



Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: Systecon North America

File: B-423175; B-423175.3; B-423175.4

Date: February 24, 2025

Julia M. Holden Davis, Esq., and Tadd C. Blair, Esq., Gunster Yoakley & Stewart, for the protester.

Damien C. Specht, Esq., James A. Tucker, Esq., and Brian E. Doll, Esq., Morrison & Foerster LLP, for the intervenor, Repkon USA Defense LLC.

Debra J. Talley, Esq., Wade L. Brown, Esq., Jessica L. Weiford, Esq., and Brian Tuftee, Esq., Department of the Army, for the agency.

Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's award of a sole-source contract to another firm pursuant to temporary acquisition authority is denied where the record demonstrates the agency had a reasonable basis for concluding the protester was not a capable source.

DECISION

WPI Services, LLC, doing business as Systecon North America (Systecon), of Juno Beach, Florida, protests the Department of the Army, U.S. Army Materiel Command's award of sole-source contract No. W519TC-25-F-0015, to Repkon USA Defense LLC, of Tampa, Florida, for the design, construction, and commissioning of a domestic trinitrotoluene (TNT) facility. The protester primarily argues that the agency erred in finding that Systecon did not demonstrate it had a viable and proven technology, and therefore, improperly failed to consider Systecon a capable source for the sole-source contract.

We deny the protest.

BACKGROUND

On September 28, 2023, the Army published a sources sought notice *via* the System for Award Management (SAM), seeking information from interested sources to support the acquisition strategy for the design, construction, and commissioning of a TNT

(2,4,6-trinitrotoluene) production facility within the continental United States (CONUS).¹ AR, Tab 9, Sept. 28 Notice at 3. The notice stated that the targeted production capacity is five to fifteen million pounds of TNT per year. *Id.*

The agency issued three updates to the sources sought notice on SAM that refined the information being sought. AR, Tab 13, December 19 Notice; Tab 20, June 7 Notice; Tab 22, August 19 Notice. As relevant here, the second updated notice stated that the government “intends to utilize the information submitted in response to this sources sought notice to make a non-competitive, sole source contract award(s) under the temporary acquisition authorizations provided in Class Deviation 2024-O0005, paragraph B(1), for covered contracts related to Ukraine, Taiwan, and Israel.”² AR, Tab 20, June 7 Notice at 3. The notice also provided that the agency “intends for this sole source action to include a contract(s) for the design, construction, and commissioning of the TNT facility, as well as follow-on production.” *Id.* In the third updated notice, the Army further advised that the agency “intends to assess and compare the information submitted in response to the sources sought (including all updates) and thereon make a determination as to which technology, technology provider, teaming arrangement, and facility location, as well as other aspects logically encompassed therein, would be in the public’s best interest for the award and execution of a sole source contract for the design, build, and commissioning of a TNT facility.” AR, Tab 26, August 19 Notice at 3.

Eight companies responded to the final iteration of the sources sought notice, including Systecon. AR, Tab 4, D&F at 5. The Army conducted an initial evaluation of each response “to determine if sources were potentially capable based on the viability of their identified technology and experience with TNT processes and construction of TNT facilities.” *Id.* Based on this review, the agency concluded that four of the sources, including Systecon, were “not considered [a] capable source[],” as their responses “did not demonstrate they had a viable and proven technology.” *Id.* In addition, the agency concluded that three of those four sources, including Systecon, “also did not demonstrate any experience with TNT processes or construction [of] TNT facilities.” *Id.*

¹ TNT is a chemical compound that is well-known for its use as secondary explosive material. Agency Report (AR), Tab 4, Army Determination and Findings (D&F) at 2. Its stability, predictable detonation properties and insensitivity to shock and friction makes it relatively safe and convenient to handle, and it is widely used in a variety of military applications. *Id.*

² The class deviation implements “temporary acquisition flexibilities for covered contracts related to Ukraine, Taiwan, and Israel provided by section 1244 (a) and (c) of the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023, as amended by section 1242 of the NDAA for FY 2024.” Department of Defense (DOD) Class Deviation 2024-O0005. As relevant here, the class deviation implements a new statutory presumption that the public interest exception to full and open competition exists for any covered sole-source contract. *Id.* § (B)(1).

