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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Critical Process Filtration, Inc.

File: B-400746, B-400747, B-400750, B-400751, B-400752, B-400785

Date: January 22, 2009

Brent Arbogast for the protester.

Michael Walters, Esq., and Richard Ferguson, Esq., Defense Logistics Agency, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contentions that three agency procurements for brand-name filters improperly limit competition are denied where the record shows that the agency is procuring the brand-name items using simplified acquisition procedures and has adequately justified the use of its brand-name approach under the procedures applicable to simplified acquisitions.
 2. Protester's contention that a fourth agency procurement for brand-name filters improperly limits competition is sustained where the procurement history information set forth in the solicitation shows that the value of the requirement is likely to exceed the applicable simplified acquisition threshold of \$100,000; accordingly, the streamlined procedures applicable to simplified acquisitions cannot be used for this requirement.
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DECISION

Critical Process Filtration, Inc. (CPF) of Nashua, New Hampshire, a small business, protests the terms of six solicitations by the Defense Logistics Agency (DLA) for various types of brand-name fluid filters which are used in particular weapons systems. CPF argues that the solicitations lack essential information that would allow CPF to determine whether it can manufacture the filters itself, and therefore, whether to submit responses, and more broadly, that DLA has unjustifiably limited competition to specific brand-name items.

We deny three of the protests, dismiss two of them,¹ and sustain one.

BACKGROUND

Each of the challenged solicitations was electronically posted on the DLA Internet Bid Board System at <https://www.dibbs.bsm.dla.mil> as a request for quotations (RFQ), and each RFQ sought a different type of fluid filter. The postings provided only the national stock numbers (NSN), the names of the manufacturers, and their part numbers.

DLA describes all four of the RFQs as simplified acquisitions because it assigns a value of under \$100,000 to them. See Federal Acquisition Regulation (FAR) § 2.101 (definition of “simplified acquisition threshold”). For three of the RFQs, there appears to be no question that the procurement is properly valued at less than the simplified acquisition threshold.² First, in B-400750, DLA estimated that it would place orders under an indefinite-delivery purchase order (IDPO)³ for an estimated quantity of 274 filters over the 2-year term of the IDPO which, based on the lowest and highest historical prices listed in the RFQ, suggests a total price between \$8,190

¹ During the course of the protests DLA explained that two solicitations (RFQ SPM7AX-08-X-0508 and RFQ SPM7MC-09-T-0468) had been canceled for reasons unrelated to the merits of the protests. We dismiss those protests (B-400746 and B-400747, respectively) as academic. The rest of this decision addresses the four remaining RFQs.

² It appears possible that micro-purchase procedures could have been used in one instance.

³ An IDPO is

a simplified acquisition procedure that applies indefinite delivery contract concepts to simplified acquisitions. An IDPO, when established by agreement of the contractor, establishes a standing quotation(s) from the contractor for a definite period for an indefinite quantity of supplies. However, when established as a contract, through performance undertaken by the contractor on a purchase order, an IDPO establishes a firm commitment that the contractor will perform under subsequent orders issued, at the purchase order price for a definite period for an indefinite quantity of supplies.

Defense Logistics Acquisition Directive ¶ 13.390-1 (available online at <http://www.dla.mil/j-3/j-3311/dlad/rev5.htm> (visited Jan. 15, 2009)).

The RFQs for the IDPOs (RFQ SPM7M1-08-U-J179 and SPM7L4-09-U-A006) include a standard clause specifying that the vendor will deliver any quantities ordered during the term of the IDPO, up to a maximum total of \$100,000 for all orders.

and \$21,098. RFQ SPM7M1-08-U-J179 at 1, 7. Second, in B-400752, DLA will purchase 8 filters which, based on the only historical price listed in the RFQ, suggests a total price of \$3,496. RFQ SPM7MC-09-T-0151 at 1, 3. Third, in B-400785, DLA will purchase 60 filters which, based on the two historical prices listed in the RFQ, suggests a total price between \$789 and \$900. RFQ SPM7M3-08-T-K838 at 1, 4.⁴

However, in the fourth case, B-400751, the RFQ contains an estimate that shows that DLA will purchase 1,356 filters over the 2-year term of the IDPO. Based on the lowest and highest historical prices also listed in the RFQ, our Office calculates a potential IDPO value between \$205,881 and \$343,977. RFQ SPM7L4-09-U-A006 at 1, 7.⁵

Each of the RFQs advised that DLA lacked data about the part, and that any firm wishing to propose an alternative to the brand-name item would be required to submit a data package for both the specified brand-name part, and the offered alternative.

