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Decision

Matter of: Gichner Systems Group, Inc.

File: B-414392

Date: May 31, 2017

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DIGEST

1. Protest of the agency's decision to award a sole-source contract is denied, where the agency reasonably determined that other possible manufacturers would be unable to meet the delivery schedule as a result of a first article testing requirement.
2. Protest that the agency's decision to award a sole-source contract resulted from the agency's failure to engage in advance planning is denied, where the agency began its acquisition planning prior to the expiration of the previous contract and intervening events changed the nature of the procurement.

DECISION

Gichner Systems Group, Inc.,¹ of Dallastown, Pennsylvania, protests the decision of the Department of the Army to award a sole-source contract to General Dynamics Armament and Technical Products, Inc. (GDATP), of Marion, Virginia, under request for proposals (RFP) No. W56HZV-17-R-0098, for 31 Army Standard Family (ASF) shelters. Gichner challenges the basis for the proposed sole-source award, arguing that it is a qualified manufacturer of the shelters that could meet the Army's needs and that the Army's need for shelters is the result of a lack of advance planning.

¹ Gichner is a wholly-owned subsidiary of Kratos Defense and Security Solutions, Inc.

We deny the protest.

BACKGROUND

The ASF shelter is a one-side expandable, rigid wall shelter that meets International Organization for Standardization (ISO) standards.² See Agency Report (AR), Tab 7, Justification and Approval Document (J&A), at 1. The ASF shelter is a major component in the Army's armament repair shop set (ARSS) system, which provides U.S. forces with the most current and accurate tools to perform field-level maintenance on a range of weaponry, from small arms to field artillery. Id. The ARSS provides the capability to return damaged, mission critical weapons systems and equipment to operational readiness at the equipment location. Id. at 2. The ASF shelters are shipped from the contractor's facility to the Tobyhanna Army Depot, where the shelters are modified to become the ARSS. Id.

Gichner supplied the Army with ASF shelters under a 5-year, indefinite-delivery, indefinite-quantity (ID/IQ) contract that expired in July 2010. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 3. The Army subsequently competed the requirement and awarded a 5-year ID/IQ contract to GDATP in December 2010. AR, Tab 7, J&A, at 4. GDATP's contract expired in December 2015; the last ASF shelter was delivered in March 2017. Id.; Supp. COS/MOL at 4.

In July 2015, prior to the expiration of GDATP's contract, the Army issued a request for information to conduct a market survey of the industry's capability to provide ASF shelters. AR, Tab 3, Federal Business Opportunities (FBO) Notice, July 9, 2015. Gichner responded to the request for information. AR, Tab 4, Gichner Response to 2015 FBO Notice.

In December 2015, after the leadership of the Army office responsible for ASF shelters changed, the Army decided to produce a new, lighter, more efficient and cost effective ASF shelter for the ARSS program, which resulted in several engineering change proposals to be incorporated into the next 5-year contract. COS/MOL at 3. The scope of work for the next contract was amended, and in November 2016, the Army posted another request for information to the FBO website. Id. at 4; AR, Tab 5, FBO Notice, Nov. 1, 2016. Gichner again responded to the request for information. AR, Tab 6, Gichner Response to 2016 FBO Notice.

In early February 2017, since a long-term contract had not yet been awarded and there was a reduced number of shelters remaining to be delivered to the Tobyhanna Army

² ISO is a non-governmental organization that establishes international standards for a variety of products and services. See <http://www.iso.org/iso/home/about.htm> (last visited May 30, 2017).

Depot, the depot slowed its production line of the ARSS system.³ COS/MOL at 4. In addition, the Army decided to delay using the new design of the shelters. Id. Further, the agency issued a notice of its intention to award a sole-source contract to GDATP to provide 31 ASF shelters to mitigate the probability of the ARSS program experiencing a major break in production at the Tobyhanna Army Depot. AR, Tab 2, FBO Notice, Feb. 10, 2017. The notice stated that the contract to GDATP would fulfill the immediate need for ARSS shelters until a new, competitive contract could be awarded. Id.

