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Decision

Matter of: Meggitt Safety Systems, Inc.

File: B-297378; B-297378.2

Date: January 12, 2006

Richard B. Oliver, Esq., McKenna Long & Aldridge LLP, for the protester.
Robert R. Fleck, Esq., and Robert E. Vollmar II, Esq., U.S. Army Materiel Command, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's sole-source acquisition of urgently required automatic fire suppression systems is denied where record shows agency adequately investigated protester's capabilities, and reasonably concluded that protester would not be able to timely meet agency's requirements.

DECISION

Meggitt Safety Systems, Inc. protests the Department of the Army's award of contract No. W56HZV-05-C-0773 to Kidde Technologies, Inc., dba Kidde Dual Spectrum (KDS), for a quantity of automatic fire suppression systems (AFSS) to be installed in the U.S. Marine Corps's light armored vehicles. Meggitt asserts that the agency improperly awarded the contract on a sole-source basis.

We deny the protest.

The Marine Corps employs a family of light armored vehicles (LAV) used in various military missions throughout the world. Based on experience during the war in Iraq, it was determined that the LAVs required a survivability upgrade consisting of upgraded armor plating and installation of AFSS on all vehicles currently in the agency's inventory, as well as a number of additional LAVs that the agency intends to field in support of additional Marine Corps companies.¹ (The survivability upgrade

¹ The vehicles at issue here are designated as LAV A2; this designation is being assigned to these vehicles to connote that they have received the survivability upgrade at issue. Previously, these vehicles were designated as LAV A1. Hearing

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also includes an upgrade to the vehicles' suspension systems to accommodate the additional weight of the new components, as well as the replacement of certain vehicles' gun turrets.)

While the agency had concluded by the beginning of 2005 that the survivability upgrade would be necessary, it did not have any funding with which to pursue the acquisition. Nonetheless, in an effort to obtain market research data to determine the availability of the AFSS, the agency issued a request for information (RFI), with responses due by February 28, 2005. The agency received four responses by the deadline, including the protester's and KDS's (a fifth response was submitted by another concern in April). Contracting Officer's (CO) Statement at 2-3. The agency evaluated the responses to ascertain the technology readiness level (TRL), or "maturity," of each firm's AFSS. The RFI specified an AFSS with a minimum TRL rating of at least 8 as necessary to meet the agency's requirements, and also expressed, as an objective, an AFSS with a TRL rating of 9. TRL ratings are established consistent with guidance outlined in the Department of Defense Technology Readiness Assessment Deskbook, May, 2005, which describes TRL ratings ranging from 1 to 9, with the TRL 8 rating being defined as "actual system completed and qualified through test and demonstration," and a TRL rating of 9 defined as "actual system proven through successful mission operations." Agency Report (AR), exh. 15, at 3-15.

The agency determined that the KDS AFSS merited a TRL rating of between 8 and 9. Specifically, the agency found that variants of the KDS AFSS had been fielded on numerous other military vehicles (including the Stryker or LAV 3 vehicles, as well as LAV 2 vehicles furnished under various foreign military sales agreements) and was rated as TRL 9 for those vehicles. However, [deleted] for the LAV A2s, the agency concluded that the TRL rating for the KDS AFSS was essentially somewhere between a TRL rating of 8 and 9. AR, exh. 16, at 4-5; Tr. at 44-45. The record shows that the agency also gave some consideration to the fact that KDS had a current production capability that was adequate to meet the needs of the requirement. Tr. at 43.

The agency assigned the Meggitt AFSS a TRL rating of 7. (A TRL rating of 7 is defined as "system prototype demonstration in an operational environment." AR, exh. 15, at 3-15.) The agency stated the basis for this rating as follows:

Meggitt has not supplied an AFSS to a U.S. military ground vehicle.
Meggitt has supplied components and systems to the commercial

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Transcript (Tr.) at 6-7. The family of LAV A2 vehicles includes some seven different variants of LAVs. Tr. at 42. In addition, the record includes periodic references to the LAV 3, or Stryker vehicle, which is distinct from the LAV A2.

aviation industry and to some U.S. military aircraft. The system Meggitt is proposing [deleted] requires establishment of production facilities to support the [Marine Corps's] LAV requirements. Due to the lack of integration into a LAV or similar ground vehicles, the TRL is considered to be 7.

AR, exh. 16, at 5.

As noted, the receipt of responses to the RFI and the TRL ratings occurred prior to the time that the agency received funding for the requirement. The agency finally received funding authority for the requirement on June 1, and on June 16 the Marine Corps provided the Army with its direction regarding how, specifically, the funding should be allocated for the survivability upgrade. Tr. at 11. Thereafter, on August 18, the agency executed a justification and approval (J&A) to make a sole-source award to KDS, citing unusual and compelling urgency, 10 U.S.C. § 2304(c)(2) (2000), as the basis for its decision. AR, exh. 10. On September 15, the agency issued a solicitation for the requirement to KDS, AR, exh. 11, and on September 29 the agency entered into a letter contract with KDS for a quantity of [deleted] AFSS kits. AR, exh. 2.

