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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Lyntronics Inc.

File: B-292204

Date: July 22, 2003

Anthony Vigliotti for the protester.

Maj. Edward E. Beauchamp and John J. Reynolds, Esq., U.S. Army Materiel Command, for the agency.

Noah B. Bleicher and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly modified incumbent's contract to increase number of required batteries, instead of conducting competitive procurement, where agency reasonably determined that any firm other than incumbent would require testing that would result in unacceptable delay in deliveries.

DECISION

Lyntronics Inc. protests the decision of the Department of the Army, Communications-Electronics Command (CECOM), to modify Mathews Associates, Inc.'s (MAI) contract No. DAAB07-98-D-R311, to increase the ceiling quantity of BA-5347/U lithium manganese dioxide batteries that can be ordered under the contract. Lyntronics argues that CECOM unreasonably determined that Lyntronics is not capable of meeting the agency's needs.

We deny the protest.

The BA-5347/U battery is the only non-rechargeable power source authorized for use in the Thermal Weapon Sight (TWS).¹ After a formal "best value" source selection in

¹ The TWS is a scope that mounts onto firearms such as the M16 and M4 rifles. It provides the soldier with a thermal image of the enemy, giving the soldier the ability to view the enemy in conditions such as darkness, smoke, foliage or fog. The battery is housed inside the TWS.

September 1998, CECOM awarded MAI an indefinite-delivery, indefinite-quantity contract to supply the Army with the battery for 3 years. Subsequent modifications extended the duration of the contract through July 31, 2004, and increased the maximum quantity of batteries that could be ordered to 75,000. CECOM has since initiated a follow-on competitive acquisition to succeed MAI's contract, and expects award to be made by September 2003, with deliveries commencing in September 2004.

Due to a determination to fully field the TWS in connection with unforeseen military buildups, including Operation Enduring Freedom and Operation Iraqi Freedom, demand for the BA-5347/U battery has been consistently rising. As a result, the Army determined that it would need to acquire additional batteries prior to the commencement of deliveries under the new follow-on contract. Thus, on March 10, 2003, the Army executed justification and approval (J & A) number 03-083, authorizing CECOM to increase the quantity ceiling under MAI's contract to 225,000 batteries. The J & A concluded that a sole-source modification was justified because MAI is the only responsible source reasonably capable of meeting the immediate, interim requirements. See 10 U.S.C. § 2304(c)(1) (2000) (use of other than competitive procedures authorized when the supplies or services needed are available from only one responsible source, or from a limited number of sources, and no other products will satisfy the agency's needs). According to the J & A, no other source could meet CECOM's needs because "[a]ny other source's product 'would need to undergo required safety and First Article Testing [FAT] that would result in delivery delays of approximately one year from contract award.'" Consistent with the J & A, CECOM posted a notification of the modification in FedBizOps on March 19, which discussed CECOM's concern regarding delivery delays due to necessary testing for firms other than MAI.

Although CECOM had inadvertently omitted from the synopsis any reference to standard note 22 (which indicates that offerors have 45 days to describe their interest in and capability to perform the requirement), Agency Request for Summary Dismissal, at 2, Lyntronics contacted CECOM on March 24 to express interest in the requirement. Lyntronics was advised that it had 30 days "to write a proposal giving as much information as possible in a condensed package." Protester's Response to Agency's Request for Summary Dismissal, at 3. In its April 2 one-page response, Lyntronics briefly introduced the company as a "viable source for this battery," and stated that it could have a first article ready for testing in 3-4 weeks and could begin delivering batteries 1 month after production approval. However, the response did not provide any detail describing how this would be achieved. After reviewing this response and contacting Lyntronics to determine the type of battery cell it was proposing to use, CECOM affirmed its conclusion that MAI was the only responsible source with an approved production line that could meet its critical short-term needs. Agency's Request for Summary Dismissal, Tab A, Statement of Contracting Officer, ¶ 5. CECOM issued modification No. P00007 on April 7, raising the ordering ceiling under MAI's contract to 225,000 units. Lyntronics filed this protest with our Office on April 21, challenging the justification for the sole-source modification.

An agency has the authority under 10 U.S.C. § 2304(c)(1) to limit a procurement to the only firm it reasonably believes can meet its needs within the time available. Litton Computer Servs., B-256225 et al., July 21, 1994, 94-2 CPD ¶ 36 at 5-7. We will not object to an agency's determination to use other than competitive procedures unless we find that it lacks a reasonable basis. Id.

Lyntronics asserts that it submitted information in its April 2 response sufficient to demonstrate its ability to meet the agency's requirement, and that CECOM therefore lacked a reasonable basis for modifying MAI's contract instead of competing the requirement. We disagree.