DLA explains that it is conducting brand-name procurements,⁶ all of these filters are “critical application items,”⁷ and that it has identified the only known approved sources for these filters. DLA also states that each of the manufacturers of the

⁴ Unlike the other protests here, this RFQ listed six manufacturers of the required filter. RFQ SPM7M3-08-T-K838 at 2.

⁵ Historical pricing information contained in this RFQ indicates that DLA purchased 168 units of this filter on July 24, 2008, and also indicates that between September 3 and September 10, DLA issued four more orders, to purchase a total of 36 additional filters. Over that 1-week period in September, the per-filter prices ranged from \$167.02 to \$253.67, and three of the orders were placed on three consecutive days. RFQ SPM7L4-09-U-A006 at 7. Furthermore, as discussed further below, DLA acknowledges that it issued the IDPO under this RFQ on November 12, 2008, and immediately placed an order for 469 filters, followed by a second order for 159 more filters on December 4, which together effectively reached the \$100,000 maximum. Letter from DLA to GAO, Jan. 13, 2009, at 2 and exhs. 4, 5, 9.

⁶ DLA has not argued that it is relying on its authority to establish approved sources, see 10 U.S.C. § 2319, but rather relies on its authority to solicit brand-name items only. Agency Report (AR) at 3. In addition, with respect to the largest-valued RFQ (RFQ SPM7L4-09-U-A006), DLA has advised our Office that the “Test Program for Certain Commercial Items,” FAR Subpart 13.5, is not applicable. Letter from DLA to GAO, Jan. 13, 2009, at 2 n.3.

⁷ DLA defines a critical application item as “an item essential to weapon system performance or operation, or the preservation of life or safety, or safety of operating personnel, as determined by the military services.” AR at 2.

brand-name filters “holds the related data proprietary.” AR at 2. DLA explains that it relies on an “Acquisition Method/Acquisition Method Source Code,”⁸ which is maintained in its Federal Logistics Information System database. The codes are used to record whether a part should be procured competitively, or only from sources specified in the database. E.g., AR, Tab 21, Declaration of DLA Equipment Specialist Supervisor, at 2.

DLA also explains that the cost of approving an additional source ranges from \$1,700 to \$4,700 depending on the number of engineering support activities involved. Therefore DLA believes it would not be cost-effective for the government to incur the cost of performing the engineering analysis that would be required to approve an additional source for three of the four filters.⁹ In other words, in DLA’s view, it would be unlikely to recoup those costs through competition.

DISCUSSION

Although CPF filed separate protests challenging the terms of each of these RFQs, the protests all raise the same issue, in essentially identical arguments. CPF argues that FAR § 11.104(b), which governs use of brand-name-or-equal purchase descriptions, bars DLA from conducting a procurement for brand-name items without setting forth salient characteristics that would permit broader competition.¹⁰ E.g., Protest B-400750 at 3. More broadly, CPF argues that DLA has no basis to limit these procurements to the brand-name items.

⁸ This is also referred to in the DLA Federal Logistics Information System (FLIS) Procedure Manual as the “Acquisition Method Suffix Code.” AR, Tab 16, Excerpt from DLA FLIS Procedure Manual (Oct. 2008 edition), vol. 10, at 10.3-225.

⁹ In B-400751 (challenging RFQ SPM7L4-09-U-A006), DLA is considering CPF’s request for a filter so that the firm can attempt reverse engineering of the filter, but no final decision on the request has been reached under DLA’s replenishment parts purchase or borrow program. AR at 10; AR, Tab 20, Declaration of DLA Bailment Officer, at 3-4.

