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Decision

Matter of: Humanetics Innovative Solutions

File: B-416979.3

Date: May 15, 2019

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DIGEST

Proposed sole-source acquisition of a follow-on contract for highly specialized equipment is unobjectionable where no further procurements are anticipated and the agency reasonably determined that award to any other source would cause unacceptable delays in fulfilling the agency's requirements.

DECISION

Humanetics Innovative Solutions, of Farmington Hills, Michigan, protests the Department of the Army's decision to pursue a sole-source acquisition of up to 40 advanced technology blast test dummies, known as warrior injury assessment manikins (WIAMen) anthropomorphic test dummies (ATDs) from Diversified Technical Systems Inc. (DTS), of Seal Beach, California.¹ The agency opted not to compete the

¹ As the Army explains, "[e]ach WIAMan ATD consists of the ATD Structure and an embedded Instrumentation and Data Acquisition System (IDAS)." Agency Report (AR), Tab 16, Draft Justification & Approval (J&A) at 3. In this decision, the term ATD refers to the manikin alone, independent of the data-capturing components embedded within the manikin. The data acquisition system (DAS) is a component part in an ATD that records the test results. The IDAS includes the DAS, load cells that measure the force applied to the ATD during testing, and other instruments. Protester Supp. Briefing, Ex. 1, Decl. of Humanetics Exec. Vice President, Mar. 17, 2019, ¶¶ 11.

procurement after determining that the time needed to reperform testing of any non-DTS WIAMan or ATD would result in unacceptable delay to the procurement and substantial duplication of testing costs. Humanetics raises several arguments as to why the WIAMan acquisition can and should be competed, either in whole or in part. The protester also contends that the Army failed to engage in reasonable advance planning, which affected the Army's ability to use full and open competition in this procurement.

We deny the protest.

BACKGROUND

In March 2011, the Army initiated market research into the creation of a purpose-built WIAMan to assist the Army in improving the protective design of Army combat vehicles by assessing the vehicles' ability to protect soldiers from under body blasts.² AR, Tab 4, Market Research Report at 1; Hearing Transcript (tr.) at 294:17.³ In 2012, the Army, out of the Army Contracting Command (ACC)-Aberdeen Proving Ground (APG), contracted with Humanetics for the WIAMan first generation design concepts and initial technical data package (TDP). COS/MOL at 5. In September 2014, ACC-APG contracted with DTS to develop the WIAMan instrumentation concepts. Id.

On December 19, 2014, ACC-APG competitively awarded cost-plus-fixed-fee contract No. W911QX-15-D-0001 to DTS for "the research, design, engineering, development, fabrication, testing, and analysis of [a] Gen[eration] 1 prototype [WIAMan . . .], including instrumentation and support equipment [. . .] associated project management, system integration, and logistic support," at a maximum value of \$31 million.⁴ AR, Tab 15, DTS

² The WIAMan "measures the force, acceleration, and rotational velocity [that] a 50th percentile [for size] male soldier would experience in an [under body blast]." Contracting Officer's Statement (COS)/Memorandum of Law (MOL) at 4-5. Insufficient protection from under body blasts in theater results in significant injury to vehicle passengers, including limb amputations and compartment syndrome, a condition in which the limb remains attached but is heavily damaged. Hearing Transcript (Tr.) at 373:4, 375:12-25. Importantly, the WIAMan's value to the Army is realized only when it is used in conjunction with testing of an Army vehicle to improve vehicle safety design.

³ These citations are to the transcript for the hearing our Office held on April 19, 2019.

⁴ DTS manufactures various types of DAS for incorporation into ATDs fabricated by other companies, including Humanetics. Intervenor Comments, Decl. of DTS Project Manager, Mar. 18, 2019, ¶ 3. Humanetics manufactures ATDs, into which it integrates commercially-available DAS. Protester Comments, Decl. of Humanetics Exec. Vice President ¶ 15. In its science and technology contract, DTS subcontracted the production of the ATD components. COS/MOL at 11. DTS originally proposed Humanetics as a subcontractor for the engineering and fabrication of the manikin. Id. at 5 n.2. After DTS refused to sign a non-compete agreement with Humanetics, Humanetics elected not to continue as DTS' subcontractor. Id.

Sci. & Tech. Contract at 1-2, 6; AR, Tab 4, Market Research Report at 3. DTS was to deliver a TDP in accordance with MIL-STD-31000A. AR, Tab 15, DTS Sci. & Tech. Contract at 80. For both the first-generation WIAMan and the internal DAS and support equipment, DTS' contract provided that "[t]he TDP level shall be 'Developmental,'" as provided in MIL-STD-31000A. Id. at 80, 87; see also id. at 11.

