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Decision

Matter of: Lasmer Industries, Inc.
File: B-400866.2, B-400916.2, B-401046
Date: March 30, 2009

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Michael L. Walters, Esq., and Matthew O. Geary, Esq., Defense Logistics Agency, for the agency.
Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's cancellation of solicitations for parts was reasonable where the agency discovered that obtaining one of the parts under an existing contract would be more advantageous to the government than continuing with the procurement and that it no longer had a requirement for the other part solicited.
3. Agency's issuance of a delivery order for parts was within the scope of the underlying contract and could have been reasonably anticipated by offerors, in light of the fact that the ordered part was specifically included in the contract, and the contract allowed the agency to order the part under a negotiated delivery schedule.

DECISION

Lasmer Industries, Inc. of Kerrville, Texas, protests the Defense Logistics Agency, Defense Supply Center, Columbus' (DSCC) cancellation of two solicitations-- (1) request for proposal (RFP) No. SMP7L2-08-R-0176 for vehicular seats, national stock number 2540-01-436-4175 (NSN 4175); and (2) request for quotations (RFQ) No. SPM7L2-08-Q-0159 for vehicular seats, NSN 2540-01-381-8392 (NSN 8392). Lasmer also protests that DSCC's issuance of delivery order 0001 for the vehicular seats that were the subject of the canceled solicitations under DSCC's Fleet Automotive Support Initiative--Global (FASI-G) contract No. SPM7LX-08-D-9021, was outside the scope of that contract.

We deny the protests.

On September 5, 2008, DSCC issued the RFP seeking proposals for a quantity of 22,308 vehicular seats (NSN 4175). Lasmer filed a protest to the contracting officer on September 15, alleging that its previously approved part number had been improperly removed as an approved source from the solicitation.¹ Attempts at negotiations to resolve this agency-level protest failed and on November 21, Lasmer filed a protest of the RFP with our Office.

As a matter of background, DSCC conducted the FASI-G procurement with the intent to reduce the Government's supply chain and inventory while improving response time and increasing mission readiness by purchasing all of DSCC's land based tactical and non-tactical vehicle fleet needs through the issuance of delivery orders under the FASI-G contracts. The FASI-G contracts will provide DSCC with complete logistical supply chain support for land based tactical and non-tactical vehicle fleets worldwide. That is, the FASI-G contracts will cover the entire supply chain (forecasting, inventory investment, purchasing, warehouse operations, transportation, etc.) for the contract's NSN items.

The FASI-G solicitation was issued using competitive procedures for firm fixed-price, indefinite-quantity contracts. The solicitation was split into a restricted partial small business set-aside requirement of 730 parts and an unrestricted requirement for the integrated supply support of 1,246 parts. Lockheed-Martin is the contractor for the unrestricted part of the FASI-G procurement and its contract included the NSN 4175 vehicular seats. AR at 3-4.

Because of the significant number of parts and requirements, the FASI-G solicitation/contract called for a 270-day implementation/start-up period in which the Government would attrite its stock and manage an orderly transfer of the supply chain management responsibilities for the NSNs listed in the contract. After the implementation period is complete, on day 271, the execution phase of the contract begins, in which the contractor becomes responsible for delivering all ordered material in response to delivery orders issued by the agency within delivery timeframes of 2, 4, or 6 calendar days depending on the priority of the order. AR, Tab 5A, Lockheed's Proposal, at 2; Tab 7, FASI-G Contract, attach. 5, at 12. Additionally, amendment 0003 to the solicitation (which also became part of the FASI-G contracts) authorized the government to issue early delivery orders during the implementation period by negotiating a plan with the vendor upon a review of the Government's stock levels and the time needed to ramp up the vendor's inventory. AR at 6. In this regard, amendment 0003 states:

should Government stock be depleted and the vendor able to provide the item prior to day 271, the item may be turned on for FASI-G

¹ The RFP quantity was changed by amendment 0001 to 8,400 seats as part of the agency's settlement discussions with Lasmer.

support. The Government and contract awardee will further outline a plan for the attrition of Government stock and ramp up of vendor inventory post award.

