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**Comptroller General
of the United States**

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

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Decision

Matter of: Argon ST, Inc.

File: B-402908; B-402908.2

Date: August 11, 2010

Marcia G. Madsen, Esq., David F. Dowd, Esq., and Polly A. Myers, Esq., Mayer Brown, LLP, for the protester.

John W. Chierichella, Esq., Anne B. Perry, Esq., and Townsend L. Bourne, Esq., Sheppard, Mullin, Richter & Hampton, for ICx Tactical Platforms Corporation, the intervenor.

Marvin D. Rampey, Esq., Kevin E. Bolin, Esq., and Angela J. Cosentino, 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 surveillance systems, where the agency determined that only the awardee, the original equipment manufacturer of the systems, and not the protester, which has never manufactured and delivered such systems, could timely meet the agency's needs, and the sole-source did not result from a lack of advance procurement planning.

DECISION

Argon ST, Inc. of Fairfax, Virginia protests the award of a contract on a sole-source basis to ICx Tactical Platforms Corporation of Alpharetta, Georgia, under request for proposals (RFP) No. N00164-10-R-JT08, issued by the Crane Division, Naval Surface Warfare Center, Department of the Navy, for Ground Based Operational Surveillance Systems (G-BOSS) Lite, to be used by the United States Marine Corps (USMC) and Joint Operating Forces in Operation Enduring Freedom.

We deny the protest.

BACKGROUND

The G-BOSS Lite is part of a “family of surveillance and detection systems the Marine Corps uses in theater.” Agency Report (AR), Tab 7, Justification and Approval for other than Full and Open Competition (J&A), at 2. The G-BOSS Lite is a light “trailer-based, unmanned, surveillance system for use in austere environments with optical, infrared, radar and seismic surveillance systems linked by command and control software.”¹ AR at 8 n.6. The G-BOSS Lite units are “emplaced to detect hostile troop movements, insurgent infiltrations, and IED [improvised explosive device] placement by providing persistent surveillance around military facilities, border crossings, and other key locations,” and “provide warfighters with the capability to remotely detect enemy movements at great distances.” AR at 2.

The G-BOSS Lite was designed and developed by ICx with the U.S. Army Night Vision and Electronic Sensors Directorate (NVESD) Laboratory, and was derived from a similar, pre-existing Army system called “Cerberus,” which was also developed by ICx with the Army NVESD Laboratory.² AR at 9 n.8. According to the agency, with “the transition of activities to Operation Enduring Freedom,” the USMC found that the Cerberus variant purchased and in use by the USMC was “not as effective in the mountainous terrain of Afghanistan,” and subsequently “chose to initiate its own persistent surveillance program” with USMC-specific configurations. Id.

These USMC-specific configurations are known as G-BOSS. Id. In order to “minimize the logistics impact,” the USMC “chose to modify and enhance the Army’s existing Cerberus variant,” with the result being the G-BOSS Lite. In its report, the agency details a number of the “[m]odifications and enhancements” to the Cerberus system that resulted in the G-BOSS Lite, including the use of a different radar and camera, as well as “command and control software and networking variations, and increased ruggedization for use in austere environments.” Id. The record reflects that the USMC has 16 G-BOSS Lite units in inventory; 2 of these units were developed as prototypes by ICx and 14 of these units have been purchased from ICx, the original equipment manufacturer (OEM) of G-BOSS Lite. AR at 3. The agency reports that 12 G-BOSS Lite units are “currently deployed in Afghanistan,” and 4 G-BOSS Lite units are “being utilized for garrison/pre-deployment/engineering development training.” Id.

The record reflects that since September 2009, the agency has been preparing for the issuance of a solicitation for G-BOSS Lite that will provide for the award of a

¹ The two other G-BOSS variants are “heavy trailer-based” and “man-portable.” AR at 2 n.2.

² The name “Cerberus” is trademarked and owned by ICx.” AR at 9 n.8.

contract on the basis of full and open competition. AR at 7. The agency states in this regard that because it is not in the possession of a technical data package for the G-BOSS Lite, and that “[a]ny technical data [it] initially received . . . for the G-BOSS systems was inadequate for purposes of future competitive procurements,” it is and has been in the process of “reverse-engineering all G-BOSS systems to independently develop” technical data packages. AR at 8.