The effort to develop the WIAMan IDAS took approximately 2 years. Tr. at 21-22. Once the WIAMan achieved technology readiness level (TRL) 6,⁵ it was eligible for a production-type contract. AR, Tab 4, Market Research Report at 3; tr. at 360:17-19. At this point, there was a change in contracting offices from ACC-APG, which was responsible for the science and technology contract, to ACC-Orlando, which would be responsible for the production contract.⁶ Tr. at 234:15-24, 237:18-20.

On January 29, 2018, the Army posted a notice on the Federal Business Opportunities portal seeking to identify sources that could manufacture a "build-to-print" WIAMan.⁷ AR, Tab 3, Sources Sought Notice; AR, Tab 4, Market Research Report at 1. On March 20, the Army concluded that there were nine potential offerors, including three that responded to the sources sought notice. AR, Tab 4, Market Research Report at 8-10. On June 4, the contracting officer determined that there were at least two firms that could compete for the WIAMan acquisition, and therefore the procurement would proceed under full and open competition. AR, Tab 28, Contracting Officer, ACC-Orlando, Mem. for the Record.

⁵ TRLs are standard industry ratings scaled from 1 (low) to 9 (high) used to assess the maturity of a technology for a particular use. Lockheed Martin Corp., Northrop Grumman Sys. Co.--Costs, B-410719.8, B-410719.9, Dec. 12, 2016, 2017 CPD ¶ 8 at 3 n.4. A technology rated at TRL 6 would be a representative model or prototype system tested in a relevant environment, such as a high-fidelity laboratory environment. Id.

⁶ The transition between contracting offices caused some confusion about the data rights held by DTS. See, e.g., AR, Tab 4, Market Research Report at 7 (finding that DTS' development contract "include[d] the WIAMan production TDP [technical data package] as a deliverable."). The ACC-Orlando contracting officer relied on representations of ACC-APG personnel as to the scope of DTS' data rights. Tr. at 148:6-11. DTS sent its assertion of data rights in the science and technology contract to ACC-APG in September 2018, after the ACC-Orlando contracting officer completed the market research report in April 2018. AR, Tab 27c, DTS Data Rights Assertions; AR, Tab 4, Market Research Report.

⁷ Although the term "build to print" is not defined in the solicitation, it has been used to mean that the solicitation contains a TDP that provides information sufficient for a competent manufacturer to fabricate, assemble, and test an item. See Lakota Tech. Sols., Inc., B-298297, Aug. 4, 2006, 2006 CPD ¶ 118 at 2; Colmek Sys. Eng'g, B-291931.2, July 9, 2003, 2003 CPD ¶ 123 at 2; Raytheon Co.-Integrated Def. Sys., B-400610 et al., Dec. 22, 2008, 2009 CPD ¶ 8 at 8 n.9 ("'Build-to-print' is a term of art that refers to producing an item based on mature, proven, detailed data packages.").

On August 2, the Army published a draft solicitation/synopsis for solicitation No. W900KK-18-R-0072, which anticipated that release of a final solicitation would occur during the week of August 20. AR, Tab 5, Draft Solicitation; COS/MOL at 5. The notice provided that “[t]he technical data package (TDP) [was only] available upon request” due to the size of the TDP. AR, Tab 5, Draft Solicitation at 1.

On August 30, ACC-APG emailed DTS “to confirm that DTS does not have any technical data or [intellectual property] assertions in accordance with the requirements contained in Defense Acquisition Regulation System (DFARS) clause 252.227- 7013.” AR, Tab 27b, ACC-APG Email to DTS. The Army noted that “DTS is required to deliver[] all technical data related to the products developed under this contract with unlimited rights” and that the technical data would pass with unlimited rights because “DTS has not affirmatively asserted any restrictions on the Government to use, release or disclose any of their technical data.” Id. DTS’ response was due September 5. Id.

