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Decision

Matter of: Symetrics Industries, Inc.

File: B-289606

Date: April 8, 2002

Edward J. Kinberg, Esq., Kinberg & Bickford, for the protester.
Charles G. Steenbuck, Esq., and Gregory L. Edlefsen, Esq., Naval Research Laboratory, 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

Tasking of contractor to perform retrofitting of modems is within the scope of contract providing for depot level maintenance of the modems where retrofitting reasonably falls within definition of depot level maintenance.

DECISION

Symetrics Industries, Inc. protests the Naval Research Laboratory's issuance of a task order to Innovative Concepts, Inc. (ICI) for 303 improved data modem (IDM) model 304 units, under contracts N00014-96-C-2060 and N00173-00-C-6023. Symetrics contends that approximately half of the units are not required to support the operational test and evaluation requirements of the Department of the Army, on whose behalf the units are being procured, and that the ordering of these units is beyond the scope of the ICI contracts, which are for research and development.

We deny the protest.

BACKGROUND

The Navy explains that the IDM is an interference-resistant communications modem that performs message processing and distribution functions by interfacing with host platform radios and related avionics systems. The modem has the capability to pass command and control and targeting data via digital links among tanks, ground vehicles, helicopters, airborne vehicles, and unmanned aerial vehicles.

The Naval Research Laboratory (NRL) developed the IDM and a supporting technical data package (TDP) for the Air Force F-16 System Program Office, and in the early

1990s the Air Force awarded a contract for production of the units to Symetrics. The Army became an active participant in the IDM program in 1992 and began ordering IDM hardware under the Air Force contract, which it modified with specially developed software unique to the Army. In 1996, the NRL awarded contract N00014-96-C-2060 to ICI for the acquisition of research and development efforts directed toward maintaining and further developing the IDM.

In 1999, the Army entered into a memorandum of agreement with the NRL to develop hardware and software for a new, more advanced version of the IDM, to be referred to as the IDM 303. The NRL tasked its research and development contractor, ICI, with developing the new hardware and software. The Army required that the new IDM have the ability to house the Army's Embedded Battle Command (EBC) software within its operational software. The developer of the EBC software originally estimated that it would be 12 megabytes in size; shortly after the IDM prototype had been developed and entered into testing, however, the developer announced that the size of the EBC software package had surged to 192 megabytes. The Army determined that the IDM 303 as designed would not have sufficient memory or processor capacity to accommodate the larger than expected software package. That, plus concerns over parts obsolescence, led the Army to conclude that development of the model should be discontinued.

The Army then asked the NRL to upgrade the IDM 303 design to accommodate the 192 megabyte EBC software package and to address other concerns that had arisen during qualification testing of the model. The NRL solicited from ICI, and accepted, a technical and cost proposal for redesign of the IDM;¹ the retrofitting of 153 IDM 303 units to the 304 configuration and the building of 150 new model 304 prototypes; and the development of an IDM 304 build-to-print documentation package. The ICI proposal provided for delivery of 86 retrofitted and 74 new IDMs in fiscal year 2001 and for delivery of 67 retrofitted and 76 new IDMs in fiscal year 2002. The proposal also provided for delivery of a build-to-print drawing package including schematics and mechanical drawings within 24 months after receipt of order.²

In August 2000, the NRL awarded a second contract, N00173-00-C-6023 (Digital Data Dissemination Tools and Spacecraft Systems), to ICI. One of the tasks to be accomplished under this contract was continuation of the IDM research and development efforts begun under contract N00014-96-C-2060. During the period of overlap between contract N00014-96-C-2060 and contract N00173-00-C-6023, i.e.,

¹ Although not identified as such in the ICI proposal, both parties refer to the upgraded model 303 design as the model 304.

² While it is not clear from the record precisely when the NRL issued the order to ICI, the agency does note that ICI initiated the effort in the fall of 2000. It also notes that the TDP is planned for delivery in October 2002.

August 2000 to September 2001, the IDM redesign effort was carried out primarily under the former contract; upon expiration of contract N00014-96-C-2060, the effort was transitioned into contract N00173-00-C-6023. Agency Report at 3.

Prior to protesting to our Office, Symetrics pursued an agency-level protest, which the contracting officer denied by decision dated November 19, 2001, and a request for reconsideration/amended protest, which the contracting officer denied by decision of December 7, 2001.

PRELIMINARY MATTERS

As a preliminary matter, the NRL argues that our Office should dismiss Symetrics' protest as untimely pursuant to section 21.2(a)(3) of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (2001), because it was filed more than 10 days after the protester was notified that its agency-level protest had been denied. In this regard, the agency asserts that it telecopied its denial of the protester's agency-level protest to the protester's attorney on November 19, but that Symetrics did not file its protest with our Office until December 27. The agency further argues that even if the request for reconsideration filed by the protester on December 3 may be viewed as a second agency-level protest, the protest to our Office is untimely because it telecopied a denial of the request to the protester on December 7, 20 days prior to the filing with our Office. In the alternative, the agency argues that the protester's December 3 letter cannot be viewed as a timely agency-level protest because it was not filed with the agency within 10 days of the date that the asserted basis of protest was known or should have been known to the protester.

