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Decision

Matter of: SSI Technology, Inc.

File: B-417917

Date: December 4, 2019

Bret Wacker, Esq., Clark Hill PLC, for the protester.
Frank V. Reilly, Esq., for Fischer Panda Generators, the intervenor.
Matthew R. Wilson, Esq., and Joseph M. O’Connell, Esq., Department of the Army, for the agency.
Young H. Cho, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the justification and approval in support of the agency’s notice of intent to issue a sole-source contract based on unusual and compelling urgency is denied for failure to establish competitive prejudice where, after the protest was filed, the agency provided the protester an opportunity to be considered for the procurement and reasonably determined that the protester was not capable of meeting the agency’s urgent needs.

DECISION

SSI Technology, Inc. (SSI), of Sterling Heights, Michigan, protests a notice of intent to award a sole-source contract to Fischer Panda Generators (Fischer Panda), of Pompano Beach, Florida, pursuant to solicitation No. W56HZV-19-R-0050, issued by the Department of the Army, U.S. Army Materiel Command, for auxiliary power units (APU). The protester challenges the agency’s justification and approval (J&A) supporting the proposed sole-source contract and the agency’s stated need that first article testing (FAT) is required for the procurement despite not requiring FAT for Fischer Panda.

We deny the protest.

BACKGROUND

The APUs had previously been produced by Minowitz Manufacturing Company for the Army under a contract awarded in 2015. Agency Report (AR), Tab 3, J&A, at 1. On

August 1, 2017, after becoming aware that Minowitz was going out of business, the Defense Logistics Agency (DLA) competitively awarded an indefinite-delivery, indefinite-quantity (IDIQ) contract with a 3-year ordering period, to Essex Electro Engineers (Essex), to produce APUs for the Army.¹ AR, Tab 10, Essex Contract, at 1, 32. On September 14, DLA issued a delivery order to Essex for 50 APUs that were scheduled to be delivered in July 2019. The order also required the submission of a FAT report by August 14, 2018. AR, Tab 11, Essex Delivery Order, at 1, 3, 4. Essex was unable to complete FAT or to deliver any APUs, and its contract and delivery order were terminated for default on May 14, 2019. AR, Tab 3, J&A, at 2.

On April 18, 2019, the Army issued a sources sought/request for information (RFI) notice seeking vendors that have previously manufactured APUs for the federal government and have an approved FAT waiver.² AR, Tab 2, Sources Sought/RFI at 2-3. Two vendors responded to the RFI, however, neither vendor could meet the requirement for an approved FAT waiver. AR, Tab 3, J&A, at 3.

On June 12, the Army issued a J&A for other than full and open competition pursuant to 10 U.S.C. § 2304(c)(2), as implemented in Federal Acquisition Regulation (FAR) § 6.302-2(a)(2), to obtain APUs from Fischer Panda. AR, Tab 3, J&A, at 1. The J&A explained that the Army was in a critical supply position because the previous APU supplier had gone out of business and because the contract awarded to Essex had been terminated for default. Id. at 1-2. As a result, the agency had an urgent need for 210 APUs that were required to meet backorders and monthly demand until a new competitive contract could be awarded and FAT is approved.³ Id. at 2. Relevant here, the J&A stated that the agency determined that no other type of quality assurance testing other than FAT was acceptable to validate that prospective contractors have the manufacturing capability, processes, and facilities to produce the APUs in accordance with the technical requirements of the procurement. Id. The J&A explained that the acquisition lead time to competitively procure the APUs was expected to be 10 months, and the production lead time for the APUs was anticipated to be a minimum of nine months, without FAT, and 15 months with FAT. Id.

¹ The APU, identified by National Stock Number 6115-01-465-8922, part number 12367093, consists of a Hatz 2G40-2cylinder diesel engine coupled to a chain-driven gear case that in turn drives a hydraulic pump and a 300-Amp generator. AR, Tab 3, J&A, at 1. The APU provides electrical and hydraulic power to the M88A1/A2 recovery vehicles for auxiliary and emergency functions. Id.

² Contracting responsibility for the APUs transferred from DLA to the Army in December 2018. Combined Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2 n.3.

³ The J&A also explained that the agency intended to concurrently solicit and award a new competitive IDIQ contract to fulfill future non-urgent requirements. AR, Tab 3, J&A, at 2.