On September 7, DTS provided the Army with a list of the technical data that DTS was furnishing with limited or restricted rights under its science and technology contract. AR, Tab 27c, DTS Data Rights Assertions.⁸ DTS asserted these rights under DFARS clause 252.227-7013 on the basis that each category of technical data had been “developed exclusively at private expense.”⁹ Id.; see also AR, Tab 14e, DTS Email to Army, Nov. 15, 2018, at 1 (wherein DTS claimed that “[m]ost of the DAS . . . components used in WIAMan are based upon existing DTS designs that were modified for use in this unique underbody blast environment”).¹⁰

⁸ As background, the SLICE6 HB is the DAS that DTS developed for the WIAMan. Decl. of DTS Project Manager, Mar. 18, 2019, Id. ¶ 10. DTS’ commercially-available DAS is known as the SLICE6. Id. ¶ 10. In particular, the SLICE6 HB contains additional functionality in terms of blast shielding, timing, and shock resistance. Id. ¶ 10. DTS asserted rights in firmware and schematic elements of the SLICE6; firmware and schematic elements of the DAS referred to as the SLICE6 DB; schematic elements of the DAS sensors, known as 6DXG2; load cell electronics; and certain DAS software elements. AR, Tab 27c, DTS Data Rights Assertions. According to the J&A, each WIAMan contains 26 SLICE6 DAS units, 18 load cells, and 10 ultra-small 6DXG2 sensors. AR, Tab 16, Draft J&A at 3. Although the data rights assertions refer to the SLICE6 DB, and the J&A refers to the SLICE6, these are apparently typographical errors meant to refer to the SLICE6 HB.

⁹ Under DFARS clause 252.227-7013, Technical Data-Noncommercial Items, items that are “developed exclusively at private expense” are those whose “development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.”

¹⁰ DTS’ assertion appears to conflict with the understanding of at least one Army witness, who testified that “[t]he SLICE6 HB was the original design” that was created under “[t]he WIAMan developmental TDP.” Tr. at 324:2-7. The witness postulated that
(continued...)

On September 7, after receiving DTS' data rights assertions, ACC-APG advised ACC-Orlando that these rights would be included via modification in DTS' science and technology contract. AR, Tab 27d, ACC-APG Email to ACC-Orlando, at 1. ACC-APG also "confirmed that the TDP that has been delivered under referenced [DTS] contract has been delivered in accordance with the requirements of the contract." *Id.* On September 24, the Army incorporated DTS's technical data rights assertions into DTS' contract.¹¹ AR, Tab 27e, DTS Contract Amend. P00008 at 1.

On September 28, the agency rescinded the draft solicitation/synopsis for the 40 WIAMen. AR, Tab 6, Notice of Cancellation at 2. Concurrently, the Army published a notice of its intent to sole-source the acquisition of "up to 40 WIAMan ATD with an initial delivery of five WIAMan ATD no later than July 2019[,] and five WIAMan ATD no later than September 2019," at an estimated cost of approximately \$38 million. AR, Tab 7, Notice of Intent to Sole-Source at 1, 3. The agency cited 10 U.S.C. § 2304(c)(1), as implemented by Federal Acquisition Regulation (FAR) § 6.302-1 (Only one responsible

(...continued)

"[t]he SLICE6 is [. . .] a reduced-capability SLICE6 HB that has been made available on the commercial market." *Id.* at 324:8-12; see also *id.* at 327:18-20 ("[T]he SLICE 6 HB was not the product evolution of the SLICE6.").

¹¹ DTS explains the Army's apparent error as follows:

[The ACC-APG] contracting officer in good faith mistakenly believed the government had unlimited rights. The government properly had included DFARS 252.227-7013 (Rights in Technical Data – Noncommercial Items FEB 2014), 252.227-7014 (Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation FEB 2014), and 252.227-7015 (Technical Data – Commercial Items FEB 2014), in the predecessor contract in order to acquire rights in technical data developed under the contract. Inadvertently, however, what the government did not do was include clause 252.227-7017, Identification and Assertion of Use, Release, or Disclosure Restrictions, which would have revealed the extent of the DTS technology subject to limited rights.

Intervenor Supp. Briefing at 19 (internal citations omitted). The DTS contract also contains FAR clause 52.227-11 (Patent Rights--Ownership by the Contractor May 2014). AR, Tab 15, DTS Sci. & Tech. Contract at 36. Because no party addressed the relevance of FAR clause 52.227-11, we do not consider the impact--if any--of those provisions on the instant protest. See, e.g., Campbell Plastics Eng'g & Mfg., Inc. v. Brownlee, 389 F.3d 1243, 1249 (2004) (finding the government was entitled to take title to the invention under FAR clause 52.227-11 given the circumstances of the contractor's assertion of data rights).

source and no other supplies or services will satisfy agency requirements), as the basis for the decision not to compete the requirement. Id. at 2.

