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Comptroller General
of the United States

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Decision

Matter of: Delta International, Inc.

File: B-284364.2

Date: May 11, 2000

Melvin Rische, Esq., and Howard Stanislawski, Esq., Sidley & Austin, for the protester. James J. McCullough, Esq., Deneen J. Melander, Esq., and Timothy W. Staley, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Science Applications International Corporation, an intervenor.

Frank J. Sando, Esq., Federal Bureau of Investigation, for the agency. Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. When an agency, in making a purchase under the Federal Supply Schedule (FSS), decides not to consider some items because the agency concludes that those items do not meet its needs, the vendor whose items are excluded from consideration may protest the exclusion, and GAO will determine whether the agency had a reasonable basis for determining that the excluded items did not meet its needs.
2. In purchase of portable X-ray systems under the FSS, protest challenging agency's conclusion that only a fully digital system would meet the agency's needs is sustained where record fails to show that agency had a reasonable basis for its conclusion that protester's system, which protester asserts uses a hybrid analog/digital signal, would not meet the agency's needs.

DECISION

Delta International, Inc. protests the Federal Bureau of Investigation's (FBI) issuance of purchase order No. A9G906190 to Science Applications International Corporation (SAIC) for portable X-ray inspection systems. The purchase order was placed under SAIC's Federal Supply Schedule (FSS) contract. Delta, which also has an FSS contract for portable X-ray inspection systems, argues that the FBI improperly determined that its equipment would not meet the agency's needs.

We sustain the protest.

The FBI explains that as part of a counter-terrorism initiative, Congress appropriated funding for the acquisition of equipment for local and state bomb technicians, and that its Bomb Data Center (BDC) was assigned to identify and procure appropriate equipment. The BDC identified SAIC's RTR-4 Real Time Imaging Systems as among the items to be purchased for dispersal to state and local bomb squads. Contracting Officer's Statement at 1; FBI Procurement Justification, June 12, 1999, at 1. The BDC determined that RTR-4 units should be purchased because the RTR-4 is the only "fully digital" portable X-ray system available. *Id.* at 2. On September 21, 1999, the FBI issued a purchase order worth approximately \$9.8 million to SAIC for 424 RTR-4 systems and associated equipment.

According to the agency, a fully digital system is required because:

[f]ull digitization would allow greater compatible technological improvements, faster exchange of data information, and significant quality control of resolutions. The use of a fully digital system would reduce frequency roll-off associated with the use of an analog filter. It would further eliminate image losses associated with the use of coax cables in the analog system. Further noise distortion is avoided in a fully digital system by the elimination of the Sync Grabber that is characteristic of the analog format. . . . In addition, a fully digital system could be upgraded to a wireless system at a later time, without loss of speed in image transmission.¹

Declaration of the Contracting Officer's Technical Representative (COTR), Mar. 1, 2000, at 2-3. In addition, a fully digital system "will allow the Bomb Technician on the scene of an incident to digitally transmit images to other locations anywhere in the country for real-time assistance from other experts." Declaration of COTR, Mar. 22, 2000, at 2.

By way of background, the FBI explains that the RTR-4 and Delta's system, the foXray II, consist of three components, which are linked by cable: an X-ray source, which generates X-rays that are directed at a suspect device; an imager housing a camera, where the image is acquired; and a control unit, which the bomb technician uses to send commands to control the other components and which receives data from the imager and allows them to be viewed on a screen. Declaration of COTR, Apr. 12, 2000, at 2; see also Protester's Comments, Apr. 13, 2000, at 9. The two

¹ The contracting specialist explains that wireless technology would eliminate the need for cables to link the components of the system. According to the contracting specialist, the FBI is not now ready to adopt wireless technology because of the possibility that use of a wireless frequency might detonate a bomb; the agency might consider converting to wireless systems when the technology advances sufficiently, however. Declaration of Contracting Specialist, Feb. 1, 2000, at 1.

systems differ in the manner in which they transmit data from the imager to the controller, however. According to the COTR:

With the RTR-4, the camera housed in the imager is fully digital in that the image is digitized on the chip within the camera itself, prior to any transmission of data to the control unit. Transmission of data to the control unit is in digital format. With the conventional technology of the RTR-3 [the predecessor unit to the RTR-4], foXray [the predecessor to the foXray II] and foXray II, the camera housed in the imager is analog. Only analog video data is established within the camera, prior to transmission to the control unit. Transmission of data to the control unit is in analog video format.

Declaration of COTR, Apr. 12, 2000, at 2.

Delta argues that the agency improperly determined that only a fully digital X-ray system would meet its needs. The protester contends that its system is essentially digital in nature and, although it employs a hybrid analog/digital technology to transmit data from the imager to the controller, it does not use an analog filter, coaxial cables, or a Sync Grabber, and thus does not have the problems that the agency associates with these features. The protester further contends that its system transmits data from the imager to the controller faster than the RTR-4; that it achieves better quality images than the RTR-4, “with quality being measured in quantitative forms, such as resolution, penetration and dynamic range”; and that it already has wireless capability. Protester’s Comments, Mar. 13, 2000, at 4-5. Delta also argues, in response to the agency’s argument that fully digital transmission is important because of its compatibility with other digital equipment, that both the RTR-4 and the foXray II transmit images from the controller to other equipment digitally; as a result, the protester contends, “each of the products is fully compatible with other digital equipment, and there is absolutely no difference between them in this regard.” Protester’s Comments, Apr. 13, 2000, at 3.

The agency views the protest as contending that the protester “should have been given an opportunity to compete for award of the FSS order.” Agency Memorandum of Law at 2. The agency points out that, when placing an order under an FSS, an agency is not required to seek further competition. Federal Acquisition Regulation (FAR) § 8.404(a). On that basis, the agency contends that the protest should be denied.

It is true, as the agency contends, that agencies are generally not required to compete FSS buys (other than in the limited ways, not relevant here, that are set out in FAR 8.404(b)). Accordingly, if the protest were contending that the agency was required to conduct a competition, it would be dismissed for failure to state a valid basis of protest.

Here, however, the question is not whether the agency was required to compete the buy, but rather whether the agency had a reasonable basis for determining that only the RTR-4 met its needs. Indeed, the agency itself states that, in our Office's review of this matter, "the focus should properly be whether there is a reasonable basis for the agency requirements." Agency Memorandum of Law at 3. We agree.

Section 259(b)(3) (1994) of title 41 of the United States Code provides that the procedures established for the General Services Administration's multiple award schedule program (that is, the FSS program) satisfy the general requirement in 41 U.S.C. 253(a)(1) for use of competitive procedures "if--(A) participation in the program has been open to all responsible sources; and (B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government." See also FAR 8.404(a). Use of the streamlined procedures of the FSS in lieu of conducting a competition is thus premised on a determination regarding what the agency's needs are and which FSS supply or service meets those needs at the lowest overall cost. The fundamental principle of government accountability dictates that those determinations are subject to review, and we view it as axiomatic that, in order to withstand review when challenged in a bid protest, the agency must be able to provide a reasonable basis for its determinations regarding its needs and the FSS supply or service that meets those needs at the lowest overall cost.

Consistent with that principle of accountability, FAR § 8.404(b)(7) provides that,

[i]f an agency's requirement in excess of the [\$2,500] micro-purchase threshold is defined so as to require a particular brand name, product, or a feature of a product peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, the ordering office shall include an explanation in the file as to why the particular brand name, product, or feature is essential to satisfy the agency's needs.

Where, in connection with an FSS purchase in excess of the micro-purchase threshold, a bid protest challenges an agency's definition of its needs that excludes consideration of supplies or services offered by the protesting FSS vendor, we will review the agency's documentation, including its report to our Office, in order to determine whether the agency's definition of its needs has a reasonable basis. See Design Contempo, Inc., B-270483, Mar. 12, 1996, 96-1 CPD ¶ 146 at 3; National Mailing Sys., B-250441, Jan. 28, 1993, 93-1 CPD ¶ 75 at 2, recon. denied, B-250441.2, June 28, 1993, 93-1 CPD ¶ 496; TSI Inc., B-249815, Dec. 22, 1992, 92-2 CPD ¶ 429 at 2. In FSS buys, as in other procurements, the determination of what the agency needs and which products meet those needs is within the agency's discretion, and we will not sustain a protest in this area unless the determination lacks a reasonable basis. See Design Contempo, Inc., supra.

Here, we conclude that the FBI lacked a reasonable basis for its determination that the protester's system did not meet the agency's needs.

Specifically, in response to the protester's arguments and questioning by our Office, the agency elaborated on the requirement for full digitization that underlay the decision that the protester's system could not satisfy the agency's needs. The COTR conceded that the RTR-4 does not transmit data from the imager to the controller faster than the foXray II, as he had originally argued; he explained, however, that the RTR-4, because it transmits only digital data, can alter its speed of transmission, and that the ability to transmit more slowly is in fact an advantage because it allows for the transmission of a more detailed image. According to the COTR:

The digital camera technology of the RTR-4 allows variations or changes in transmission frequency in order to achieve a higher resolution or more sensitivity in the intensity scale. The RTR-4 can alter its speed based upon the data to be captured and transmitted. If there is detailed data the digital technology has the capability to operate at a reduced rate in order to ensure it captures the detail quality in image resolution. Analog video is not able to achieve this operation at a reduced frequency and thereby sacrifices resolution and image sensitivity for speed. . . . The RTR-4's ability to operate at reduced or varying frequencies insures a higher quality image. The inability of analog video to make this adjustment results in a lesser image quality. The quality of image resolution becomes more noticeable as the length of the transmission increases. The longer the transmission cable distance the more likely high frequency signal will be degraded when transmitted in analog format. We are procuring systems with 330 feet of cable, for operator safety reasons. At that length there is a noticeable difference in image between digital and analog technology.

Declaration of COTR, Apr. 12, 2000, at 1-2. The COTR further explained, in response to the protester's argument that its system already has wireless capability, that there is a difference between the wireless capabilities of the RTR-4 and the foXray II due to the difference between digital and analog technology:

Digital transmission in a wireless format with the RTR-4 allows multidirectional transmissions of images as well as encrypted transmissions in sensitive environments, to prevent interception or monitoring. The analog transmission of the foXray II in wireless mode would allow any commercial receiver working at the same frequency to intercept such analog transmissions. Such a mishap could have adverse consequences.

Id. at 3. Finally, in response to the protester's argument that its system has the capability to transmit data digitally to other equipment, the COTR explained that,

although the foXray II can transmit data to other locations in digital format after the data have been converted from analog to digital in the controller, the earlier analog transmission (from the imager to the controller) has resulted in a loss of edge and image sharpness, and thus the image that is transmitted to other locations is of a lesser quality.² Letter from FBI to GAO 2 (Apr. 13, 2000).

The justification for a fully digital requirement now advanced by the agency differs considerably from the justification that it originally advanced. Whereas the agency originally argued that one advantage of a fully digital system is its higher speed in transmitting data, the agency now argues that it is the ability of a digital system to transmit data more slowly that is an advantage. Further, whereas the agency originally attributed the ability of the digital system to produce better quality images to the fact that it does not use an analog filter or coaxial cables, it now argues that the ability to generate better quality images is attributable to the ability of the digital system to operate at reduced or varying frequencies. Third, whereas the agency originally argued that an advantage of a fully digital system is that it could be upgraded to wireless at a later date without loss of speed in image transmission, it now argues that the advantage of digital over analog is that a digital transmission in wireless mode can be encrypted, whereas an analog transmission cannot be.

As with the agency's initial arguments, the protester takes issue with each of the agency's post-protest positions. Specifically, Delta disputes the agency's contentions that the RTR-4 is able to generate a higher quality image than the foXray II; that the quality of image generated by the foXray II will degrade if it is transmitted a distance of 330 feet from the imager to the controller; and that the foXray II's signal cannot be encrypted in wireless mode. Delta maintains that its system provides higher resolution and greater penetration capability than the RTR-4;³ that "there is no degradation of the foXray II's image quality even at [a distance from imager to controller of] 150 meters, or 492 feet"; and that its signal can be encrypted.

² The agency does not dispute the protester's contention that its system does not use an analog filter, coaxial cables, or a Sync Grabber, features identified in the COTR's declaration of March 1 as characteristic of an analog system. The COTR had pointed to these features in support of the agency's position that a system with such features would not meet its needs.

³ As proof that the foXray II provides higher resolution and greater penetration capability than the RTR-4, the protester has submitted a copy of a standardized test chart demonstrating the ability of the foXray to detect a wire .004 inches in diameter, a capability that the RTR-4 lacks, according to the protester. Delta also offers proof that its system can detect a wire with a diameter of .005 inches behind a 1/8 inch steel plate; the protester maintains that according to SAIC's Internet site, the thinnest wire that the RTR-4 can detect behind a 1/8 inch steel plate is .008 inches in diameter. Protester's Comments, Apr. 13, 2000, at 11.

Protester's Comments, Apr. 13, 2000, at 4, 10, 11. The protester argues that the agency has made certain incorrect assumptions regarding the capabilities of the foXray II based on its experience with other systems, such as SAIC's RTR-3, which transmit an analog signal from the imager to the controller. Delta maintains that these assumptions do not hold true for its system because the signal that it transmits from imager to controller is, rather than analog, an analog/digital hybrid.

Based on our review of the record here, we conclude that the agency did not have a reasonable basis for believing that only the RTR-4 system would meet its needs. Every justification for the agency's position, including those offered during the course of the protest, is premised on the assumption that the only alternative to the RTR-4 system is a system in which data are transmitted from the imager to the controller in analog format. Delta has repeatedly denied the correctness of this assumption with regard to its system, arguing that its signal is an analog/digital hybrid. There is no evidence in the record that the FBI had any basis for its assumption that the deficiencies of analog systems applied to the foXray II or ever sought to determine whether a system using a hybrid signal might serve its needs.

Because the FBI has not demonstrated that its assessment of its needs and of Delta's system's compliance with those needs had a reasonable basis, we sustain the protest. In light of the changes in the agency's explanation of its needs during the course of the protest, we recommend that the FBI review its needs to ensure that they are as articulated during the protest,⁴ and that the agency then make a determination of whether the protester's system is able to meet those needs. If the agency determines that it is, we recommend that, in accordance with FAR § 8.404(b)(3)(ii), the agency contact Delta and SAIC to seek reductions in their schedule prices. If, once this information has been received, the FBI determines that issuance of an order to Delta will meet the agency's needs at a lower overall cost than the order issued to SAIC, we recommend that the agency cancel the order issued to SAIC and issue an order for any undelivered systems to Delta. We also recommend that the agency reimburse the protester for its costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2000). In accordance with section 21.8(f)(1) of our Regulations, Delta's certified claims for such costs,

⁴ We understand the agency's position now to be that it needs a system that not only will generate a high-quality image generally, but one which also can transmit an image from an imager to a controller 330 feet away without degradation, and has the ability to encrypt a wireless signal.

detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

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of the United States