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**Comptroller General
of the United States**

**United States General Accounting Office
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Decision

Matter of: NABCO, Inc.

File: B-293027; B-293027.2

Date: January 15, 2004

Ronald S. Perlman, Esq., and Michael B. Tuite, Esq., Buchanan Ingersoll, for the protester.

John D. Pelligrin, Esq., for UXB International, Inc., an intervenor.

Michael J. O'Farrell, Jr., Esq., Department of the Air Force, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Awardee's proposed explosive ordinance disposal total containment vessel (TCV) is a commercial item, even though it is a modified version of an existing commercially available TCV, where the modification is minor and customarily available in the commercial marketplace.

DECISION

NABCO, Inc. protests the award of a contract to UXB International, Inc., issued by the Department of the Air Force under solicitation No. F13-DEA-32200100, for 15 explosive ordinance disposal total containment vessels (TCV). NABCO contends that UXB's proposed TCV is not a commercial item and does not comply with certain solicitation requirements.

We deny the protests.

The TCV is a trailer-mounted vessel that permits the safe transport of terrorist devices out of populated areas to areas where the devices can be safely counter charged. The solicitation for TCVs was issued on September 9, 2003 as a "combined synopsis/solicitation for commercial items."¹ The solicitation specified that award

¹ The determination to acquire the TCVs as commercial items was made after market research conducted by the Air Force revealed that three firms had available commercial TCVs.

would be made to the “responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government,” considering technical capability, price, and delivery schedule. Solicitation at 1-3.

The solicitation required that the proposed TCV meet certain physical and performance-based requirements. Among these requirements was that the proposed TCV was to be capable of operating in two separate modes: a “gas tight” mode capable of containing all gases generated from a detonation of no less than 3 pounds of C4 or equivalent explosives, and a “controlled vent” mode capable of containing a detonation of no less than 10 pounds of C4 or equivalent explosives. The TCV was also to contain drain and fill ports for decontamination, as well as sampling capability to enable monitoring and sample collection after detonation or during the treatment process. The TCV was to have an inside diameter of no less than 42 inches, an access door located on the side of the vessel for safely loading and unloading suspect devices, and a trailer to provide a stable platform. The TCV, trailer, and all accessories were not to exceed 6,000 pounds in weight. Delivery was required no later than May 15, 2004.

Three offerors responded to the solicitation. UXB proposed a model “MECV-L,” which is a modified version of its model “MECV-5L” (one of two commercial lines of mobile explosive containment vessels UXB distributes²), with a reconfigured door to meet the requirements of the solicitation. NABCO and the other offeror also proposed TCVs from their commercial product lines.

In evaluating offers, the agency did not affirmatively evaluate whether each proposed TCV was a commercial item; rather, the agency presumed that each of the offers was for a commercial item, based on its market research performed in advance of the solicitation (which included responses from both NABCO and UXB) and the fact that nothing in the proposals suggested the TCVs proposed were not commercial items. Hearing Transcript (Tr.) at 36-40, 67-68. All three offerors’ proposals were found to be technically acceptable, but only NABCO’s and UXB’s proposals were found to meet the delivery date. Award was made to UXB because, all other factors being equal, its price of \$2.7 million was lower than NABCO’s proposed \$3.6 million price. Notice of award was provided to NABCO on October 2, 2003, and these protests followed.³

² The other commercial product line distributed by UXB is the “MECV-5.” The “5” in either product line denotes the maximum explosive capacity for the vessel, which in this case refers to 5 kilograms of TNT in a gas tight mode. This equates to at least 8 pounds of C4 equivalent in a gas tight mode.

³ The performance of the contract has been stayed pending resolution of the protests.

NABCO first complains that UXB's proposed TCV is not a commercial item. Federal Acquisition Regulation (FAR) § 52.202-1(c), incorporated by reference in the solicitation, defines a commercial item to be:

- (1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and that--
 - (i) Has been sold, leased, or licensed to the general public; or
 - (ii) Has been offered for sale, lease, or license to the general public;

- (2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

- (3) Any item that would satisfy a criterion expressed in paragraphs (c)(1) or (c)(2) of this clause, but for--
 - (i) Modifications of a type customarily available in the commercial marketplace; or
 - (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. "Minor" modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor[.]

NABCO contends that UXB's proposed MECV-L is not a commercial item because it has not been sold, or offered for sale, commercially in a configuration that is fully compliant with all of the solicitation's requirements. However, the record demonstrates that UXB has commercially sold, or offered for sale, its MECV-5L product line, upon which the proposed MECV-L here is based, with all of the same features as required under this solicitation, except for the door modification.⁴

⁴ Although some sales were for MECV-5L units weighing in excess of 6,000 pounds, which is also reflected in some of UXB's marketing materials, the intervenor explains that the vessel may be manufactured in varying weights, depending on the size of the construction mold, weight of the steel used in construction, and equipment features
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Tr. at 150, 153, 199; Intervenor’s Hearing exh. No. 1, at 4, 6, 20-21, 26-29, 32, 39-40. The protester concedes that the MECV-5L units are commercial items as defined in the FAR. Tr. at 83-84, 123. Thus, we need only consider whether the door modification is of “a type customarily available in the commercial marketplace” under paragraph 3(i), or a “minor modification” under paragraph 3(ii), of the commercial item definition. Under these paragraphs, the MECV-L does not have to have been sold, or offered for sale, in the modified configuration in order to qualify as a commercial item.