The notice also advised potential offerors as follows: “[t]his is a requirement for build to print WIAMan ATD prototypes, which currently incorporate DTS [IDAS] hardware, software and firmware. The Government has Limited and/or Restricted rights in the Technical Data and software for the DTS IDAS, which is a commercial product.”¹² Id. at 1. Contractors that believed they could satisfy the requirement were required to submit a capability statement demonstrating “that their ATD has gone through biofidelity testing to meet the ATD requirements”¹³ This testing include[s] Whole Body and Component Biofidelic Response Matched-Pair Testing, Durability Testing, Interoperability Equipment Testing, and Life Fire Test and Evaluation . . . conducted at Government approved facilities.” Id. Responses were due by October 15. Id. at 1.

On October 9, Humanetics filed a protest with our Office challenging the agency’s decision to proceed with a sole-source procurement. B-416979, Protest.

On October 15, Humanetics submitted its capability statement to the Army, detailing its claims that it could manufacture the WIAMan using the build-to-print information and DTS’ SLICE6 DAS. AR, Tab 8, Humanetics Capability Statement at 1. The capability statement did not affirm that Humanetics’ ATD had completed any under body blast biofidelity testing. Id.; see also Army Supp. Briefing at 13. On October 19, Humanetics filed a supplemental protest challenging the agency’s estimates of the WIAMan cost elements. B-416979.2, Protest.

On October 22, the Army requested that our Office dismiss Humanetics’ protest as premature because the agency had not yet evaluated Humanetics’ capability statement. AR, Tab 11, B-416979.1, B-416979.2, Req. for Dismissal at 2. The agency also represented that it “ha[d] not made any final decision as to its acquisition strategy for the WIAMan production contract.” Id. at 3, 5. On October 24, Humanetics withdrew its protest in order to allow the agency to proceed with an evaluation of Humanetics’ capability statement. AR, Tab 12, Protester Resp. to Req. for Dismissal, Oct. 24, 2018.

¹² The Army’s statement here that the DTS IDAS for the WIAMan is a commercial product appears to be incorrect. As noted above, the SLICE6 DAS is available commercially, while the WIAMan’s SLICE6 HB is not. Tr. at 223:6-24.

¹³ The WIAMan performance requirements are not publicly available, but the Army stated that they would have likely been provided to manufacturers that were willing to sign a non-disclosure agreement, and that testing at Army facilities was commercially available. Tr. at 283:9-13, 287:17-288:8. Any other WIAMan manufacturer would need to demonstrate the biofidelity of its WIAMan, i.e., that the data provided accurately reflect the injuries a soldier would sustain in the same blast. Tr. at 287:17-288:8; Protester Comments, Exh. 1, Decl. of Humanetics Exec. Vice President, ¶ 6.

On January 24, 2019, the Army finalized its evaluation of Humanetics' capability statement and concluded that "Humanetics is not capable of satisfying the Government's requirement for 40 WIAMAN ATDs without delay of schedule and substantial duplication of costs for certification and verification." AR, Tab 13, Humanetics Capability Statement Evaluation at 1. The agency stated that the delays and additional costs were related to testing that would be required on any WIAMan that was not manufactured in exactly the same manner as DTS' WIAMan. Id. at 3-4 ("[I]f any changes were made to the design of the [WIAMan,] extensive Range of Motion, Whole Body and Component Biofidelity, Durability, Matched-Pair and Live Fire Test and Evaluation [tests] will be required . . ."). The Army advised Humanetics of its intent to "proceed with a sole source acquisition to Diversified Technical Systems Inc." Id. at 1.

On February 4, Humanetics filed the current protest with our Office.

During the pendency of the protest, the Army provided our Office with a draft of the J&A for the proposed sole-source award to DTS.¹⁴ AR, Tab 16, Draft J&A. The draft J&A presents the agency's conclusion that there is only one responsible source and no other supplies or services will satisfy agency requirements. Id. at 6 (citing 10 U.S.C. § 2304(c)(1); FAR § 6.302-1). The Army determined that "[i]f a different company were used to manufacture the WIAMan ATD, extensive [testing] will have to be reconfirmed." Id. at 6. The Army also concluded that it could not proceed with a competition for the manufacture of the WIAMan with the DTS IDAS as government-furnished equipment (GFE) because there would be "substantial duplication of testing and cost and delay of schedule if another company produces or integrates the WIAMan ATD." Id. at 8. The Army asserts a need for 10 WIAMen by the end of fiscal year 2019 for use in the testing and safety design of the Army's new armored multipurpose vehicle (AMPV), which is currently scheduled for the middle of fiscal year 2020. Tr. at 256:24-257:4, 344:10-13. The agency anticipates a need for up to 30 additional WIAMen over the following 4 years, not to exceed 40 WIAMen in total. AR, Tab 16, Draft J&A at 8. However, after this procurement, the agency does not anticipate a further need for WIAMen. Id. at 9.

