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Decision

Matter of: Tel-Instrument Electronics Corporation

File: B-419529; B-419529.2

Date: April 19, 2021

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DIGEST

1. Protest alleging that the agency's acquisition strategy will unduly restrict competition and result in a *de facto* sole-source acquisition is denied where the record shows that the agency had a reasonable expectation of competition.
 2. Protest alleging that agency treated protester unequally by holding pre-solicitation conferences with other offerors but not with the protester is denied where the agency was unaware that the protester was a potential offeror at the time, and the agency's requirements were not yet established.
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DECISION

Tel-Instrument Electronics Corporation (TIC), of East Rutherford, New Jersey, protests the terms of request for proposals (RFP) M67854-20-R-5117 issued by the United States Marine Corps for handheld radio test sets. The protester alleges that the solicitation requirements were drafted around one firm's products, creating a *de facto* sole-source acquisition, and that the agency erred by failing to share certain information with the protester prior to the issuance of the solicitation.

We deny the protest.

BACKGROUND

The agency is seeking to procure radio test equipment that will permit the agency to test its existing inventory of radios as well as potential future radios that operate at a higher radio frequency. Agency Report (AR), Tab 1, Contracting Officer's Statement and

Memorandum of Law (COS/MOL) at 4.¹ Specifically, the agency currently operates radios that use frequencies up to 2.6 gigahertz (GHz), but anticipates fielding 5 or 6GHz radios at some point in the next ten years. *Id.* at 4, 9-10. The agency notes that its existing radio testers, which were procured ten to fifteen years ago, are not capable of testing the agency's existing radios and the agency would like to ensure that this acquisition is "future proof." *Id.*

The agency initiated market research for this procurement in 2017, at which point the agency issued a request for information (RFI) seeking information concerning test sets capable of testing up to 2.6 GHz. See AR, Tab 6, 2017 RFI at 352. In response to the RFI, the agency received white papers from industry, and held an industry day in September of 2017. COS/MOL at 4. In 2018, the agency issued a second RFI, seeking information about test sets capable of testing up to 6GHz. AR, Tab 8, 2018 RFI at 392. This RFI, however, also included a draft purchase description for a test set that only tested up to 3GHz. *Id.* at 394. The agency represents that at the time of the 2018 RFI it had concluded that it would likely need 6GHz test sets, and, to the extent potential offerors questioned the reference to a 3GHz testing capability, the agency made clear at a subsequent industry day that it was in fact seeking 6GHz test sets. COS/MOL at 4-5. The agency received seven responses to the 2018 RFI. *Id.* The record reflects that the protester did not respond to either the 2017 or 2018 RFI.

In May and June of 2019, the agency met with four firms that expressed interest through their RFI responses and shared information about the status of the prospective radio test set procurement. AR, Tab 15, Statement of Engineering Lead and Meeting Notes at 760-765. For example, the agency advised two of the firms that it anticipated requiring testable product samples as part of any competition, and that certain testing scripts would not likely be required. *Id.* However, the agency also indicated uncertainty about many points, and provided conflicting information to different firms. *Id.* For example, on June 26, the agency told one firm that the agency anticipated making award "by the end of July," but a few weeks later told another firm that bid samples will be required as part of the evaluation by the "end of the year/January." *Id.* at 762, 764.

In October of 2019, the protester contacted the agency about the potential procurement for the first time and asked for updated technical specifications if any were available. Comments and Supp. Protest, exh. 1, att. 1, Emails from Chief Executive Officer (CEO) of TIC to Agency at 3. The agency replied that it was currently engaged in preparing a solicitation for publication and that the protester should watch for the public release of the solicitation. *Id.* at 2-3. Between November of 2019 and May of 2020 the agency prepared its final specifications, acquisition plan, market research report, and source selection plan. Comments and Supp. Protest at 3.

The agency ultimately issued the solicitation on July 22, 2020, using the commercial item acquisition procedures of Federal Acquisition Regulation (FAR) part 12. COS/MOL

¹ Because the agency report contains several separately paginated documents, citations are to the Adobe pdf pagination.

at 5. The RFP contemplated the award of a single fixed-price indefinite-delivery, indefinite-quantity contract. AR, Tab 12, RFP at 599-600. Among other things, the solicitation required test sets capable of testing radio signals up to 6GHz, and that offerors provide two test samples with their proposals. *Id.* at 601, 612-615. Proposals were due on October 21, 2020, thereby allowing potential offerors three months to submit proposals.