In March, the Army finalized a J&A to support its decision to award a sole-source contract. AR, Tab 7, J&A, at 6. The J&A concluded that a sole-source award to GDATP was justified under 10 U.S.C. § 2304(c)(1) and Federal Acquisition Regulation (FAR) § 6.302-1(a)(2)(i)(B) because there was only one responsible source and no other supplies or services would satisfy the agency's requirements. Id.

The J&A explained that the ASF shelters are critical to support the weapon repair missions of the ARSS program, which the J&A identified as highly specialized equipment. AR, Tab 7, J&A, at 1. The J&A concluded that a contract was needed to provide additional shelters to be delivered to the Tobyhanna Army Depot by October 2017 in order to prevent a major break in the production line of ARSS systems, which would result in the program failing to meet its required fielding of ARSS systems. Id. at 2. The J&A stated that if the requirement for shelters was competed, the Army would not receive its first shelters under the resulting contract until September 2019. Id. In this regard, the J&A stated that a new competitive contract would take about 12 months to complete and there would be a 4-month lead time for some materials, 8 months to build the first shelter for first article testing, 3-4 months for the testing, another month for the test report, and 7 months to produce the first shelter. Id. The J&A noted that the solicitation for the previous contract was issued in June 2010, the contract was awarded to GDATP in December 2010, and the first article test report was approved in October 2012--22 months from contract award to first article test approval. Id.

The J&A acknowledged that the results of the November 2016 request for information showed that three firms, including Gichner and GDATP, were capable of manufacturing ASF shelters, but that because Gichner and one other firm would be subject to the first article testing requirements, they would be unable to meet the October 2017 delivery requirement. Id. at 3-4. The J&A concluded that only GDATP could meet the requirement because it (1) has the required resources that have previously supplied the necessary items; (2) successfully passed first article testing; and (3) was currently producing shelters in the current configuration. Id. at 4. With respect to actions to increase competition, the J&A stated that the Army was developing a procurement package for full and open competition for a long-term contract for ASF shelters. Id. at 3.

³ The Tobyhanna Army Depot is capable of producing 18 ARSS systems per month but typically produces 3 systems per month. Supp. COS/MOL at 2. In February 2017, the Army further reduced production to one system per month. COS/MOL at 5.

Upon learning of the Army's intention to award a sole-source contract to GDATP, Gichner protested to our Office.

DISCUSSION

Gichner challenges the Army's rationale for the sole-source award to GDATP and argues that the Army failed to engage in advance planning. Specifically, Gichner argues that the agency's sole-source award is unreasonable and a violation of the Competition in Contracting Act (CICA) because Gichner can manufacture the ASF shelter without the need for first article testing since it held a prior contract for these shelters. Gichner also argues that the sole-source award is a result of a lack of advance planning since the agency knew as early as 2015, when GDATP's contract expired, that it would need additional shelters.

The Army asserts that its J&A, which states that a sole-source award to GDATP is justified under 10 U.S.C. § 2304(c)(1) and FAR § 6.302-1(a)(2)(ii)(B) because there is only one available source, is reasonable.⁴ The agency maintains that the shelter has undergone significant changes since Gichner last held the contract in 2010 and that Gichner (and any manufacturer other than GDATP) would need to undergo first article testing. The agency also states that it began planning for the acquisition of ASF shelters in 2015.

CICA requires agencies to obtain full and open competition in its procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A). However, CICA permits

⁴ As an initial matter, the Army also argues that Gichner's protest is premature and should be dismissed because the Army has not issued a solicitation or awarded the contract. COS/MOL at 6-7. The Army cites to a prior protest by Gichner challenging the Army's intended sole-source award of a contract for fire suppression refill system shelters, which we dismissed as premature. Id. (citing Gichner Sys. Group, Inc., B-414231, Mar. 13, 2017 (unpublished decision)). We dismissed that protest because the Army had not yet issued a solicitation or evaluated the capability statement Gichner submitted in response to the FBO notice that invited interested firms to submit capability statements.

