



Comptroller General
of the United States

Washington, D.C. 20548

R. Arsenoff

Decision

Matter of: Forster Enterprises, Inc.

File: B-237910

Date: April 5, 1990

Charles M. Colt, for the protester.
Millard F. Pippin, Office of the Assistant Secretary,
Department of the Air Force, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Agency reasonably limited a procurement of hospital generators to the one source known not to require extensive first article testing where record shows that a continuing supply of items was urgently required to protect lives and that no other sources, including the protester, could make timely delivery.
2. Agency properly elected not to synopsise a solicitation restricted to the one source known to be able to meet urgent delivery requirements; protester, who could not meet urgent delivery requirements, was not prejudiced by a failure to synopsise the solicitation or to timely synopsise contract award.

DECISION

Forster Enterprises, Inc., protests the award of contract No. F04606-89-D-0112 to the Libby Corporation by the Department of the Air Force for 100-kilowatt (KW) generators used to power mobile emergency hospitals as part of the Deployable Medical Systems (DEPMEDS) program. Forster alleges that the agency's use of noncompetitive procedures was not properly justified and that it was otherwise improperly denied an opportunity to compete as a result of the agency's failure to synopsise the solicitation and to timely synopsise the award to Libby.

We deny the protest.

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As the result of a competitive procurement conducted by the Air Force, Forster was awarded a contract for 100-KW generators in support of the DEPMEDS program on August 31, 1989. Because the protester had never produced the item first article testing was required. Under its contract, Forster is scheduled to submit a first article test report in December 1990 and government approval is scheduled for February 2, 1991, assuming that Forster timely passes first article testing, delivery of production units is scheduled to begin no sooner than February 2, 1992.

On June 9, 1989, while a pre-award survey was still being completed on Forster, the DEPMEDS project manager sent a request to the contracting activity which reported that the current stock of 100-KW generators would be exhausted by April 1990 resulting in a "shortfall" in the needed items between that time and the time Forster could be expected to begin delivery under its then-anticipated contract.^{1/} Given the DEPMEDS fielding requirements for mobile hospitals during that period, the request stated that a failure to obtain generators during the shortfall period would jeopardize the lives of military personnel because of a lack of medical treatment facilities. Accordingly, a restricted-source procurement to cover the shortfall requirements was requested pursuant to 10 U.S.C. § 2304(c)(2) (1988) on the basis that there was an "unusual and compelling urgency" because the government would be seriously injured if the requirements were subject to competitive procedures. Libby was identified by DEPMEDS as the only source which could make timely deliveries since it alone had first article testing approval in place.

As a result, on September 20 the Air Force completed a Justification and Approval (J&A), pursuant to Federal Acquisition Regulation (FAR) § 6.303, authorizing a restricted-source procurement for 208 generators to cover the expected shortfall on the basis of an "unusual and compelling urgency." The J&A was properly certified and approved and included a determination not to synopsise the procurement in the Commerce Business Daily (CBD) pursuant to FAR § 5.202(a)(2). Libby was then awarded an unpriced letter contract not to exceed \$46,500 per unit on September 29, at which time the award was reported to Congress and the media. Forster states that it learned of the award to Libby on November 21. The agency reports that

^{1/} An on-site plant facility survey was conducted on May 22 and a resulting report was issued on May 31; however, a pre-award financial report was not completed until July 7.

a synopsis of the award was not sent to the CBD until November 30 due to an administrative error.

Initially, Forster makes several allegations with respect to the sufficiency of the J&A. While admitting that DEPMEDS is urgent "to a certain extent," the protester contends that the agency has not shown that the generators themselves are any more of a limiting factor in the deployment of hospitals than any other components. Forster also states that the issue of how the government will be "seriously injured" if competition is not restricted is not addressed in the J&A. Also, the protester suggests that the "real reason" for the urgency was delay in the award of its own contract. This according to the protester is evidenced by the agency taking more than a month to complete its pre-award facility survey report, and by a subsequent delay in award until August 1989.

Further, Forster contends that the Air Force never considered potentially available competition from other sources before issuing the J&A. The protester maintains that it voluntarily offered an accelerated delivery schedule in May 1989 at its on-site pre-award survey which was allegedly ignored by the agency, and Forster contends that, had it been given the incentive of an unpriced contract like Libby, it could have taken steps to accelerate delivery to meet the June 1990 deadline required to meet the shortfall less expensively than Libby. The protester also speculates that two other firms would have been willing to compete in an unpriced competition, but acknowledges that at least one of these firms does not presently have first article approval.

Finally, Forster argues that the decision not to synopsize the solicitation was improper because the J&A was insufficient, for the reasons advanced above, to authorize an urgent procurement--a necessary prerequisite to waiver of the CBD publication requirement; and, the protester asserts that the delay in synopsizing the award to Libby precluded it from protesting in time to enter the competition when it could allegedly have met the shortfall delivery date of June 1990.

