



Comptroller General
of the United States

853120

Washington, D.C. 20548

Decision

Matter of: Equa Industries, Inc.

File: B-257197

Date: September 6, 1994

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.

Lynne Georges, Esq., Defense Logistics Agency, for the agency.

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DIGEST

1. Agency properly restricted urgent competition for parkas for use in severe cold, wet weather to two manufacturers that had timely delivered an earlier version of the parka under previous contracts, where the agency reasonably believed those offerors were the only manufacturers that would have a high probability of delivering quality parkas in a timely manner.

2. Contracting officer's decision to exclude the protester from a competition for parkas urgently needed for use in severe cold, wet weather was proper where the contracting officer reasonably concluded that the protester's performance under three prior contracts for items of apparel was delinquent and, therefore, the protester could not be relied upon to meet the compressed delivery schedule in the present exigent situation.

DECISION

Equa Industries, Inc. protests the Defense Personnel Support Center's (DPSC) decision to exclude it from the competition under request for proposals (RFP) No. SPO100-94-R-0134 for extended cold weather clothing system parkas for use by the United States Army. We deny the protest.

The subject parka initially was designed to protect military troops in extreme cold weather environments. The major using service, the Army, wanted to use the parka in severe cold, wet weather and also wanted to use it as an everyday field coat. However, the parka did not provide sufficient

protection in severe wet weather, and it could not be worn on a daily basis because repeated washing caused leaking and fading. Therefore, at the request of the Army, the parka was redesigned and extensive testing conducted. In December 1993, the specifications for the basic cloth and the end item parka were rewritten. The Army approved the new specifications within 2 months and, in February 1994, requested that DPSC purchase 94,417 parkas to support its cold, wet weather operations in the following winter.

The contracting officer determined that the requirement for this redesigned parka was urgent and that accelerated procurement procedures would be appropriate. The contracting officer further determined that the competition should be limited to two previously successful manufacturers of the old parkas. Thus, on March 10, the present RFP was issued to Tennier Industries, Inc. and Tennessee Apparel Corporation only.

Both firms submitted initial proposals by the March 24 closing date, and DPSC conducted negotiations with both offerors. Equa learned of the impending contract award before best and final offers were received and asked the contracting officer whether it also would be allowed to compete; upon receiving a negative reply, Equa protested to our Office. Best and final offers were received on May 16, and a contract awarded to Tennier Industries on June 14.

Equa contends that the contracting officer incorrectly determined that the urgent need for the new parkas justified DPSC's using accelerated procurement procedures and soliciting offers from only two firms. Equa asserts that there was sufficient time to complete the acquisition on a full and open competitive basis and that the length of time the agency waited before making the award shows that the urgency representation was insincere.

Under the Competition in Contracting Act of 1984 (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) (1988); Federal Acquisition Regulation (FAR) § 6.302-2(a)(2). This authority is limited by the CICA provisions at 10 U.S.C. § 2304(e), which require agencies to request offerors from as many sources as practicable. See FAR § 6.302-2(c)(2). An agency using the urgency exception may restrict competition to the firms it reasonably believes can perform the work promptly and properly, and we will object to the agency's determination

only where the decision lacks a reasonable basis. See Jay Dee Militarywear, Inc., B-243437, July 31, 1991, 91-2 CPD ¶ 105; Servrite Int'l, Ltd., B-236606, Dec. 6, 1989, 89-2 CPD ¶ 520. In this regard, we have recognized that a military agency's assertion that there is a critical need which impacts military operations carries considerable weight. Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579.

We are persuaded that the contracting officer's decision that the urgent need for new parkas justified the use of an expedited acquisition process was reasonable.

The basic, undisputed facts known to the contracting officer at the time she decided that an accelerated procurement would be necessary were: (1) the old parkas were not satisfactory for the Army's severe, wet weather operations, (2) the number of parkas requested for this purchase (94,417 units) represents the minimum quantity needed by the Army for the following winter's operations, (3) the new parkas are critical to the health and safety of soldiers operating in cold, wet weather², (4) there were no existing stocks of the new parka, and (5) the normal manufacturing lead time (i.e., from contract award to delivery of the first production units) is approximately 8 months. In view of the fact that the parka is critical to successful military operations and the health of soldiers, and because it would take so long after awarding a contract to receive deliveries, we do not find unreasonable the contracting officer's determination that the requirement was urgent and that the procurement process must be expedited.

