

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-183683

DATE: October 9, 1975

MATTER OF: Non-Linear Systems, Inc.; Data Precision Corporation

DIGEST:

1. Although procurement assigned priority designation 02 is sufficient authority for contracting officer to negotiate under public exigency exception rather than formally advertise, such authority does not give contracting officer authority to negotiate with only one source where other sources can meet agency's needs as applicable statute and regulations require solicitation of proposals, including price, from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and time limitations involved.
2. While public exigency justification for negotiation imbues contracting officer with considerable range of discretion in determining extent of negotiation consistent with exigency of situation, and D & F reasonably supported sole-source negotiation, RFP should nevertheless be canceled and resolicited on unrestricted basis where protests prior to award indicate multimeter being procured is off-the-shelf item which other manufacturers can furnish within time required.
3. Where sole-source RFP was listed in Commerce Business Daily and protester was unable to obtain copy of RFP after reasonable efforts to do so prior to closing date, failure by agency to comply with request was contrary to ASPR § 1-1002.1.

By letters dated June 23, June 27, and August 4, 1975, with enclosed administrative reports, the Command Counsel, Headquarters United States Army Materiel Command, seeks to justify the proposed award of a contract to John Fluke Manufacturing Co., Inc. (Fluke), by the United States Army Missile Command, Redstone Arsenal, Alabama (MICOM), for 149 Fluke 8000A-01 multimeters after a negotiated, sole-source solicitation, request for proposals (RFP) DAAH01-75-R-0746. We have received protests against the proposed award from Non-Linear Systems, Inc. (Non-Linear Systems), and Data Precision Corporation (Data Precision). For the reasons that follow, the protests are sustained.

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The following is a restatement of the facts leading up to the proposed award and the protests.

The multimeter is a component of the Guided Missile System Contact Support Set (TOW/DRAGON). Without an operating multimeter, the Contact Support Set is not suitable for its intended purpose, which is to isolate failures of the missile system in order to determine necessary corrective action to prevent deadlined equipment.

In April 1969, at the request of the Maintenance Engineering Division, Supply and Maintenance Directorate and the TOW Project Office, the Maintenance and Procedures Shop conducted tests on the TOW Missile System using Multimeter, model 300M AN/USM-303, FSN 6625-933-2406, a standard Army item used in the Land Combat Support System. This multimeter was found to be inadequate for troubleshooting the TOW Missile System because it would load the error detector card in both the search mode and digital mode.

Upon further testing by the Maintenance Shop using other meters, it was found that the John Fluke model 800 D was satisfactory for troubleshooting the TOW Missile System. However, the 800 D was an A. C. powered meter and for field use a battery-powered meter was required. The John Fluke model 853A-03 (also called 853M) was found to be basically the same as the 800 D and was battery-powered.

Before the 853A-03 meter was selected for the TOW Missile System Shop Set, a letter was sent by MICOM to the United States Army Electronic Command, Fort Monmouth, New Jersey (ECOM), in May 1969. This letter specified the need for and gave the parameters of a meter to be used with the TOW Missile System. It was pointed out in this letter that the 853M meter had been evaluated by MICOM and that it met the necessary requirements for the TOW Missile System. It was also requested that ECOM procure and supply the John Fluke 853M, or an equivalent, to support the TOW requirement.

ECOM stated in August 1969 that it had no meter in its inventory that would meet MICOM's needs and recommended that MICOM purchase and provide the necessary support for same. ECOM also

stated in November 1969 that it did not nor could it take cognizance of a meter equal or equivalent to the John Fluke 853M for which MICOM had requirements.

MICOM initially purchased 22 each of the 853A-03 John Fluke meters in November 1970, and deployed them as an item of the Shop Equipment, G.M. System, manufactured at Anniston Army Depot (ANAD). ANAD purchased an additional 33 meters to be used in the Shop Sets which were scheduled to be built.

In September 1973, Fluke advised the TOW Project Office that it was discontinuing the production of model 853M and recommended its new model 8000A-01 (NSN6625-00-210-7584). TOW obtained a Fluke Model 8000A-01 multimeter and MICOM performed a technical evaluation. The model was found to be satisfactory for TOW's requirements. The 8000A-01 was also being used by the Navy and Air Force; in addition, environmental testing to include vibration was conducted by the Navy, which met classification requirements.

