



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Decision

Matter of: Persistent Systems, LLC

File: B-415544

Date: January 16, 2018

Christian F. Henel, Esq., and Gunjan R. Talati, Esq., Kilpatrick Townsend & Stockton LLP, for the protester.

Captain Matthew R. Wilson, and Jason A. Barocas, Esq., Department of the Army, for the agency.

Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging a solicitation provision as being unduly restrictive of competition is denied where the agency articulated a reasonable basis for the requirement relating to the safety of military personnel and national defense.

DECISION

Persistent Systems, LLC, of New York, New York, protests the terms of request for proposals (RFP) No. W15P7T-17-0003, issued by the Department of the Army, U.S. Army Materiel Command, for the production of 2-channel, handheld dismounted and mounted leader radios. Persistent Systems challenges several of the solicitation's requirements as being unduly restrictive of competition, and argues that the Army otherwise failed to follow the requirements of Federal Acquisition Regulation (FAR) part 11 when establishing the agency's requirements.

We deny the protest.

BACKGROUND

The RFP, which was issued on September 7, 2017, and subsequently amended four times, seeks proposals for the production of 2-channel, handheld dismounted and mounted leader radios. The RFP provides as follows:

The Leader Radio is a 2-channel handheld and mounted radio to be used at the Team, Squad, and Platoon leader's level to provide the capability

for these leaders to have interoperable voice communications with tactical enablers such as aviation, fires, coalition, host nation, or other adjacent units that use legacy Single Channel Ground and Airborne Radio System (SINCGARS) while simultaneously maintaining voice and data communication with subordinates and peers in one handheld device. . . . The Leader Radio enables simultaneous use of the legacy [SINCGARS] and Solider Radio Waveform (SRW) waveforms.

RFP, attach. No. 11, Performance Requirements Document, at 5.

The RFP contemplates the award of two indefinite-delivery, indefinite-quantity (IDIQ) contracts, as well as initial task order awards to the two contract awardees. RFP, attach. No. 36, Section M – Evaluation Factors, at 1. Award of the IDIQ contracts is to be made on a lowest-priced, technically-acceptable basis. Id. Each contract is to have an initial five-year ordering period, with a five-year option ordering period. RFP at 416. Task orders can be issued against the IDIQ contracts on a fixed price, cost reimbursement, or no cost basis, and the total ceiling value for the contracts is \$3.885 billion. Id. at 3.

DECISION

Persistent Systems challenges a number of solicitation requirements as being unduly restrictive of competition, and argues that the agency otherwise failed to follow various procurement planning provisions set forth under FAR part 11 when establishing the agency's requirements. The Army responds that all of the challenged requirements are reasonably related to meeting the agency's legitimate needs, and that its procurement planning was adequate and in accordance with applicable regulations. Throughout the protest, the parties vigorously contested the merits of these various issues, and raised various procedural objections. As discussed below, however, this protest ultimately comes down to one dispositive issue.

Specifically, the issue of whether the agency reasonably requires the leader radio to be independent and autonomous, or whether a solution that can leverage other radio infrastructure can reasonably satisfy the government's needs. The parties agree that as currently constituted, the solicitation effectively seeks a single handheld radio that can independently and autonomously communicate simultaneously using the SINCGARS and SRW waveforms. Stated differently, the parties understand that the agency requires the leader radios to be able to independently broadcast over both waveforms without the need for a secondary radio.

Persistent Systems argues that its proposed solution, which requires "tethering" to another fielded radio, can satisfy the agency's reasonable core communication requirements. The protester's solution effectively uses radio over internet protocol technology to route the signal to the strongest points of transmission and receipt on the network. In other words, the warfighter would carry a single Persistent Systems radio that would route the signal to another radio, for example a truck or second dismounted

radio system, for transmission, thus satisfying the agency's reasonable need for the warfighter to only carry a single radio that can simultaneously broadcast both of the required signal waveforms. Persistent Systems makes several arguments regarding the technical superiority of its solution, and argues that the agency's concerns regarding the risks associated with having to rely on other radio infrastructure are unreasonable or remote at worst.

The Army, on the other hand, argues that a "tethered" solution such as Persistent Systems' proposed radio is unacceptable because the protester's radio, among other concerns, cannot broadcast the radio communications directly, but, rather, must route the communications through a second radio. The agency argues that the required tethering will make the warfighter dependent on the availability of another fielded radio, which may not be available or may become compromised in austere battlefield conditions, or, alternatively, require the warfighter to carry an additional radio which would defeat the agency's interest in reducing the number of radios and amount of ancillary equipment that the warfighter is required to carry. We find that the agency has articulated a reasonable explanation for the requirement as being necessary for effective battlefield communication and the safety of the warfighter. Therefore, we find no basis to sustain the protest.

Procuring agencies are required to specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies' legitimate needs (or as otherwise authorized by law). 10 U.S.C. § 2305(a)(1)(B)(ii). Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency's needs. Air USA, Inc., B-409236, Feb. 14, 2014, 2014 CPD ¶ 68 at 3. We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. AAR Airlift Grp., Inc., B-409770, July 29, 2014, 2014 CPD ¶ 231 at 3. Additionally, where, as here, requirements relate to issues of human safety or national defense, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness. Coulson Aviation (USA), Inc., B-411525, B-411525.2, Aug. 14, 2015, 2015 CPD ¶ 272 at 15; Womack Mach. Supply Co., B-407990, May 3, 2013, 2013 CPD ¶ 117 at 3.

Although the protester contends that its proposed solution is superior to the existing technology contemplated under the solicitation and argues that the risk that a soldier would be unable to tether to another battlefield radio would be minimal, we do not substitute the protester's or our own judgments regarding the acceptability of such risks. The Army has reasonably identified the need for its requirement that the radios be able to independently and autonomously communicate without the need to rely on secondary radio infrastructure. Although Persistent Systems has posited that under many circumstances the risks with tethering identified by the agency could be remote, that is not the relevant applicable standard. Rather, in light of the important safety and national defense implications of the required communications at issue, the agency is

entitled to the discretion to achieve the highest possible reliability and effectiveness. Coulson Aviation (USA), Inc., *supra*; Womack Mach. Supply Co., *supra*.

As a result of our foregoing determination, we conclude that Persistent Systems is not an interested party to challenge other provisions of the solicitation. Under the bid protest provisions of the Competition in Contracting Act of 1984, only an interested party may protest a federal procurement. 31 U.S.C. § 3551(2). That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. *Id.*; 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Coulson Aviation (USA), Inc., B-411306 *et al.*, July 8, 2015, 2015 CPD ¶ 214 at 8. Moreover, competitive prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that the agency's actions arguably were improper. *Id.*

Here, even assuming that Persistent Systems were to prevail on its remaining protest allegations, it would be ineligible for award because, as addressed above, its product could not satisfy the agency's reasonable requirement for the leader radio to be able to work independently of another radio. Thus, since the protester cannot meet this requirement, it is not an interested party to object to the other alleged solicitation defects. *See, e.g., W.A. Whitney Corp.*, B-227082, July 7, 1987, 87-2 CPD ¶ 20; W.A. Whitney Corp.--Recon., B-227082.2, Sept. 8, 1987, 87-2 CPD ¶ 224.

The protest is denied.

Thomas H. Armstrong
General Counsel