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Decision

Matter of: Gichner Systems Group, Inc.

File: B-414287; B-414287.2; B-414287.3

Date: April 27, 2017

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John E. McCarthy Jr., Esq., David C. Hammond, Esq., Robert J. Sneckenberg, Esq., and Hart W. Wood, Esq., Crowell & Moring LLP, for AAR Mobility Systems, the intervenor.

Wade L. Brown, Esq., Debra J. Talley, Esq., and Russell W. Bottom, Esq., Department of the Army, for the agency.

Paula J. Haurilesko, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that a commercial shelter modified to agency specifications is no longer a commercial item is denied, where the shelter, as modified, is offered for sale to the public on the firm's website.
 2. Protest that the agency improperly decided to award a sole-source contract is denied, where the agency reasonably determined that the protester could not have its product tested in time to meet the agency's fielding schedule.
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DECISION

Gichner Systems Group, Inc.,¹ of Dallastown, Pennsylvania, protests the decision of the Department of the Army to award a contract on a sole-source basis to AAR Mobility Systems (AAR),² of Cadillac, Michigan, under request for quotations (RFQ) No. W9098S-17-T-0014 for shelters for the petroleum quality analysis system – enhanced (PQAS-E). Gichner challenges the Army's determination that AAR's shelter

¹ Gichner is a wholly-owned subsidiary of Kratos Defense and Security Solutions, Inc.

² AAR Mobility Systems is a division of AAR Manufacturing, Inc.

is a commercial item and the agency's justification for the proposed sole-source award. Gichner primarily argues that it can meet the requirement and that the Army failed to provide a reasonable opportunity for the firm to qualify its shelter.

We deny the protest.

BACKGROUND

The PQAS-E system is comprised of a fully-integrated analytical fuel laboratory that is installed in an environmentally-controlled shelter, which can be mounted on the Army's family of medium tactical vehicle platform. Agency Report (AR), Tab 7, Approved Justification & Approval (J&A), Dec. 13, 2016, at 2; AR, Tab 6, Contracting Officer's (CO) Market Research, at 1. The PQAS-E is used to test fuel for contaminants and additives on-site to avoid delays to the Army's mission that would occur if fuel samples were sent to qualified government testing facilities in other locations. AR, Tab 7, Approved J&A, Dec. 13, 2016, at 2. The PQAS-E, which serves as a mobile laboratory, permits the Army to more quickly receive assurance of the quality of fuel that is received, stored, and issued from any source--commercial, military, or captured enemy stocks--and reduce the risk of using unsafe fuel. Id. at 3.

In November 2006, the Army posted a notice to the Federal Business Opportunities (FBO) website announcing the agency's intent to procure from AAR the design, fabrication, documentation, and test support for International Organization for Standardization (ISO) type shelters for the PQAS.³ FBO Notice, Solicitation No. W52H09-07-T-5137, Nov. 22, 2006, www.fbo.gov (last visited Apr. 3, 2017). The notice was amended to provide an opportunity for other potential sources to submit expressions of interest and demonstrate the ability to meet the agency's stated requirement. FBO Notice, Solicitation No. W52H09-07-T-5137, Dec. 5, 2006, www.fbo.gov (last visited Apr. 3, 2017). However, the notice also stated that offers from concerns other than AAR were not being solicited, and that the notice was for subcontracting purposes only. Id.

Gichner submitted an expression of interest in response to the notice, but was advised that the government intended to negotiate only with AAR because "any shelter provided or developed by other than AAR would have to undergo extensive testing which would add 18 months to the program schedule." AR, Tab 6g, Army Response to Gichner, Dec. 20, 2006. Further, in December 2006, after reviewing the responses of Gichner and other companies, the Army issued a J&A for other than full and open competition to obtain a prototype shelter from AAR.⁴ See AR, Tab 8, Prototype J&A, at 2.

³ ISO is a non-governmental organization that establishes international standards for a variety of products and services. See <http://www.iso.org/iso/home/about.htm> (last visited Apr. 3, 2017).

⁴ The J&A stated that the shelter was a modified commercial item. AR, Tab 8, Prototype J&A, at 3.

The 2006 J&A stated that AAR was “uniquely qualified” to provide a shelter because it already produced a shelter that had been tested and approved for human habitation in austere environments, weight limitations, and electromagnetic interference (EMI) and radiofrequency interference (RFI) stability, and therefore the shelter would not have to undergo the tests again. Id. at 3. The J&A also stated that testing another product would result in duplication of costs and schedule delay. Id. With respect to actions to increase competition, the J&A acknowledged that four contractors had expressed interest in supplying a shelter, but the J&A stated that a government technical data package (TDP) was not available and there were no plans to purchase a TDP due to cost and schedule impacts. Id.