Under the Competition in Contracting Act of 1984 (CICA), an agency may use noncompetitive procedures to procure goods where its needs are of such an unusual and compelling urgency that the government would be severely injured if it is not permitted to limit the number of sources it solicits. 10 U.S.C. § 2304(c)(2); FAR § 6.302-2(a)(2). This authority is limited by the provisions at 10 U.S.C. § 2304(e), which require agencies to request offers from as many sources as

practicable. An agency using the urgency exception may restrict competition to the firm or firms it reasonably believes can perform the work promptly and properly.^{2/} See Industrial Refrigeration Serv. Corp., B-220091, Jan. 22, 1986, 86-1 CPD ¶ 67. We will object to the agency's determination where the record shows that the decision lacks a reasonable basis. Servrite Int'l, Ltd., B-236606, Dec. 6, 1989, 89-2 CPD ¶ 520.

For the reasons discussed below, we find that the contracting agency's determination to restrict competition to Libby in order to meet the shortfall was reasonable.

We have reviewed the J&A together with the original DEPMEDS request upon which it was based. Contrary to the protester's speculation that mobile hospital components other than the generators in issue could have just as easily limited deployment of the medical facilities, the J&A explicitly contains a finding, endorsed by the Army Office of the Surgeon General, that: "[w]ithout these generators, hospitals would not be functional [and] fielding of the DEPMEDS would be halted." In the absence of any substantive response from the protester, we are presented with no basis to disagree with the agency's conclusion that a critical need impacting military operations existed as a result of the expected shortfall in generators. Servrite Int'l, Ltd., B-236606, supra. Likewise, we find that, contrary to the protester's assertions that the J&A does not address whether the lack of the generator will result in injury to the government, the Air Force expressly found in the J&A that without the generators the hospitals would not function and, as a result, lives would be put in jeopardy.

As to Forster's suggestion that the "real reason" for the urgency was administrative delay in the award of its own contract, we have reviewed the record of the procurement and find no unusual delays as suggested by the protester. The

^{2/} Forster also contends that the urgency exception in FAR § 6.302-2 cannot be used to restrict competition to only one offeror and suggests that, in such circumstances, FAR § 6.302-1 (only one source will satisfy agency needs) must be used. We disagree. Where the record shows only one source is capable of timely meeting an agency's urgent needs based on its prior established production of an item which would permit waiver of a first article test requirement, competition may be limited to that source under FAR § 6.302-2. Daylight Plastics, Inc., B-225057, Mar. 10, 1987, 87-1 CPD ¶ 269, aff'd, Daylight Plastics, Inc.--Reconsideration, B-225057.2, Apr. 28, 1987, 87-1 CPD ¶ 440.

request for proposals was issued in January 1989 and, after the issuance of several technical amendments, it closed in April 1989. Approximately 2 weeks after closing, the contracting agency requested a plant survey of Forster and a report responsive to that request was completed about 1 month later in May 1989. A financial survey of the protester was conducted, and after several exchanges requiring Forster's cooperation, it was completed in early July 1989. Award was made on August 31. We do not find that this timetable shows any unreasonable delay in the procurement process considering the multi-year nature of the award to be made, and Forster's first-time participation in such a procurement. The shortfall was discovered by the requiring activity in June 1989 and promptly reported to the contracting officer. Thus, we find nothing in the record to support a conclusion that the Air Force acted in such a way as to bring the urgency of the shortfall on itself, as the protester suggests. See Tan-Tex Indus., 68 Comp. Gen. 663 (1989), 89-2 CPD ¶ 209.

Further, we find no support for Forster's claim that other firms, including itself, could have successfully participated in a competition to deliver generators by June 1990. The Air Force has provided evidence to the effect that, notwithstanding the protester's May 1989 offer to advance its delivery schedule from February 1992 to June 1990, such an acceleration could not be reasonably expected to be accomplished in view of absolute time requirements associated with protracted engine testing which is an important element of the first article testing process, and in view of Forster's documented need to greatly expand the size of its facility and expand its work force just to meet its present contractual obligations, which provide for January 1992 delivery at the earliest.

The protester's principal response to the agency's position is to merely characterize its views as "pessimistic." We have no basis to dispute the Air Force's conclusion that Forster would have significant problems delivering the generators when they were needed to meet the expected shortfall. Moreover, Forster has provided no evidence to rebut the agency's finding that Libby was the only firm which would not require extensive first article testing before it could deliver the needed generators. Accordingly, we have no basis for concluding that the agency acted unreasonably in restricting the procurement as it did. Servrite Int'l, Ltd., B-236606, supra.

Finally, since we have found the J&A to have properly supported a restricted procurement on the basis of urgency, the protester is incorrect in its assertion that a CBD

synopsis was required with regard to the solicitation. See FAR § 5.202(a)(2) (authorizing waiver of the CBD requirements in such situations). As to Forster's suggestion that it was prejudiced by the delay in publicizing the award from the end of September 1989 until November 1989, we disagree since, as discussed above, the record does not support the protester's assertion that it could have met the required delivery schedule in any event.

The protest is denied.



 James F. Hinchman
General Counsel