To aid in its preparation for the future competitive acquisition of G-BOSS, including the G-BOSS Lite variant, the agency, on November 9, 2009, issued a request for information (RFI) informing vendors that the agency anticipated the issuance of a solicitation providing for the award of a fixed-price contract for the production and sustainment of an aggregate total of 600 G-BOSS units over a 5-year period. AR, Tab 18, RFI No. N00016410SNB04, at 2. The RFI included a questionnaire to be completed by interested vendors and returned to the agency, and also announced the agency’s intent to host an “Industry Day” for the purposes of meeting with vendors interested in competing for the production and sustainment of G-BOSS. *Id.*; Tab 15, Special Notice RFI No. N00016410SNB04, at 1. The Industry Day was conducted from December 15 through December 18 with numerous vendors, including Argon. AR, Tab 13, Industry Day Schedule. According to the agency, it intends to issue a request for proposals (RFP) in late 2010 providing for multiple competitive awards for the production and sustainment of G-BOSS, including the G-BOSS Lite variant. AR at 12; Tab 12, Industry Day Presentation Slides, at 6.

The record further reflects that while the agency was working towards the issuance of a competitive solicitation for the G-BOSS, it became aware in September 2009 that the USMC Combatant Commander Operation Enduring Freedom had submitted a “draft” urgent statement of need for G-BOSS systems “in connection with a proposed major increase in U.S. troop deployment in Afghanistan.”³ AR at 13. Given the agency’s view that a finalized urgent needs statement for the G-BOSS could be “received anytime before the end of 2009,” the agency conducted “[w]eb-based market research,” and contacted the OEMs of the three G-BOSS variants, including ICx, regarding the OEMs’ “production and delivery capabilities in the event of an official urgent requirement and funding approval.” AR at 13.

On January 7, 2010, the Navy received a finalized and approved urgent statement of need from the USMC, stating, among other things, that the USMC urgently needed certain specified quantities of all three G-BOSS variants, including 34 G-BOSS Lite units. AR at 14; Tab 10, Urgent Statement of Need (Jan. 7, 2010). The Navy states

³ According to the agency, USMC Combatant Commanders “are granted the ability to identify critical military deficiencies in the field and make urgent, time sensitive requests for supply.” AR at 13 n.11. The agency states that “[t]he median time to generate, vet, validate, and execute” such an urgent request after submission by the Combatant Commander is 193 days. AR at 13.

that after it received the finalized urgent statement of need, it “took another look at the RFI responses and Industry Day submissions by vendors to better understand market capability,” and found “that none of these systems was a duplicate of existing G-BOSS systems currently in use by the [USMC] and that none of these systems were suitable for immediate fielding without modification, testing, and certification.” AR at 14-15. The Navy subsequently determined that because it did not have a technical data package for any of the G-BOSS variants, including the G-BOSS Lite, the “only reasonable way” for the Navy to timely fulfill the USMC’s urgent needs would be to procure the necessary G-BOSS variants from the OEMs on a sole-source basis. AR at 15.

While preparing a J&A for the G-BOSS systems and subjecting the J&A to “a vetting process pending approval,” the Navy was further informed by USMC engineers that a “substantial” logistics support structure for the G-BOSS Lite had been developed over the past 14 months. AR at 16. The agency reports here that the logistics support structure developed and in place for the G-BOSS Lite includes, among other things, training, supply support, maintenance, technical data, computer resources, support equipment, and special tools. AR at 16. For example, with regard to the training aspect of the G-BOSS Lite logistics support structure, the agency explains that USMC G-BOSS operators, as well as G-BOSS field representatives and trainers/installers, receive training at certain locations within the United States from “contractor trainers that are Subject Matter Experts on the operation of the current G-BOSS Lite configuration.” AR at 16-17. The agency adds that the establishment of a training program involves, among other things, the development of a program of instruction, the development of an operator’s manual and maintenance technical manuals, and the training of the personnel who will provide the actual training in the operation and maintenance of the system. AR at 17.

The Navy received funding for the USMC’s urgent need for the three G-BOSS variants on March 5, and on March 23, issued a fully signed and executed J&A for the award of a contract on a sole-source basis to ICx for 34 G-BOSS Lite units. AR at 25; Tab 7, J&A (Mar. 23, 2010).