In August 2007, the Army posted a notice on the FBO website announcing its intent to procure up to 50 PQAS-E shelters over a 3-year period. AR, Tab 9a, FBO Notice, Solicitation No. W52H09-07-R-5025, Aug. 8, 2007. The notice stated that the solicitation was restricted to AAR, and that offers from other concerns were not solicited. Id. The J&A associated with the procurement stated that AAR’s shelter was uniquely qualified because it had already been modified to meet the government’s requirements, and had already been tested and approved by the Army. AR, Tab 9, 2007 J&A, July 26, 2007, at 3. This 2007 J&A stated that AAR had developed the prototype for the PQAS-E. Id. at 3-4. The J&A further stated that accepting an alternate shelter would require prior approval/qualification from the program manager, testing of the shelter, and possible modifications to the shelter manuals and procedures, and would result in duplication of costs and an unacceptable delay in production. Id. at 4. With respect to actions to increase competition, the 2007 J&A again stated that a TDP was not available, and that there were no plans to purchase or develop a TDP due to cost and schedule impacts. Id. The contract value was estimated to be \$8.5 million. Id. at 2. This J&A was amended in October 2007 to add another 31 shelters to AAR’s contract, increasing the value of the procurement to \$13.9 million. AR, Tab 9, Amendment to 2007 J&A, Oct. 2007, at 1.

In June 2011, the Army posted a notice on the FBO website announcing its intent to award a 3-year contract to procure a minimum of 2 and a maximum of 50 shelters from AAR. AR, Tab 10a, FBO Notice, Solicitation No. W9098S-11-R-0012. The notice invited all responsible sources to submit a proposal. Id. The J&A associated with this procurement (the “2011 J&A”) stated that AAR has been producing the shelter since 2007, and also cited the lack of TDP, and impact on cost and schedule as the reasons for taking no action to increase competition. AR, Tab 10, 2011 J&A, at 3-5. The contract was valued at \$9.8 million. Id. at 2-3.

With respect to the procurement at issue here, in June 2016, the Army posted a sources sought notice on the FBO website providing salient characteristics for 20-foot, ISO-style, PQAS-E shelters to assess the commercial availability of the shelters. AR, Tab 3, FBO Notice, June 21, 2016. The notice included exterior and interior dimensions, weight requirements, and features such as EMI and RFI shielding, a generator, an

environmental control unit, a power distribution unit, internal counters, and a rear storage unit. Id. The notice also provided a level II TDP.⁵ Id.

Nine companies responded to the notice, including Gichner and AAR. AR, Tab 6, Army Research Memorandum, at 1. As relevant here, Gichner's response explained that its lightweight medium tactical shelter met, or could be configured to meet, all of the Army's defined performance requirements. AR, Tab 6d, Gichner Response to 2016 FBO Notice, at 2. Gichner stated that it provided 20-foot ISO shelters to all branches of the U.S. military, and could easily tailor the location of partition walls, doors, entry panels, and other features to meet the Army's specific space requirements. Id. Gichner also stated that it had extensive experience in modifying shelters to accommodate power distribution units, environmental control units, EMI/RFI shielding, generator systems, and work surfaces. Id. at 6-7.

The Army evaluated the companies' responses, and concluded that only AAR could meet its needs. AR, Tab 6, Army Research Memorandum, at 3. With respect to Gichner and two other companies, the memorandum stated that their shelters would require considerable modification to meet the Army's requirements. Id. at 2-3. The Army concluded that, although the shelters were considered commercial items, in order to control cost, maintain schedule, and allow for standardization, continued purchases from AAR were necessary. Id. at 3.

