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Decision

Matter of: Zodiac of North America, Inc.

File: B-414260

Date: March 28, 2017

Stanley R. Soya, Esq., Ellen M. Lynch, Esq., and Anthony C. Scalice, Esq., Baker Botts LLP, for the protester.

William A. Wozniak, Esq., and Robert E. Korroch, Esq., Williams Mullen, for Atlantic Diving Supply, Inc., the intervenor.

Wade L. Brown, Esq., and Laura K. Anderson, Esq., Department of the Army, for the agency.

Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's modification of a contract is denied where modification of the contract was within scope and of a nature that competitors could have reasonably anticipated at the time of the original award.

DECISION

Zodiac of North America, Inc., of Stevensville, Maryland, protests the modification of contract No. W56HZV-13-D-0151, awarded to Atlantic Diving Supply, Inc. (ADS), of Virginia Beach, Virginia, by the U.S. Army Contracting Command - Warren for production of inflatable combat raiding craft and inflatable combat assault craft. Zodiac argues that the Army improperly relaxed the specification requirements such that it will be acquiring materially different boats, and has effectively awarded a sole-source contract to ADS in violation of the Competition in Contracting Act (CICA).

We deny the protest.

BACKGROUND

The underlying request for proposals (RFP) No. W56HZV-13-R-0186 was issued on February 28, 2013, and anticipated award of a fixed unit-price, indefinite-delivery/indefinite-quantity contract to provide 7-person inflatable combat raiding

craft (I-CRC), 15-person inflatable combat assault craft (I-CAC), and corresponding outboard motors. RFP at 4, 111. The 7-person I-CRC will be used to support missions such as airborne and air mobile infiltration, clandestine over-the-horizon insertion and extraction, submarine infiltration and exfiltration of special operations forces, surface swimming operations, SCUBA operations, river reconnaissance, searching, water gap crossing, and humanitarian missions. Id. at 4. The 15-person I-CAC will be used to support missions such as hydrographic survey and side-scan sonar operations, bridging operations, water gap crossing for larger forces, and safety and diver recovery platform. Id. Award was to be made to the lowest-priced, technically acceptable offeror. Id. at 111.

The RFP included the Federal Acquisition Regulation (FAR) clause at § 52.209-4, First Article Approval -- Government Testing (SEP 1989) -- Alternate I (JAN 1997) and Alternate II (SEP 1989), which requires that the contractor provide two units of each of the boats and motors for first article test within 60 days of contract award. RFP at 74. The clause further provides:

(c) If the first article is disapproved, the Contractor, upon Government request, shall submit an additional first article for testing. After each request, the Contractor shall make any necessary changes, modifications, or repairs to the first article or select another first article for testing. All costs related to these tests are to be borne by the Contractor, including any and all costs for additional tests following a disapproval. The Contractor shall furnish any additional first article to the Government under the terms and conditions and within the time specified by the Government. . . . The Government reserves the right to require an equitable adjustment of the contract price for any extension of the delivery schedule or for any additional costs to the Government related to these tests.

Id.

The solicitation also included three attachments, referred to as purchase descriptions, which set forth the product requirements for the boats and motors. The three purchase descriptions were for the 7-person I-CRC, the 15-person I-CAC, and the corresponding submersible outboard motors. As relevant here, the purchase description for the submersible outboard motors for the 7-person I-CRC and 15-person I-CAC required that they propel a fully-loaded craft (2,120 pounds and 4,000 pounds, respectively) at 16 knots during sea state 1 (calm water) within two minutes. RFP, Attach. 3, Purchase Description for Submersible Outboard Motors (Feb. 26, 2013), at 1-2.

The agency awarded the contract to ADS and Zodiac protested the award to this Office. In its protest, Zodiac alleged inter alia that the agency should have found

ADS' proposal technically unacceptable because ADS had proposed boats whose motors were insufficient to meet the speed requirements. Our Office denied the protest, finding that Zodiac had proposed the same motors as ADS, and that the agency had reasonably relied on test reports submitted by ADS to demonstrate compliance with the speed requirements.¹ Zodiac of North America, B-409084 et al., Jan. 17, 2014, 2014 CPD ¶ 79 at 3.