With regard to the door configuration, which UXB proposes to modify from a “slide out” to “swing out” style to meet the Air Force’s requirements, NABCO asserts that the modification is not commercially available and is “substantial” in terms of the effort required for redesign. However, the record evidences that the door modification is available commercially; that is, UXB has already provided its “swing out” door to its commercial customers on other containment vessel product lines (*e.g.*, the portable containment vessels and mobile containment vessels), and this same design is applicable to the MECV-L in a “scaled down” size. Intervenor’s Hearing exh. 2; Tr. at 161-62. The record also demonstrates that the door modification is a “minor modification” because, as the agency asserts, and we agree, it does not significantly alter the nongovernmental function or essential purpose of the TCV, which is to contain a blast. Tr. at 64. Thus, we find that the proposed MECV-L offered by UXB under this solicitation is a commercial item.

NABCO complains that the Air Force did not formally evaluate, or document, whether UXB’s (and the other offerors’) proposed TCV was a commercial item at the time of the evaluation. However, there is no requirement in the FAR that agencies formally evaluate or document whether an offered item is a commercial item when using commercial item procedures, and the protester has not provided any authority for its belief that such an analysis is required. In any event, as the agency explains, even though it did not undertake a formal analysis of proposals to determine whether the items proposed were in fact commercial items, it did have a belief, based on its market research, that the items proposed were commercial, and nothing in the offerors’ proposals, and in particular UXB’s, suggested that the items proposed were not commercial items. In making award to UXB, the agency further argues, it made a *de facto* determination that the item upon which award was made was a commercial item. Tr. at 67-68, 96-97, 254-55. Given that the record otherwise demonstrates that UXB’s proposed MECV-L is indeed a commercial item, we cannot find the agency’s actions in this regard objectionable.⁵

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included with the vessel, and asserts that it has sold vessels weighing less than 6,000 pounds to its commercial customers. Tr. at 198-203.

⁵ To the extent that NABCO asserts that we should disregard the Air Force’s post-protest commercial item analysis and explanation as reflecting a new agency

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NABCO next contends that UXB's proposed MECV-L does not comply with the solicitation requirements for explosive capability in both the gas tight and controlled vent modes, and for sampling capability.⁶ However, the record demonstrates compliance with each of these requirements, as asserted by UXB in its proposal. Agency Report, Tab 6, UXB Proposal, attach. A, at 1-3; attach. B; Tr. at 156-59 (explosive capability ratings exceed that required under solicitation); Tr. at 205 (drain and fill ports for sampling capability are a "standard item"). Although NABCO complains that UXB has not provided any supporting evidence of compliance, such as test results demonstrating explosive capability, such documentation was not required under the solicitation, and was not provided by NABCO either. Given that this procurement was conducted using simplified acquisition procedures where detailed proposals demonstrating compliance were not required, and the agency was unaware of any information contradicting UXB's statements of compliance (and NABCO has provided none here), we find that the Air Force reasonably relied on UXB's statements in determining that UXB's proposal was technically acceptable.⁷

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judgment, see Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, we note that the commercial item analysis and evidence presented here, and considered by this Office, reflects less a matter of new judgment by the agency and more a matter of additional objective evidence for us to determine whether the agency's original presumption--that UXB offered a commercial item--was reasonable. See Chicataw Constr., Inc., B-289592, B-282592.2, Mar. 20, 2002, 2002 CPD ¶ 62 at 7-8 (objective evidence accorded more weight than evidence of new agency rationale). The evidence presented supports the Air Force's determination that the MECV-L proposed by UXB under this solicitation is a commercial item.

⁶ In its supplemental protest, NABCO asserts for the first time that UXB's proposed MECV-L also does not meet the weight requirement of the solicitation. This allegation is untimely filed. Protest grounds, other than those alleging solicitation defects, must be raised within 10 days of when the basis for protest is known or should have been known. 4 C.F.R. § 21.2(2) (2003). Here, the record shows that NABCO was aware of its basis for protest, and indeed discussed it with the agency, as early as October 30, 2003, see Supplemental Protest, exh. 2, Letter from NABCO to Air Force (Oct. 30, 2003), at 3, but did not raise this issue as a basis for protest until November 17 (more than 10 days later). In any event, UXB's proposal asserts that the MECV-L weighs 5,800 pounds, which is less than the maximum weight specified by the solicitation, and, as discussed above, UXB explained how this would be achieved.

⁷ NABCO also asserts that UXB's proposal is ambiguous as to which model TCV was proposed because of two isolated references to the "MECV-5L" as opposed to the "MECV-L." However, the Air Force did not find the proposal ambiguous, as one
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See Premier Eng'g & Mfg., Inc., B-283028, B-283028.2, Sept. 27, 1999, 99-2 CPD ¶ 65 at 7-8.

NABCO finally complains that UXB cannot meet the May 15 delivery requirement, given that performance is currently stayed and vessel modifications will require 3 to 6 months for redesign efforts, and another 3 weeks for testing once performance resumes. However, contrary to NABCO's suggestion, the stay of performance does not render non-compliant UXB's otherwise compliant proposal because, as the Air Force explains, "for every day contract performance is delayed due to this protest, the successful offeror will be granted an additional day to complete contract performance." Air Force Supplemental Memorandum of Law at 5. Furthermore, even assuming that the protester's estimates of reconfiguration and testing time are correct, it has not demonstrated that the agency's conclusion, that UXB could meet the delivery date as it promised, was unreasonable.

The protests are denied.

Anthony H. Gamboa
General Counsel

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reference was understood by the agency to be a typographical error, and the other reference was understood to refer to a current drawing of the MECV-5L (without the "swing out" door), which led the agency to clarify with UXB the nature of the door configuration not reflected on the drawing. Tr. at 230.