Here, the Army had previously issued two requests for information and evaluated those responses. The Army then issued a notice in FBO stating that it intended to award a contract to GDATP on or about April 28, 2017. AR, Tab 2, FBO Notice, Feb. 10, 2017. The FBO notice did not request any responses from interested sources. Id. We have found that a protest is not premature where the agency publicizes a notice of intent to enter into a sole-source contract but does not invite responses from potential sources. See VSE Corp.; Johnson Controls World Servs., Inc., B-290452.3 et al., May 23, 2005, 2005 CPD ¶ 103 at 5; cf. Pancor Corp., B-234168, Mar. 29, 1989, 89-1 CPD ¶ 328 (protest in response to notice seeking potential sources is premature). Accordingly, we find Gichner's protest here to be timely filed.

an exception to the use of competitive procedures where there is only one responsible source able to meet the agency's requirement. 10 U.S.C. § 2304(c)(1); FAR § 6.302-1; Barnes Aerospace Grp., B-298864, B-298864.2, Dec. 26, 2006, 2006 CPD ¶ 204 at 4. When using noncompetitive procedures pursuant to 10 U.S.C. § 2304(c)(1), such as here, agencies must execute a written J&A with sufficient facts and rationale to support the use of the cited authority. 10 U.S.C. § 2304(f)(1)(A), (B); FAR §§ 6.302-1(d)(1), 6.303-1, 6.303-2, 6.304. Our review of an agency's decision to conduct a noncompetitive procurement focuses on the adequacy of the agency's rationale and conclusions set forth in the J&A; where the J&A sets forth a reasonable justification for the agency's actions, we will not object to the award. Research Analysis & Maint., Inc., B-296206, B-296206.2, July 12, 2005, 2005 CPD ¶ 182 at 4.

We address several of Gichner's arguments below. In reaching our decision, we have considered all of the protester's arguments and conclude that none provide a basis for sustaining the protest.⁵

Challenge to Justification for Sole-Source Contract

Reasonableness of First Article Testing Requirement

Gichner argues that the Army's justification for a sole-source award to GDATP is unreasonable because it is based on an unnecessary requirement for first article testing. More specifically, Gichner contends that first article testing is not required by the FAR where, as in the circumstance here, the government has complete and detailed specifications. Gichner asserts that the changes to the specifications that have occurred since its contract expired in 2010 are not significant. In this regard, Gichner asserts that many of the changes are administrative because they simply update drawings or change markings; permit alternative manufacturing methods; or were initiated under Gichner's prior contract. Gichner Supp. Comments at 4-6.

The Army states that its decision to continue requiring first article testing is consistent with the FAR and otherwise reasonable. The Army acknowledges that it owns the detailed specifications for the ASF shelter, but points out that, although normally first article testing would not be required for products with complete and detailed specifications, the circumstances here render first article testing reasonable. Supp.

⁵ For example, Gichner asserts that FAR § 6.302-1 does not authorize a sole-source award for the ASF shelters because GDATP is not the original source of the shelters and is, at best, the most recent source. Gichner Comments at 5-6. However, GDATP states that a company it purchased originally designed the ASF shelter for the Army in the late 1970s and either that company or GDATP has been awarded all but one of the shelter contracts. GDATP Supp. Comments at 4-5. Based on this information, Gichner's assertion provides no basis to sustain the protest ground. See Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

COS/MOL at 3 (citing FAR § 9.304(d)). In this regard, the Army states that the ASF shelter is a major component of the ARSS system, which is highly specialized equipment that provides U.S. forces in the field with the most current and accurate tools to return damaged, mission-critical weapons systems and equipment to operational readiness. COS/MOL at 2, 9. The Army states that there are serious consequences if the shelters are not manufactured properly. Supp. COS/MOL at 2. In order to conduct or support repair missions on broken weapons on the battlefield, the ARSS must function in sometimes harsh and dangerous environments. COS/MOL at 13-14.

