



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: Marvin Land Systems, Inc.

File: B-276434; B-276434.2

Date: June 12, 1997

William A. Roberts III, Esq., Lee P. Curtis, Esq., and Richard P. Castiglia Jr., Esq., Howrey & Simon, for the protester.

Joel R. Feidelman, Esq., Anne B. Perry, Esq., and Nancy R. Wagner, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Napco International, Inc., an intervenor. Vera Meza, Esq., and Robert A. Maskery, Esq., Department of the Army, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester challenges exclusion from consideration for the award of a procurement contract, protest is denied as to base quantity, because agency reasonably determined that only the awardee could satisfy its requirements for the base quantity within the time required.

DECISION

Marvin Land Systems, Inc. protests the sole source award of contract No. DAAE07-97-C-X065 to Napco International, Inc. by the U.S. Army Tank-automotive and Armaments Command (TACOM) for M113A3 conversion kits. The contract is a procurement of a requirement that had been previously awarded to Kit Pack Company; Kit Pack's contract was terminated for default. Marvin contends that the agency had no reasonable basis to exclude it from consideration for award of this requirement.

We deny the protest.

The M113A3 conversion kits are necessary to support ongoing upgrades at Anniston Army Depot, Alabama, and Bokuk Industries, Guji, Korea of the M113 Family of Vehicles (the M113 Armored Personnel Carrier, M577 Command Post Vehicle, M1068 Standard Integrated Command Post Systems, M58 Smoke, Opposing Forces Surrogate Vehicle, and M1064 120MM Mortar System). The kits contain more than 1,100 different parts, several of which (such as the armor plate, transmission controller, and variable speed fan drive) are long-lead items.

These kits were the subject of an earlier competitive procurement. FMS Corporation submitted the lowest-priced offer under that procurement, but was found nonresponsible and was denied a certificate of competency from the Small Business Administration. The next low-priced offeror withdrew its offer. Kit Pack submitted the third low-priced offer and Napco the fourth low-priced offer.

A contract was awarded to Kit Pack on October 30, 1995, for 764 kits, with delivery of 50 kits per month to begin October 21, 1996. On November 1, 1996, Kit Pack's contract was terminated for default because of Kit Pack's failure to make delivery due to its financial condition.¹

FMS, which had delivered more than 2,300 M113A3 conversion kits to the Army since 1987, filed for bankruptcy in June 1995. On August 30, 1995, Marvin purchased all of FMS's operational facilities, equipment, and machinery and retained most of FMS's key operational management personnel. After this date, Marvin expressed to the Army its interest in supplying kits to the agency. Two of FMS's contracts--a Field Artillery Ammunition Supply Vehicle (FAASV) kit contract and an M113-related kit contract--were novated to Marvin; Marvin did not agree, however, to the novation of three other M113-related kit contracts because the agency would not agree to price increases for those contracts. Marvin also won a limited competition to provide conversion kits for the Bradley Fighting Vehicle.

After the termination of Kit Pack's contract, Marvin again expressed interest in supplying the M113A3 conversion kits. However, on February 26, 1997, the Army noncompetitively awarded a reprocurement contract with a total estimated value of \$19,086,617 to Napco for 401 conversion kits with an option for 258 additional kits at a unit price of \$28,963 per kit.² Napco is to begin delivery of 60 kits per month on September 26, 1997; delivery of the option quantity is to begin immediately after delivery of the basic quantities--exercise of the contract option is required to be within 240 days of contract award.

The Army's sole source award to Napco was supported by a written "Justification and Approval" that found that only Napco could provide the required 659 conversion kits within the time required. Specifically, the Army found that Napco, which was delivering this kit under other contracts, was the only source

¹Kit Pack failed to meet the first scheduled delivery date.

²[DELETED]. The balance of the Army's requirements from the terminated contracts (105 kits) was placed with the Red River and Anniston Army Depots.

with the production expertise and current production line capable of meeting the Army's urgent requirement for the kits. The Army noted that:

"[h]istorically, procurement lead time for a competitive solicitation for kits that are this large has been 7-12 months. TACOM Production Division has established the production lead time for this kit at 360 days. Napco, because of their active production status, could begin delivery within 210 days after award. Thus, a letter contract award to Napco would result in kit deliveries beginning in 210 days, with completion in 11 months as opposed to deliveries starting in 576 days for a competitive, fixed price contract. If a competitive procurement for this requirement was issued, the [g]overnment would encounter a 15 month break in production at two separate production facilities at the cost of approximately \$500K each per month. Even with the letter contract to Napco, the [g]overnment may encounter a three month break in production at the Anniston production facility which is still substantially better than a 15 month production break for a competitive procurement."