In January 2017, the Army posted a notice on the FBO website announcing its intention to award a 5-year, sole-source, indefinite-delivery, indefinite-quantity contract to AAR for PQAS-E shelters in accordance with Federal Acquisition Regulation (FAR) subpart 3.5, simplified procedures for certain commercial items. AR, Tab 3a, FBO Notice, Solicitation No. W9098S-17-T-0014, Jan. 6, 2017. The associated RFQ provided for a minimum of 3 and maximum of 24 shelters. RFQ at 1, 4-5. The shelters are to be integrated with various commercial laboratory instruments and supplies, as well as a generator and an environmental control unit, to create the PQAS-E. Hearing Transcript (Tr.) at 95-96, 214-15.⁶

The Army subsequently posted a J&A supporting the sole-source award to AAR. AR, Tab 3b, FBO Notice, Solicitation No. W9098S-17-T-0014, Jan. 20, 2017. The 2017 J&A states that AAR is the only company that can meet the Army's requirements for the PQAS-E shelter without the government investing considerable money and experiencing "unacceptable" production delays. AR, Tab 7, 2016 J&A, at 9. The J&A states that AAR's shelter has a unique design, which the Army co-developed with AAR.

⁵ A level II TDP provides top-level physical characteristics but lacks manufacturing details. Hearing Transcript at 87.

⁶ Our Office conducted a hearing on March 30, 2017, in which we obtained testimony from the contract specialist involved in preparing the J&A and two program officials involved with the PQAS-E program.

See id. at 3-4. The J&A also identifies the shelter's unique features: EMI shielding, RFI capability, lightweight aluminum construction, a segmented mechanical porch, a workspace, a storage area, a ladder for easy access, a canvas vestibule for entry into the laboratory, and mountability onto vehicles or trailers. Id.

The 2017 J&A states that failure to purchase the shelter from AAR would severely impact the PQAS-E's operational capability because each piece of analytical equipment is designed to meet the specific assembly footprint of AAR's shelters. Id. at 4. Specifically, the J&A states that purchasing a shelter from a company other than AAR would require the Army to redesign a new prototype footprint to accommodate the PQAS-E equipment. Id. The J&A also states that the equipment is unique in size and shape so that it fits the shelter. Id.

The Army further justifies continuing to award to AAR on the basis that standardization of the analytical equipment, testing procedures, training requirements, purchasing of spare parts, and technical manuals would continue to provide a benefit to the Army. Id. The Army estimates that rewriting training and repair manuals would cost \$500,000, based on the original development costs of the PQAS-E. Id.

The 2017 J&A further states that redesigning the shelter would cost \$1.8 million and take 24 months to complete. The J&A states that testing--which includes performance, transportability, and environmental testing--would cost \$580,000 and take an additional 18 months. Id.

While the J&A recognized that if another vendor were able to build the shelter to the same specifications, the standardization issue would be resolved, it also notes that the Army does not have the level III TDP for the shelter and that the technical data for the shelter is proprietary to AAR.⁷ Id. at 5. The J&A states that, to obtain competition, the Army would have to either purchase the level III TDP from AAR or reverse engineer the shelter. Id. The J&A also states that purchasing the level III TDP would cost the government approximately \$2 million, and that reverse engineering the shelter would take at least 1.5 years. Id. The J&A notes that, based on market research and responses to the FBO sources sought notice, several of the companies have the capability to produce similar shelters, but that any shelter would have to be modified, which would increase costs and create program delays. See id. at 6-9.

Upon learning of the agency's intention to award a sole-source contract to AAR, Gichner timely filed this protest with our Office.

⁷ A level III TDP provides detailed design, engineering, manufacturing, inspection, packaging, and quality assurance information to enable the procurement or manufacture of an item. AR Legal Memorandum at 16.

DISCUSSION

Gichner challenges the Army's decision not to compete the shelter contract on multiple bases. Gichner argues that the Army erroneously concluded that the shelter is a commercial item, and erroneously applied the simplified acquisition procedures of FAR subpart 13.5.⁸ Gichner also argues that the Army's 2017 J&A is inaccurate and does not provide a proper basis for awarding a sole-source contract to AAR. The protester also argues that the Army was required to provide the company an opportunity for its shelter to be tested. Although we address only a portion of Gichner's arguments in this decision, we have considered all of its arguments, and conclude that none provide a basis for sustaining the protest.

Commercial Item Status

As an initial matter, Gichner challenges the Army's determination that AAR's shelter is a commercial item and that the simplified acquisitions procedures of FAR subpart 13.5 apply to this procurement. Second Supp. Protest at 15.⁹ Gichner contends that, instead, the procurement should be subject to the requirement for full and open competition applicable to non-commercial items. Id. at 18. Gichner acknowledges that the basic shelter is a commercial item, but argues that the modifications made by AAR for the Army are not minor changes as provided in the FAR definition of a commercial item. Id. Gichner states that unlike a standard, commercially available 20-foot ISO container, AAR's PQAS-E shelter is divided into three compartments and includes patented features such as integrated jacks, roller plates on the bottom of the shelter, and detent rails that lock into a military-specific material handling system. Id. at 17-18. Gichner argues that a product with a specific feature used to transport the product on military aircraft cannot be a commercial item. Id. at 18.