¹⁰ During the course of this protest, CPF has raised additional issues, none of which we conclude have merit. For example, CPF argues in general terms that the agency has improperly labeled these filters as critical application items. We think an agency’s determination of which items are critical for the maintenance of a weapons system, and which are not, is a matter largely committed to agency discretion. Pem All Fire Extinguisher Corp., B-231478, July 27, 1988, 88-2 CPD ¶ 95 at 2-3, recon. denied, B-231478.2, Oct. 4, 1988, 88-2 CPD ¶ 313. In this respect, CPF has provided no basis for our Office to question the designation of these filters as critical application items.

DLA responds that it has properly used a brand-name specification in each of these RFQs because it lacks the data needed to specify its needs in any greater detail, or to evaluate alternative products, and because these procurements are under the simplified acquisition threshold. AR at 6. In addition, DLA argues that its use of brand-name purchase descriptions is permitted by the FAR where the brand-name items are essential to the government's needs, market research supports the lack of an alternative item, and, in the case of simplified acquisitions as here, the basis is documented in the contracting file. AR at 6-8 (citing FAR §§ 11.105, 13.106-1(b)). DLA did not prepare a written justification for these procurements under FAR § 6.302-1 because the use of such justifications is not required when an agency is using simplified acquisition procedures. AR at 7; see also FAR § 6.001(a).

In reviewing DLA's obligations in this situation, we look first to Part 13 of the FAR, which establishes the procedures for simplified acquisitions. These simplified procedures are designed to promote efficiency and economy in contracting, and to avoid unnecessary burdens for agencies and contractors, where, in cases like these, the value of the acquisition is less than \$100,000. See FAR § 2.101. In simplified acquisitions, agencies are only required to obtain competition to the "maximum extent practicable." 10 U.S.C. § 2304(g)(3); FAR § 13.104; Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 at 3. In a simplified acquisition, an agency can limit a solicitation to a brand-name item where the "contracting officer determines that the circumstances of the contract action deem only one source reasonably available (e.g., urgency, exclusive licensing agreements, brand name or industrial mobilization)." FAR § 13.106-1(b)(1). In such cases, we review protests of sole-source determinations—and, as here, the decision to limit the procurement to a brand-name—for reasonableness. Europe Displays, Inc., B-297099, Dec. 5, 2005, 2005 CPD ¶ 214 at 3-4.

For three of the RFQs, DLA has demonstrated a reasonable basis for using a brand-name specification for these filters. CPF asserts that DLA has no basis for limiting the solicitations to brand-name items, disputes the DLA's reliance on its database to furnish a justification for a brand-name procurement, and contends that the database is merely descriptive of previous procurement experience; its arguments provide no basis to sustain the protests. A contracting officer may rely on prior procurement history in the conduct of market research. International Filter Mfg., Inc., B-299407, Apr. 10, 2007, 2007 CPD ¶ 71 at 4. DLA has advised our Office, and the record supports its claim, that DLA does not have sufficient data to consider alternatives to the brand-name items. Under these circumstances, and particularly the fact that these procurements are properly valued at less than \$100,000, the FAR permits a streamlined approach to procuring these items. See FAR § 10.001(a)(2)(iii). Therefore, in our view, the protest record for the challenges to RFQs SPM7M1-08-U-J179, SPM7MC-09-T-0151, and SPM7M3-08-T-K838 supports the agency's brand-name only approach.

However, as noted above, RFQ SPM7L4-09-U-A006 provides an estimated quantity of 1,356 filters over the 2-year term of the IDPO. At the lowest historical price listed in

the RFQ, the value of this requirement is more than double the simplified acquisition threshold. Since, in our view, neither CPF nor DLA had adequately addressed the implications of this aspect of the record, we asked both parties to address whether DLA's explanation for its actions was consistent with the requirements of the FAR for requirements of this magnitude—that is, greater than \$100,000. Fax from GAO to Parties, Jan. 9, 2009, at 1.

In response, DLA argues that the IDPO does not obligate the government to purchase the estimated quantity, and in fact limits purchases to \$100,000. DLA argues that this approach is approved by the Defense Supply Center Columbus Acquisition Guide (DAG). Letter from DLA to GAO, Jan. 13, 2009, at 2 (citing DAG § 13.9002).¹¹ In its submission, CPF continued its arguments that the record here shows that the agency has failed to conduct proper acquisition planning. Letter from CPF to GAO, Jan. 14, 2009, at 1-2.