The J&A further stated that, as of May 2019, Fischer Panda was the only approved source to have an approved FAT for the APUs. Id. at 3. The J&A explained that, although, two vendors responded to the RFI issued in April 2019, neither of the vendors was able to satisfy the requirement for an approved FAT waiver. Id. The J&A also noted that other than the two vendors that responded to the RFI, no other sources had expressed interest in the agency's requirement. Id.

Based on the responses received from the RFI, the J&A explained that the agency determined that Fischer Panda was the only vendor that could start production of the APU without FAT. Id. at 2, 3. The agency noted that Fischer Panda has a current FAT approval and had previously produced the APUs both as a subcontractor for a M88 production contract, and as a prime contractor for a contract under which the APU is a subassembly. Id. As a result, the solicitation that was issued to Fischer Panda did not require FAT. Id. at 3. The J&A further explained that with the elimination of FAT, Fischer Panda's production lead time would be substantially less, when compared to other vendors, and Fischer Panda would be able to meet the Army's urgent current requirement in addition to being able to fulfill the agency's backorders until a competitive contract would be awarded. Id. at 3-4.

On August 1, the Army posted its notice of intent to award a sole-source contract to Fischer Panda on the Federal Business Opportunities (FBO) website. AR, Tab 16, Solicitation and J&A Posting at 1. The Army's notice was issued as a combined synopsis/solicitation with a response date of August 30. Id. The following day, the agency posted the J&A supporting the proposed sole-source award to Fischer Panda on FBO. Id. at 2.

On August 8, SSI filed an agency-level protest arguing that the J&A was factually incorrect. AR, Tab 5, Pre-Protest Letter. Specifically, SSI argued that the J&A incorrectly stated that no sources other than Fischer Panda had an approved FAT for the requirement because SSI had received its FAT approval for the APU on November 1, 2006. Id. at 2. SSI also raised concerns that the agency had not contacted SSI to ascertain its capabilities, despite SSI's experience producing APUs on a prime contract on other contracts, as well as having participated in the competition that resulted in the award to Essex in 2017. Id.

On August 14, SSI and the agency held a conference call, during which SSI was invited to submit a FAT waiver request in order to ascertain SSI's capabilities. COS/MOL at 2; AR, Tab 7, FAT Waiver Submittal; Supp. Agency Briefing at 7. On August 15, SSI submitted its FAT waiver request documentation. AR, Tab 7, FAT Waiver Submittal. In its transmittal letter, SSI noted that neither the J&A nor the solicitation issued to Fischer Panda required FAT, but that SSI was submitting the request for a FAT waiver "with the understanding that, if the FAT [w]aiver is approved, the [s]olicitation will be modified in a manner which would provide SSI the opportunity to compete for a contract to meet the Government's stated urgent requirement for the stated quantity of the APUs." Id. at 1-2.

After submitting its FAT waiver request documentation, SSI made several inquiries to the agency on the status of its FAT waiver request before filing this protest with our Office on August 29.⁴ See Protester's Response to Agency Supp. Briefing, exhs. A and B (emails from SSI to agency inquiring about the status of the FAT waiver submission).

On September 4, the agency denied SSI's FAT waiver request but did not notify SSI of its decision until September 27. AR, Tab 12, FAT Waiver Denial; AR, Tab 15, Agency Letter to SSI Regarding FAT Waiver Denial. In its communication to SSI, the agency explained that the FAT waiver was denied because of the following reasons: SSI had not produced the APU in over 10 years; SSI had not passed FAT for the APU in the past 13 years; and SSI had a major change in its processes by moving its manufacturing facility since this APU was last produced. AR, Tab 15, Agency Letter to SSI Regarding FAT Waiver Denial.

DISCUSSION

The protester contests the agency's conclusion that Fischer Panda is the only vendor capable of meeting the agency's urgent needs because: SSI received FAT approval in 2006; SSI had previously produced APUs for the government; and the contracting officer for this procurement should have been aware of SSI's capabilities because he was the same contracting officer for the prior competition, in which SSI participated, and which resulted in the award to Essex. Protest at 7-9; Protester's Comments at 5-7. SSI also challenges the agency's stated need for a vendor with an approved FAT even though the solicitation issued to Fischer Panda did not include a FAT requirement. Protest at 9; Protester's Comments at 9-12. While we do not address every issue raised, we have considered all of the protester's arguments and conclude that none furnishes a basis on which to sustain the protest.⁵