During contract performance in 2014, ADS twice failed first article testing. See Agency Report (AR), Tab 7, Zodiac Agency Protest Decision, at 2. On September 11, 2015, the Army modified its contract with ADS. AR, Tab 13, Modification P00004. The modification revised the purchase descriptions for the boats and motors as follows:

- I-CRC Motors: Change the propelled weight from 2120lbs to 1908lbs (10% reduction) at sea state 1 within two minutes
- I-CAC Motors: Change the propelled weight from 4000lbs to 3600lbs (10% reduction) at sea state 1 within two minutes
- I-CRC: 3 inch dimensional increase to the hard deck floor and storage bag²
- I-CRC: Removal of the airborne transportability requirement.

See id. at 2. In addition, the modification increased the required maximum working pressure for both boats from 4.3 to 4.6 pounds per square inch (psi).³ AR, Tab 15,

¹ Specifically, ADS had submitted a test report stating that the I-CRC with a base weight of 2,124.5 pounds achieved speeds in excess of 16 knots in sea states between 1 to 2 and 2 (wavelets) in under two minutes and the I-CAC with a weight of 4,434 pounds achieved speeds in excess of 16 knots in sea state 1 in under two minutes. Zodiac of North America, supra at 3. The agency evaluated the test reports submitted by ADS and determined that the information demonstrated compliance with the speed requirements. Id. In our decision, we stated that Zodiac did not show that the test reports were questionable on their face or that the agency otherwise was unreasonable in determining that the information submitted by ADS was adequate to demonstrate compliance with the speed requirements. Id.

² The solicitation originally required that the storage bag for the boat and boat deck, when it is rolled for storage, be no more than 66 inches in width and 30 inches in diameter. RFP, Attach. 1, Purchase Description for 7-person I-CRC, at 6. As modified, the storage bag, when it is rolled for storage, must be no more than 66 inches in width and 33 inches in diameter. AR, Tab 15, Revised Purchase Description for 7-person I-CRC, at 6.

³ The working pressure relates to the pressure to which the craft has to be capable of being inflated. AR, Tab 7, Zodiac Agency Protest Decision, at 3. The maximum working pressure is the maximum pressure that the weakest component of the

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Revised Purchase Description for 7-person I-CRC, at 5, 18, and 29; AR, Tab 16, Revised Purchase Description for 15-person I-CAC, at 5, 17, and 27. Regarding the contract price, the modification resulted in a downward equitable adjustment, such that ordering years two, three, and four prices would become ordering years three, four, and five prices, respectively. AR, Tab 13, Modification P00004, at 2.

Based on information Zodiac received in response to a Freedom of Information Act request on October 5, 2016, Zodiac filed an agency protest on October 17. AR, Tab 6, Zodiac Agency Level Protest. In its protest to the Army, Zodiac alleged that the Army improperly changed the contract requirements and effectively awarded a sole-source contract to ADS. Id. at 4-6. Specifically, Zodiac argued that in response to ADS twice failing first article testing, the Army issued modification P00004 to improperly relax the contract requirements and provide ADS with a third opportunity to pass first article testing, in violation of CICA. Id. On December 22, the Army denied Zodiac's protest. AR, Tab 7, Zodiac Agency Protest Decision. This protest followed.

DISCUSSION

Zodiac argues that modification P00004 improperly relaxed the original solicitation's performance requirements, which changed the scope of work anticipated by the RFP. Zodiac contends that the resulting work should therefore be subject to competition pursuant to CICA and Zodiac should have the opportunity to compete under a new solicitation based on the relaxed requirements. Further, Zodiac contends that such a change was not anticipated at the time the original solicitation was issued, and the field of competition would have changed had the agency relaxed the specifications in the original solicitation. As detailed below, we conclude that the record demonstrates that the scope of the original contract was not substantially changed by modification P00004, the changes to the contract could reasonably have been anticipated by competitors for the initial solicitation, and the changes to the contract would not have had a substantial impact on the field of competition for the original contract award.