AR, Tab 6C, Amend. No. 3, at 2.

On December 2, 2008, 84 days into the 270-day FASI-G contract's implementation period, the contracting officer became aware of the FASI-G contracts and contacted the FASI-G program manager to determine if the NSN 4175 seats were included in those contracts and to determine if it was feasible for the FASI-G contractor to begin support of the vehicular seat item NSN 4175. DSCC and Lockheed negotiated a schedule pursuant to the provisions contained in amendment 0003 that would allow Lockheed to provide the vehicular seats to the agency during the implementation phase of the contract, while at the same time ramping-up for an early "go live" date for the execution period starting in April 2009. AR at 9. Based on her discussions with the FASI-G program manager, the contracting officer determined that there were more favorable pricing and delivery terms under the FASI-G contract than under the RFP. She also recognized that the intent of the FASI-G contract was to supply all future needs for DSCC's land based tactical and non-tactical vehicle fleet needs. Consequently, the contracting officer decided to place delivery order 0001 against the FASI-G contract on December 5. AR, Tab 26, Contracting Officer Declaration at 1-2; AR at 9. Based on the foregoing, on December 9, the contracting officer canceled the vehicular seat RFP.

We dismissed Lasmer's protest as academic on December 11 because the agency canceled the RFP. On December 19, Lasmer protested the cancellation of the RFP, and on January 22 protested the issuance of the delivery order for the vehicular seats under the FASI-G contract.

During the same time frame as the preceding protests, DSCC issued an RFQ for vehicular seats NSN 8392. Here too, Lasmer protested the solicitation at the agency level and then to our Office on December 8, alleging that its previously approved part number had been improperly removed as an approved source from the solicitation. This RFQ was canceled by DSCC on December 11. Therefore, GAO dismissed this protest as academic. Lasmer then filed a protest against the cancellation of the RFQ on January 22.²

Lasmer protests that the cancellations of the RFP and RFQ were improper. Specifically, the protester argues that the agency's cancellations were pretextual to avoid our review of Lasmer's initial protests and to avoid awarding Lasmer contracts.

² Lasmer also protested the agency's issuance of a delivery order under the FASI-G contract for the NSN 8392 items that were the subject of the RFQ, but later withdrew this protest upon the agency's showing that no such delivery order had been issued.

In this regard Lasmer has pointed to various agency actions, which purport to demonstrate animosity between the agency and Lasmer, allegedly leading to both prejudice against Lasmer and improper procurement actions.

An agency has broad authority to cancel an RFP or RFQ, and needs only a reasonable basis to do so. Deva & Assocs. PC, B-309972.3, Apr. 29, 2008, 2008 CPD ¶ 89 at 3 (RFQ); A-Tek, Inc., B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 2 (RFP). Moreover, an agency may properly cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known. Daston Corp., B-292583, B-292583.2, Oct. 20, 2003, 2003 CPD ¶ 193 at 3. Where a protester has alleged that an agency's rationale for cancellation is pretextual, that is, the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest, we will closely examine the bases for the agency's actions. Superlative Tech., Inc., B-310489, B-310489.2, Jan. 4, 2008, 2008 CPD ¶ 12 at 7; Gonzales-McCaulley Inv. Group, Inc., B-299936.2, Nov. 5, 2007, 2007 CPD ¶ 192 at 5. Notwithstanding such closer scrutiny and even if it can be shown that personal animus or pretext may have supplied at least part of the motivation to have the RFP canceled, the reasonableness standard applicable to cancellation of a solicitation remains unchanged.³ e-Management Consultants, Inc.; Centech Group, Inc., B-400585.2, B-400585.2, Feb. 3, 2009, 2009 CPD ¶ 39 at 5; Dr. Robert J. Telepak, B-247681, June 29, 1992, 92-2 CPD ¶ 4 at 4. Cancellation of a solicitation is reasonable where the agency determines that it no longer has a requirement for the item solicited, Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995, 95-1 CPD ¶ 73 at 4, or where the agency discovers an existing contract for its requirement would be more advantageous to the government than continuing with the procurement. Brian X. Scott, B-310970; B-310970.2, Mar. 26, 2008, 2008 CPD ¶ 59 at 3.