On October 7, Meggitt filed this protest with our Office, challenging the sole-source award to KDS. Thereafter, on November 9, the agency executed a second J&A that reduced the quantity of AFSS kits covered by the justification from [deleted] to [deleted], again citing unusual and compelling urgency as the basis for the sole-source award for the smaller quantity. AR, exh. 36. The agency notified our Office of its intent to partially terminate the KDS contract for the convenience of the government, AR, exh. 21, and notified KDS to continue performance of the contract notwithstanding Meggitt's protest, but only for [deleted] units. AR, exh. 20.

Meggitt's challenge to the sole-source award to KDS focuses primarily on the interval of time between the agency's market survey activities and the point at which it made award to KDS. We have considered all of Meggitt's arguments and find them to be without merit. We discuss the most significant arguments below.

The Competition in Contracting Act (CICA), 10 U.S.C. § 2304(c)(2), permits an agency to use other than competitive procedures in acquiring goods or services where the agency's requirement is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals. Moreover, while CICA requires that agencies solicit offers from as many potential sources as is practicable when using the unusual and compelling urgency exception to limit competition, 10 U.S.C. § 2304(e), an agency nonetheless may limit a procurement to the only firm it reasonably believes can properly perform the work in the time available. McGregor Mfg. Corp., B-285341, Aug. 18, 2000, 2000 CPD ¶ 151 at 6. In this regard, a military agency's assertion that there is a critical need that is related to human safety

and affects military operations carries considerable weight. Id. at 7. The reasonableness of the contracting activity's judgments must be considered in the context of the time when they were made and the information that was available at that time. Equa Indus., Inc., B-257197, Sept. 6, 1994, 94-2 CPD ¶ 96 at 3 n.1.

Meggitt asserts that the agency improperly failed to engage in adequate advance planning. In this regard, Meggitt asserts that, after obtaining the responses to the RFI, the agency essentially did nothing for a period of approximately 6 months before eventually making its sole-source award to KDS. Meggitt maintains that, among other things, the agency declined its offer, included in its response to the RFI, to perform testing of its product at the firm's own expense, AR, exh. 8, at 5, and also unreasonably declined its offer, in an April 28 e-mail, to update its RFI response in April. AR, exh. 35, at 1.

Although the record shows that the agency did not respond to Meggitt's April 28 e-mail, the agency's Chief of the Marine Corps Program Division testified that this was because, due to the lack of funding at that time, the agency did not think it was appropriate to cause any of the respondents to expend further effort in preparing materials or information. Tr. at 63. In a similar vein, he testified that he never specifically declined Meggitt's offer to perform testing at its own expense, but that, again, the agency was reluctant to encourage additional expenditures by Meggitt or other concerns in the absence of program funding. Tr. at 109-11.

We find nothing unreasonable in the agency's actions. Simply stated, the agency acted in a manner that was prudent under the circumstances, since there were no funds available and no firm basis for the agency to conclude that it would be able to perform the upgrade. As noted, the question for our Office is whether the contracting activity's judgments, considered in the context of the time when they were made and the information that was available at that time, appear reasonable. Equa Indus., Inc., supra. Further, regarding Meggitt's offer to perform testing at its own expense, in the absence of agency direction not to perform such testing, there is no basis to find that the agency somehow unreasonably precluded Meggitt from conducting such testing. Meggitt has not shown why it could not have performed such testing at its own expense (and provided the agency with its results), and thereby possibly positioned itself differently with respect to the agency's urgent requirement. In effect, Meggitt's decision to refrain from such testing was a matter of its own business judgment, not improper agency action. We note that the agency's witness testified that he would have at least considered the results of such testing. Tr. at 116-17.²

² Similarly, it is not apparent why Meggitt could not have simply furnished the agency with any updated information it deemed relevant to establishing its capabilities.

Meggitt argues that, at the point in time that the agency did receive funding for the requirement, Meggitt already had unreasonably been excluded from further consideration. Meggitt points out two considerations in connection with this assertion. First, the record includes testimony showing that by late April the agency had essentially determined that Meggitt would not be a viable source for the requirement. Tr. at 119-20. Meggitt argues that this was unreasonable because, as events turned out, it could have met the agency's requirement. Second, the record shows that at the point in time when the agency did receive funding, it decided to pursue a sole-source award to KDS because it had concluded that any other offeror would need approximately 13 months from contract award to first production delivery. Tr. at 23-25. Meggitt maintains that this 13-month estimate is erroneous, and that it could begin production deliveries within the time frame under KDS's contract (approximately 6 months after award).

