-Hamilton, since S&G and Safemasters expressed interest in supplying the locks. See FAR § 6.302-2(c)(2). A potential offeror may not be denied the opportunity to submit and have considered an offer if the offeror can demonstrate that its product meets or can meet the approval standards before contract award. 10 U.S.C. § 2319(c)(3). On the other hand, the agency is not required to delay a procurement in order to provide a potential offeror an opportunity to become approved. 10 U.S.C. § 2319(c)(5); Florida Ordnance Corp., B-247363.4, Aug. 31, 1992, 92-2 CPD ¶ 138. S&G cannot demonstrate its qualification. At the time of the procurement, S&G did not have a product qualified as meeting specification FF-L-2740, and did not submit a sample for testing until December 8, some 6 weeks after the October award to Mas-Hamilton. In view of the urgent nature of the requirement, DISC was not required to delay the procurement for 4 months, the minimum time necessary for completion of qualification tests.

We reach a similar conclusion with regard to Safemasters. Safemasters contends that it is a viable source for the locks based upon its prior sale of 30 Mas-Hamilton X-07 locks to the government and its offer to sell an additional 280 locks under other procurements. Safemasters is not an authorized distributor and ordinarily obtains its locks from a Mas-Hamilton distributor. However, based upon the agency's requirement for 9,600 locks on an expedited basis,

²The protesters observe that the record does not contain an installation schedule and argue that 9,600 locks is neither a firm requirement nor a reasonable number which could be installed on an expedited basis. Although the record does not include firm information from local DOD activities on the number of locks needed by each activity, such information is not necessary to demonstrate the urgency of the requirement. The urgent need to retrofit/upgrade the locks was not based on the views of local DOD activities as to their security needs. Rather, the urgency was based on the decision by DOD officials with responsibility for protecting all classified information that such information is vulnerable as long as the current locks are in place and that all of the locks currently in place should be upgraded as soon as possible. The absence of specific documentation on where and when each lock will be installed does not lead to the conclusion that the requirement is not valid, and the protesters do not provide any evidence to support their contention that the number of locks is unreasonably large.

Mas-Hamilton advised its distributors that it would be unable to furnish them with X-07 locks until March 1994, well after the October award date. Safemasters does not argue that it now possesses 9,600 X-07 locks and admits that it cannot obtain them from Mas-Hamilton or an authorized distributor. Safemaster's limited past ability to furnish less than 4 percent of the current requirement, and its bare assertion of capability, do not establish a capability to timely meet the requirement. See Servrite Int'l Ltd., supra. Since Safemasters was not a viable source to be considered, DISC³ reasonably decided to limit the procurement to Mas-Hamilton.

In the alternative, the protesters argue that any urgency is attributable to DISC's lack of advance planning since Congress directed the retrofit program in October 1992. An agency may not make a sole-source award where the need for the sole-source acquisition resulted from a lack of advance planning by agency procurement officials. 10 U.S.C. § 2304(f)(5)(A). However, a change in conditions does not generally indicate a lack of advance planning by an agency. Magnavox NAV-COM, Inc., B-248501, Aug. 31, 1992, 92-2 CPD ¶ 143. Such changed conditions may include policy changes. See Arthur Young & Co., B-221879, June 9, 1986, 86-1 CPD ¶ 536 (sole-source award based on urgency did not occur as a result of a lack of advance procurement planning but rather was the result of the Secretary of Navy's policy decisions to perform work with outside contractors instead of in-house personnel and to drastically cut budget of affected organizations). Here, the urgency is attributable to a DOD policy change concerning the retrofit program rather than a lack of advance planning.

Until June 1993, DOD considered that retrofitting the more than 200,000 security containers represented too great an expense since other elements of the protective system mitigated the security risks involved. While a combination of congressional reports directed the institution of a \$15 million retrofit program, the retrofit program was not part of the 1993 DOD Appropriations Act. Since, as a general proposition, legislative history does not constitute binding law, DOD was not required to follow that direction.

³The protesters contend that Mas-Hamilton's failure to supply sufficient quantities of its locks to its distributors and others constitutes a violation of the laws prohibiting restraints of trade. Such allegations are outside the scope of the bid protest process and should be referred to the Department of Justice since the interpretation and enforcement of such laws are functions of the Attorney General and the federal courts. MR Resources, B-242475, Feb. 14, 1991, 91-1 CPD ¶ 176.

AAA Eng'g and Drafting, Inc., et al., 66 Comp. Gen. 436 (1987), 87-1 CPD ¶ 488. In June 1993, however, the new Secretary of Defense communicated to the C3I Office that compliance with the full spirit and intent of congressional direction was required. Between June and September, DLA and DISC provided a competitive acquisition plan for the retrofit program. When, in September and October, DOD determined that expeditious replacement of some of the locks was required, DISC prepared a two-stage acquisition plan and required DOD to quantify the requirement by identifying those locks which could be installed expeditiously. As a result, the 24,000 lock requirement was reduced first to 12,000 then to 9,600 locks, representing those locks which could be installed in vulnerable security containers in the time between deliveries under an expedited award and those under a competitive award. Under these circumstances, we have no basis to conclude that the urgency was based on a lack of advance planning.

Finally, according to the protesters, since the X-07 lock incorporates a microcomputer, the procurement is for a Federal Information Processing (FIP) resource and subject to the Brooks Act authority of the Administrator of General Services. 40 U.S.C. § 759 (1988). The protesters argue that DISC's failure to obtain a DPA from GSA as required by the Brooks Act makes the award to Mas-Hamilton void as a matter of law.

Consistent with the protester's request, our Office sought the opinion of GSA on this issue. In response, GSA advised that it looks to the nature of the products solicited, rather than the products offered in response to the solicitation. Thus, unless the solicitation requires the contractor to deliver FIP resources, a DPA is not required. See Best Power Tech. Sales Corp. v. Austin, 984 F.2d 1172 (Fed. Cir. 1993). Here, specification FF-L-2740 does not require the use of FIP resources, and GSA concluded that a DPA was not required. Under this analysis, we agree that Mas-Hamilton's inclusion of a microcomputer as part of its lock meeting specification FF-L-2740 did not transform this procurement into one for FIP resources. We have no basis

“We reject the protesters' further contention that DISC's specification of Mas-Hamilton's part number effectively made the procurement one for FIP resources since the letter contract with Mas-Hamilton specifies that the locks must meet specification FF-L-2740.

to object to the conduct of the procurement without a DPA.
See Ebon Research Sys., B-253833.2; B-253833.3, Nov. 3,
1993, 93-2 CPD ¶ 270.

The protests are denied.

Robert P. Murphy
Acting General Counsel