DISCUSSION

Humanetics broadly challenges the agency's determination that any procurement other than a sole-source award to DTS would result in substantial duplication of cost and unacceptable delay, due to the need for additional testing. The protester raises many

¹⁴ To date, the Army has not finalized or approved the J&A. We have, at times, agreed to review a draft J&A as part of a protest challenging the agency's basis for proceeding with a sole-source acquisition. See, e.g., Unitron LP, B-406770, Aug. 14, 2012, 2012 CPD ¶ 247 at 3. Because the agency's conclusion that the time cost of additional testing justifies a sole-source award to DTS is essentially identical in three relevant documents--the evaluation of Humanetics capability statement, the notice of intent to sole-source, and the draft J&A--we will review the reasoning provided in the draft J&A as part of this protest.

arguments in support of a competitive procurement, among them, that it can manufacture the WIAMan in full using the build-to-print TDP, and no additional testing is needed; that even if certain portions of WIAMan IDAS were provided to the Army with limited rights, the WIAMan IDAS could still be provided to Humanetics as GFE for incorporation into a Humanetics-built ATD manufactured according to the build-to-print TDP; and that the agency failed to engage in reasonable advance planning by not obtaining--or even asserting--government data rights in the IDAS developed for the WIAMan. As discussed below, we deny the protest because we do not find that the agency's conclusions regarding unacceptable delay were unreasonable.¹⁵ The protester raises several additional arguments that are not discussed below; we have reviewed them all and find that none provides a basis to sustain the protest.

Scope of Testing

Humanetics disputes the Army's determination that "Humanetics is not capable of satisfying the Government's requirement for 40 [WIAMan] ATDs without delay of schedule and substantial duplication of costs for certification and verification." AR, Tab 13, Humanetics Capability Statement Evaluation at 1; see also AR, Tab 16, Draft J&A at 7-8. The protester notes that the draft solicitation is described as "build-to-print" and asserts that it has the capability to manufacture the WIAMan using the agency's TDP. Protest at 5.

The Competition in Contracting Act (CICA) requires agencies to obtain full and open competition in their procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A). However, CICA offers an exception to the use of competitive procedures where the supplies or services required by an agency are available from only one responsible source, and no other type of supplies or services will satisfy agency requirements. 10 U.S.C. § 2304(c)(1); see also FAR § 6.302-1(a)(2). Where the agency intends to award "a follow-on contract for the continued development or production of a major system or highly specialized equipment,"¹⁶ CICA provides that:

[S]uch property or services may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures when it is likely that award to a source other than the original source would result in—

¹⁵ Because unacceptable delay is itself sufficient justification for a sole-source acquisition, and because we find reasonable the agency's conclusions that retesting will result in unacceptable delay, we do not consider whether a competitive acquisition here would also result in substantial duplication of costs that are not expected to be recovered through competition. See 10 U.S.C. § 2304(d)(1)(B); Raytheon Co.-Integrated Def. Sys., B-400610 et al., Dec. 22, 2008, 2008 CPD ¶ 8 at 6.

¹⁶ The protester does not challenge the agency's presupposition that the WIAMan is a type of highly specialized equipment under 10 U.S.C. § 2304(d)(1)(B).

- (i) substantial duplication of cost to the United States which is not expected to be recovered through competition; or
- (ii) unacceptable delays in fulfilling the agency's needs.

10 U.S.C. § 2304(d)(1)(B); see also FAR § 6.302-1(a)(ii).

When an agency uses noncompetitive procedures, it must execute a J&A with sufficient facts and explanation to support the use of the specific authority. Raytheon Co.- Integrated Def. Sys., supra, at 6; see 10 U.S.C. § 2304(f). Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A; when the J&A sets forth reasonable justifications for the agency's actions, we will not object to the award. FN Am., LLC, B-415261, B-415261.2, Dec. 12, 2017, 2017 CPD ¶ 380 at 5.