CICA requires "full and open" competition in government procurements as obtained through the use of competitive procedures. 10 U.S.C. § 2304(a). Once a contract is awarded, however, our Office will generally not review modifications to that contract because such matters are related to contract administration and are beyond the scope of our bid protest function. 4 C.F.R. § 21.5(a); Poly-Pacific Techs., Inc., B-296029, June 1, 2005, 2005 CPD ¶ 105 at 3. An exception to this rule arises where a protest alleges that a contract modification changes the work

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system can handle. Id. at n.3. PSI is the pressure that a gas or liquid exerts on the walls of the container. Id.

from the scope of the original contract, since the work covered by the modification would otherwise be subject to the statutory requirements for competition absent a valid determination that the work is appropriate for procurement on a sole-source basis. Anteon Corp., B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 at 4. Although challenges to the relaxation of contract requirements are less common than challenges to contract modifications that enlarge a contract's scope of work, our Office recognizes that both fall within the scope of this exception, and we will consider whether modification of performance requirements result in work that should be subject to competition. Poly-Pacific Techs., Inc., supra at 3-4.

In determining whether a modification triggers the competition requirements in CICA, our Office looks to whether there is a material difference between the modified contract and the contract that was originally awarded. Engineering & Prof'l Servs., Inc., B-289331, Jan. 28, 2002, 2002 CPD ¶ 24 at 4. To assess whether a contract is so substantially changed by the modification that the original and modified contracts are essentially and materially different, we consider such factors as the extent of any changes in the type of work, performance period, and costs between the modification and the original contract, as well as whether the original solicitation adequately advised offerors of the potential for the change or whether the change was the type that reasonably could have been anticipated, and whether the modification materially changed the field of competition for the requirement. Marvin J. Perry & Assocs., B-277684, B-277685, Nov. 4, 1997, 97-2 CPD ¶ 128 at 3.

Zodiac first argues that modification P00004 so substantially relaxed the contract requirements that the Army will be procuring "dramatically different boats and motors than the boats and motors that the Army had solicited." Protest at 1. More specifically, the protester alleges that the 10 percent propelled weight reduction will alter the intended use of the boats such that in an operational situation, the boats will not be able to accommodate the payload (motor, fuel, all of the equipment and number of soldiers it was originally intended to carry). Id. at 5. Zodiac also argues that the increased working pressure will cause the boats to take longer to inflate and will have a corresponding impact on the durability of the fabric of the boats, affecting safety. Id. Further, Zodiac argues that increasing the size of the storage bag for the 7-person I-CRC by three inches will limit the means by which these boats can be transported and deployed in platforms with size restrictions, and elimination of the airborne transportability requirement in its entirety further eliminates the Army's ability to utilize the boat in conjunction with airborne operations. Id. at 5-6.

The Army responds that modification P00004, executed almost two years into contract performance, made minor changes to the technical specifications that are within the scope of the contract, and contests the protester's allegations that the changes will have any impact on mission performance. Combined Contracting Officer's Statement of Facts/Memorandum of Law (COS/MOL) at 9-11. As explained by the Army, although the motors are now required to accommodate

10 percent less weight when reaching 16 knots during sea state 1 (calm water) within two minutes, the payload weight requirements for the boats themselves remain unchanged. Id. at 13-14. In other words, the deliverables will still function as 7-person I-CRCs and 15-person I-CACs and the agency will not be forced to leave behind anyone or anything as a result of the decreased propelled weight requirement. AR, Tab 8, Decl. from Director, Requirements Determination Division, Army Maneuver Support Center of Excellence, ¶ 2.

Further, the Army states that the increase in working pressure will not impact the safety of the boats because testing has already demonstrated (during a 300 percent overpressure/psi test) that the fabric of the boats can withstand the increased pressure. COS/MOL at 16; AR, Tab 8, Decl. from Director, Requirements Determination Division, Army Maneuver Support Center of Excellence, ¶ 3. Additionally, the Army notes that modification P00004 did not change the required inflation time for the boats (15 minutes for the 7-person I-CRC and 25 minutes for the 15-person I-CAC) and any increase in inflation time caused by the increased working pressure is insignificant because it did not exceed the Army's requirements for inflation time. COS/MOL at 16. Finally, the Army states that a larger storage bag and elimination of airborne transportability requirements for the 7-person I-CRC will not will impact how the boats can be transported or what platforms they can be deployed from, and will not prevent the Army from performing airborne operations with the boats. Id. at 17-18; AR, Tab 8, Decl. from Director, Requirements Determination Division, Army Maneuver Support Center of Excellence, ¶¶ 4-5.