The J&A cites unusual and compelling urgency, 10 U.S.C. § 2304(c)(2) (2006), as the basis for the acquisition of the G-BOSS Lite from ICx on a sole-source basis. AR, Tab 7, J&A, at 2. The J&A describes in some detail the manner in which the G-BOSS Lite is used, and the results achieved through their use by the USMC, particularly with regard to their use in detecting “insurgency threats” and the placement of IEDs. Id. The J&A concludes in this regard that the G-BOSS Lite are needed “as soon as possible,” and that “[a]ny delays in procurement will mean missed IEDs” that “will result not only in equipment damage, but in the dismemberment and death of Marine Corps personnel.” Id. at 2. The J&A adds that the procurement of the G-BOSS Lite “is imperative because the warfighters are currently training in the use of the G-BOSS Lite,” noting here that if any other surveillance system were procured, “it would require retraining the warfighter.” Id. at 2-3. The logistics support structure

in place for G-BOSS Lite is also cited in the J&A as support for the urgency requirement and why only the G-BOSS Lite systems will currently meet the USMC's needs. Id. at 3. The J&A notes that while certain market research had been conducted, the urgent "requirement has not been synopsisized via posting on the [Federal Business Opportunities] website due to the critical time constraints of the urgent need." Id. Finally, the J&A provides that the contracting officer had determined that the costs of purchasing the 34 G-BOSS Lite units from ICx would be fair and reasonable, and notes that the Navy is proceeding with the development of "a technical data package to allow for competition on future requirements," and that the competitive solicitation of proposals for "all G-BOSS variants" was planned for issuance in late 2010. Id.

The agency subsequently provided a solicitation to ICx for the 34 G-BOSS Lite units, with delivery to be completed by August 2010. AR at 25-26. A delivery schedule providing for the delivery of all 34 G-BOSS Lite units was ultimately agreed upon by the Navy and ICx, essentially providing for the delivery of 4 G-BOSS Lite units per week from July 22 through September 16.⁴ AR at 26. The agency, after having "worked to establish fair and reasonable prices for the procurement," awarded a contract for \$10,509,400 to ICx on April 23. AR at 26; Tab 5, Contract, at 4. ICx publicly announced the award of the contract on May 13, and on May 21, Argon filed this protest. AR at 27. ICx is proceeding with the performance of the contract, and in accordance with the terms of the contract's delivery schedule, the majority of the 34 G-BOSS Lite units will be delivered by the time this decision is issued.

Argon challenges the sole-source award to ICx, arguing that contrary to the agency's conclusion, Argon is capable of providing the G-BOSS Lite or comparable surveillance systems for use by the USMC. Argon also contends that the agency improperly failed to engage in adequate advance planning, which resulted in this sole-source award to ICx; that the J&A prepared by the agency is defective; and that the agency has not proceeded in an urgent manner so as to justify the urgency basis for the sole-source award. We have considered the numerous arguments raised by Argon in support of its position, and find the protest to be without merit. We discuss the most significant arguments below.

ANALYSIS

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

⁴ The delivery schedule specifically provides for the delivery of four G-BOSS Lite units per week through September 9, with the remaining two units to be delivered on September 16. AR at 26.

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. McGregor Mfg. Corp., B-285341, Aug. 18, 2000, 2000 CPD ¶ 151 at 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 7; 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.

The protester claims that it could "produce surveillance systems to meet the [USMC's] needs," arguing that it could "deliver G-BOSS Lite systems" that "would not be different from, or incompatible with, existing fielded systems." Protester's Supp. Comments at 3. The protester also claims, apparently in the alternative, that it could produce "compatible units on an expedited basis," starting "with [DELETED]." Protester's Comments at 9. With regard to its capability to produce and deliver G-BOSS Lite units, the protester has provided with its comments on the agency report on this protest a declaration from Argon's Director of Imaging Systems, stating that, "[b]ased on [this individual's] understanding of G-BOSS Lite," Argon, starting "with [DELETED] which Argon is presently manufacturing," could modify these units "to the G-BOSS Lite configuration" and deliver these units to "the Government within [DELETED] of contract execution." Protester's Comments, exh. 1, Declaration of Argon's Director of Imaging Systems (July 8, 2010), at 1. The protester provided with the declaration a "technical proposal" describing the similarity between the G-BOSS Lite and [DELETED], and generally explaining how Argon would modify or manufacture units to be delivered to the agency. Protester's Comments, exh. 1, Technical Proposal. Argon adds in its protest that during the Industry Day it had informed the Navy that Argon "had been selected [by the Navy] to supply Cerberus Tactical Long Range Systems and were currently building units which are a very close variant to the [G-BOSS Lite] system," and "[DELETED]." Protest at 4.