CECOM's FedBizOps synopsis explained that the primary justification for restricting the acquisition to one source was that deliveries by a source other than MAI would be delayed unacceptably due to the time required for testing. Lyntronics failed to substantively address this concern in its April 2 proposal, instead merely asserting, without supporting explanation or information, that it could have a first article ready in 3-4 weeks, and the first shipment ready in an additional month. In light of CECOM's stated concern and projected 1-year timeframe, it was incumbent upon Lyntronics to provide specific information detailing its alternative FAT schedule; absent such information, CECOM had no basis to determine that Lyntronics would be able to perform the required tests and deliver batteries within CECOM's timeframe. See Litton Computer Servs., supra.

Lyntronics maintains that the agency has not established that testing will result in material delays in delivering the batteries. Again, we disagree. CECOM's determination regarding testing delays was based on its prior experience under MAI's contract and under other contracts for similar batteries. The record shows that FAT requirements for the BA-5347/U battery involve successfully completing 25 different tests. The agency reports that actual testing took MAI nearly 6 months to successfully complete, and that MAI delivered the first batteries under its original contract 18 months after receipt of order. Agency Report, Tab B, CECOM LRC Power Sources Team Technical Statement (CECOM Statement), at ¶¶ 6-9.² Similarly, according to CECOM, proven battery producers have taken between 10 and 15 months to prepare for and complete FAT requirements under prior government contracts. For example, under a 2002 contract (No. DAAB07-02-D-A204 for the BA-5800 and BA-5567 batteries), it took the contractor approximately 11 months from contract award to complete FAT. Under another contract

² MAI was awarded its original contract on September 30, 1998. After 6½ months of preparatory efforts, including establishing the bill of materials, obtaining commitments from suppliers and test facilities, and building both cells and batteries for prototype testing, MAI began FAT on April 15, 1999. CECOM approved MAI's FAT report on October 5, 1999. CECOM Statement, at ¶¶ 6-9

(No. DAAB07-02-D-A205, for the BA-5590 and BA-5567 batteries), FAT took 13 months, and under another (No. DAAB07-02-D-A219, for the BA-5367 battery), FAT took approximately 10 months. Agency Report, Tab A, Contracting Officer's Statement, at 7. Further, offerors competing under a current solicitation (No. DAAB07-02-R-A266) for a lithium battery similar to the BA-5347/U have indicated that 9 to 10 months would be the minimum time needed for FAT preparation, testing and reporting. Id.

We find the agency's explanation of the historical timeframe for completion of testing on this and other batteries to be persuasive support for its conclusion that a similar amount of time would be required for a new contractor performing the requirement here. Although Lyntronics disagrees with CECOM's position regarding testing delays, it has not shown why the agency's historical experience is not a valid basis for its decision to modify MAI's contract, or otherwise shown that the agency's position is incorrect. Rather, Lyntronics's position is supported by two timetables merely stating, essentially, that it could complete the testing in a much shorter time than estimated by the agency. As with its April 2 response to the synopsis, however, Lyntronics has failed to provide information or explanation either supporting these timetables or bringing the government's estimated timeframe into question. Moreover, these timetables represent best-case scenarios in that they do not account for potential unforeseen problems or testing failures; there was nothing unreasonable in the agency's considering such eventualities in determining the appropriate acquisition approach. In sum, we conclude here that we have no basis for questioning the agency's position that deliveries by a new source would be materially delayed. See Magnavox Elec. Sys. Co., B-258076 et al., Dec. 30, 1994, 94-2 CPD ¶ 266.

CECOM also has shown that the testing delays would prevent it from meeting its needs for additional batteries prior to their availability under the new follow-on contract. The average monthly demand (AMD) was at 2,411 batteries in December 2002, and by March 2003--when the J & A was executed--had more than doubled, to 5,721. CECOM Statement, at ¶ 10. By the time the modification was issued on April 7, CECOM had approximately 25,000 batteries remaining available under MAI's contract, and the AMD was consistently rising. Agency's Response to GAO's Request for Additional Information, June 26, 2003. As of May 16, the AMD had increased to 12,225, CECOM had 29,105 backorders, and there were only 5,348 batteries on hand. CECOM Statement, at ¶ 10. Thus, CECOM reasonably determined that modification of MAI's contract was necessary to meet its interim needs.

We conclude that CECOM reasonably determined that only MAI could satisfy its requirements for the BA-3547/U battery within the time required, and that the sole-source modification of that firm's contract was unobjectionable.

The protest is denied.

Anthony H. Gamboa
General Counsel