Although DLA argues that its actions are consistent with the statutes and regulations applicable to simplified acquisitions, the use of these procedures must be based on a reasonable expectation that the value of the requirement is at or below the simplified acquisition threshold. Where an agency uses simplified acquisition procedures to meet requirements that should reasonably be valued above the simplified acquisition threshold, our Office will sustain the protest. E.g., Global Commc'ns Solutions, Inc., B-299044, B-299044.2, Jan. 29, 2007, 2007 CPD ¶ 30 at 3 (protest sustained where agency used simplified acquisition procedures for commercial item acquisition that record demonstrated could only reasonably be valued above the applicable threshold).

We see no basis for DLA's approach of using simplified acquisition procedures where its estimated requirement for these filters cannot reasonably be expected to fall within the applicable threshold (\$100,000) for a simplified acquisition of this nature. Although DLA responds that the use of simplified acquisition procedures is appropriate here because it limits the purchase under each of these IDPOs to \$100,000, regardless of the value of the estimated quantity, we think DLA is, in essence, splitting these orders to allow the use of simplified acquisition procedures, which is expressly barred by FAR § 13.003(c)(2). Cf. Mas-Hamilton Group, Inc.,

¹¹ The guidance in DAG § 13.9002 does not address the question of what procedures are applicable where, as here, the purchase is expected to exceed \$100,000. It merely provides, in relevant part, that "IDPOs apply indefinite delivery contract concepts under simplified acquisition procedures They are most appropriate for repetitive, low dollar value items The aggregate total dollar value of orders issued against an IDPO Basic Agreement shall not exceed \$100,000" Letter from DLA to GAO, Jan. 13, 2009, exh. 1 (DAG excerpt). In any event, we note that DAG § 13.9002 was not promulgated as a regulation.

B-249049, Oct. 20, 1992, 92-2 CPD ¶ 259 at 5-6. Under this provision, agencies are advised:

Do not break down requirements aggregating more than the simplified acquisition threshold . . . into several purchases that are less than the applicable threshold merely to--

(i) Permit use of simplified acquisition procedures.

FAR § 13.003(c)(2); see also 10 U.S.C. § 2304(g)(2) (“A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified procedures . . .”).

In our view, DLA is using the streamlined features of simplified acquisitions where the solicitation on its face demonstrates that the use of those procedures is improper. Indeed, DLA’s experience under the resulting IDPO demonstrates this point: less than 1 month after issuance of the IDPO (which the RFQ described as having a maximum term of 2 years), DLA had already reached the \$100,000 ceiling. In addition, the procurement history for this part, and the estimated quantity identified in the solicitation, strongly suggest that DLA will make additional purchases to meet its continuing needs. We therefore sustain this protest.

CONCLUSION

The protests challenging RFQs SPM7AX-08-X-0508 and SPM7MC-09-T-0468 (B-400746 and B-400747, respectively) are dismissed. The protests challenging RFQs SPM7M1-08-U-J179, SPM7MC-09-T-0151, and SPM7M3-08-T-K838 (B-400750, B-400752, and B-400785, respectively) are denied. The protest of RFQ SPM7L4-09-U-A006 (B-400751) is sustained.

RECOMMENDATION

In a letter dated January 13, 2009, DLA informed our Office that although DLA counsel had advised agency buyers that a timely pre-award protest had been filed on October 15, 2008, “[r]egretfully, despite this directive, . . . an award was made . . . and two orders were issued. . . .” DLA directed the vendor to stop work under the orders on January 13. In its letter, DLA also explained that the orders that had been placed essentially “maxed out” the IDPO, in DLA’s parlance.

Since the IDPO was improperly issued, we recommend that the IDPO and the orders be terminated for the convenience of the government, if feasible. Furthermore, we recommend that DLA review its needs for this part and, if its requirements exceed the threshold for a simplified acquisition--as the record strongly suggests--DLA should procure this requirement using full and open competition, or properly justify any decision not to do so. We are also concerned that DLA has delayed providing a part to CPF to permit the firm to attempt to reverse engineer the filter being

purchased here, and therefore DLA should consider doing so promptly. Finally, we recommend that the protester be reimbursed the costs of filing and pursuing protest B-400751, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2008). CPF should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Gary L. Kepplinger
General Counsel