ISE 742

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: E. Huttenbauer & Son, Inc.

File: B-252320.2; B-252320.3

Date: June 29, 1993

Samuel Huttenbauer, Jr. for the protester.
Michael Trovarelli, Esq., and Michael Briskin, Esq., Defense Logistics Agency, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against sole-source awards of military rations contracts is denied where the contracting agency reasonably determined that only one known firm was capable of promptly and properly meeting the urgent supply requirement caused by Operation Restore Hope in Somalia; the agency was not required to solicit the protester where, based on the firm's delinquent and improperly performed current contract for the same item, the agency reasonably concluded that the firm is unable to perform the requirement.

DECISION

E. Huttenbauer & Son, Inc. protests the Defense Logistics Agency's (DLA) multiple sole-source awards to Vanen Foods Company under request for proposals (RFP) No. DLA13H-92-R-9059, for food traypacks, also known as, T-rations. The protester argues that it improperly was denied an opportunity to compete for the procurement.

We deny the protest.

The traypack, part of the Army field feeding system, consists of an entree, vegetable, and starch or dessert sealed in a multi-serving metal can. It is heated and served in its own can at field locations where more sophisticated feeding support is not available. Huttenbauer was awarded a prior contract, No. DLA13H-92-C-2160, for traypacks in February 1992 in the amount of $11,715,421. As modified, Huttenbauer's contract required 582,912 cans of 9 types of traypack entrees, with staggered delivery to be completed by January 29, 1993. Under its contract, the protester experienced performance problems including submission of nonconforming first articles and failure to

meet numerous delivery dates. While the protester claimed that its delinquencies were due to seasonal shortages of raw ingredients, it also became apparent to the agency through random sampling of the delivered cans that the firm was experiencing quality problems, as many of the can seams were defective for failing to meet the required measurements, indicating lack of a hermetic seal. In November 1992, the agency decided that, rather than proceed with a termination for default on the basis of the failed first articles, missed deliveries, and defective can seams, it would attempt to help the protester cure its quality problems by providing it a government-owned seamer. In this connection, on November 23, the protester submitted a proposed delivery schedule extending through February 19, 1993, for the 230,000 cans outstanding under the contract, contingent on the government-owned seamer being installed by December 9.

Shortly thereafter, on December 17, DLA was informed of an urgent requirement for 329,260 cans of 13 varieties of traypack entrees for troops in Somalia. This requirement, with an estimated value of $6,500,000, was generated in part by the increased operational needs of the services as they were called upon to support Operation Restore Hope, and also by the fact that the traypack stock had been depleted due to the delinquencies under the protester's contract. Substitute rations were not suitable to fill the requirement due to the need for non-labor intensive field feeding, which the tray packs provide. The agency determined that, based on a projected manufacturer lead time of 25 days, award by December 31 was necessary to meet the January 29, 1993, required delivery date. At the time the new requirement arose, 228,519 cans remained to be delivered under the protester's contract, the protester was 17,783 cans behind its proposed delivery schedule, and negotiations between it and the agency were on-going concerning the terms for use of the government-owned seamer. Additionally, the agency had discovered that 65 lots (totaling 101,398 cans) accepted under the protester's contract had defective can seams, thus necessitating warranty action. Based on these deficiencies in Huttenbauer's performance and the successful performance history of Vanee, the only other known producer of the required items, the agency determined that only Vanee could reliably deliver the large quantity of traypacks within the required time frame.

The agency justified its decision to employ noncompetitive procedures based on the exception to full and open competition granted in the Competition in Contracting Act of 1984 (CICA) for unusual and compelling urgency, 10 U.S.C. § 2104(c)(2) (1988). See also Federal Acquisition Regulation (FAR) § 6.302-2. The requisite justification and approval was approved by the head of the DLA procuring activity and the solicitation was issued to Vanee on

December 23, with a closing date of December 28. However, thereafter, the agency was unable to negotiate a contract with Vanee that would meet the originally requested January 29 delivery date for all items. As a result, multiple awards in the total amount of $5,408,106 were made to Vanee as follows: (1) on December 29 for 33,408 cans with delivery on January 29; and (2) on January 4 for 47,424 cans with delivery on January 29, and an additional 100,416 cans with delivery on February 12 and February 26. For six of the entree types covering the remaining 148,032 required cans, the agency was unable to make a price reasonableness determination without the submission of cost and pricing data. As a result, negotiations were not concluded on these items until February 10, with an offered delivery of 62,592 cans on March 8 and the remaining 85,440 cans on March 20.