In our view, the agency did not improperly relax the specifications because the original nature and purpose of the solicitation and contract has not been changed by modification P00004. The capabilities and missions of the 7-person I-CRC and 15-person I-CAC set forth in the solicitation and contract remain the same after the modification to the contract. The changes to the purchase descriptions of the boats and motors are relatively minor when viewed against the entirety of all of the contract specifications and performance requirements. Defense Systems Group; Warren Pumps, Inc.; Dresser Indus., Inc., B-240295 et al., 1990 U.S. Comp. Gen. LEXIS 1182, Nov. 6, 1990 (protest denied where modifications involved substantial cost and affect first article test requirements, delivery schedule, and performance specification but did not change the nature and purpose of the original contract).

Moreover, modification P00004 did not change the performance period of the contract. The contract remains a five-year contract as awarded in 2013, and will expire on September 24, 2018. AR, Tab 3, ADS Contract W56HZV-13-D-0151, at 3. In addition, the downward equitable adjustment extending the option year ordering prices to the following year's prices for the remaining years of the contract is relatively small, and is a function of the contract's first article approval clause operating precisely as the contract intended. Id. at 72-73; see also RFP at 74. On this record, we agree with the Army that modification P00004 did not materially change the contract. See Emergent BioSolutions, Inc., B-402576, June 8, 2010,

2010 CPD ¶ 136 at 10-11 (modification to contract did not change the original objectives of the contract given the broadly defined developmental nature of the requirement for an anthrax vaccine).

Zodiac next argues that the original solicitation did not adequately advise offerors of the potential for the change. We disagree and find that the changes made by modification P00004 are changes to the requirements that competitors could have reasonably anticipated. As discussed, the RFP and the resulting contract included the requirement that the boats and motors pass first article testing. Under the terms of the first article approval clause, the contractor is afforded an opportunity to “make any necessary changes, modifications, or repairs to the first article or select another first article for testing” in the event it did not receive first article approval. RFP at 74. The inclusion of the first article test requirements in the RFP itself indicates the potential for changes, such as those made by modification P00004, to be made to the technical specifications of the boats and motors. See Engineering & Prof'l Servs., Inc., supra at 4-5 (modification to incorporate technological advances in ruggedized handheld computers was within scope of original contract where RFP contemplated advances could be incorporated into the requirement as they became available).

Zodiac also contends that the modification would have materially changed the field of competition had the agency relaxed the specifications in the original solicitation. However, Zodiac has not demonstrated that the changes made by modification P00004 would have materially changed the field of competition. Zodiac has not alleged that other or different competitors would have participated in the procurement. Instead, Zodiac repeatedly states that it would have proposed different, less expensive boats than the boats it proposed under the original solicitation. Protest at 2, 4, and 6-7; Comments at 1 and 3. Zodiac's proffer of how it would have altered its original offer in response to the changed requirements does not show that the field of competition would have otherwise changed.

Finally, Zodiac argues that its boats met the original solicitation requirements, since it was found technically acceptable, and therefore it has been prejudiced by the agency's actions. However, Zodiac has failed to establish that it was prejudiced by the changes made to the specifications by modification P00004. Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain a protest. Emergent BioSolutions, Inc., supra at 14. Here, the modification in requirements had no impact on Zodiac's ability to compete for the contract originally. More importantly, Zodiac has not even alleged that the boats it would have proposed in response to the modified requirements, even if lower-priced than the offer it originally submitted in response to the RFP, would have been lower than those proposed by ADS in this lowest-price technically acceptable procurement, such that it would have been awarded the contract. See Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶ 192 at 9-10. Accordingly, there is no basis for finding that the

modification in the specifications for the boats and motors and in the overall performance requirements resulted in any prejudice to Zodiac.

The protest is denied.

Susan A. Poling
General Counsel