The Army states that given its shortage of kits at its production facilities, the delivery of kits after May 1997 will adversely affect its M113 production line, which in turn adversely impacts its schedule in fielding vehicles.

Marvin challenges the Army's noncompetitive award, asserting that, because of its acquisition of FMS's assets and key personnel, Marvin is qualified and capable of providing the conversion kits within the time required. The Army responds that Marvin does not have the capability to timely meet the agency's needs.

Generally, in the case of a repurchase after default, the statutes and regulations governing regular federal procurements are not strictly applicable. TSCO, Inc., 65 Comp. Gen. 347, 350 (1986), 86-1 CPD ¶ 198 at 5. Under Federal Acquisition Regulation (FAR) § 49.402-6(b), the agency may use any terms and acquisition method deemed appropriate for repurchase of not more than the required quantity, provided it obtains as reasonable a price as practicable and competition to the maximum extent practicable. We review the repurchase to determine whether the agency acted reasonably under the circumstances. Barrett and Blandford Assocs., Inc., B-250926, Feb. 2, 1993, 93-1 CPD ¶ 95 at 3. The question here is whether the Army reasonably concluded that Marvin could not meet the agency's needs within the exigent time requirements. We find that the agency did.

The record establishes that the Army has an urgent requirement for conversion kits. As noted above, kits are necessary to support ongoing production lines at two separate production facilities where the M113 Family of Vehicles are being upgraded; upgrade of these vehicles, which support "Force Package I" (first-to-fight) combat units, presents important national defense considerations. If Kit Pack had

satisfactorily performed its contract requirements, the agency would have begun receiving 50 kits per month in October 1996. Kit Pack's contract, however, was terminated for default on November 1, 1996, and the Army received no deliveries from Kit Pack. It is un rebutted that the Army's production lines to support the M113A3 conversion upgrades will be adversely affected if conversion kits are not acquired by May 1997 (which will not happen even under the noncompetitive award). As of September 1997, when the Army is to receive the first delivery of kits from Napco, the Army will have experienced a shortage of nearly 600 kits from that anticipated under the agency's original acquisition plan.

Aside from the time necessary to conduct even a limited competition for the reprocurement, the production lead time for the M113A3 conversion kits is fairly lengthy. Specifically, the Army states that the production lead time for this kit is generally 360 days. Napco, however, because of its active production status, could begin delivery within 210 days after award. Even this expedited delivery schedule would not satisfy the agency's exigent requirement for kits. While the record supports Marvin's contention that its acquisition of FMS's operational assets and key operational management personnel provided Marvin with the capability of producing the M113A3 conversion kits, the record does not establish that Marvin could provide kits on the accelerated basis Napco will provide. In this regard, Marvin has presented no evidence to rebut the agency's contention that it would take Marvin at least 360 days after award to begin delivery of kits. Given the agency's acute need for conversion kits, we find the agency acted reasonably in acquiring kits from Napco;³ we do not find, as Marvin suggests, that the agency should further delay this acquisition because the agency could not acquire kits from any source by May 1997--the date by which it first needed delivery of kits.

As noted by the protester, we have questioned the inclusion of options in noncompetitive awards where they are not separately justified. See Master Sec., Inc., B-235711, Oct. 4, 1989, 89-2 CPD ¶ 303 at 4. However, based on this record, we find that the inclusion of the option quantity in the reprocurement contract was not improper. As indicated, the agency justified the exigent need for the entire quantity of M113A3 conversion kits, including options, which exigency was caused

³Marvin also argues that acquisition of the kits noncompetitively from Napco was improper because the agency did not conduct appropriate advance planning in conducting its reprocurement. While the Competition in Contracting Act of 1984 provides that an agency cannot justify a noncompetitive award that is due to an agency's lack of advance planning, see 10 U.S.C. § 2304(f)(5)(A) (1994), this concept is not applicable to an agency's reprocurement for the account of a defaulted contractor. See Performance Textiles, Inc., B-256895, Aug. 8, 1994, 94-2 CPD ¶ 65 at 3 n.1. In any event, the record here does not evidence any lack of advance planning by the Army, which awarded a reprocurement contract within 90 days of the termination of Kit Pack's contract.

by the prior contractor's failure to deliver the kits. While delivery of the option quantities was to commence after delivery of the base quantity in April 1998, the record does not show that Marvin could meet that delivery schedule, considering the undisputed 360-day production lead time and the time necessary to conduct even a limited competition.

The protest is denied.

Comptroller General
of the United States