In the meantime, the situation on the protester's contract had further deteriorated. Negotiations between DLA and the protester concerning the use of the government-owned seamer had collapsed on February 3 when the protester refused to pay the lowest rental fee permitted by the FAR. See FAR §§ 45.403 and 52.245-9(j)(iii). While the protester had made some deliveries between December 20 and February 10, 128,916 cans remained to be delivered, which was a quantity greater than the protester's entire production for the preceding 2-1/2 months. Based on these circumstances, DLA concluded that the protester could not match the delivery schedule proposed by Vanee for the remaining 148,032 cans, and a final award for that quantity was made to Vanee on February 10. This protest ensued. The protester contends that it in fact was capable of filling the urgent requirement, and that the agency thereafter improperly excluded it from the competition.

Under 10 U.S.C. § 2304(c)(2), an agency may use noncompetitive procedures to procure goods or services where the agency's needs are of such unusual and compelling urgency that the government would be seriously injured if the agency were not permitted to limit the number of sources from which it solicits bids or proposals. An agency using the urgency exception may limit competition to firms with satisfactory work experience which it reasonably believes can promptly and properly perform the work. See also FAR § 6.302-2(a)(2); Jay Dee Militarywear, Inc., B-243437, July 31, 1991, 91-2 CPD ¶ 105. In these circumstances, the agency is not required to solicit an incumbent contractor if, in the agency's reasonable judgment, there is doubt based on the incumbent's prior record that the firm can perform acceptably. Sanchez Porter's Co., 69 Comp. Gen. 426 (1990), 90-1 CPD ¶ 433; Atlanta Investigations, B-227980; B-227981, July 30, 1987, 87-2 CPD ¶ 121. We will object to an agency's determination in this regard only when it lacks

a reasonable basis. See AT&T Information Servs., Inc., 66 Comp. Gen. 58 (1986), 86-2 CPD ¶ 447; Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579.

DLA's decision not to solicit an offer from Huttenbauer was reasonable. The record before the contracting officer showed that under the firm's current contract involving less critical conditions and normal lead times, Huttenbauer had submitted nonconforming first articles, had been unable to meet delivery schedules, and also had delivered defective items. This record alone, we think, provided support for the contracting officer's view that Huttenbauer could not promptly and properly perform the urgent requirement with its shorter, more critical delivery schedule. Moreover, the delivery schedule Huttenbauer proposed to cure the delinquent deliveries under its current contract indicated that deliveries under that contract could not be made before the agency's urgently needed supplies were required, further supporting the conclusion that the firm could not immediately begin production on the urgent requirement. (In contrast, Vanee had few or no items under contract and could immediately begin production.) Huttenbauer claims it could have filled this urgent requirement by "utilizing a second and possibly a third shift." However, this representation reflects potential rather than proven ability; an agency is not required to accept the risk of performance that such a statement represents, particularly when the agency's needs are urgent and the firm's recent performance record does not provide any reason to believe the firm can perform as required. See Jay Dee Militarywear, Inc., supra.

Huttenbauer argues that its poor past performance was created by agency actions such as (1) the agency's delay in awarding its current contract, resulting in the firm being unable to secure poultry during a time of seasonal shortage; (2) improper first article rejections which caused deficiencies--the protester complains that the agency acted inconsistently, passing a first article item on can content while failing it on the basis of defective seams, and then passing another first article for the same item on seams, but failing it for content--and delinquent deliveries; and (3) a defective chili con carne specification, resulting in 12 days of downtime.