Where an agency does not possess a TDP adequate for competition, the agency may procure its requirement on a sole-source basis from a contractor whose prior experience reduces the risk to the agency that its needs will not be timely met. Raytheon Co.- Integrated Def. Sys., supra, at 7. This is so even where, given less stringent deadlines, other contractors might as ably perform. Id. Once the agency establishes support for the sole-source procurement, the burden shifts to the protester to show that it is unreasonable. See, e.g., GlobaFone Inc., B-405238, Sept. 12, 2011, 2011 CPD ¶ 178 at 3; EA Eng'g, Sci. & Tech., Inc., B-411967.2 et al., Apr. 5, 2016, 2016 CPD ¶ 106 n.2 ("it is the protester's burden to prove its allegations"); Chicago Dryer Co., B-401888, Dec. 8, 2009, 2009 CPD ¶ 253 at 3. The protester's disagreement with the agency's rationale does not provide a basis to sustain the protest. Allied-Signal Inc., B-247272, May 21, 1992, 92-1 CPD ¶ 461 at 10.

As a preliminary matter, the Army's finding of unacceptable delay is a direct function of the scope of retesting the Army considers necessary to ensure that any newly-sourced WIAMan would be verified in time to meet the development schedule for the new AMPV. AR, Tab 16, Draft J&A at 11 ("The additional testing of an ATD from a new manufacturer would . . . incur delay such that WIAMan would not be available to support Operational Test Requirements [for the AMPV] in [the second quarter of fiscal year 2020]."); see also tr. at 343:24-344:9 (The Army "compressed the schedule [for WIAMan development] because the concern was that, based on our original schedule, we were going to miss the critical testing of the AMPV, in particular[,] the operational test.").

The protester does not contest the Army's estimated time for any specific test. See, e.g., AR, Tab 31, WIAMan Test Schedule. Instead, the dispute here concerns the scope of testing. In order for the WIAMan to assist the Army in improving vehicle blast protection, a WIAMan must provide data that is "biofidelic," i.e., data that accurately indicates the injuries a soldier would sustain in a blast. Tr. at 40:2-15. In the Army's view, the designs of the WIAMan IDAS and ATD are sufficiently biofidelic, such that the WIAMan can progress to verification testing. Army Supp. Briefing at 16-18. The Army contends that, given the overarching importance of biofidelic performance in the utility of the WIAMan, and the relationship between product design and biofidelity, any change to

a component of the current design of the WIAMan would require full retesting of any non-DTS WIAMan. Army Supp. Briefing at 13-14; AR, Tab 21, Decl. of ATD Laboratory Manager, Aberdeen Test Center n.2 (“Because the data collected during the [science and technology] phase was specific to the performance of the DTS [WIAMan], it cannot be leveraged for [verification] on an ATD from another manufacturer.”). The agency estimates that retesting another manufacturer’s WIAMan would take 347 days.¹⁷ AR, Tab 31, WIAMan Test Schedule; see also tr. at 70:3-6.

Humanetics argues that ATDs with a build-to-print TDP require only limited certification testing and not the full retesting described by the Army. Protester Comments at 4 (While “[b]iofidelity testing during the development stage can last as long as the development process itself, [] certification testing of a build-to-print ATD takes only a few hours or days at most.”). The protester contends that, given the Army’s statements that the TDP is build-to-print, the agency has not sufficiently justified its claimed need for the full scope of testing. Protester Post-Hearing Brief at 4-7.

The Army responds that despite its use of the term “build to print,” the TDP is in fact insufficient for another company to replicate a WIAMan without additional retesting. See AR, Tab 21, Decl. of ATD Laboratory Manager, Aberdeen Test Center, at 2; tr. at 23:24-24:5; 259:16-19 (“[T]here are certain material specifications [for the WIAMan] that the Army was looking to get out of the [DTS science and technology] contract. We were just unable to achieve those in time.”). In this regard, “[s]ubsequent to the cancellation of the draft solicitation, ACC-Orlando became aware that the extent and duration of duplicative testing that would be required [. . .] if any entity other than DTS and its subcontractors were to manufacture and integrate the WIAMan was much greater than initially anticipated.” COS/MOL at 11. Accordingly, “regardless of [DTS’] data rights, award to any other source would result in unacceptable delays” Id. at 12.