On August 24, the protester requested a 3-month extension of the date for receipt of proposals from October 21, 2020, to January 22, 2021, and the agency granted that extension. COS/MOL at 5. On December 23, 2020, the protester requested a second extension, explaining that the COVID-19 pandemic had delayed shipping of critical parts, and that the protester expected to have fully compliant samples by April of 2021. Protest at 5. The agency denied this second request for an extension. COS/MOL at 5. The agency received three offers in response to the RFP, including one from the protester. *Id.* Notably, the protester's response did not include test samples, while the other two responses included test samples. *Id.* On January 14, 2021, TIC filed this protest.

DISCUSSION

The protester principally alleges that the procurement is a *de facto* sole-source acquisition because 6GHz radio testers are currently only commercially available from one firm and the agency did not have a reasonable expectation of receiving more than one offer in response to the solicitation. Protest at 6-7. Accordingly, the protester argues that the agency erred by refusing to provide the protester additional time to complete its testing sample, which would permit greater competition.² *Id.* at 7-9. Additionally, the protester argues that, by holding pre-solicitation conferences with some offerors, but not with it, the agency violated FAR section 15.201(f). According to this FAR section, when an agency shares certain types of information with prospective offerors, the agency is required to make the shared information public as soon as practicable, but in any case no later than the next public release of information. Comments and Supp. Protest at 3-18.

De Facto Sole-Source Acquisition

² The protester advanced certain other arguments not addressed in this decision. We have considered these arguments and conclude that none provide a basis to sustain the protest. For example, the protester initially argued that the agency's 6GHz requirement was unduly restrictive of competition because the 6GHz requirement may not actually reflect the agency's testing needs. See Protest at 7. The agency responded to this protest argument at length in the agency report, but the protester's comments did not address the agency's rebuttal. See COS/MOL at 8-9. Where, as here, an agency provides a detailed response to a protester's assertions and the protester either does not respond to or rebut the agency's position, we deem the initially-raised arguments abandoned. *Citrus College; KEI Pearson, Inc., B-293543 et al.*, Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4.

The protester alleges that the procurement is a *de facto* sole-source because the agency did not have a reasonable expectation of receiving more than one offer in response to the solicitation. Protest at 6-7. Specifically, the protester argues that only one firm currently sells a 6GHz radio tester, and that the agency's market research revealed this fact. *Id.*; Comments and Supp Protest at 18-23. The protester further contends that our decisions have concluded that an agency should, in some cases, delay or restrict procurements where only one offeror can supply the agency's needs to avoid purchasing more than strictly necessary in a non-competitive environment. Protest at 7-9. Because the agency intends to procure the entirety of its needs for the next several years, the protester argues the agency erred by refusing to grant a second 3-month extension to obtain additional competition. *Id.*

Our decisions have concluded that, where only one source is currently capable of furnishing required goods or services, but other firms are developing capability to meet the agency's requirements, the agency may procure its immediate needs using noncompetitive procedures. See, e.g., *Raytheon Co.--Integrated Defense Sys.*, B-400610 *et al.* Dec. 22, 2008, 2009 CPD ¶ 8 at 11-12 (denying protest where the agency did not extend sole-source contracts' periods of performance past the time at which competitive procurements would be feasible to meet the Navy's needs); *Honeycomb Co. of Am.*, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209 at 2-3 (sustaining protest where the agency proposed to issue a sole-source contract with a 4-year period of performance where the urgency basis was not well supported, and the agency acknowledged it could take steps to improve competition).

In other words, we have explained that in a situation where competition does not exist but will exist in the near future, the Competition in Contracting Act of 1984, 41 U.S.C. § 253, requires agencies to purchase, in the noncompetitive environment, only what is necessary to satisfy needs that cannot await the anticipated competitive environment. *Ricoh Corp.*, B-234655, July 5, 1989, 89-2 CPD ¶ 3 (sustaining protest where agency issued a *de facto* sole-source award for four years of requirements where at least four firms were currently developing compliant products and anticipated being able to offer the products in less than 10 months).

The facts of this case, however, do not present those of a *de facto* sole-source procurement. Prior to the release of the solicitation, the agency conducted significant market research and received expressions of interest from seven prospective offerors in 2018. COS/MOL at 4-5. Additionally, the agency conducted meetings with four of those prospective offerors in 2019 and received assurances from at least two firms that 6GHz radio testers were either already in production or were then in development.³ *Id.*;

³ Relatedly, the protester argues that the agency erred in considering items currently in development in assessing the likelihood of competition in a procurement using the commercial item procedures of FAR part 12. See, e.g., Comments and Supp. Protest at 18-19. However, as the agency notes, the FAR permits the use of commercial items

AR, Tab 15, Statement of Engineering Lead and Meeting Notes at 760-765. Accordingly, the agency appears to have had a reasonable expectation of receiving more than one offer in response to this solicitation. The reasonableness of the agency's expectation of competition is reinforced by the fact that the agency received three offers in response to the solicitation, two of which included test samples.⁴ COS/MOL at 5. In short, there is no basis on these facts to conclude that this solicitation was a *de facto* sole-source acquisition.