We find the agency's actions unobjectionable. First, the record shows that, at the time of the agency's assigning TRL ratings, Meggitt had not previously fielded its AFSS on Department of Defense ground vehicle platforms.³ While Meggitt did state in its response to the RFI that its AFSS was a mature product that had been installed on over 10,000 vehicles worldwide, AR, exh. 8, at 3, the record shows that, in fact, Spectronix (the firm with which Meggitt had entered into a licensing agreement to manufacture its components in the United States), and not Meggitt itself, had manufactured and installed the units in question.

Second, in its response to the RFI, Meggitt proposed to establish a production facility to fabricate the Spectronix components that it was licensed to manufacture. The agency was concerned that the establishment of a new production facility to manufacture components that Meggitt had not previously produced introduced an element of risk that was unacceptable in light of the agency's urgent requirement. Tr. at 17-19. We find nothing unreasonable in the agency's conclusion, given that Meggitt did not have a production capability at the time it responded to the RFI; indeed, it was this consideration, primarily, that led the agency to assign Meggitt a TRL rating of only 7.⁴

³ The record shows that Meggitt, [deleted] for purposes of conducting limited performance testing, Tr. at 18, 19, 94, but there are no other instances identified in the record where the Meggitt system has been installed or tested in a Department of Defense ground vehicle platform.

⁴ Although the issue of whether Meggitt has this production capability has been prominent throughout the development of the protest record, Meggitt has tendered no detailed evidence relating to even a current capability to manufacture its AFSS as proposed. The only evidence provided is an affidavit in which Meggitt's Director of Advanced Development only generally avers, without supporting documentation or references, that Meggitt has established a production facility that is capable of meeting the agency's delivery requirements. Meggitt Affidavit, Dec. 2, 2005, at 1.

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Finally, we do not find the agency's 13-month estimate of the time necessary from contract award to production unit deliveries unreasonable. The agency's witness testified as follows:

Q: Do you recall how that 13 months was established? Can you break that out at all?

A: I can, based on our experience in developing systems and subsystems for application to the Marine Corps LAV fleet. We find that the typical timeline requires some three months for development of the design, the initial design, production of the prototypes for test, approximately five to six months to conduct thorough testing to include reliability, availability, maintainability testing, performance testing, environmental tests, and operational tests in the evaluation, five to six months for those activities. And then once the design has been validated through that series of testing, the contractors would be authorized to begin production. And in a situation like this, it would be expected to take about five months to acquire the raw materials, establish the manufacturing processes, produce the components, do the production testing, and package them for delivery.

Tr. at 24-25. Meggitt takes issue with this testimony, arguing that the agency's estimates are inflated and that a more expedited delivery could be achieved. However, Meggitt has furnished no evidence establishing that the agency's timeline is not at least roughly accurate. Moreover, again, Meggitt has not established that it had the capability to begin performance at the time of the award to KDS. Given that the delivery schedule for KDS's contract calls for initial deliveries no later than 6 months after contract award, and given that, in order to meet the agency's delivery requirement here Meggitt would essentially have to make initial deliveries in less than one-half the time the agency estimates it would need, we find no basis to question the agency's determination that Meggitt was not in a position to perform the contract.

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This lack of supporting evidence is significant in light of testimony by an agency witness relating to another contract awarded to Meggitt to manufacture its AFSS for installation in certain other Department of Defense vehicles (Humvees). That witness testified that Spectronix, rather than the protester, had manufactured some of the components under that contract. Tr. at 89-91. Meggitt has tendered no evidence to rebut this testimony which suggests that it lacks a current capability to manufacture its AFSS as proposed in its response to the RFI, notwithstanding the centrality of the issue during our consideration of the case.

Meggitt asserts that the agency's partial corrective action, that is, its reduction in the number of units to be produced by KDS from [deleted] to [deleted], is inadequate because Meggitt eventually will be in a position to manufacture at least some of the remaining [deleted] units, even assuming the agency's 13-month estimate is roughly correct.⁵ In this regard, the record shows that KDS's deliveries under the contract commence 180 days after the September 29 award date and continue until 360 days after award. AR, exh. 2, at 5; exh. 20. However, since the delivery schedule under the KDS contract contemplates that all quantities will be delivered in just under 12 months after award, and since, as discussed, there is nothing unreasonable in the agency's conclusion that Meggitt could need as much as 13 months to begin deliveries, there is no basis for us to question the number of units remaining under KDS's contract.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁵ Meggitt also complains that the agency has made no commitment regarding whether it intends to hold a competition for the remaining [deleted] units. However, to the extent that Meggitt is asserting that the agency intends improperly to acquire these remaining units without using competitive procedures, Meggitt's allegation merely anticipates improper agency action; as such, this aspect of Meggitt's protest is speculative and premature, and therefore not for our consideration at this time. Sun Chem. Corp., B-288466 et al., Oct. 17, 2001, 2001 CPD ¶ 185 at 13.