We also do not agree with the protester that the length of time the agency waited before making the award shows that the agency's urgency representation was unreasonable. Upon receipt of a request to procure the parkas on an exigency basis, the contracting officer immediately conducted a market survey of the six firms that had manufactured and delivered the old parkas to DPSC in the past 2 years to ascertain which firms would have a high probability of delivering quality parkas in a timely manner. The contracting officer eliminated four firms, including Equa,

¹The reasonableness of the contracting officer's judgments must be considered in the context of the time when they were made and the information that was available to her at that time. Jay Dee Militarywear, Inc., *supra*.

²The Chief of DPSC's Field Clothing & Equipment Branch stated: "Unavailability of the item could lead to frostbite, hypothermia, sickness, personnel downtime, and possible death."

from consideration based upon prior delinquent deliveries or lack of capacity, leaving only two manufacturers, Tennier and Tennessee Apparel, to compete for the present contract. On February 23, 1994, after completing the market survey, the contracting officer signed a justification and approval (J&A) supporting her decision to restrict competition under the urgency exception to full and open competition, 10 U.S.C. § 2304(c)(2), to the two firms she believed could deliver the parkas in a timely manner. On March 10, even before the J&A was finally approved,³ the contracting officer issued the RFP to the two offerors.

Between issuance of the RFP and award of the contract to Tennier Industries on June 14, the following activities occurred: (1) receipt of initial offers (March 24), (2) negotiations with offerors, (3) issuance of two amendments changing the specifications and further accelerating the delivery schedule (initial delivery 120 days after contract award), (4) filing of Equa's protest (May 4), (5) receipt of best and final offers (May 16), and (6) authorization to award the contract (pursuant to FAR § 33.104(b)(1)(i)) in the face of Equa's protest on the basis of urgent and compelling circumstances (June 9).

All of the above activities were consistent with the contracting officer's determination of urgency and the necessity for an expedited procurement process. The agency also points out that it saved additional procurement time by: (1) not advertising the procurement,⁴ (2) using a 15-day rather than the normal 30-day response time for proposals,⁵ and (3) not having to evaluate a larger number of technical proposals and avoiding the possibility that it would have had to conduct pre-award surveys on offerors that had been delinquent on previous contracts. In all, only 2 months elapsed between approval of the J&A supporting a limited competition and receipt of best and final offers. We also note that the additional month's delay after receiving best and final offers was due at least in part to Equa's filing the pre-award protest and the requirement that the award be withheld until authorization was received from the head of the contract activity.⁶ Thus, it appears that the procurement was handled with all due dispatch and, in these circumstances, we cannot conclude, as the protester

³The sixth and final approval authority actually signed the J&A on March 15, 1994.

⁴See FAR § 5.203(a).

⁵Id.

⁶See FAR § 33.104(b).

urges, that the length of time before awarding the contract indicates that DPSC's determination that the exigent situation required the use of expedited procedures was unreasonable. See Essex Electro Eng'rs, Inc., B-250437, Jan. 28, 1993, 93-1 CPD ¶ 74.

Equa also argues that, even if an accelerated procurement was justified, DPSC improperly excluded Equa from the competition. As a previous supplier of the old parkas, as well as other items of military apparel, Equa contends that it could have supplied the new parkas in a timely manner. The protester further contends that the contracting officer incorrectly determined that Equa was late under three prior clothing contracts with the agency. Equa argues that it either delivered the goods on time or that any late deliveries it made were excusable; Equa also argues that the contracting officer failed to consider any mitigating circumstances with regard to late deliveries and schedule extensions.

The agency argues that Equa made late deliveries under three previously-awarded contracts. The agency reports that the present contracting officer examined the contract files and spoke with the other contracting officers before determining that Equa's performance was poor under the three prior contracts and that Equa's late deliveries were inexcusable. Thus, the agency reports that the contracting officer decided not to allow Equa to compete for the present urgent requirement because she could not reasonably conclude that Equa would meet the present RFP's delivery schedule.

The question of whether Equa's late deliveries were excusable is a matter of contract administration and therefore is not for resolution under our Bid Protest Regulations. See 4 C.F.R. § 21.3(m)(1) (1994); see E. Huttenbauer & Son, Inc., B-252320.2; B-252320.3, June 29, 1993, 93-1 CPD ¶ 499. Our review is limited to considering whether the contracting officer's determination not to solicit the firm was reasonable based on the information available at the time. Id. We believe the contracting officer's determination was reasonable.

Two of the contracts reviewed by the contracting officer were for coveralls. Under the more recent contract (No. DLA100-94-C-0406) the record shows that the contract was modified to extend the delivery schedule by 30 days on two occasions. Equa and the contracting officer appear to agree that a major cause of the performance delays was the failure of a sole source supplier to provide the fabric on schedule. Equa, therefore, asserts that the delay was not its fault and that its performance was on schedule once the two extensions were granted. However, the contracting officer contends that: (1) Equa was contractually

responsible for performance delays even if due to late deliveries by its fabric supplier; (2) Equa's performance delay and consequent delivery extensions were also due in part to Equa's transferring production operators from the coverall contract to another contract; and (3) Equa agreed in both contract modifications that the delays were not legally excusable.

The contracting officer also concluded that Equa's performance was inexcusably delinquent in delivering both basic and option quantities under an earlier coverall contract (No. DLA100-92-C-0352). For example, the present contracting officer's notes of her review of this contract show that Equa was more than 3 months late in delivering the last of the basic units. The present contracting officer's note of a conversation with the previous contracting officer indicate that the cause of the delay was that Equa again had problems obtaining the cloth to make the coveralls. However, the protester states that it was not delinquent; that the delivery delays were caused by late size changes ordered by the government; and that the contracting officer in that contract agreed to, but did not, extend the delivery schedule.

Regarding Equa's most recent contract (No. DLA100-92-C-4164) for the old version of the parka, the record again shows that Equa was late in making scheduled deliveries. The present contracting officer points out that the delivery schedule was extended twice, but that Equa's final delivery was still more than 4 months behind the revised schedule. The present contracting officer considered Equa's performance to be delinquent and the delays inexcusable. Equa argues that the delays were caused by the government in testing the parkas that were delivered. The contracting officer did consider the fact that some of the delays may have been caused by the government. However, the contracting officer points out that a large part of the late deliveries was due to Equa's problems with its fabric supplier and that two other parka manufacturers received their fabric from the same fabric supplier in a timely fashion. We note that Equa's own correspondence with DPSC regarding this contract shows that there was a leakage problem in one lot and that Equa was having a serious problem receiving fabric on time from its supplier.

We think the contracting officer's decision to not solicit Equa was reasonable in these circumstances. The record before the contracting officer showed that Equa had continual problems with its fabric supplier on three recent contracts. Regardless of whether the government extended the delivery schedule every time Equa requested an extension, Equa was unable to make deliveries in accord with the original--and in some cases with the revised--delivery

schedule. Whether the many delays experienced by Equa were excusable or not is not really relevant. What is relevant is the fact that Equa was late on all three contracts. In view of the Army's urgent need for parkas before winter, and the present procurement's compressed delivery schedule, we believe that the contracting officer's determination that Equa could not be relied upon to deliver the new parkas on time was rational. Based upon Equa's past performance problems, the contracting officer reasonably excluded Equa from the competition and decided to solicit the only two manufacturers that, based on their prior contract history of on-time delivery, could be expected to meet the exigent delivery schedule. See E. Huttenbauer & Son, Inc., supra; see also Hercules Aerospace Co., B-254677, Jan. 10, 1994, 94-1 CPD ¶ 7.

The protest is denied

/s/ Robert H. Hunter
for Robert P. Murphy
Acting General Counsel