Here, the agency explains that it canceled the solicitations because it no longer had a need for them. In the case of the RFP, the agency canceled the solicitation because the contracting officer concluded that she was able to obtain more favorable pricing and delivery terms under the existing FASI-G contract. In the case of the RFQ, the agency canceled the solicitation because the contracting officer determined the agency had adequate supplies on hand to support its demands through June 2009, during the FASI-G contract's execution phase.

³ Government officials are presumed to act in good faith, and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference and supposition. Deva & Assocs. PC, *supra*, at 5; Logistics Solutions Group, Inc., B-294604.7, B-294604.8, July 28, 2005, 2005 CPD ¶ 141 at 4. Here, based on our review of the record, including the protester's arguments, we find no evidence of unfair or prejudicial motives of the agency's procurement officials to avoid making award to Lasmer.

Lasmer argues that the cancellation of the RFP was improper because neither the delivery order's schedule nor price were more advantageous than acquiring the items under the RFP, as the contracting officer had concluded. Delivery Order No. 1 to the Lockheed FASI-G contract provided for weekly deliveries of the NSN 4175 vehicular seats beginning February 13, 2009, at 1,040 seats per delivery with the final delivery scheduled for April 17 (133 days from issuance of the order) in the amount of 640 seats, for a total of 10,000 seats⁴; these seats were priced at \$144.91 per seat. AR, Tab 16, Modification to Delivery Order (Jan. 30, 2009), at 2. Under the RFP, the first delivery of 2,350 seats was scheduled 90 days after award, with subsequent deliveries at 120 days for 2,000 seats, 150 days for 2,000 seats, 180 days for 2,000 seats, and 210 days for 50 seats, for a total of 8,400 seats. Lasmer's proposed price under the RFP was [DELETED] per seat. AR at 11; AR, Tab 19, Lasmer's Proposal, at 4-7. Based on our review of the documentation, we find the agency could reasonably conclude that because the agency would receive more seats in a shorter amount of time at a lower cost under the delivery order to the Lockheed FASI-G contract than under the RFP, it was more advantageous to the government.⁵ Thus, we find the agency had a reasonable basis for canceling the RFP because the NSN 4175 items could be more advantageously acquired under another contract. See Brian X. Scott, supra.

As to the RFQ, the NSN 8392 vehicular seat inventory was not depleted as were the NSN 4175 vehicular seats that were to be obtained under the RFP. The record shows that upon the contracting officer's discovery of the FASI-G contract, she reviewed the supply status of NSN 8392 and determined that there were sufficient supplies on hand to support the item throughout the FASI-G implementation period. AR, Tab 30, Internal Correspondence (Dec. 11, 2008), at 1-2. Therefore, she had a reasonable basis for canceling the RFQ because there was no longer an immediate need for the solicited items. See Peterson--Nunez Joint Venture, supra.

Lasmer contends that delivery order No. 0001 for the vehicular seats that were to be acquired under the RFP constituted a modification that exceeded the scope of the original FASI-G contract, and that it therefore constituted an improper sole-source award under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (2006).

⁴ As indicated by the original RFP, DSCC has a requirement for a total of 22,308 vehicular seats.

⁵ While the protester attempts to show that the price in the FASI-G contract was not more advantageous due to an incentive schedule that was built into the contract, the incentive schedule is inapplicable for the delivery orders issued prior to the implementation period. AR at 18.