The Competition in Contracting Act (CICA), 10 U.S.C. § 2304(c)(2), permits an agency to use other than competitive procedures in acquiring goods or services where the agency's requirement is of such an unusual and compelling urgency that the

⁴ The parties do not dispute that SSI's August 8 correspondence to the agency was an agency-level protest. See, e.g., AR, Tab 7, FAT Waiver Submittal, at 1. On August 30, the contracting officer sent a formal response to SSI stating that "[i]n light of the GAO level protest . . . the Army's response to the pre-protest letter will be included, as necessary, in the Agency report we send to GAO." AR, Tab 9, Agency Response to Pre-Protest Letter.

⁵ For example, in its comments to the agency report filed on October 10, 2019, the protester challenges the agency's conclusions resulting in the denial of the FAT waiver. Protester's Comments at 11. SSI, however, was informed of the basis for its FAT waiver denial on September 27, 2019. Consequently, these arguments are untimely, because they were raised more than 10 days after the basis was known or should have been known. 4 C.F.R. § 21.2(a)(2).

government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals. Although CICA requires that agencies solicit offers from as many potential sources as is practicable when using the unusual and compelling urgency exception to limit competition, 10 U.S.C. § 2304(e), an agency nonetheless may limit a procurement to the only firm it reasonably believes can properly perform the work in the time available. American Sys. Corp., B-412501.2, B-412501.3, Mar. 18, 2016, 2016 CPD ¶ 91 at 8-9; Camden Shipping Corp., B-406171, B-406323, Feb. 27, 2012, 2012 CPD ¶ 76 at 6; McGregor Mfg. Corp., B-285341, Aug. 18, 2000, 2000 CPD ¶ 151 at 6.

When citing an unusual and compelling urgency, the agency is required to request offers from as many potential sources as is practicable under the circumstances. 10 U.S.C. §. 2304(e). An agency using the urgency exception may restrict competition to the firms it reasonably believes can perform the work in the available time so long as the agency did not create the need for the sole-source award from a lack of advanced planning. 10 U.S.C. § 2304(f)(5)(A). When using noncompetitive procedures pursuant to 10 U.S.C. § 2304(c)(2), such as here, agencies are required to execute a written J&A with sufficient facts and rationale to support the use of the cited authority. See 10 U.S.C. §§ 2304(f)(1)(A), (b); FAR §§ 6.302-2(c)(1), (d)(3), 6.303, 6.304. Our review of an agency's decision to conduct a noncompetitive procurement focuses on the adequacy of the 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. Camden Shipping Corp., supra.

Here, the record shows that the agency issued an RFI on FBO to ascertain whether there was any interest from vendors that had previously manufactured APUs for the government and had an approved FAT waiver.⁶ AR, Tab 16, Solicitation and J&A Posting. As discussed above, only two vendors responded to the RFI, and neither vendor could meet the requirement for an approved FAT waiver. AR, Tab 3, J&A, at 3. Moreover, SSI did not respond to the RFI. Based on the lack of capable vendors responding to the RFI, the agency issued a notice of intent to place a sole-source award with Fischer Panda, and prepared the accompanying J&A in support of the agency's decision. Id. After the agency posted the J&A, SSI protested to the agency, challenging the J&A's factual determinations. Despite not having responded to the sources sought/RFI notice, the agency provided SSI an opportunity to submit a FAT waiver request to determine whether SSI could satisfy the agency's urgent requirements.⁷

⁶ Publication on the FBO website, which has been expressly designated by statute and regulation as the official public medium for providing notice of contracting actions by federal agencies, constitutes constructive notice of contracting actions. See PR Newswire Ass'n, LLC, B-400430, Sept. 26, 2008, 2008 CPD ¶ 178 at 2; CBMC, Inc., B-295586, Jan. 6, 2005, 2005 CPD ¶ 2 at 1.

⁷ On October 17, after submission of the agency report and comments from the parties, the agency, for the first time requested that our Office dismiss SSI's protest as

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Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6; see also Sallyport Global Holdings, B-417223.2, B-417223.4, Apr. 3, 2019, 2019 CPD ¶ 133 at 5.