On November 6, 2024, the Army awarded a sole-source contract and delivery order to Repkon in the amount of \$435,000,000 for the design, build, and commissioning of a TNT facility in Graham, Kentucky. AR, Tab 3, Award Synopsis at 3; Tab 2a, Contract; Tab 2b, Delivery Order. On November 13, the Army posted a synopsis of the contract via SAM. AR, Tab 4, Award Synopsis; COS/MOL at 27. Thereafter, Systecon filed this protest with our Office on November 18.

DISCUSSION

The protester argues that the Army improperly found that Systecon's response to the sources sought notice failed to demonstrate that Systecon was a "capable source" to perform the contract.³

As noted above, the Army awarded the instant non-competitive, sole-source contract to Repkon using the temporary acquisition authorization provided in class deviation 2024-O0005. AR, Tab 20, June 7 Notice at 3. As also previously explained and relevant here, the class deviation implements a new statutory presumption that the public interest exception to full and open competition exists for any covered sole-source contract. DOD Class Deviation 2024-O0005 § (B)(1). As a general matter, the Competition in Contracting Act (CICA) requires procuring agencies to engage in full and open competition. 10 U.S.C. § 3201(a). There are, however, seven exceptions to the general requirement that permit agencies to engage in contracting without providing for full and open competition. The "public interest" exception, at issue here, permits an agency to use other than full and open competitive procedures when the head of the agency "determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned," and further notifies Congress in writing of that determination not less than 30 days before the award of the contract. 10 U.S.C. § 3204(a)(7); see also Federal Acquisition Regulation (FAR) 6.302-7. If using this exception, the authorizing official must make a written D&F supporting use of the exception that "set[s] forth enough facts and circumstances to clearly and convincingly justify the specific determination made." FAR 6.302-7(c)(1),

³ In its initial protest, Systecon also argued that the Army abused its discretion in its application of class deviation 2024-O0005, that the Army failed to act with complete impartiality and make a reasonable cost decision, and that it arbitrarily awarded the contract to Repkon. Protest at 2, 5. The agency provided a substantive response to these protest allegations, but Systecon did not substantively respond to the agency's arguments in its comments. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 35-61; see *generally* Comments. Where, as here, an agency provides a detailed response to a protester's assertion and the protester fails to rebut the agency's arguments in its comments, the protester fails to provide us with a basis to conclude that the agency's position with respect to the issue in question is unreasonable. 4 C.F.R. 21.3(i)(3); *Medical Staffing Sols. USA*, B-415571, B-415571.2, Dec. 13, 2017, 2017 CPD ¶ 384 at 3. We consider these allegations to be abandoned and do not discuss them further. *Medical Staffing Sols. USA*, *supra*.

1.704; *Sikorsky Aircraft Corp.*, B-403471, B-403471.3, Nov. 5, 2010, 2010 CPD ¶ 271 at 4.

Generally, our Office will review a D&F issued by an agency in support of the public interest exception to determine whether the D&F provides, on its face, a clear and convincing justification that the restricted competition furthers the public interest identified. We consider a protester's arguments that the D&F relies on facts that have no relation to the stated public interest, or that the D&F relies on materially inaccurate information. *Asiel Enters., Inc.*, B-408315.2, Sept. 5, 2013, 2013 CPD ¶ 205 at 5. We will not, however, sustain a protest based on the protester's disagreement with the conclusions set forth in the D&F. *Sikorsky Aircraft Corp.*, *supra* at 5.

The agency executed the D&F document on October 7, 2024. The D&F provided that the agency intended to award a sole-source contract to Repkon for the design, construction, commission, and operation of a five million pound per year TNT production capability at a commercial explosives site in Graham, Kentucky. AR, Tab 4, Army D&F at 2. The D&F further detailed the importance of the requirement and the public interest to be furthered, discussed the vendors that had responded to the final source selection notice, and explained that "[a]n initial evaluation of each response was conducted by the [agency] to determine if sources were potentially capable based on the viability of their identified technology and experience with TNT processes and construction of TNT facilities." *Id.* at 5. In light of the market research conducted by the agency, as well as an assessment of the different approaches submitted by firms and an analysis by subject matter experts regarding the government's current and projected TNT needs, the D&F concluded that it was "imperative" that the agency issue the subject sole-source contract to Repkon to ensure the "rapid replenishment of the DOD's depleted inventory stemming from the years-long support of Ukraine to date" as well as the "continuing need to meet new demand arising from the Ukraine and Israeli counter-offensives into the foreseeable future." *Id.* at 8.

