



Decision

Matter of: Armorworks Enterprises, LLC

File: B-401671.3

Date: November 6, 2009

Christopher R. Yukins, Esq., and Avi Baldinger, Esq., Arnold & Porter LLP, for the protester.

Major Walter Dukes, U.S. Army Materiel Command, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

GAO does not have jurisdiction to consider protest challenging agency's decision to issue three separate delivery orders for body armor plates where each of the delivery orders is valued below the statutory threshold of \$10 million, and the record does not support protester's contention that agency's decision to procure the plates by separate delivery orders was a pretext, that is, a deliberate effort to evade GAO's bid protest jurisdiction.

DECISION

Armorworks Enterprises, LLC, of Chandler, Arizona, protests the terms of three requests for quotations (RFQ), issued by the U.S. Army Materiel Command, for Small Arms Protective Insert (SAPI) plates (body armor) to be delivered to the government of Afghanistan. Each RFQ is for a different SAPI plate size (small, medium, and large). The plates are to be ordered under an existing multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contract for Foreign Military Sales deliveries. Armorworks argues that splitting the plates by size under three separate RFQs was irrational, and that the agency acted in violation of the Small Business Act because it failed to set aside any part of the requirement for small business concerns.

We dismiss the protest.

The record reflects that the agency received a request from the U.S. Army Security Assistance Command (USASAC) to purchase approximately 57,000 SAPI plates for delivery to the government of Afghanistan. On September 1, 2009, USASAC informed the agency that the need for the plates was "urgent" and requested that the

purchases be “expedited.” Agency Memorandum, Sept. 10, 2009. As a result of this request, on September 2, the agency issued three separate RFQs, one for 17,844 small SAPI plates with an estimated value of \$6 million, a second for 28,782 medium SAPI plates with an estimated value of \$9 million, and a third for 10,958 large SAPI plates with an estimated value of \$6 million. The RFQs had a closing date of September 9 and provided that the selected contractors must complete delivery within 90 days after receipt of the order. Agency Memorandum, Sept. 10, 2009.

On September 9, Armorworks, one of the ID/IQ contract holders, protested the terms of the RFQs, arguing that it was improper to split the requirement for the plates into three separate RFQs by size. According to Armorworks, no body armor requirement has ever been divided this way in the past. Rather, Armorworks asserts, SAPI plates are always ordered in combined groups of small, medium, and large, so that when they are delivered to the users, there is no risk that soldiers of one particular size—small, medium, or large—will be left without protection. In addition, Armorworks maintains that the agency should have “set these procurements aside for small business, in whole or in part.” Protest at 2.

The agency responded by asserting that our Office does not have jurisdiction over the protest challenging the RFQs because each RFQ concerns the award of a separate delivery order with an estimated value of less than \$10 million, the statutory threshold for our Office’s task and delivery order protest jurisdiction. We agree.

This Office’s authority to consider task and delivery order protests was recently expanded by section 843 of the National Defense Authorization Act of Fiscal Year 2008 (NDAA). In this regard, the NDAA authorizes this Office to consider protests filed in connection with task orders that are valued in excess of \$10 million. Pub. L. No. 110-181, 122 Stat. 3, 239 (2008).

There is no dispute that each of the contemplated delivery orders is valued at less than \$10 million. Rather, Armorworks argues that our Office should consider the RFQs as reflecting a single requirement with a combined value of \$21 million. In this regard, Armorworks contends that the agency’s decision to divide the plates into three separate delivery orders was essentially a pretext, designed to avoid the \$10 million threshold and thereby avoid the protest jurisdiction of our Office. Armorworks reaches this conclusion based on the fact that dividing the orders by plate size is allegedly without precedent, coupled with its belief that such a division is “irrationally dangerous to troops and morale.” Protester’s Response to Agency’s Memorandum, at 4.

Fundamentally, Armorworks’ pretext argument is premised on the notion that the agency’s decision to separately procure the plates by size was made in bad faith. Government officials are presumed to act in good faith, Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 4, and we will not aggregate separate task or delivery orders in connection with a multiple-award ID/IQ contract, for the purpose of establishing the \$10 million jurisdictional threshold,

absent a clear showing that the agency's decision to issue separate orders was made solely to evade our protest jurisdiction.

Here, the record does not support a finding that the agency's decision to separately order its plates by size was a pretext as Armorworks suggests. Rather, the agency has explained that it divided the requirements into three separate orders according to size based on its understanding that contractors' SAPI production lines are established for a particular size; issuing separate delivery orders for the SAPIs by size, the agency reasoned, would allow prospective contractors to focus on making only one size. This in turn would encourage more contractors to compete and thereby help ensure that all of the urgently needed items would be provided within the short 90-day timeframe for delivery.¹ Agency Memorandum, Sept. 10, 2009. Given the agency's rationale for separating the orders by plate size, we have no basis to conclude that the agency's decision to issue three separate task orders was a pretext, that is, a deliberate effort to evade our protest jurisdiction. Accordingly, because each RFQ is for a delivery order which is valued at less than \$10 million, our Office does not have jurisdiction to hear Armorworks' protest of the RFQs.

The protest is dismissed.

Lynn Gibson
Acting General Counsel

¹ Armorworks contends that the agency's actions are inconsistent with a separate procurement for approximately 61,000 plates, which the agency did not divide by plate size. That acquisition, however, was not identified as urgent and had a longer delivery time of 6 months from the date of award.