



Decision

Matter of: Derm-Buro, Inc.

File: B-400558

Date: December 11, 2008

Frank Guthart for the protester.

Jared P. Weissberger, Esq., Defense Logistics Agency, for the agency.

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DIGEST

Agency reasonably determined to solicit only two of five firms listed on the qualified products list in connection with a reprourement, where the two firms were the only firms currently producing the required product, and the only firms eligible for a waiver of first article test requirements.

DECISION

Derm-Buro, Inc., of Plainview, New York, protests the failure of the Defense Logistics Agency, Defense Supply Center Philadelphia (DSCP) to solicit it in connection with solicitation No. SPM1C1-08-R-0146, a reprourement for anti-gravity suits.

We deny the protest.

The anti-gravity suit is required to be worn by all Navy, Marine, and Air Force jet pilots and is designed to prevent the pilot from losing consciousness during high-gravity maneuvers. Without the anti-gravity suit, a military pilot is exposed to gravity-induced loss of consciousness, which occurs when blood is forced into the lower region of the body in reaction to acceleration or deceleration during high-gravity maneuvers in military fighter aircraft. According to the agency, the anti-gravity suit is the most critical “life and limb” flight clothing for jet pilots, and offerors of anti-gravity suits are required to be technically qualified at the time of award by having their products listed on the qualified products list (QPL). The agency reports that the anti-gravity suit is currently in a “critical supply position with an increasing number of backorders that remain unfulfilled.” Agency Report (AR), Memorandum for Record, at 3.

The challenged solicitation is a reprourement for anti-gravity suits that were to be delivered under a prior contract that was terminated for default.¹ With regard to this reprourement, the agency specifically solicited two of five firms listed on the QPL, Switlik Parachute Company and Mustang Survival Manufacturing, to compete for the defaulted requirement. Derm-Buro, also a manufacturer of anti-gravity suits listed on the QPL, was not aware that Switlik and Mustang had been solicited in connection with the defaulted requirement until each was awarded a contract, at which point Derm-Buro filed this protest. Derm-Buro asserts that as a firm listed on the QPL it was entitled to receive a copy of the solicitation, and that DSCP, by withholding the solicitation, improperly denied it the opportunity to submit an offer.

Citing our decision in Montage Inc., B-277923, B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176, the agency first argues that we should dismiss the protest. In Montage, we reexamined our previous view that a defaulted contractor may not be automatically excluded from a competition for the defaulted requirement because such an exclusion would constitute an improper premature determination of nonresponsibility. In recognition of the broad authority to repro cure accorded the contracting officer by Federal Acquisition Regulation (FAR) § 49.402-6, we adopted the position that we would decline to review an agency's decision not to solicit a defaulted contractor in the reprourement of work remaining under the defaulted contract. The agency argues that the Montage decision should control here because Derm-Buro, although not the defaulted contractor in connection with the anti-gravity suits being repro cured, was recently terminated for default for failure to timely present first article test (FAT) samples and make deliveries under other contracts for anti-gravity suits.

We decline to extend the decision in Montage beyond the situation presented in that case, and again more recently in Essan Metallix Corp., B-310357, Dec. 7, 2007, 2008 CPD ¶ 5, wherein a contractor protests its exclusion from a reprourement necessitated by the termination of its own contract. As that is not the situation presented here, we will review whether the agency's decision to exclude Derm-Buro was reasonable.

Generally, the statutes and regulations governing federal procurements are not strictly applicable to repro procurements of defaulted requirements. Essan Metallix Corp., supra, at 2. Rather, under FAR §§ 49.402-6(a), (b), and 52.249-8, an agency may use any terms and acquisition method deemed appropriate for repurchase of not more than the undelivered quantity for which the contract was terminated, although an agency must obtain competition to the maximum extent practicable and as

¹ The defaulted contractor under the prior contract is not a party to this protest.

reasonable a price as practicable.² Id. These FAR provisions allow the agency to purchase the needed supplies as expeditiously as possible while preserving the government's right to seek excess reprourement costs from the defaulted contractor. Id.

The agency argues that it was not required to solicit Derm-Buro in connection with the reprourement, and properly made awards to Switlik and Mustang in accordance with FAR § 49.402-6(a), (b). The agency states that it elected to limit competition to Switlik and Mustang on the basis that the two firms were the only firms that were currently, or had recently, delivered the required suits successfully. AR, Contracting Officer's Report, at 5. Of the five firms whose products were listed on the QPL at the time the solicitation was issued, one was the contractor terminated for default under the prior contract and two, including Derm-Buro, had not delivered anti-gravity suits recently enough to be eligible for a waiver of FAT requirements. Id. at 5-6. Thus, the agency determined that Switlik and Mustang were the only firms that could be practicably included in the competition in order to ensure continuous deliveries without a break in production and thereby secure the expeditious replacement of the quantity of anti-gravity suits remaining undelivered from the terminated contract.

Derm-Buro counters that the agency's rationale does not hold because the delivery schedule under the reprourement contracts will allow sufficient time for all contractors on the QPL to compete, including Derm-Buro, and that by not soliciting all contractors on the QPL the agency failed to obtain competition to the maximum extent practicable and repurchase at as reasonable a price as practicable.³ Derm-Buro insists that it is fully capable of producing the required anti-gravity suits, has successfully delivered approximately 65,000-70,000 units in the past and, as it has argued before the Armed Services Board of Contract Appeals, was improperly terminated under its prior contracts.⁴

² The reprourement here is for the exact number of anti-gravity suits that remain undelivered from the terminated contract.

³ Derm-Buro, as a veteran-owned small business, also requested that the matter of its qualifications be referred to the Small Business Administration under FAR § 19.6. FAR § 19.6 applies when an apparent successful small business offeror is determined by the contracting officer to be nonresponsible. FAR § 19.6 does not apply here, as Derm-Buro is not an apparent successful offeror and, in any event, as addressed in our discussion of Montage, our Office no longer considers an agency's determination to exclude a firm from a reprourement to involve a determination of nonresponsibility.

⁴ The propriety of the terminations for default on its prior contracts is a matter of contract administration not for review by our Office. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2008).

The agency's decision to limit competition for the reprourement to the two firms currently producing anti-gravity suits, and the only firms on the QPL not subject to FAT requirements, was reasonable. With respect to not soliciting Derm-Buro, the firm's last successful delivery of anti-gravity suits was in November 2006. Therefore, as stated by the agency, Derm-Buro would be required to submit FAT samples and pass a FAT before it could begin production. Given that the recent terminations for default on Derm-Buro's contracts were a result of its failure to provide FAT samples in a timely manner and failure to make deliveries within the timeframe established in its contract, the agency had a reasonable concern that soliciting Derm-Buro (or any other firm subject to FAT requirements) could have an adverse effect on the agency's ability to expeditiously reprocore the critically needed suits. In light of the agency's critical need and the broad discretion granted the agency in determining how to conduct a reprourement, we conclude that the agency obtained maximum practicable competition by soliciting the two firms on the QPL that were not subject to FAT requirements, and could therefore ensure continuous deliveries of anti-gravity suits with no breaks in production.

The protest is denied.

Gary L. Kepplinger
General Counsel