The protester does not challenge the agency's conclusions in the D&F supporting the Army's use of the exception or argue that the D&F fails to set forth enough facts and circumstances to clearly and convincingly justify the specific determination made to award the sole-source to Repkon. Rather, the protester contends that the conclusions in the D&F regarding the agency's basis for finding that Systecon's response did not demonstrate that Systecon was a capable source are based on materially inaccurate information. For the reasons discussed below, we disagree.

As noted above, the Army conducted an initial evaluation of each response "to determine if sources were potentially capable based on the viability of their identified technology and experience with TNT processes and construction of TNT facilities." AR, Tab 4, D&F at 5. Based on this review, the agency found that Systecon, was "not considered [a] capable source[]," as its response "did not demonstrate [it] had a viable

and proven technology.”⁴ *Id.* The protester argues that this conclusion is premised on false information.

The agency’s conclusion in the D&F that Systecon’s proposed technology was not considered viable was based on the agency’s finding that Systecon’s teammate, which is the company Systecon is using as a technology provider, is owned by a Chinese company. AR, Tab 24, Army Email at 3. The agency explained that “[t]his is of concern since [the Chinese company] would have access to whatever technology we install.” *Id.* In response to the protest, the agency’s project lead further explains that this conclusion was based on Systecon’s “proposed [] approach [of] utilizing a technology-provider teammate, [DELETED].” AR, Tab 18c, Declaration of Project Lead at 3. The project lead explains that “[b]ased on our team’s research and on [DELETED] website, we discovered that [DELETED] is owned by a Chinese company, [DELETED].” *Id.* The project lead found that “[t]his was concerning to us because Systecon was relying on [DELETED] to provide the technology and to perform a significant role as a teammate.” *Id.*

In support, the team lead points to various statements in Systecon’s response where it discusses [DELETED]’s involvement. *Id.*, quoting AR, Tab 29, Systecon Final Response at 2 (stating that “[t]his facility will utilize [DELETED]’s patented continuous pump-nitration manufacturing process[.]”); *id.* at 8 (explaining that Systecon “has an exclusive teaming agreement with [DELETED] for the design, build, and construction of a CONUS TNT facility” and that “[a]s the leader in nitration technologies and provider of the safest nitration system, [DELETED] will be an integral part of plant engineering and procurement processes.”); *id.* at 8 (stating that “[DELETED] will provide calculations, simulations, drawing, and detail process design.”); *id.* at 8 (noting that “[DELETED] will provide equipment along with equipment inspection during manufacturing and assist in delivery.”); *id.* at 8 (explaining that “[DELETED] will train our operators how to operate the plant,” “will deliver a complete set of operation and safety manuals,” and “will test plant performance before and throughout the final Guarantee Test Run.”).

The project lead explains that “[e]ven though Systecon claimed that it would have ‘full control over the proprietary technologies and plant,’ [DELETED] would be playing a material role in the technology and the facility” and “would likely have an impact on the integrity, reliability, effectiveness, safety, and success of both the technology and the facility.” AR, Tab 18c, Declaration of Project Lead at 3. In this regard, the project lead notes that [DELETED] “would have access to the design, the control system logic, and the operations of the plant” and that “[t]hrough its work at the facility, [DELETED] could have access to vital information, including information about our military capabilities and

⁴ In addition, the agency concluded that Systecon “also did not demonstrate any [recent] experience with TNT processes or construction TNT facilities.” AR, Tab 4, D&F at 5. Although the protester also challenges this D&F conclusion as materially inaccurate, because, as discussed herein, we find that the agency reasonably excluded Systecon from further consideration because of the national security risk associated with [DELETED]’s ties to a Chinese company, we do not address this argument.

vulnerabilities (like our capacity, processing conditions, inputs and outputs), and could have visibility into our projected military requirements.” *Id.* at 3-4. The project lead explains that “based on the connection between [DELETED] and [DELETED],” the agency found that “[DELETED] could also have access to all the above as well” and felt that it would be a “national security risk to utilize a technology and a technology provider teammate that could lead to potentially having a Chinese company’s influence on or access to a CONUS-based TNT facility.” *Id.* at 4. In addition, the project lead notes that it would also be a national security risk “for the Government (and our allies) to be using and relying upon technology susceptible to influence by a Chinese company and likely also the Chinese government.” *Id.* The project lead states that “[f]or this reason, we found Systecon had not presented a viable approach” and therefore “considered Systecon eliminated from any further consideration because of that reliance on a Chinese technology provider[.]” *Id.*

