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# Decision

**Matter of:** Perimeter Solutions

**File:** B-418687

**Date:** July 17, 2020

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John G. Horan, Esq., and Lauren N. Olmstead, Esq., Faegre Drinker Biddle & Reath LLP, for the protester.

David T. Ralston Jr., Esq., Frank S. Murray, Esq., and Julia DiVito, Foley & Lardner LLP, for the intervenor.

Debra J. Talley, Esq., and Timothy R. Pyzik, Esq., U.S. Army Materiel Command, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest alleging that awardee is not an authorized distributor of the solicited product is denied where record fails to establish that either the protester or awardee are authorized distributors as the term is used in the solicitation, and both parties appear to have contractual arrangements that, if enforced, would enable them to provide the solicited product; whether the parties abide by their respective contractual arrangements is a matter between private parties not for consideration by Government Accountability Office.

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## DECISION

Perimeter Solutions, of Clayton, Missouri, protests the award of a contract to ICL-IP America, Inc., of Saint Louis, Missouri, under request for proposals (RFP) No. W52P1J20R3006, issued by the Department of the Army for a quantity of white phosphorus produced by Monsanto. Perimeter argues that ICL-IP is not an authorized distributor of the solicited product.

We deny the protest.

There are very few relevant facts surrounding this protest, and only a single issue for our consideration. The RFP contemplates the award of a 5-year, indefinite-delivery, indefinite-quantity, fixed-price contract for white phosphorus produced by Monsanto Company to the firm submitting the lowest overall price. RFP at 46. The record shows

that ICL-IP submitted the lowest price of \$3,342,150, while the protester submitted a price of \$4,492,800. Agency Report (AR) exh. 17, Source Selection Decision Document, at 1. Based on these prices, the agency made award to ICL-IP. *Id.* at 2.

The RFP includes a single sentence relating to the issue arising in this protest. That sentence provides as follows: “Under the authority at Federal Acquisition Regulation (FAR) 6.302-3, this procurement is restricted to authorized distributors of White Phosphorus produced by Monsanto within the U.S., its outlying areas, and Canada.” RFP at 3. In a nutshell, Perimeter argues that the award to ICL-IP was improper because, it claims, the awardee is not an authorized distributor of Monsanto white phosphorus. Meanwhile, Perimeter claims that it is an authorized distributor of Monsanto white phosphorus.

We find no merit to the protest. The single sentence quoted above is the only provision in the RFP relating to the acquisition being restricted to authorized distributors of Monsanto white phosphorus. The term “authorized distributor” is not otherwise defined in the RFP, and more importantly, there was no requirement in the RFP for offerors to provide any information to demonstrate that they are an “authorized distributor” of Monsanto white phosphorus, whatever that phrase may mean.

Consistent with the absence of any requirement for information relating to an offeror’s status as an authorized distributor, neither the protester, nor ICL-IP provided any information in their proposals relating to the question. The record does include evidence of the agency having made an informal inquiry about each firm’s ability to provide Monsanto white phosphorus. AR, exh.13, ICL-IP’s Confirming Email; exh. 33 Perimeter Confirming Email. Each firm represented that they would be providing Monsanto white phosphorus to the agency.

Given these facts, we have no basis to object to the agency’s award of the contract to ICL-IP. As noted, the RFP did not include any requirement for offerors to provide evidence of their status as an authorized distributor of Monsanto white phosphorous. It follows that the absence of such information in the ICL-IP proposal would not provide a basis for the agency to reject the firm’s proposal.

During the development of the record in this case, it came to light that there was a prior affiliation, as well as a current contractual relationship, between the protester and ICL-IP which appears to be at the heart of the protest. Perimeter previously was known as ICL Performance Products, a business unit that was a wholly-owned subsidiary of another entity known as ICL Group, Limited. Affidavit of the Senior Vice President of ICL Specialty Products, Inc. at 3. In March, 2018, ICL Group, Limited sold ICL Performance Products (now Perimeter) to a third party. *Id.* At approximately the same time of that sale, ICL Performance Products (now Perimeter) entered into an agreement with yet

another business unit of the “ICL family,” a concern known as ICL Specialty Products, Inc.<sup>1</sup> *Id.*

The agreement between Perimeter and ICL Specialty Products, Inc. has several features that are germane. First, it refers to a “master supply agreement” which appears to memorialize a contractual relationship between ICL Performance Products (now Perimeter) and Monsanto for the purchase of Monsanto white phosphorous. (The so-called “master supply agreement” between Perimeter and Monsanto was not provided to our Office.) Affidavit of the Senior Vice President of ICL Specialty Products, Inc., exh. 2, Elemental Phosphorus Supply Agreement, at 1; Protester’s Supplemental Submission Concerning the Supply Agreement, exh. A, Elemental Phosphorus Supply Agreement, at 1.