The record shows that, for individual WIAMan body parts, the Army provided manufacturers with detailed technical drawings, a list of the materials used in the manufacture of each part, and the ratios of those materials. See, e.g., DTS Hearing Exh. 1 at 1-2 (showing the design of the WIAMan neck and the “45A Butyl Rubber Formulation Ingredients,” including the relative proportions of each ingredient). However, these drawings do not specify the order or method of mixing the materials, nor the pressure, temperature, or time required for each step of the manufacturing process. Tr. at 23:24-24:5 (“There’s materials that are listed in the TDP that don’t have instructions on actually how to manufacture them. It just has the chemical makeup and compounds that are needed to produce that particular part and just has the overall drawing of the shape and size of the part.”). We agree that, without these detailed

¹⁷ The testing categories the Army considers necessary are: electrical verification, physical tasks, operational tasks, biofidelity response corridor whole body matched pair, component matched pair, certification, durability, human injury matched pair, live fire, and biofidelity response corridor matched pair data analysis. AR, Tab 31, WIAMan Test Schedule. The Army provided an estimated time and cost to complete each test. Id.

instructions on how to assemble the materials, the Army's concern that manufacturing differences could lead to a loss of biofidelity--a central feature of this product--was reasonable.¹⁸ Because the Army has established a requirement to confirm the biofidelity of a non-DTS WIAMan with retesting, it also reasonably concluded that this process would result in unacceptable delay because, with the time needed to re-test, the WIAMan would not be verified in time for use in the development of the AMPV.

As noted above, a protester is charged with demonstrating that the agency's actions are unreasonable. Chicago Dryer Co., *supra*, at 3 (“[A] protester challenging an agency's sole-source determination on the basis that its product meets the agency's needs has the burden of showing that this is the case.”). Yet Humanetics neither adequately explains why retesting is unnecessary nor shows that the TDP is sufficient for a manufacturer other than DTS to replicate the WIAMan in its current form. Accordingly, the protester fails to rebut the agency's claim that the TDP is in fact not “build-to-print,” such that biofidelity retesting would be unnecessary.¹⁹ In short, the protester has not demonstrated the unreasonableness of the agency's position. Based on our review of the record, the testimony at hearing, and the pleadings, we find that the Army described a reasonable need for the full scope of testing for any non-DTS WIAMan. Accordingly, we find no basis to disturb the agency's decision to award a sole-source contract to DTS. Raytheon Co.-Integrated Def. Sys., *supra*, at 7; Unitron LP, B-406770, Aug. 14, 2012, 2012 CPD ¶ 247 at 5.

Possibility of Competition Using GFE

Humanetics next asserts that if another manufacturer cannot replicate the IDAS due to DTS' asserted data rights, the Army could still provide the IDAS as GFE for

¹⁸ By way of analogy, if two competent bakers are provided with specifications for the size, and shape of a cake and a list of ingredients, but no instructions, then it is likely that the bakers would use different procedures in terms of interim procedures, time and temperature. Even if both met the design specifications on the first attempt, the results could differ in texture. This understanding supports the conclusion that identical procedures should be used to ensure that identical items are created.

¹⁹ The protester argues that our Office should sustain the protest on the basis of the J&A's inaccuracy in describing the TDP as build-to-print, as we sustained the protest in our decision in Sabreliner Corp., B-288030, B-288030.2, Sept. 13, 2001, 2001 CPD ¶ 170. Protester Post-Hearing Comments at 9-10. First, the facts of Sabreliner, including the potential for a 19-year sole-source contract and the agency's considerably understated sole-source estimates, are not reasonably applicable to the protest at hand. Second, the protester states unequivocally that “the contract at issue is a build-to-print contract” with information sufficient to “enable Humanetics to manufacture the WIAMan ATD according to the intended design.” Protester Comments at 3. Having asserted that the TDP is, in substance, build-to-print, Humanetics cannot also challenge the draft J&A as fundamentally flawed for erroneously making the same claim.

incorporation into an ATD obtained through a competitive procurement.²⁰ Protester Comments at 12. According to Humanetics, “[a]n ATD’s biofidelity does not depend on the DAS, as the DAS simply records what happens during the test.” *Id.* at 4. The protester frames the Army’s stated need to rerun biofidelity tests on another manufacturer’s ATD as merely “conclusory.” *Id.* at 13. In this argument, Humanetics acknowledges the importance of an ATD’s biofidelity and again relies on claim that the TDP is adequate for ATD manufacture.