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 additional G-BOSS Lite units to be used by USMC personnel in Operation Enduring Freedom, and that this need is related to human safety and affects military operations. The record reflects, and the protester does not dispute, that at this time the agency does not have a technical data package for the G-BOSS Lite that could be made available to Argon or any other firm for the manufacture of that system. Further, as reasonably explained by the agency, the manufacture of a fully functioning G-BOSS Lite that is ready for use by the warfighter is more complex than a simple assembly of various components, and to date, ICx is the only vendor to have manufactured, tested and delivered G-BOSS Lite units. Additionally, although Argon has provided a "technical proposal" with its comments on the agency report generally describing how it would manufacture "compatible units on an expedited basis," it conceded in describing its proposal that because the agency lacks a technical data package for G-BOSS Lite, the proposal was prepared by Argon "without the benefit of even a basic description of G-BOSS Lite." Protester's Comments at 9. Also, as pointed out by the agency, Argon has not manufactured and delivered either a G-BOSS Lite unit or a Cerberus unit to the government. In this regard, the agency points out that Argon's contract with the Navy for Cerberus Tactical Long Range Systems, which Argon claims are a very close variant to the G-BOSS Lite system, was terminated by the agency prior to the delivery or acceptance of any Cerberus units to agency.

In sum, while Argon claims that it could manufacture and deliver G-BOSS Lite units or another "compatible" system that could meet the urgent needs of the warfighter, it has not shown that the agency's differing view was unreasonable. That is, at the time the J&A was executed as well as the time of award, ICx was the only source that had already successfully manufactured and delivered G-BOSS Lite units and could move immediately into production upon contract award, whereas Argon had not demonstrated that it could provide the G-BOSS Lite units to meet the urgent requirements but only claimed that it could do so. See FXC Corp., B-257697.2; B-257973, Dec. 1, 1994, 94-2 CPD ¶ 216 at 10.

Nor do we agree with Argon that the urgency of the requirement that resulted in the sole-source award to ICx for 34 G-BOSS Lite units was the result of a lack of advance procurement planning. As Argon 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 the G-BOSS Lite program is relatively new, and that the agency has been actively planning for the competitive acquisition of G-BOSS Lite

units since September 2009 and intends to issue an RFP in late 2010 providing for awards on a competitive basis. Additionally, the record further reflects that the urgent need for the G-BOSS Lite units was due to “unforeseen military requirements,” that is, to provide additional G-BOSS Lite units to USMC personnel “in support of protection of Forward Operating Bases in Afghanistan” at a date earlier than could be accommodated through a competitive procurement. AR, Tab 9, Joint Operational Needs Prior Approval Reprogramming Action (Feb. 2, 2010), at 1-2. Given the urgency of the unforeseen requirements being protested here, Argon’s complaints that the agency should have developed a technical data package earlier or obtained one from ICx are insufficient to show that the agency did not engage in advance procurement planning under the circumstances present here.⁵

The protester also argues that the J&A executed here is defective. For example, the protester contends that the J&A is inadequate because “it does not address when the G-BOSS units are required by the Government or even when they are required to be delivered by ICx,” and thus cannot justify an urgency requirement. Supp. Protest at 3. The protester adds here that “[a]lthough the J&A was executed on the basis of urgency, it confirms . . . that the requirement was in development for a very long time,” pointing out that the USMC’s urgent statement of need was executed in January 2010 and the J&A was executed in March 2010. The protester concludes here that “[d]espite the purported urgency, the Navy has been taking its time.” Supp. Protest at 4.

Section 6.303-2 of the Federal Acquisition Regulation sets forth the required content of a J&A. This section does not require that a J&A based upon urgency specify the dates on which the items being acquired will be delivered, or the date on which the items are “required to be delivered,” as asserted by the protester. As such, we fail to see why the statement in the J&A that the G-BOSS Lite units are needed “as soon as possible” is inadequate or inconsistent with an urgent requirement. We also disagree with the protester that the agency, whose actions include the research, preparation, vetting, and execution of the J&A over a 2-month period, can reasonably be characterized as “taking its time.” In this regard, we believe that the agency’s actions, as well as those of ICx, support the characterization of the requirement as urgent, given that the delivery of the G-BOSS Lite units commenced less than 7 months after the agency’s receipt of the urgency requirement, and 4 months after the execution of the J&A, and will be completed shortly after this decision is issued.

Although the protester is correct, and the agency concedes, that the statement in the J&A that no other available surveillance system incorporates “ground sensors” is

⁵ The agency has provided a detailed and reasonable explanation regarding the development of the technical data package for the full and open competition and why the technical data package was not available for the urgent requirement protested here.

inaccurate, this error provides no basis on which to find the agency's actions unreasonable, given that the rest of the J&A reasonably supports the sole-source decision. The remainder of the alleged "errors" in the J&A as identified by the protester, such as the J&A's assertion that the acquisition of another system would "require retraining the warfighter" reflect, in our view, the protester's disagreement with the agency's judgment and not factual errors in the J&A. Thus, we find that the J&A reasonably supports the sole source determination.

The protest is denied.

Lynn H. Gibson
Acting General Counsel