Our Office will generally not review protests of modifications or delivery orders under contracts because such matters are related to contract administration and are beyond the scope of our bid protest function. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2008); DOR Biodefense, Inc.; Emergent BioSolutions, B-296358.3; B-298358.4, Jan. 31, 2006, 2006 CPD ¶ 35 at 6. An exception to this rule is where, as here, it is alleged that a contract modification is beyond the scope of the original contract because, absent a valid sole-source determination, the work covered by the modification would be subject to the statutory requirements for competition. Engineering & Prof'l Servs., Inc., B-289331, Jan. 28, 2002, 2002 CPD ¶ 24 at 3.

When a protester alleges that an order is outside the scope of the contract, we analyze the protest in essentially the same manner as those in which the protester argues that a contract modification is outside of the scope of the underlying contract. The fundamental issue is whether issuance of the task or delivery order in effect circumvents the general statutory requirement under CICA that agencies “obtain full and open competition through the use of competitive procedures” when procuring their requirements. See 10 U.S.C. § 2304(a)(1)(A).

In determining whether a modification (here, the order) is a “cardinal change” that triggers the competition requirements in CICA, we look to whether there is a material difference between the modified contract and the contract that was originally awarded. MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7. Evidence of a material difference between the modification and the original contract is found by examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified. Atlantic Coast Contracting, Inc., B-288969.4, June 21, 2002, 2002 CPD ¶ 104 at 4. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of change found in the modification, and thus whether the modification could have changed the field of competition. DOR Biodefense, Inc.; Emergent BioSolutions, *supra*.

Lasmer argues that the delivery order is outside of the scope of the FASI-G contract because the contract was not intended to accommodate the type of procurement embodied by the delivery order and because DSCC failed to issue the order in accordance with the FASI-G contract’s strict 2, 4, or 6 day ordering procedures. The agency responds stating that the FASI-G contract’s purpose was to fulfill the ordering needs of the government through complete supply chain management and since NSN 4175 was listed as an item in the FASI-G contract, any contractor submitting a proposal would contemplate orders placed for this item. The agency also points out that amendment 0003 allows the parties to mutually negotiate a plan that would enable a vendor to supply the item during the implementation phase of the contract and as such the strict execution phase delivery ordering procedures do not apply. We agree with the agency.

As indicated above, while the contract contemplates that NSN items will primarily be ordered during the execution phase, the contract also recognized that orders can be

issued during the implementation phase. For example, the Lockheed FASI-G contract provides:

Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the schedule. Such orders may be issued -- FROM: 270 days after award (or earlier) THROUGH: 120 months.

AR, Tab 7, RFP at 32, Section I, Clause I16A16, FAR 52.216-18(a) (emphasis added). More particularly, as quoted above, the provisions in amendment 0003 clearly allow the parties to provide for the contractor to supply an NSN item identified under the contract prior to the beginning of the execution phase of the contract.

Here, the agency and Lockheed negotiated a plan that would enable Lockheed to supply NSN 4175 vehicular seats, which was one of the specific NSN items listed in Lockheed's contract, during the implementation phase based upon the Government's stocking levels and the contractor's capability. While the protester argues that the strict delivery timeframes apply, amendment 0003 does not state nor imply that the delivery timeframes would apply to any negotiated deliveries prior to the 271st day. Based on our review, we believe that the delivery order was within the scope of the FASI-G contract and could have been reasonably anticipated by offerors, in light of the fact that the contract covered a broad scope of supply chain management functions, of which delivery of the listed items, including NSN 4175, were required, and expressly allowed the agency to order specific items under a negotiated delivery schedule prior to the execution phase if a need arose.

The protest is denied.⁶

Gary L. Kepplinger
General Counsel

⁶ The protester raises numerous arguments in its protests. We have considered all of the arguments and find them to be without merit. We address the most significant contentions in this decision.