First, we disagree with the agency's contention that the protester's December 3 letter to the contracting officer was exclusively a request for reconsideration, and, as such, did not toll the 10-day period for filing with our Office. The protester's December 3 letter to the contracting officer was labeled as a "Request for Reconsideration of Protest/Amendment to Protest" and clearly raised a ground of protest distinct from the ground raised in the original agency-level protest—*i.e.*, that the task order issued to ICI for delivery of 303 IDM model 304 units is beyond the scope of contract N00173-00-C-6023. (In its initial agency-level protest, the protester, which at the time was unaware of the existence of the above contract, complained only that the task order for delivery of the IDM 304 units was beyond the scope of contract N00014-96-C-2060.) In our view, the protester's letter of December 3 may reasonably be considered a second agency-level protest, meaning that the 10-day period for filing with our Office did not begin to run until the protester received notice that the agency had denied it.

Second, regarding the agency's assertion that the second denial was telecopied to the protester's attorney on December 7, the only evidence that the agency has produced in support of this assertion is a statement from an NRL procurement technician, dated January 23, 2002, declaring that to the best of her knowledge, both

the agency's denial of the original protest and its denial of the request for reconsideration/amended protest were telecopied to the protester's attorney on the dates they were issued, i.e., November 19 and December 7, respectively. The agency has furnished no facsimile cover sheets, transmission confirmations, or communications journals confirming the transmissions. Moreover, the protester's attorney maintains that the only copy of the decision that he received was a mailed one, which arrived in his office on December 17. Given the lack of documentary evidence supporting the agency position that the decision was telecopied to the protester's attorney on December 7, and protester's counsel's affirmative statement to the contrary, we cannot conclude that the protester received the denial of its second agency-level protest on December 7; accordingly, we have no basis upon which to find that Symetrics' December 27 filing with our Office was untimely.

We are also unable to conclude that the protester's second agency-level protest was filed more than 10 days after the protester knew or should have known of its basis for protest. The premise of the agency's argument in this regard is that the protester knew or should have known on November 26--when it received a mailed copy of the agency's denial of its initial agency-level protest explaining that the period of performance of NRL contract N00014-96-C-2060 had expired on September 30, 2001--that if the NRL were acquiring IDM 304 units, it must be under another contract vehicle, and that this was all the information that it needed to raise its second protest. Even assuming for the sake of argument the validity of the agency's contention, the protest was timely because it was filed on December 3, less than 10 days after November 26.

The agency also argues as a preliminary matter that Symetrics is not an interested party to object that the task order is beyond the scope of ICI's contracts since the order calls for a research, developmental engineering, and evaluation effort that Symetrics, as a build-to-print manufacturer, would be incapable of performing. In this regard, a protester is not an interested party where it would not be eligible to receive a contract award were its protest to be sustained. International Training, Inc., B-272699, Oct. 2, 1996, 96-2 CPD ¶ 132 at 2.

The essence of Symetrics' protest is that the agency is acquiring some of the IDM model 304 units for other than development and testing purposes; that this is beyond the scope of the ICI research and development contracts; and that, as a consequence, the NRL should either comply with the statutory and regulatory requirements for using noncompetitive procedures or delay the acquisition until after development of the TDP, at which point Symetrics could compete for them. Under these circumstances, we think that Symetrics is an interested party to protest that issuance of the task order is beyond the scope of ICI's contract.

DISCUSSION

The protester argues that approximately half of the IDMs that the agency is acquiring are not required for development and testing purposes and that the acquisition of these units is beyond the scope of contracts N00014-96-C-2060 and N00173-00-C-6023.

We first address our jurisdiction to consider this protest. While 10 U.S.C. § 2304c(d) (2000) generally precludes protests in connection with the issuance or proposed issuance of a task order,³ protests on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued are authorized. See Floro & Assocs., B-285451.3, B-285451.4, Oct. 25, 2000, 2000 CPD ¶ 172 at 6. Because this protest contends that the work at issue exceeds the scope of the contracts, we conclude that we do have jurisdiction to hear the protest.

In determining whether a task order is beyond the scope of the original contract, we look at whether there is a material difference between the task order and that contract. Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. Id. The overall inquiry is whether the task order is of a nature that potential offerors would reasonably have anticipated. See Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 at 3.

The agency explains that the task order for the IDMs encompasses two separate and distinct requirements: a requirement for the fabrication of 150 model 304 prototypes to meet operational testing requirements to establish and verify a TDP to be used in further competitive acquisitions of the unit,⁴ and a requirement for the retrofitting of 153 model 303 prototypes to the model 304 configuration. Agency Response to GAO Questions, Mar. 15, 2002, at 2. The agency further explains that it determined that 150 prototypes were required for testing purposes by multiplying the number of platforms on which the IDM is to be installed (10) by the number of units per

³ For the record, we note that no written task order was actually issued here; rather, the agency explains, “[t]he order to ICI to proceed based on its proposal . . . was provided orally.” Letter from Agency to GAO, Feb. 1, 2002, at 3.