Determining whether a product is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable. GIBBCO LLC, B-401890, Dec. 14, 2009, 2009 CPD ¶ 255 at 3. We find the Army's judgment in this regard to be reasonable.

⁸ Subpart 13.5 of the FAR provides special authority for acquisitions of commercial items exceeding the simplified acquisition threshold but not exceeding \$7 million (\$13 million for acquisitions as described in FAR § 13.500(c)), including options. FAR § 13.000. The estimated value of this acquisition is less than \$7 million. AR, Tab 7, 2016 J&A, at 1.

⁹ Gichner incorporated its initial and first supplemental protests into its second supplemental protest.

The FAR defines a commercial item, as relevant here, 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
 - (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;

* * * * *

- (3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, 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. . . .

FAR § 2.101.

Although Gichner focuses on the third paragraph of the FAR definition, we conclude that AAR's shelter meets the definition of a commercial item based on the first paragraph. In this regard, the Army executed a commerciality determination that stated that ISO type shelters are regularly used by a variety of commercial industries for transportation, storage, and housing options, and therefore meet the criteria for commercial items. Hearing Book (HB), Tab 38, Army Commerciality Determination. Additionally, during the hearing we conducted, the assistant program manager responsible for the PQAS-E program stated that, as part of her market research, she found that AAR listed its PQAS-E shelter on its website for sale. Tr. at 94-95, 97-98. Subsequently, AAR confirmed that the PQAS-E shelter is offered on its website to the general public. AAR Post-Hearing Comments at 5; HB, Tab 39, AAR PQAS-E Shelter Sale Website.¹⁰ Therefore, because the record shows that AAR's PQAS-E shelter has been offered for sale to the public, we conclude that the Army reasonably determined that the shelter is a commercial item.

¹⁰ <http://www.aarcorp.com/petroleum-quality-analysis-system-enhanced-pqas-e-shelter/> (last visited Apr. 20, 2017).

Challenge to J&A

Gichner also raises several challenges to the findings in the Army's 2017 J&A. For example, Gichner argues that a level III TDP is not required to produce a shelter that meets the Army's requirements. Second Supp. Protest at 8. Gichner states that the Army's sources sought notice provided the salient characteristics of the PQAS-E, which included exterior and interior dimensions, weight, EMI and RFI capabilities, and the requirements for an electrical system, a generator, an environmental control unit, a rear storage compartment, and detent rails. Id. Moreover, Gichner argues that it already produces a shelter that would need only minor design changes to meet the Army's requirements. Id. at 13.

Gichner also argues that the features that the Army identified as unique to AAR's shelter--a mechanical porch, enclosed work and storage areas, extensive seat tracks for attaching equipment, EMI/RFI capabilities, and approval for human habitation in austere environments--are not unique. Id. at 9. In this regard, Gichner states that it currently produces shelters that have mechanical porches, enclosed work and storage areas, and EMI and RFI capabilities. Id. at 9-10. The protester also states that the seat tracks the Army identified are commercial products, and that Gichner has extensive experience integrating similar tracks. Id. at 9. Gichner further explains that its engineers already prepare fully integrated system designs with respect to environmental service conditions and other relevant characteristics. Id. at 10. In short, Gichner argues that the 2017 J&A inaccurately states that the PQAS-E equipment would have to be redesigned because the equipment is specified by the Army and consists of brand name components. Id. In this regard, Gichner states that it could modify its shelter around the specified equipment. Id.

The Army acknowledges that a shelter that meets its requirements could be produced for testing purposes even without a level III TDP. AR Legal Memorandum at 19. The Army states, however, that even if Gichner could produce a shelter that meets the physical characteristics listed in the sources sought notice, Gichner could not meet the testing requirement in time to meet the agency's production schedule. In this regard, the Army states that testing would take 18 months to complete and that the agency cannot wait until another company's shelter is tested. Id. at 7; AR, Tab 7, 2016 J&A, at 4; Tr. at 91. During the hearing conducted by our Office, the assistant program manager stated that the Army needs to field the PQAS-E in June 2017 to address a shortage of PQAS-Es in Iraq. Tr. at 92. The Army also states that the PQAS program is ending the last stage of production, and therefore the Army will not be procuring additional shelters in the future. See CO's Decl. at 1; Tr. at 150.