Because the agency had a reasonable expectation that it would receive competition, we see no basis to conclude that the agency was required to limit its purchase quantities or further delay the procurement. The original RFP provided offerors 3 months to respond, and at the protester's sole request the agency provided a 3-month extension to permit the protester to complete its test samples. While the agency could have elected to provide a second extension, on these facts the agency was not required to do so.

Pre-Solicitation Conferences

The protester alleges that the agency violated FAR section 15.201(f) when it held pre-solicitation conferences with other offerors, but declined to provide the same information when the protester requested it. Comments and Supp. Protest at 3-18. Specifically, the

procedures to procure items that are not currently commercially available when those items will, among other things, either be available in time to meet the government's delivery orders, or can meet the government's needs with minor modifications. See COS/MOL at 7-8 (*citing* FAR 2.101).

Here, the agency's market research revealed that one firm currently offered a suitable test set and at least one other firm was then developing a suitable test set. See AR, Tab 15, Statement of Engineering Lead and Meeting Notes at 760-765. Additionally, several other firms believed that they could modify their existing products to meet the agency's needs. See AR, Tab 9, 2018 White Papers, *generally*. Accordingly, the fact that only one offeror had an existing commercially available product in July of 2019 does not render the agency's decision to use commercial item procedures inappropriate--the agency had a reasonable expectation that other offerors would either soon have commercially available products or could modify their existing products to meet the requirement.

⁴ The protester objects that one of the offerors modified its commercial offering to meet the government's needs and that its test sample may not be "fully compliant with all the Performance Specifications." Supp. Comments at 10. This argument is purely speculative, but, even assuming the protester is ultimately correct, it is irrelevant. Here, the question is whether the agency had a reasonable expectation of receiving multiple offers when it issued the solicitation. Even if only one of the offers is ultimately found to be technically acceptable, that does not retroactively establish that the agency was unreasonable in expecting that it would receive competition, especially where, as here, the agency actually received more than one potentially compliant proposal.

protester notes that the agency held meetings in June and July of 2019 with four other offerors. *Id.* At these meetings, the agency disclosed, among other things, the fact that there would be a forthcoming solicitation seeking 6GHz test sets and that the agency anticipated requesting test samples. *Id.* However, when the protester inquired about updated technical specifications for the forthcoming procurement in October of 2019, the agency declined to substantively respond, simply noting that the agency was preparing to issue the solicitation, which would provide updated technical specifications. Comments and Supp. Protest, exh. 1, att. 1, Emails from CEO of TIC to Agency at 2-3.

The protester contends that, because the solicitation was not issued until July of 2020, the other offerors had nearly a year's advanced notice that they would need to provide 6GHz test samples, information the protester did not receive. Comments and Supp. Protest at 14-18. The protester contends that this violates FAR section 15.201(f)'s requirements, and that the agency was required to make public the information revealed in pre-solicitation conferences as soon as practicable.⁵ *Id.* Additionally, the protester argues that, even if this FAR provision were not applicable, the agency's actions represent impermissible unequal treatment of the offerors because the other offerors received significant information much earlier and therefore had longer than the protester to prepare their test samples. Supp. Comments at 4-5.

The FAR provides, in relevant part, that:

When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage.

FAR 15.201(f).

We cannot conclude that the agency violated the FAR in this case. These conferences represented an early market research discussion with potential offerors. All parties acknowledge that these conferences took place prior to the agency's preparation of its final specifications, acquisition plan, market research report, and source selection plan. *See, e.g.*, Comments and Supp. Protest at 3. Moreover, the conferences were conducted at a time when the protester had not yet made its interest in the requirement known to the agency, and there is no suggestion in the record that the agency excluded any offerors which, at that point, expressed interest in the requirement.

⁵ Additionally, the protester notes that FAR section 15.201(f) also provides that "[w]hen conducting a presolicitation or preproposal conference, materials distributed at the conference should be made available to all potential offerors, upon request." However, in this case, the record does not suggest that the agency distributed any materials at any of the pre-solicitation conferences, so this provision is inapplicable on its face.

More significantly, it is not clear that the agency's requirements were sufficiently definite such that the disclosures represented the kind of "specific information necessary for the preparation of proposals," contemplated by the FAR. The protester is correct that the agency mentioned a need to submit test samples in at least two of those meetings, and test samples were ultimately required by the solicitation. See AR, Tab 15, Statement of Engineering Lead and Meeting Notes at 760-765. However, other items discussed in the conferences were either inconsistent between the recorded conferences or were not ultimately incorporated in the solicitation.