In addition, during the agency’s review of Systecon’s response, the project lead explains that she asked the contracting officer to assess if there was any regulatory requirement justification to making Systecon non-viable due to [DELETED]’s intricate involvement in Systecon’s approach. *Id.* at 5. The project lead states that she “was informed that as defined in [Defense Federal Acquisition Regulation Supplement] DFARS 225.003, [DELETED] meets the definition of a ‘Communist Chinese Military Company’”⁵ and that “[i]n accordance with DFARS 225.003, the U.S. Government is prohibited from acquiring items covered by the USML [United States Munitions List] or the 600 series of the CCL [Commerce Control List] [which would include the acquisition of TNT], through a contract or subcontract at any tier, from any Communist Chinese military company.”⁶ *Id.*; COS/MOL at 36.

⁵ The agency states that “DFARS 225.003 defines ‘Communist Chinese military company’ as ‘any entity, regardless of geographic location, that is -- (1) A part of the commercial or defense industrial base of the People’s Republic of China (including a subsidiary or affiliate of such entity); or (2) Owned or controlled by, or affiliated with, an element of the Government or armed forces of the People’s Republic of China.” COS/MOL at 36. The procuring contracting officer determined, “based upon a review of [DELETED]’s shareholders at the time, that it met the definition as being ‘owned or controlled by, or affiliated with, an element of the Government . . . of the People’s Republic of China.” *Id.* The agency explains that the research indicated that [DELETED]’s “largest stockholder was [DELETED], a wholly owned by the State-Owned Assets Supervision and Administration Commission (SASAC) of the [DELETED] People’s Government.” *Id.*

⁶ The agency explains that TNT is a CCL 600-series covered item because “MIL-DTL-248D TNT falls under the following category: 1C608 ‘Energetic materials’ and related commodities” and that “MIL-DTL-248D TNT is an explosive specially designed for military application and not enumerated or otherwise described in the USML Category.” COS/MOL at 36, n.21.

Systecon acknowledges that its response to the sources sought notice proposed to partner with [DELETED] and does not dispute that [DELETED] is owned by [DELETED], which is controlled and majority owned by the Chinese government.⁷ Comments & Supp. Protest at 2; Supp. Comments at 2-3, 5-6. In addition, Systecon offers no rebuttal of the Army's determination that Systecon's proposed use of [DELETED]'s technology and [DELETED] as a teammate was a non-viable approach that presented an unacceptable level of national security risk due to [DELETED]'s ties to a Chinese company. Comments & Supp. Protest at 2; Supp. Comments at 2-3, 5-6. Instead, the protester focuses solely on the Army's finding that awarding to Systecon with its proposed approach would be prohibited by DFARS section 225.770-2. Supp. Comments at 2-3, 5-6. In the protester's view, the Army's D&F was premised on the following materially false fact: (i) that [DELETED] "was a 'communist Chinese military company,' which therefore made its technology 'not viable.'" Supp. Comments at 2. In this regard, the protester asserts that DFARS section 225.770-2 technically did not bar award of the contract to Systecon--either because the "solicitation" did not "incorporate" DFARS clause 252.225-7007, because [DELETED] might not meet the DFARS definition of a "communist Chinese military company", or because "the design, construction, and commissioning of the TNT facility, as well as follow-on production [of TNT]" is "a service, not a product" and therefore does not fall within the prohibitions of DFARS clause 252.225-7007. Comments & Supp. Protest at 3-4.

⁷ In its supplemental protest, Systcon also asserts that: (1) the Army essentially failed to conduct proper discussions with Systecon because the Army failed to inform Systecon that it had been eliminated from consideration despite communicating questions and concerns to Repkon and other entities, (2) it was unreasonable and inconsistent with the terms of the sources sought notice for the Army to eliminate Systecon from consideration based on a threshold assessment that Systecon did not demonstrate that it had viable and proven technology; and (3) the Army failed to properly consider and evaluate Systecon's proposal on the merits because it previously improperly eliminated Systecon from consideration. Comments & Supp. Protest at 5-23.