On December 19, 1974, the Directorate for Materiel Management, Redstone Arsenal, issued a Procurement Work Directive (P/WD) for 149 8000A-01 Fluke multimeters. The P/WD had a Uniform Material Movement and Issue Priority System (UMMIPS) Priority Designator of 02 and requested a delivery of 88 multimeters on March 29, 1975, and 61 on July 7, 1975. The 149 multimeters will reportedly take care of MICOM's needs until March 1976. The contracting officer states that the need for 149 multimeters is as follows: 16 units in a back-order status, 28 units to provide the prescribed safety level in supply depot, 77 units to cover anticipated demands during the production and procurement cycle, 28 units to cover anticipated demands during the reorder cycle. Information received in May showed that 51 units were then in a back-order status.

On April 4, 1975, solicitation RFP DAAH01-75-R-0746 was issued on a sole-source basis to Fluke for 149 Fluke multimeters 8000A-01. In the April 4 edition of the Commerce Business Daily, the RFP in question was announced with the due date of May 1, 1975. On April 7 or 8, Data Precision began its attempts to obtain a copy of the RFP. Data Precision tried unsuccessfully throughout April to get a copy of the RFP, and finally received one on May 1. (The details of this attempt will be given later.) Fluke responded to the solicitation by letter dated April 9, 1975, and submitted

its formal proposal on April 23, 1975. On April 18, Non-Linear Systems protested the sole-source solicitation to our Office; on April 30, Data Precision took similar action.

MICOM seeks to justify the negotiated, sole-source solicitation to Fluke and the proposed contract thereunder on the following grounds: the requirement came to the contracting officer's shop with an Issue Priority Designator (IPD) of 02; the urgency of the requirement vested the contracting officer with considerable discretion to negotiate on a restricted basis with a contractor who had an established, quality product which had been used in the past; there were no specifications drawn up which defined the performance parameters required by the multimeter; there were no drawings which described the design of the instrument; the only purchase description available to MICOM was the John Fluke part number; documentation that was sufficient to provide other firms necessary data to manufacture the item was not available at the time, and to generate such technical data and run a complete procurement cycle would require more than 15 months.

The Issue Priority Designator 02 was sufficient authority for MICOM to negotiate rather than formally advertise for the multimeters. One of the exceptions to the formal advertisement requirement of 10 U.S.C. § 2304(a) (1970), is 10 U.S.C. § 2304(a)(2) (1970), the "public exigency" exception. Armed Services Procurement Regulation § 3-202.2(vi) (1974 ed.), which implements this section, provides:

"Application. In order for the authority [to negotiate due to public exigency] of this paragraph 3-202 to be used, the need must be compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the supplies or services were not furnished by a certain date, and when they could not be procured by that date by means of formal advertising. When negotiating under this authority, competition to the maximum extent practicable, within the time allowed, shall be obtained. The following are illustrative of circumstances with respect to which this authority may be used:

* * * * *

"(vi) purchase request citing an issue priority designator 1 through 6, inclusive, under the Uniform Material Movement and Issue Priority System (UMMIPS)."

Where, as here, a purchase request for supplies carries an IPD 01 through 06, ASPR § 3-202.2(vi) (1974 ed.) provides that "the public exigency" exception to the requirement for formal advertising, contained in 10 U.S.C. § 2304(a)(2) (1970), may be used without further justification. See Hy Gain Electronics Corporation, Antenna Products Company, B-180740, December 11, 1974, 74-2 CPD 324. However, the authority to negotiate for an item does not give the contracting officer the authority to negotiate with only one source. To the contrary, 10 U.S.C. § 2304(g) provides:

"In all negotiated procurements in excess of \$10,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: * * *." (Emphasis supplied.)

As quoted above, ASPR § 3-202.2(vi) (1974 ed.) also requires the procuring activity to obtain competition to the maximum extent practicable within the time allowed.