For example, in two of the conferences, the agency indicated that they would update the 2018 RFI specification to include a requirement that the test sets be capable of testing up to 200 watts with attenuation. *Id.* at 762, 764. However, this requirement was not incorporated in the RFP, which ultimately included the same wattage requirements as the 2018 RFI. See RFP at 615, 697; AR, Tab 8, 2018 RFI, at 397. As another example, on June 26, 2019, the agency told one firm that the agency anticipated making award "by the end of July," but in July of 2019 told a different firm that bid samples would be required as part of the evaluation by the "end of the year/January." AR, Tab 15, Statement of Engineering Lead and Meeting Notes at 762, 764. However, the solicitation was not issued until July of 2020 and originally contemplated an October response time, significantly later than either of the dates discussed in the conferences.

Offerors rely on preliminary information provided by an agency before it has issued a solicitation, or, as in this case, before the agency has even created an acquisition plan, at their peril. For example, an offeror seeking to develop a suitable test sample that had relied on the fuzzy timing provided in the conferences the agency held with potential offerors would have expended significant resources to accelerate development in vain. Because the agency's requirements and solicitation planning were still in flux at the time these conferences were conducted, we cannot conclude that the agency communicated any "specific information about a proposed acquisition that would be necessary for preparation of proposals" in the sense contemplated by the FAR.⁶

However, even assuming for the sake of argument that the information communicated at these conferences was the type of specific information necessary for the preparation of proposals contemplated by FAR section 15.201(f), the agency's response

⁶ Relatedly, the protester also argues that the agency's intent to seek test sets that could test up to 6GHz (rather than 3GHz) was new information provided at the conferences to which it was not privy. See, e.g., Supp. Comments at 11-12. We do not agree. In this regard, the agency's 2018 RFI specifically noted that the agency was seeking a test set that could test up to 6GHz. AR, Tab 8, 2018 RFI, at 392-394. While the RFI also included a draft purchase description that described a test set that only needed to test up to 3GHz, the RFI's explicit reference to 6GHz test sets made it clear that, at minimum, the agency was *potentially* interested in procuring 6GHz testers. *Id.* While, the pre-solicitation conferences also indicated that the agency was potentially interested in procuring 6GHz test sets, as discussed above, the agency's requirements were not yet definite when the conferences were held.

nonetheless met the minimum requirements of the FAR. In this regard, the FAR requires that the information “must be made available to the public as soon as practicable, but no later than the next general release of information.” FAR 15.201(f). Here, once the agency began to prepare for the issuance of a solicitation in September of 2019, the record does not show any further releases of information by the agency to prospective offerors. That is to say, the next general release of information was the publication of the solicitation in July of 2020. This meets the FAR’s minimum requirement to provide the information “no later than the next general release of information.”

Finally, concerning the protester’s allegations of unequal treatment, we cannot conclude that the agency engaged in impermissible unequal treatment. While the agency did not hold a pre-solicitation conference with the protester, we note that the protester had not contacted the agency concerning the prospective requirement at the time the agency was holding the conferences. The protester did not respond to either of the agency’s original RFIs, did not attend industry day events in 2017 or 2018, and only made contact with the agency concerning this requirement in October of 2019. Had the protester expressed interest in the requirement earlier, there is no doubt that the protester would have received the same early, yet indefinite, information other offerors received.

Moreover, we note that the agency issued the solicitation with a 3-month response time, and, during that 3-month period, the protester requested and received a 3-month extension to complete its test sample. No other offeror requested additional time to respond, but the agency nonetheless attempted to encourage competition by providing more time to permit the protester to compete. See COS/MOL at 5-6. That is to say, the protester received approximately six months to respond to the solicitation after receiving all necessary information about the agency’s requirements.

Significantly, the decisions the protester relies on to support its contention that the agency treated it unequally are inapposite. For example, the protester cites *Ems Dev. Corp.*, B-242484, May 2, 1991, 91-1 CPD ¶ 427, for the proposition that it is improper for an agency to conduct a competitive procurement after initially giving one firm material information for use in preparing its technical proposal without providing that information to the other competing firms. First, that case relied on prior FAR provisions that have since been substantively amended. *Ems Dev. Corp.*, *supra* at 1-2 (*citing* FAR 15.410(c)). Moreover, even setting that aside, the case is distinguishable on its facts. In *Ems Dev. Corp.*, the agency provided relevant information to one offeror prior to the issuance of the solicitation, but did not include that information in the published solicitation, resulting in unequal access to information during the competition. *Id.* at 2-3.

Here, there is no suggestion that the agency omitted relevant information from the solicitation--once the agency issued the solicitation and began the competition, all offerors were competing on a level playing field.

The protest is denied.

Thomas H. Armstrong
General Counsel