As discussed above, the agency argues that the TDP is not sufficiently detailed for another firm to manufacture a WIAMan that replicates the DTS WIAMan, even if the Army purchases DTS’ IDAS for incorporation into the a non-DTS WIAMan ATD. The agency explains that even if it did provide DTS’ IDAS as GFE to another manufacturer for incorporation into an ATD, it would still need to reperform the majority of tests, resulting in an unacceptable delay of 297 days. AR, Tab 16, Draft J&A at 8. According to the Army, this testing would be necessary even “if any entity other than DTS and its subcontractors were to manufacture or integrate the WIAMan.”²¹ Army Supp. Briefing at 14; tr. at 70:12-13.

Humanetics has not shown that the Army’s position is unreasonable. The protester has not manufactured a WIAMan ATD that has undergone biofidelity testing, as required by the notice of intent to sole-source. Furthermore, as discussed above Humanetics has not demonstrated that the TDP is sufficient for it to replicate the DTS WIAMan ATD. On this record, we have no basis to find unreasonable the Army’s conclusion that necessary ATD retesting would result in unacceptable delay. Raytheon Co.-Integrated Def. Sys., supra, at 9.

Advance Planning

Finally, Humanetics also argues that the agency failed to adequately plan for this procurement, because it failed to obtain or assert its data rights under DTS’ science and technology contract. Protester Supp. Briefing at 2.

²⁰ The Army also defends its sole-source decision on the basis that DTS refuses to sell the WIAMan IDAS to the Army as GFE. AR, Tab 16, Draft J&A at 5. See also AR, Tab 14e, DTS Email to Army, Nov. 15, 2018, at 1; DTS Supp. Briefing, Decl. of DTS CEO, ¶ 7. DTS’ posture and the Army’s reliance thereon do not affect the reasoning of this decision.

²¹ According to the Army, if DTS’ IDAS were incorporated into another manufacturer’s ATD, it would not be necessary to repeat either the electrical verification or the live fire tests, thus saving 50 days of the testing schedule. Tr. at 70:18-20. However, the Army also estimates that it would add “a minimum of 180 days” to complete a sole-source procurement of DTS’ IDAS for incorporation into another offeror’s WIAMan, exclusive of any manufacturing and delivery time. Tr. at 168:19-169:13; 170:12-24.

A contracting officer may not properly use noncompetitive procedures if the procuring agency created the need to use such procedures through a lack of advance planning. See 10 U.S.C. §2304(f)(5)(A); FAR § 6.301(c)(1); New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6. However, an agency's procurement planning need not be error-free or successful, and the fact that an agency encounters delays or exigencies does not demonstrate that the agency failed to meet its obligation for advance planning. eAlliant, LLC, B-407332.4, B-407332.7, Dec. 23, 2014, 2015 CPD ¶ 58 at 5.

Here, we do not conclude the Army's decision to award a sole-source contract to DTS was the result of a lack of advance planning. In contrast, the record shows that the WIAMan achieved TRL 6 and became ready for accreditation (tr. at 44:5-224) at the same time that the AMPV arrived at the development stage, giving the Army a limited window to obtain concrete benefits from the WIAMan by using it to improve the safety design of the AMPV. The protester argues that the agency did not appropriately investigate or assert its data rights in the WIAMan. Yet the intervenor itself acknowledges that the failure to include an intended DFARS clause regarding government data rights was inadvertent. Furthermore, any agency errors related to the IDAS data rights are not relevant to the agency's finding that it would need to retest any non-DTS ATD. Given the independent schedules of the development of the WIAMan and AMPV, and the opportunity presented by their confluence, we see no basis to conclude that the Army's scheduling constraints are the product of a lack of advanced planning.²² See Gichner Sys. Grp., Inc., B-414392, May 31, 2017, 2017 CPD ¶ 178 at 10 (finding that changes to the agency's needs refuted the claim that the agency failed to engage in advance planning).

The protest is denied.

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General Counsel

²² In support of its allegation that the agency failed to engage in advance planning, Humanetics relies on our decision in eFedBudget Corp., B-298627, Nov. 15, 2006, 2006 CPD ¶ 159, in which we concluded that the agency had taken a "passive approach" and failed to investigate procurement options that would permit competition. Id. at 6-7. In contrast, the record here shows that the agency actively pursued a competitive procurement and only contemplated a sole source after DTS claimed certain data rights in WIAMan components. The protester's argument that the agency has not sufficiently pursued its rights in the SLICE6 HB does not adequately address the agency's claim that retesting will cause unacceptable delay. In particular, the agency explained that biofidelity retesting would be needed if the ATD changed, even if the DAS remained the same. AR, Tab 21, Decl. of ATD Laboratory Manager, Aberdeen Test Center, at 2.