The statutes and implementing regulations, although allowing negotiation due to a "public exigency," required MICOM to obtain maximum competition subject to the constraints of the nature and requirements of the supplies and the time in which the supplies were needed. The position of this Office has been that the contracting

officer has a considerable degree of discretion to determine the amount of competition consistent with the exigency of the situation. See B-174968, December 7, 1972; B-176919, April 16, 1973. In reconciling the discretion given a contracting officer due to the "public exigency" exception with the maximum competition demanded by 10 U.S.C. § 2304(g) (1970) and ASPR this Office has stated:

"While the applicable statute (10 U.S.C. 2304(g)) requires that even where authority exists to negotiate procurements, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, the 'public exigency' justification for negotiation imbues the contracting officer with a considerable range of discretion in determining the extent of negotiation consistent with the exigency of the situation. In the absence of evidence indicating an arbitrary or capricious exercise of the discretion permitted, our Office is not required to object thereto." 44 Comp. Gen. 590, 593 (1965).

The contracting officer's Determination and Findings (D & F) of January 14, 1975, justifying the sole-source solicitation shows that the determination was based upon the following facts: the procurement work directive (P/WD) listed only a John Fluke manufacture number and a national stock number, which referred to the John Fluke Digital multimeter; the P/WD stated that no procurement history existed from which to solicit other sources; attached to the P/WD was a master format K indicating, according to MICOM Regulation 715-84, that there was no documentation available to enable the Government to precisely, accurately and definitely state the information needed to competitively procure the item; and there were required delivery dates of 88 each, on March 29, 1975, and 61 each, on July 7, 1975, with a production lead time of 5 months.

While we believe the foregoing findings reasonably supported the determination to negotiate sole source, we also believe that the facts revealed as a result of the protests indicate that the continued restriction of the procurement (no award has been made) is neither necessary nor valid.

Tab 11 of the administrative report contains the letter from MICOM to ECOM dated May 21, 1969, in which MICOM laid out the parameters for the multimeter it desired. We quote:

"3. The required TOW and SNILLBLACH parameters for a meter are as follows:

"(a) Portable, light-weight AC/DC meter (battery-powered).

"(b) High accuracy resistance checks (1% accuracy).

"(c) Low-scale, accurately-read meter at 0.

"(d) Low-scale 0 center, good read-out accuracy in low millivolt readings (no more than five millivolts full-scale readings).

"(e) Ten millivolt DC resolution from 0 scale."

Furthermore, the latter stated that enclosed was "a copy of the tentative specifications of the meter."

In a July 1973 letter from Fluke to the Procurement Contracting Division, Anniston Army Depot, in which Fluke suggests to MICOM that it use Fluke model 8000A-01 in place of its discontinued model 853A-03, Fluke states that it is enclosing technical data files for both the 853A-03 and the 8000A-01, and also points out in some detail the salient specifications of both the 853A-03 and the 8000A-01. In addition, Fluke notes that the latter model can be delivered 30 days after receipt of award.

Furthermore, the protesters have submitted evidence to the effect that the Army's requirement is for, and Fluke's item is, a standard off-the-shelf digital multimeter; that 20 or more firms produce off-the-shelf multimeters which will meet or exceed the performance parameters noted above; that there is no need for any technical documentation other than a listing of the salient characteristics of the Fluke model 8000A-01, which have been known to the Army since at least July 1973, and available to the general public in Fluke's published brochures; and the prices for their

standard off-the-shelf multimeters, meeting or exceeding the capabilities of the specified Fluke model, are less than that quoted by Fluke. In addition, the 5-month production lead time cited by the contracting officer appears to be of questionable validity. A phone call to one of Fluke's sales offices by our Office revealed that one could obtain 50 multimeters within 30-90 days, not 5 months. Furthermore, Non-Linear Systems asserts that vendors of competitive models of the 8000A-01 can deliver in less than 30 days.

Counsel for the Army has stated that while it is the policy of the Department of Defense to compete procurement requirements as much as possible to avoid the appearance of favoritism or unethical conduct, if a given situation dictates procurement from one sole source only, the Government should not be compelled to do otherwise. To support this argument, Counsel has pointed to our decision, California Microwave, Inc., B-180954, September 24, 1974, 74-2 CPD 181, in which we said:

"We have also held that where the legitimate needs of the Government can be satisfied from only a single source the law does not require that those needs be compromised in order to obtain competition."

This decision does not justify the actions of MICOM in the instant case. The item involved in the procurement under consideration in B-180954, supra, was one which the protesting company would have to develop. In the instant case, the protesting companies contend that they and other manufacturers could have met the legitimate needs of MICOM for a multimeter without development since an off-the-shelf item is what is required and that is what Fluke is offering and what they would offer.