The question of whether Huttenbauer's prior performance deficiencies, including the failed first articles, were excusable is a matter of contract administration and

therefore are not for resolution under our Bid Protest Regulations. See 4 C.F.R. § 21.3(f)(1) (1993); Corbin Superior Composites, Inc.--Second Recon., B-242394.5, Aug. 20, 1991, 91-2 CPD ¶ 169; Shelf Stable Foods, Inc., B-226111; B-226112, Apr. 10, 1987, 87-1 CPD ¶ 400. Our review is limited to considering whether the contracting officer's determination not to solicit the firm was reasonable based on the information available at the time. See Shelf Stable Foods, Inc., supra. The contracting officer's determination here was reasonable.

First, the delay in the award of Huttenbauer's contract was due, not to some improper agency action, but to difficulties in determining the reasonableness of the protester's offered prices, including inadequate audits performed by the Defense Contract Audit Agency; agencies are required to determine that proposed prices are reasonable. FAR §§ 15.805-2 and 15.805-3; Servrite Int'l, Ltd., B-241942.3, June 13, 1991, 91-1 CPD ¶ 567. In any case, the firm elected to extend its offer when the award was delayed, and did not raise the issue of seasonal shortages of poultry until it became delinquent on the resulting contract. Second, the mere fact that the agency passed and then failed different first articles for the same item in no way establishes improper agency action. Rather, these rejections on their face raise the issue of inadequate quality control in the protester's manufacturing process. Finally, although the agency has informed us that it will pay Huttenbauer $32,500 for downtime related to the allegedly defective chili con carne specification, the protester has not alleged, and there is no reason to believe, that the alleged specification defect for only one of the nine entrees under the contract was a significant cause of the firm's overall performance problems.[1]

The protester also complains that the agency contributed to its delayed performance by conducting an unwarranted bell jar test on its first articles.[2] The agency reports (and Huttenbauer does not dispute) that this test in fact was performed only on delivered cans, during inspection under the warranty clause of the contract, and not on first articles. In either case, we fail to see how this amounts to improper action by DLA. DLA reports that it used the

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[1]While the protester generally contends that other specifications were defective, it fails to allege that any specific performance problems were attributable to those specifications.

[2]This test consists of putting the cans under a vacuum in order to monitor them for seam leaks, which would indicate the lack of a hermetic seal.

bell jar test solely to determine whether the delivered cans could be accepted despite the fact that the seams were found to be nonconforming to specifications based on the usual can seam teardown test; any resulting delay in performance thus was due, not to improper action by DLA, but to Huttenbauer's furnishing of cans with defective seams. Indeed, the record indicates that the protester has not filed any downtime claims based on the bell jar test performed on the delivered cans and, in fact, acknowledged that "its can seam may be the problem." Huttenbauer complains that Vanee's cans were not subjected to the bell jar test. However, the record indicates that cans delivered under Vanee's contracts passed the seam teardown test, and thus did not need further testing.

Huttenbauer argues that the need for this sole-source action stems from the Army's lack of advance procurement planning. According to Huttenbauer, the lack of inventory would not have existed if the agency had timely awarded the firm's current contract. 10 U.S.C. § 2304(f)(5)(A) (1988) (award of a contract using other than competitive procedures is prohibited where necessitated by a lack of advance planning by contracting officials). This argument is without merit. As discussed, the record establishes that the protested procurement was created by the unanticipated deployment of troops to Somalia and the resulting increase in needed traypacks, as well as the depletion of stock to cover that requirement. The record further shows that the depleted stock was caused by delinquent and defective deliveries under Huttenbauer's contract. Even if there had been timely and proper delivery under the protester's contract, the record indicates that the stock would have been at least 133,497 cans short of meeting the unanticipated urgent requirement. The delay in awarding Huttenbauer's contract based on the agency's legitimate need to obtain price reasonableness information did not amount to a lack of advance planning.

We conclude that DLA reasonably excluded Huttenbauer from the competition based on past performance problems, and thus properly made award to Vanee based on urgency.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel