



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Mistral Security, Inc.

File: B-405644

Date: November 9, 2011

Jack Yohe for the protester.

Mitzi S. Phalen, Esq., Department of the Navy, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of General Counsel, GAO, participated in the decision.

DIGEST

Agency reasonably awarded a contract on a sole-source basis for urgently needed explosive detection test kits, where the agency determined that only the awardee, whose kits have been tested and approved for use by the agency, and not the protester, whose kits have not been tested or approved by the agency, could timely meet the agency's needs, and the sole-source did not result from a lack of advance procurement planning.

DECISION

Mistral Security, Inc., of Bethesda, Maryland, protests the issuance of a purchase order on a sole-source basis to Field Forensics, Inc., of Largo, Florida, under solicitation No. N00174-11-P-0140, issued by Department of the Navy, for ammonium nitrate identifier test kits, to be used by the Afghan National Police (ANP) and the Afghan National Army (ANA).

We deny the protest.

The Naval Explosive Ordnance Technology Division (NAVEODTECHDIV) posted a sources sought notice on the Federal Business Opportunities website on July 23, 2008, informing vendors that the agency was seeking commercial-off-the-shelf explosive detection equipment (EDE) "capable of determining the presence of explosives in improvised explosive devices (IEDs) that are contained in mail, parcels, cargo, vehicles, and on personnel." Agency Report (AR), Tab 24, Sources Sought for Colorimetric or EDE (July 28, 2008), at 1. The

notice requested that vendors provide “information that fully explains their existing technology features, capabilities, and performance,” and stated that the agency planned “to select EDE systems for comparative testing and evaluation.” Id.

The Navy received and evaluated numerous EDE systems, and ultimately recommended the Field Forensics test kits “for procurement.” AR, Tab 23, Declaration of NAVEODTECHDIV EDE Director, at 1. On July 29, 2010, the Navy executed a Justification and Approval for Use of Other than Full and Open Competition (J&A) for 27,993 boxes of the Field Forensics kits, noting that “[d]ue to the surge in Afghanistan, a need for disposable ammonium nitrate kits has been identified” for use by the ANP and the ANA “to help mitigate the growing IED threat.” AR, Tab 2, J&A, at 1-2. The J&A stated that “[b]ased on ongoing Government market surveillance, there are no other available ammonium nitrate detection systems or kits that can be supplied in a timely manner” that would meet the agency’s needs. Id. at 2-3.

The agency took delivery of the Field Forensics kits in August and September 2010, with the anticipation that the delivered kits “would provide sufficient quantities in theater for one year.” AR at 2. However, on January 9, 2011 and March 3, 2011, the Navy received requests from the North Atlantic Treaty Organization (NATO) Training Mission-Afghanistan, for additional ammonium nitrate test kits for the ANA and ANP. AR, Tab 18, NATO Training Mission--Afghanistan Memorandum Request (March 3, 2011); Tab 20, NATO Training Mission Afghanistan Memorandum Request (Jan. 9, 2011). The agency explains here that “[b]ecause the detection kits were so effective at detecting ammonium nitrate, the ANA and the ANP employed the kits at more border locations than initially anticipated,” and “had used the quantities from the 2010 order twice as fast as anticipated, creating a new, unforeseen requirement.” AR at 7.

In response to this requirement, the Navy posted a pre-solicitation synopsis on the Navy Electronic Commerce On-Line website, stating that the Navy intended to award a contract on a sole-source basis to Field Forensics for the required test kits. AR at 3; Tab 4, Synopsis. The protester responded to the synopsis by informing the agency that it believed it could meet the agency’s requirements. AR, Tab 5, Mistral E-mail (May 25, 2011). The protester noted in its response that while it could not specifically “speak to the requirement” set forth in the synopsis because neither the synopsis nor Field Forensics’ web-site provided a full description of the item required, it believed that it was capable of meeting the requirement given that a number of Mistral’s products are currently being used by certain federal government agencies as well as “the military in Iraq and Afghanistan.” Id. The protester requested that the agency “cancel its intent to award a sole source contract for this requirement and allow a Full and Open competition to all responsible manufacturers.” Id.

The record reflects that the agency considered the protester’s request, and subsequently informed the protester that since the specific product offered by the

protester had not been tested by the agency, the protester's product did not "qualify." AR at 3; Tab 8, Navy e-mail to Mistral (June 15, 2011). The agency continued with its proposed sole-source award to Field Forensics, and executed a J&A in support of this action on July 13, 2011. AR, Tab 11, J&A (July 13, 2011). The J&A cites unusual and compelling urgency, 10 U.S.C. § 2304(c)(2) (2006), as the basis for the sole-source acquisition of the test kits at a total cost of \$1,068,998, from Field Forensics. Id. at 2. The J&A describes the need for the kits and the kits' effectiveness, and notes that the particular Field Forensics kits "were selected due to the functionality, reliability and positive test parameters obtained" from the cognizant Navy testing laboratory. Id. at 3. The J&A further provides that Field Forensics "maintains all proprietary data rights to their . . . Kits," and that the "Government does not own the technical data packages . . . necessary for procurement or for logistics support." Id.