Second, the agreement contemplates that Perimeter will sell to ICL Specialty Products, Inc., what is referred to as the “committed volume” of Monsanto white phosphorus ordered by ICL Specialty Products, Inc. from Perimeter. Affidavit of the Senior Vice President of ICL Specialty Products, Inc., exh. 2, Elemental Phosphorus Supply Agreement, at 5; Protester’s Supplemental Submission Concerning the Supply Agreement, exh. A, Elemental Phosphorus Supply Agreement, at 5. The “committed volume” is defined as [deleted] million pounds annually. *Id.* (The maximum quantity contemplated under the solicited requirement is 1.8 million pounds over the 5-year life of the contract. RFP at 3.)

Third, the agreement provides that it may be terminated by either party upon providing the other party 90-days’ notice in the event either party “suffers a change of control.” Affidavit of the Senior Vice President of ICL Specialty Products, Inc., exh. 2, Elemental Phosphorus Supply Agreement, at 21; Protester’s Supplemental Submission Concerning the Supply Agreement, exh. A, Elemental Phosphorus Supply Agreement, at 21. There is no evidence in the record before our Office showing that either party executed this provision of the contract at the time ICL Performance Products (now Perimeter) was sold to a third party, and the protester has not suggested that this agreement has been terminated, or is otherwise not in force.<sup>2</sup>

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<sup>1</sup> The “ICL family” of companies includes ICL Group, Limited, the parent company of a concern known as ICL Specialty Products North America. Affidavit of the Senior Vice President of ICL Specialty Products, Inc. at 3. ICL Specialty Products, North America owns ICL-IP--the awardee in this case. ICL Specialty Products North America also owns ICL Specialty Products through an intermediate subsidiary known as ICL Group America.

<sup>2</sup> The record also includes a second agreement executed between ICL Specialty Products, Inc. and ICL-IP, the awardee of the current contract. Affidavit of the Senior Vice President of ICL Specialty Products, Inc., exh. 1, Elemental Phosphorus Sale and Distribution Agreement. That agreement contemplates that ICL-IP will act as a reseller and purchase white phosphorus from ICL Specialty Products, Inc. This agreement is

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We draw several conclusions from the record before us. First, there appears to be a contractual agreement between Perimeter and Monsanto, but we have not been provided a copy of that agreement. There is no evidence to show whether this contractual agreement confers upon Perimeter the status of “authorized distributor” as the protester would have us believe, but in any event, there is nothing to show that the agency was referring to such a direct contractual agreement between an offeror and Monsanto when it used the term “authorized distributor” in the RFP.

Second, there is a contractual agreement between Perimeter and ICL Specialty Products, Inc. that contemplates the sale of up to [deleted] million pounds of Monsanto white phosphorous by Perimeter to ICL Specialty Products, Inc., a quantity more than sufficient to meet the solicited requirement of 1.8 million pounds. Nothing in this agreement refers to either party as an “authorized distributor” of Monsanto white phosphorous. This agreement appears to be in effect, inasmuch as Perimeter has not suggested or demonstrated that it has been terminated.

Third, there is a contractual agreement between ICL Specialty Products, Inc. and ICL-IP, the awardee (the “intra company” agreement), that contemplates that ICL-IP will act as a reseller of white phosphorous that it purchases from ICL Specialty Products, Inc. That agreement also appears to be in effect currently.

In light of these conclusions, we find that neither the protester nor the intervenor have established that they are an “authorized distributor” of Monsanto white phosphorous as that term was used by the agency in the RFP. Furthermore, and as stated above, the RFP did not require offerors to demonstrate whether they were “authorized distributors.” We also conclude that the record reflects a string of contractual agreements that will enable the awardee to purchase Monsanto white phosphorous from ICL Specialty Products; for ICL Specialty Products to purchase Monsanto white phosphorous from Perimeter; and, apparently, for Perimeter to purchase white phosphorous from Monsanto. Whether the parties ultimately agree to abide by the terms of these contractual agreements essentially amounts to a matter between private parties that is not for our consideration. *Geodata Systems Management, Inc.*, B-416798, Oct. 1, 2018, 2018 CPD ¶ 330 at 1-2 n.1. We therefore have no basis to object to the agency’s source selection decision.

The protest is denied.

Thomas H. Armstrong  
General Counsel

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referred to by the Vice President of ICL Specialty Products, Inc. as an “intra-company” agreement. Affidavit of the Senior Vice President of ICL Specialty Products, Inc., at 2.