⁴ The Army projects that it will ultimately acquire approximately 2,500 of the IDM model 304. Memorandum for Commander, Space Systems Development Department, NRL, from Product Manager, Avionics Mission Equipment, Department of the Army.

platform required to complete operational testing (15).⁵ Agency Report at 3; Contracting Officer's Representative's Statement at ¶ 10. The agency notes that the model 303 prototypes that are being retrofitted to the model 304 configuration cannot be used for operational testing because the units used in operational testing to verify the TDP must be units fabricated using the TDP.

The NRL further explains that it is acquiring the 153 retrofitted model 303 units for reasons unrelated to TDP verification. The agency notes that the model 303 prototypes are useless in their current configuration, and that a business decision was made to salvage whatever was possible from the units by retrofitting them. The agency further notes that, while the retrofit could have been accomplished at the same time as, or subsequent to, the redesign effort, it elected to have it accomplished at the same time due to common parts requirements and long lead times for the acquisition of components. The NRL maintains that retrofitting the model 303 units is within the scope of both ICI contracts, which task the contractor with furnishing depot level maintenance for deliverables. Agency Response to GAO Questions, Feb. 19, 2002. The agency explained in a conference call held on March 15, 2002 that the retrofitted model 303 units would be stockpiled by the Army for use as needed if the model 304 configuration passes testing.⁶

The protester concedes that the agency has justified its acquisition of 150 IDM model 304 units for operational testing and that this is within the scope of the ICI contracts, but argues that the acquisition of the other 153 units is beyond the scope of the contracts. We disagree. Both contracts task ICI with furnishing depot level maintenance on prototype phase deliverables,⁷ such as the model 303 units, and

⁵ The agency reports that the Army intends to install the IDM 304 on the following 10 platforms: the AH-64D (Apache Attack Helicopter), OH-58-D (Combat Scout Helicopter), CH-47F (Chinook Helicopter), UH/HH-60M (Black Hawk Helicopter), MH-47D (Special Operations Aircraft), MH-47E (Special Operation Aircraft), MH-60L (Special Operations Aircraft), MH-60K (Special Operations Aircraft), Tactical Airspace Integration System (TAIS), and the Aviation Tactical Operations Center (AVTOC).

⁶ The Army's Assistant Project Manager for the IDM program explains that the retrofitted units will be used in platforms participating in the Army's Warfighting Campaign Plan for development of digitized Army units, which is currently occurring at Fort Hood. Memorandum for Record from Assistant Project Manager, IDM, Department of the Army, Mar. 18, 2002.

⁷ Section C.4.1.5.2 of contract No. N00173-00-C-6023 provided as follows with regard to depot level maintenance:

The Contractor shall provide depot level maintenance for the Prototype, FSU, LRIP, and FRP phase deliverables. Depot level

(continued...)

retrofitting of the model 303 units reasonably falls within the definition of depot level maintenance. In this regard, depot level maintenance is broadly defined in Department of Defense Directive No. 4151.18, Aug. 12, 1992,⁸ as:

That materiel maintenance requiring major overhaul or a complete rebuild of parts, assemblies, subassemblies, and end-items, including the manufacture of parts, modifications, testing, and reclamation as required.

Because both contracts provided for ICI's performance of depot level maintenance on the modems, and depot level maintenance can reasonably be interpreted as encompassing the retrofitting effort here, we think that potential offerors would reasonably have anticipated issuance of a task order for such work. Accordingly, we

(...continued)

maintenance efforts may require development of PSE [Peculiar Support Equipment], particularly Test Program Sets (TPS). The Contractor shall minimize development of new PSE for the system. The Contractor shall prepare and submit Support Equipment Illustrations (SEIs) for all recommended PSE. The Contractor shall request any such PSE through the normal SERD process. The Contractor shall prepare Test Requirement Documents (TRD) for all LRU [Line Replaceable Unit] and SRU [Sub-Assembly Repair Unit] modules coded as repairable. The Contractor shall prepare all TRDs in accordance with the appropriate MIL STD. The Contractor shall implement a data collection, analysis, and corrective action system for the tools and related tactical communications products returned from the field. The collected data shall provide the inputs for organizational and depot level maintenance. The Contractor shall submit Data collection, analysis, and corrective action system reports to the COR for approval in accordance with the appropriate CDRL [Contract Data Requirements List].

Contract No. N00014-96-C-2060 contained a substantially similar provision at section 3.1.5.2.

⁸ We also note that this definition is consistent with the definition of "depot-level maintenance and repair" set forth in 10 U.S.C. § 2460: i.e., "material maintenance or repair requiring the overhaul, upgrading, or rebuilding of parts, assemblies, or subassemblies, and the testing and reclamation of equipment as necessary, regardless of the source of funds for the maintenance or repair or the location at which the maintenance or repair is performed."

find that the task order for the retrofitted units is within the scope of the ICI contracts and deny the protest.

The protest is denied.

Anthony H. Gamboa
General Counsel