The Navy issued a purchase order to Field Forensics for the test kits on August 10, and on August 24, posted a redacted version of the J&A on the Navy Electronic Commerce On-Line website. AR at 5-6; Tab 12, Purchase Order; Tab 13, Redacted J&A. Mistral filed this protest with our Office, and shortly thereafter the agency executed a memorandum "overrid[ing] the automatic stay of contract performance," based upon the determination that the such action was "in the best interests of the United States"; and that "urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the decision of GAO concerning the protest." AR, Tab 15, Override Memorandum. The agency's memorandum notes, among other things, that the "kits were requested under an urgent basis to help mitigate growing IED threat," and that "[c]urrently, there are zero detection kits in stock, either in warehouses or in the field, in Afghanistan." Id. at 2. Given the delivery schedule set forth in the J&A and purchase order, all or nearly all of the kits ordered will be delivered to the agency prior to our issuance of this decision.

Mistral challenges the sole-source award to Field Forensics, arguing that it is capable of providing the requisite test kits. Mistral contends, without providing any further explanation or supporting documentation, that its offered product could be tested "at any chemical lab in a manner of days," and that sole-source award here was caused by the agency's failure to engage in adequate advance planning. Protester's Comments at 2.

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. Argon ST, Inc., B-402908; B-402908.2, Aug. 11, 2010, 2011 CPD ¶ 4 at 5-6.

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 6; Eclipse Int'l Corp., B-274507, Nov. 12, 1996, 96-2 CPD ¶ 179 at 3. Underlying this policy is the simple fact that under wartime conditions, the government must procure items quickly and urgently to meet compelling military needs. Jay Dee Militarywear, Inc., B-243437, July 31, 1991, 91-2 CPD ¶ 105 at 5. An agency need not risk injury to personnel or property in order to conduct a competitive acquisition. Signals & Sys., Inc., B-288107, Sept. 21, 2001, 2001 CPD ¶ 168 at 10. Additionally, under circumstances involving a critical need of items related to human safety and affecting military readiness during wartime, the agency need only consider those sources which can immediately satisfy its requirements and not those which have the potential to do so. Jay Dee Militarywear, Inc., supra. 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.

Based upon our review of the record, we find the agency's actions here to be reasonable. As an initial matter, there is no basis on which to question the agency's position that there is a critical and immediate need for the test kits, and that this need is related to human safety and affects military operations. Additionally, the record reflects, and the protester does not dispute, that the specific test kits that Mistral would provide to meet the requirement here have not been tested by the agency. In this regard, the kit proposed by Mistral was not available for testing when the agency conducted its initial testing of the kits offered by the differing vendors that resulted in the agency's determination that only the Field Forensics kit would meet the agency's needs. Further, in contrast to the protester's unsupported assertion that its kits could be tested relatively quickly and inexpensively, the agency has furnished a relatively detailed breakdown of the costs of testing and time involved that provides that the testing of alternative products at this time would be both expensive and prohibitively time consuming. AR, Tab 22, Declaration of NAVTECHDIV Technical Specialist at 1, attach. As such, while Mistral claims that it could provide test kits that could meet the urgent needs of the warfighter, it has not shown that the agency's differing view is unreasonable. That is, at the time the J&A was executed as well as at the time of award, Field Forensics was the only source that had provided test kits that had been tested and used successfully in the field. See Argon ST, Inc., supra, at 7.

Nor do we agree with Mistral that the urgency of the requirement that resulted in the sole-source award to Field Forensics was the result of a lack of advance procurement planning. As Mistral points out, CICA mandates that noncompetitive procedures not be used where agency contracting officials failed to perform advance procurement planning. 10 U.S.C. § 2304 (f)(4); RBC Bearings Inc., B-401661; B-401661.2, Oct. 27, 2009, 2009 CPD ¶ 207 at 6. Our Office has recognized that the

requirement for advance planning does not mean that such planning be completely error-free, but, as with all actions taken by an agency, the advance planning required must be reasonable. RBC Bearings Inc., supra.

The record demonstrates that agency procured the test kits from Field Forensics for the first time in September 2010, and that the test kits were procured on a sole-source basis at that time because of the agency's determination, after publicly soliciting test kits from vendors and testing the kits received, that only the kit manufactured by Field Forensics would meet its needs. The record further reflects that the agency's current urgent need is due to the fact that the test kits procured from Field Forensics have been used by the ANA and ANP at twice the rate expected, and that the agency intends to conduct a competition on a full and open basis in fiscal year 2012. AR at 1 n.1, 4 n.5. In this regard, the agency reports that it "plans to procure approximately 1.2 million" test kits competitively, and "is considering alternative approaches, such as allowing offerors to submit test results from independent third-party testing and manufacturer safety test reports" to satisfy the agency's requirement for testing and validation prior to the procurement of the specific item offered and its use in the field. AR at 4 n.5; Agency Supp. Report at 8.

Given the critical nature of the requirement being protested here, the fact that the urgency of the requirement was in part occasioned by the use of the test kits by the ANA and ANP at twice the rate anticipated, and Mistral's relatively recent identification to the agency of its test kits as a potential source, we cannot find that the agency's sole-source acquisition here for a relatively limited quantity of kits was the result of a lack of advanced planning. In this regard, we note that the agency has represented that in light of Mistral's response to its pre-solicitation synopsis, the agency has "decided to hold a competition for the requirement" in fiscal year 2012, and has represented that the sole-source procurement here is to "fulfill" the "immediate needs" of the ANA and ANP. Agency Supp. Report at 9.

The protest is denied.

Lynn H. Gibson
General Counsel