Under these circumstances, to the extent the J&A contained factual inaccuracies--such as not stating that SSI had previously received FAT approval of the APUs in 2006 or failing to contact SSI to ascertain its capabilities prior to the execution of the J&A--SSI has failed to demonstrate how it has been prejudiced by those errors. As stated above, the record shows that in response to the agency-level protest, the Army, notwithstanding its conclusions and findings in the J&A, allowed SSI to submit its FAT waiver documentation. Because SSI was provided an opportunity to submit a FAT waiver request for review, which was then considered, we cannot conclude that SSI was prejudiced by the factual determinations of the J&A. Accordingly, SSI's challenges to the adequacy of the J&A are denied.

Next, SSI's challenges the agency's stated need for a vendor with an approved FAT and the lack of a FAT requirement in the solicitation issued to Fischer Panda. Generally, a contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to ensure product compliance with specifications. Starwin Industries, Inc., B-401576 et al., Oct. 1, 2009, 2009 CPD ¶ 199 at 4; Input/Output Tech., Inc., B-280585, B-280585.2, Oct. 21, 1998, 98-2 CPD ¶ 131 at 5. In this regard, an agency may properly restrict award to a source qualifying for a FAT waiver when such waiver is essential to meeting the required delivery schedule, or where there is a critical need for certain supplies. See Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579 at 5. Our review of an agency's decision to waive, or not waive, FAT requirements for a particular vendor is limited to determining whether the agency's decision was reasonable. Input/Output Tech., Inc., supra.

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premature and speculative, because the contracting officer was "in the process of addressing these issues--by affording SSI the opportunity to compete and evaluating SSI's FAT waiver request." Agency's Response to GAO's Request to Address Timeliness at 4-5. The agency argues SSI's protest to our Office was premature and merely anticipated prejudicial action on its FAT waiver request. Id. While the agency provided SSI an opportunity to be considered for the procurement by allowing SSI to submit a FAT waiver request, SSI's protest also essentially challenged the solicitation's lack of a FAT requirement despite the agency "[going] to great lengths to stress the importance of the need for FAT approval," as emphasized in the J&A. See Protest at 9. Accordingly, we decline to dismiss SSI's initial protest for the reasons requested by the agency, because SSI's initial protest was filed prior to the closing time established for the solicitation. See 4 C.F.R. § 21.2(a)(1).

Here, the record shows that the agency reasonably explained its need for a vendor with an approved FAT and why the agency did not include a FAT requirement in the solicitation issued to Fischer Panda. In describing the need for the FAT requirement, the agency explains that FAT has historically been required and will continue to be required for all competitive procurements due to the technical complexity of manufacturing this APU. COS/MOL at 6. The agency also advises that as detailed in the J&A, soliciting a source that will not require FAT would save approximately 6 months in production lead time. Id.; see also AR, Tab 3, J&A, at 2.

The agency further explains that Fischer Panda received FAT approval in March 2018 and since its approval, has consistently produced APUs.⁸ Following the termination for default of the competitively awarded contract to Essex and the lack of qualified vendors responding to the RFI, there was a lapse in production of APUs. As a result, the Army had an urgent need for APUs, and the agency determined that Fischer Panda was the only known source with an approved FAT that was capable of producing the required APUs. COS/MOL at 6-7. Finally, the sole-source solicitation issued to Fischer Panda did not have a FAT requirement, because, as explained by the agency, “a FAT waiver was not contemplated in the J&A since Fischer Panda has an approved FAT [and] the effect of a FAT waiver is the same as an approved FAT; namely, a new FAT will not be required.” COS/MOL at 3 n.4. While SSI may disagree with the agency’s conclusions, on this record, SSI’s arguments provide no basis to sustain the protest. See Protein Scis. Corp., B-412794, June 2, 2016, 2016 CPD ¶ 158 at 2 (protester’s disagreement with the agency’s judgment concerning the agency’s needs and how to accommodate them, without more, does not show that the agency’s judgment is unreasonable).

The protest is denied.

Thomas H. Armstrong
General Counsel

⁸ SSI also disputes the validity of Fischer Panda’s FAT approval primarily because the FAT was not performed by the government. Comments at 10. See also AR, Tab 17, Fischer Panda FAT Approval. First article testing and approval ensures that the contractor can furnish a product that conforms to all contract requirements for acceptance and can be completed by the government or a contractor. See generally FAR subpart 9.3. SSI’s objections to the validity of Fischer Panda’s FAT approval are misplaced as neither the solicitation nor the J&A required that the FAT only be performed by the government.