With regard to the protester's assertion that the agency improperly failed to conduct discussions, discussions were not required since this was not a competitive procurement based on competing proposals submitted in response to a solicitation. Instead, the agency sought and considered responses to a sources sought notice, which does not constitute a solicitation for offers. See *AeroSage, LLC*, B-415893, B-415894, Apr. 17, 2018, 2018 CPD ¶ 142 at 5. For the same reasons, the protester erroneously asserts that the Army failed to evaluate its "proposal" on the merits because the Army did not solicit or evaluate proposals. As for the rest of the arguments, these protest grounds do not challenge the underlying facts relied upon by the agency to justify the public interest exemption or that the D&F relies on materially inaccurate information; instead, the protester essentially disagrees with the agency's assessment and conclusions set forth in the D&F. We will not sustain a protest based on the protester's disagreement with the conclusions set forth in the D&F. *Asiel Enters., Inc.* *supra* at 5.; see *Mistral, Inc.*, B-422905, B-422905.2, Dec. 13, 2024, 2025 CPD ¶ 6 at 9.

Based on our review, we find that the D&F was not premised on materially inaccurate information. As discussed previously, the D&F explained that Systecon, was “not considered [a] capable source[],” as its response “did not demonstrate [it] had a viable and proven technology.” AR, Tab 4, D&F at 5. In support of this finding, the record shows that the Army determined that Systecon’s proposed use of [DELETED] technology and [DELETED] as a teammate was a non-viable approach that presented too much risk due to [DELETED] ties to a Chinese company. AR, Tab 24, Army Email at 3; AR, Tab 18c, Declaration of Project Lead at 3. Separately, the Army found that awarding to Systecon with that proposed approach would be prohibited by DFARS section 225.700-2. *Id.* at 5.

Although the protester challenges the agency’s conclusion regarding the applicability of DFARS section 225.770-2, as noted above, Systecon fails to provide any substantive response to the Army’s determination that, regardless of whether DFARS section 225.770-2 applies to this acquisition, Systecon’s proposed use of [DELETED]’s technology and [DELETED] as a teammate was a non-viable approach that presented too much risk due to [DELETED]’s ties to a Chinese company. Comments & Supp. Protest; Supp. Comments at 2-3, 5-6. In coming to this conclusion, the agency found the following, which Systecon does not dispute: that “[DELETED] would be playing a material role in the technology and the facility,” that [DELETED] “would have access to the design, the control system logic, and the operations of the plant,” and that “[DELETED] could have access to vital information, including information about our military capabilities and vulnerabilities.” AR, Tab 18c, Declaration of Project Lead at 3-4. Also not challenged by the protester is the agency’s conclusion that “based on the connection between [DELETED] and [DELETED],” “[DELETED] could also have access to all the above as well” and that it would be a “national security risk to utilize a technology and a technology provider teammate that could lead to potentially having a Chinese company’s influence on or access to a CONUS-based TNT facility.” *Id.* at 4; *id.* (noting that it would also be a national security risk “for the Government (and our allies) to be using and relying upon technology susceptible to influence by a Chinese company and likely also the Chinese government.”). *Id.*

There is no indication in the record or otherwise presented by the protester that the Army’s conclusions regarding [DELETED]’s role in Systecon’s approach, the relationship between [DELETED] and [DELETED], or the potential security risk posed are based on materially incorrect information. As such, we find nothing unreasonable regarding the agency’s determination that Systecon presented a non-viable approach to technology due to the security risk of its teammate’s relationship with a Chinese company or the agency’s decision to therefore eliminate Systecon from any further consideration. Moreover, Systecon’s exclusion from further consideration was appropriate and reasonable regardless of the determination on the applicability of the DFARS prohibition, given that the agency had found Systecon’s intended use of that particular technology and teammate to be too great a risk notwithstanding the DFARS provision. See AR, Tab 18c, Declaration of Project Lead at 4. As such, we find no basis to sustain the protest.

In sum, as referenced above, in reviewing a D&F issued by an agency in support of the public interest exception, we consider a protester's arguments that the D&F relies on facts that have no relation to the stated public interest, or that the D&F relies on materially inaccurate information. *Asiel Enters., Inc., supra*. Here, as noted above, the protester does not challenge the agency's conclusions in the D&F supporting the Army's use of the public interest exception or argue that the D&F fails to set forth enough facts and circumstances to clearly and convincingly justify the specific determination made to award the sole-source to Repkon. Instead, the protester maintains that the D&F improperly relies on materially inaccurate information. The protester, however, has failed to demonstrate that the D&F relies on materially inaccurate information.

The protest is denied.

Edda Emmanuelli Perez
General Counsel