The Army further states that Gichner's break in producing ASF shelters also merits maintaining the first article testing requirement. Supp. COS/MOL at 3. The Army explains that, not only did Gichner's contract expire in 2010, but the contracts Gichner referenced in its response to the requests for information all expired before 2015.⁶ COS/MOL at 10. The Army also explains that Gichner's shelters were subject only to the bare minimum of tests required for shipping, and not environmental and structural tests, unlike GDATP's shelters. Supp. COS/MOL at 4-5. The Army further explains that 99 engineering change proposals have been approved and incorporated into the specifications since Gichner's contract expired, which are significant both in the number of changes as well as type of change. Id. at 2, 3.

GDATP explains that some of the engineering change proposals resulted in significant changes to the technical data package for the ASF shelter. GDATP states, for example, that the electrical engineering change proposals comprise a wholesale redesign of the electrical system and the shelter contains many new electrical components that Gichner did not use during its contract. GDATP Supp. Comments at 3-4. The intervenor also notes that its ASF shelters underwent rigorous environmental tests during first article testing to ensure that the new electrical components could operate in extreme hot and cold temperatures. Id. at 4.

A contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to ensure both product compliance with the specifications and that a particular product will meet the government's stated needs. Austin Telecomms. Elec., Inc., B-256251, May 31, 1994, 94-1 CPD ¶ 331 at 2; PCB Piezotronics, Inc., B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286 at 7. We will not object to such a determination where it is reasonable. Austin Telecomms. Elec., Inc., supra.

Section 9.302 of the FAR states that first article testing and approval ensures that the contractor can furnish a product that conforms to all contract requirements for acceptance. The FAR further states that testing and approval may be appropriate when, among other things, the contractor previously furnished the product to the government but (1) there have been subsequent changes in processes or specifications

⁶ The Army also states that the referenced contracts were for containers rather than shelters. COS/MOL at 10.

or (2) production has been discontinued for an extended period of time. FAR § 9.303(b)(1), (2). Normally, testing and approval is not required in contracts for products covered by complete and detailed technical specifications, unless the requirements are so novel or exacting that it is questionable whether the products would meet the requirements without testing and approval. FAR § 9.304(d).

Gichner has not demonstrated that the Army's decision to continue to impose the first article testing requirement--and thus the Army's rationale for the sole-source award--is unreasonable. As noted above, although the FAR states that "normally" first article testing is not required where the item is covered by a detailed specification, testing may be appropriate where there have been subsequent changes to specifications or production has been discontinued for a period of time. FAR § 9.303(b)(1), (2). In this regard, the record indicates that Gichner has not produced ASF shelters for several years. Additionally, the ASF shelter specifications have undergone changes since Gichner's contract expired in 2005.

We recognize, as Gichner contends, that some of the changes arguably are not significant, such as identifying the information to be put on the shelter's unique identification plate. See Supp. COS/MOL at 7; Gichner Supp. Comments, Attach. 1, at 2. However, the significance of other changes is not as apparent, nor has Gichner demonstrated that the Army unreasonably determined that the cumulative effect of the changes is significant. In this regard, the determination as to whether modifications to a previously developed item are minor is within the agency's technical judgment that will be disturbed only where unreasonable. See, e.g., Trimble Navigation, Ltd., B-271882, B-271882.2, Aug. 26, 1996, 96-2 CPD ¶ 102 at 6 (determination as to whether modifications to global position system receiver are minor). Here, for example, the Army states that the changes to the electrical system are significant, and GDATP indicates that the electrical changes were so significant that its shelters had to undergo environmental testing to verify its operability in temperature extremes. GDATP Supp. Comments at 4. Even if, as Gichner asserts, some of the changes to the electrical system were initiated during Gichner's contract performance,⁷ we find no basis to question the agency's decision to ensure shelters can function in the harsh conditions in which they may operate. While Gichner may disagree with the Army's assessment of the importance of this and other changes, the protester has not demonstrated that the agency's judgment in this respect is in error.