As noted above, these shelters are being procured under the simplified acquisition procedures of FAR subpart 13.5. AR, Tab 3a, FBO Notice, Solicitation No. W9098S-17-T-0014, Jan. 6, 2017. Procurements conducted under simplified acquisition procedures are exempt from the statutory requirement to obtain full and open competition; instead, contracting officers are required to promote competition to the maximum extent practicable. 10 U.S.C. § 2304(g)(3); FAR §§ 13.104, 13.501; Core Sys., B-411060,

Apr. 30, 2015, 2015 CPD ¶ 148 at 3-4. Accordingly, the issue here is whether the agency specified its needs in a manner designed to obtain competition to the maximum extent practicable. See American Eurocopter Corp., B-283700, Dec. 16, 1999, 99-2 CPD ¶ 110 at 3-4. In reviewing a challenge to the agency's determination of its needs, we defer to the contracting agency, which is most familiar with its needs and how best to fulfill them, and we will question that determination only where it is shown to have no reasonable basis. Id.

Here, the record shows that the Army's 2017 J&A reasonably concluded that a sole-source award to AAR is proper in light of the need for a tested shelter to be fielded for troops in Iraq. As noted above, the Army acknowledges that a level III TDP is not necessary for a firm to produce a shelter that meets its needs, and Gichner has indicated that it has the capability to produce a shelter that meets the salient characteristics listed in the Army's sources sought notice. However, given the Army's estimate that testing Gichner's shelter would cause an 18-month delay in fielding PQAS-Es and thus in addressing the shortage of PQAS-Es for troops in Iraq, we conclude that the Army reasonably determined that only AAR's shelters could be delivered to the Army in sufficient time to meet its current needs. In this regard, we note that an agency need not delay satisfying its requirements to allow an offeror time to develop the ability to meet those requirements. See, e.g., Advanced Seal Tech., Inc., B-311308, June 5, 2008, 2008 CPD ¶ 110 at 4 n.2; Wescam, Inc., B-285792, Oct. 11, 2000, 2000 CPD ¶ 168 at 7; Container Products Corp., B-280603.2, Nov. 4, 1998, 98-2 CPD ¶ 106 at 4.

To the extent that Gichner argues that the Army failed to provide it a reasonable opportunity to have its shelter tested, we note that the Army advised Gichner by letter in 2006 that any shelter provided or developed by a company other than AAR would have to undergo extensive testing. AR, Tab 6g, Army Response to Gichner, Dec. 20, 2006. Thus, Gichner has been on notice for more than a decade that the Army required any shelter offered for the PQAS-E program to undergo testing.¹¹ Nonetheless, we note that the protester has not indicated that it has offered a shelter for testing at any point since it first expressed interest in selling these shelters to the Army in 2006. Additionally, during the pendency of this protest, the Army offered to reduce the contract period of performance to allow Gichner the opportunity to have its shelter tested. Army

¹¹ During the pendency of this protest, we asked the Army whether the provisions of 10 U.S.C. § 2319, which pertain to preaward qualification and testing requirements, applied to this procurement. In view of our conclusion that Gichner was aware of the testing requirement since 2006 and did not inquire further about testing, we need not address the applicability of section 2319. Further, even if 10 U.S.C. § 2319 did apply here, an agency is not required to delay a procurement solely to provide a potential offeror an opportunity to demonstrate its ability to become approved. 10 U.S.C. § 2319(c)(5); FAR § 9.202(e).

Dismissal Request at 1. In view of these circumstances, we cannot conclude that the Army is improperly procuring this item on a sole-source basis.¹²

The protest is denied.

Susan A. Poling
General Counsel

¹² Gichner also argues that the need to use a sole-source procurement here resulted from the Army's lack of advance planning. Gichner Objection to Agency Dismissal Request, Feb. 7, 2017, at 2; Gichner Comments at 7. We dismiss this protest ground as untimely. Under our Bid Protest Regulations, protests based on other than solicitation improprieties must be filed within 10 days of when the protester knew or should have known their basis. 4 C.F.R. § 21.1(a)(2). Here, Gichner raised this argument for the first time in its February 7, 2017, objections to the Army's dismissal request, in which it cited to sections of the J&A that was posted to the FBO website on January 20. Because Gichner knew or should have known the basis for this protest ground at the time it filed its initial protest, this protest ground is untimely.