Similarly, given the use of ARSS systems to effect repairs to weapon systems on the battlefield, an agency has the discretion to determine its requirements. See, e.g., Dash Engineering, Inc.; Engineered Fabrics Corp., B-246304.8, B-246304.9, May 4, 1993, 93-1 CPD ¶ 363 at 8 (where a solicitation requirement relates to human safety or national defense, an agency has the discretion to set its minimum needs so as to

⁷ This statement is disputed by GDATP, which contends that the technical data package it received at the beginning of its contract performance did not contain any of the identified electrical changes. GDATP E-mail, May 25, 2017.

achieve not just reasonable results, but the highest possible reliability and effectiveness). Accordingly, we conclude that Gichner has not demonstrated that the Army's decision to continue to impose a first article testing requirement on ASF shelters is unreasonable.

Waiver of First Article Testing Requirement

Gichner also argues that the Army should waive the first article testing requirement because Gichner "has significant experience" producing ASF shelters and FAR § 9.306(c) permits waiver of first article testing when the offeror has previously delivered an identical or similar items that were accepted by the government. Gichner Comments at 4. Gichner contends that, because the Army accepted the ASF shelters the protester produced under its 2005 contract, the firm should be eligible for a waiver and the Army should compete the current requirement. Id.

The Army states that, although FAR § 9.306(c) permits waiver of first article testing where the offeror has previously supplied the item, the provision does not require the Army to do so. Supp. COS/MOL at 3. The Army explains that Gichner's ASF shelters were never subject to a full and complete first article testing due to the Army's lack of funds at the time. Id. at 4. Instead, the agency performed only the bare minimum tests to ensure the shelters were acceptable for shipping. Id. at 4-5. Additionally, the Army states that 99 engineering change proposals have been incorporated into the technical data package since Gichner's contract expired, and therefore the Army concluded that waiver of the first article testing for Gichner was inappropriate. Id. at 2.

An agency's decision to waive or not to waive first article testing for a particular offeror is subject to question only where it is shown to be unreasonable. Comdyne I, Inc., B-232574, Dec. 21, 1988, 88-2 CPD ¶ 611 at 4. Because first article testing is for the protection of the government and offerors do not have any right to waiver of first article testing requirements, we will question an agency's denial of a waiver for a particular offeror only if it is the result of bad faith or fraud, or there is a clear showing of abuse of discretion by the agency. Brunswick Corp., Def. Div., B-231996, Oct. 13, 1988, 88-2 CPD ¶ 349 at 6.

In our view, the Army's decision not to waive first article testing for Gichner was reasonable. As relevant here, FAR § 9.303 states that first article testing may be appropriate where the contractor previously furnished the product to the government but there have been subsequent changes in processes or specification, or production has been discontinued for an extended period of time. Gichner's 2005 contract to provide ASF shelters to the Army for the ARSS program expired in 2010. Moreover, the information the protester provided to the Army in response to the requests for information did not identify any current contracts under which Gichner was manufacturing ASF shelters. For example, the most recent contract for ASF shelters that Gichner identified in its response to the November 2016 request for information was awarded in November 2006. See AR, Tab 6, Gichner Response to 2016 FBO Notice, at 10. Under another contract, awarded during fiscal year 2003, Gichner indicated that

its deliveries of ASF shelters concluded in early 2011. Id. at 9. In view of Gichner's apparent break in production of ASF shelters for the government, the fact that Gichner's ASF shelters did not undergo compete first article testing under its 2005 contract, and the significance of some of the engineering change proposals adopted, we conclude that the Army reasonably declined to waive first article testing for Gichner. See Honeycomb Co. of Am. – Recon., B-225685.2, Sept. 29, 1987, 87-2 CPD ¶ 313; Wilco Elec., Inc., B-194872, Sept. 24, 1979, 79-2 CPD ¶ 218 (agency did not abuse discretion in refusing to waive first article testing where protester had a two-year gap in producing the generators).

Advance Planning

Lastly, Gichner argues that the Army's need to award a sole-source contract for 31 ASF shelters was the result of the agency's failure to conduct adequate advance planning. Gichner Comments at 6-8. Gichner contends that, in view of the Army's assertion that a competition would take 12 months and there is a need for delivery of shelters by October 2017, the Army should have begun its acquisition planning for the new, updated ASF shelter no later than April 2016.⁸ Id. at 7. Gichner further contends that the Army's failure to make a decision to procure 31 shelters until February 2017 is evidence of the agency's lack of advance planning. Id. at 8.

The Army states that its decision to procure 31 ASF shelters under a sole-source contract is not the result of any failure to plan. The Army explains that its acquisition planning to procure additional ASF shelters through a long-term contract began in July 2015. COS/MOL at 11. The Army further explains that it continued its acquisition planning after the leadership change for the ASF shelters team by exploring new cost-reducing engineering change proposals and updating the source selection plan and scope of work, which was concluded in October 2016. Id. at 4, 11-12. The Army states that the sole-source contract is necessary to keep the ARSS production line open, while

⁸ Gichner argues that the amount of time the Army estimates for conducting a competitive procurement and other requirements, such as testing, is unreasonable. The Army explains that these estimates are based on prior experience. See AR, Tab 7, J&A, at 2. We find the agency's timeframes, based on actual experience procuring the same item, are reasonable. See Unitron LP, B-406770, Aug. 14, 2012, 2012 CPD ¶ 247 at 5.

Further, Gichner argues that the timeframe for conducting the procurement is unreasonable because the agency could make two sole-source awards pursuant to FAR § 6.302-1--one each to Gichner and GDATP--and therefore no competitive acquisition would be necessary. Gichner Comments at 4-5. However, as discussed above, we conclude that the Army did not abuse its discretion in declining to waive the first article testing requirement for Gichner; therefore, Gichner would be unable to meet the Army's delivery requirements even if it received a directed award.

the Army continues the acquisition process for full and open competition for the 5-year contract. Id. at 13.

Under CICA, noncompetitive procedures may not properly be used where the procuring agency created the need to use such procedures through a lack of advance planning. See 10 U.S.C. § 2304(f)(4)(A); New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6. With regard to advance planning, however, our Office has recognized that the requirement for advance planning does not mean that such planning be completely error free or successful. See Barnes Aerospace Grp., supra, at 4; Pegasus Global Strategic Solutions, LLC, B-400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 at 9. Here, we conclude that the agency's need to acquire 31 ASF shelters under a sole-source contract was not the result of a lack of advance planning.

The record demonstrates that the Army began its acquisition planning in July 2015--roughly 6 months before GDATP's contract expired--when it issued its first request for information seeking to understand the market's capabilities to meet the Army's needs at that time. See AR, Tab 3, FBO Notice, July 9, 2015. The December 2015 leadership change resulted in the decision to develop a new, lighter, more efficient and cost effective ASF shelter for the ARSS program instead of acquiring more of the current configuration of the ASF shelter. COS/MOL at 3. Accordingly, the Army developed engineering change proposals and amended the scope of work for the next 5-year contract, which is to be subject to full and open competition. Id. at 4. The Army states that it is continuing to work toward competing a 5-year contract for the updated shelters. In light of the above, we conclude that Gichner's complaint--that the Army's decision to award a sole-source contract for 31 shelters to maintain the ARSS production line--does not show that the agency failed to engage in advance procurement planning under the circumstances present here.

In sum, Gichner has not demonstrated that the Army's decision to issue a sole-source contract to GDATP is unreasonable.

The protest is denied.

Susan A. Poling
General Counsel