Neither is the fact that Fluke has provided MICOM with satisfactory multimeters in the past justification for negotiating with only Fluke. This Office has held that the fact that an instrument manufactured by one company has proven satisfactory in use is not sufficient basis to exclude others where the evidence indicates that they have the ability to meet the agency's needs. See

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50 Comp. Gen. 209, 215 (1970). In that case, we noted that restriction of the procurement to a brand name rather than on an "or equal" basis was contrary to ASPR § 1-1206 (1974 ed.).

We believe that the above discussion adequately demonstrates that the solicitation should be canceled and the procurement resolicited on an unrestricted basis. We are not unmindful of the fact that the procurement was initiated on an "exigency" basis. However, we note that whereas the P/WD was issued in December 1974, the D & F was not issued until January 14, 1975, and the RFP was issued on April 4, 1975. Furthermore, no award has been made and the protesters contend that a 30-day delivery requirement can be met.

We also believe something should be said concerning Data Precision's efforts to obtain a copy of the RFP. We relate the incident as explained by Mr. Robert M. Scheinfein, vice president for sales, Data Precision:

"In the April 4 edition of Commerce Business Daily, issue #PSA-6294, Page 23, the RFP in question was announced with the due date of May 1, 1975. On approximately the 7th or 8th of April, Redstone Arsenal was telephoned requesting a copy of the RFP. We were advised that we would receive a copy. On the 17th of April, I personally visited Redstone Arsenal, and not having received the RFP, I met with Mr. Charles Trenkle in Building 4488. Mr. Trenkle is the buyer for this RFP. At that meeting, attended by Mr. Trenkle, Mr. Turpin, my representative, and myself, Mr. Trenkle indicated that he could not give me the RFP because it was a sole source item. Shortly thereafter, he called in Mr. Jeff Darwin of the Army SBA. They indicated that in order to receive the RFP, DATA PRECISION had to be a qualified vendor.

"They suggested that I contact Mr. Martin of Maintenance of Building 5681 who advised me that he was not concerned with either the qualification or procurement for the RFP. He directed me to Mr. Marion Anderson, the Chief of his section who indicated he had no responsibility regarding this project.

"At that point, I went directly to Major General V. H. Ellis, the Commander of Redstone and, although I was unable to meet with him personally, his secretary referred me to his aide who, in turn, was kind enough to set up an immediate appointment with Mr. William Parker, Deputy Director of Procurement and Production.

"Mr. Parker requested that I dictate a letter to his secretary * * * to formally request the RFP.

"That afternoon, I received a telephone call from Captain Kowallik of Procurement, who indicated that in order to receive the RFP, DATA PRECISION 'must be qualified prior to bidding'. He then gave me the name of a gentleman at the Lexington Army Depot, whom I was able to finally contact after several days. Mr. Phil Smith of the Test Measurement Diagnostic Office indicated that he did not decide on this product and was not involved in this RFP and was not concerned with qualification.

"On about the 29th of April, I again called Mr. Trenkle and indicated the total lack of cooperation with all contacts to whom I had been referred. At that time, the RFP had still not been sent to DATA PRECISION. On the 30th of April, I again called Mr. Trenkle, whom I advised that I would submit an official protest of the RFP. He indicated, at this time, they would send the RFP and that it was still a sole source procurement. * * * This was received the next day at DATA PRECISION, May 1, 1975, which was the closing date of the RFP."

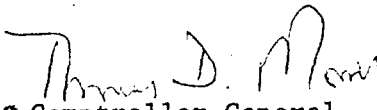
These actions by MICOM are contrary to ASPR § 1-1002.1 (1974 ed.) which states:

"* * * When a solicitation for proposals has been limited as a result of a determination that only a specified firm or firms possess the capability to meet the requirements of a procurement, requests

for proposals shall be mailed or otherwise provided upon request to firms not solicited, but only after advice has been given to the firm making the request as to the reasons for the limited solicitations and the unlikelihood of any other firm being able to qualify for a contract award under the circumstances * * *

MICOM offers no explanation for these actions, but labels them as "non-prejudicial" to Data Precision. We do not agree. MICOM's actions precluded Data Precision from competing on an item which it and other companies appear to be qualified to produce.

Finally, it should be noted that the procurement history of the multimeter, as related in the administrative report, fails to indicate any attempt to competitively procure an acceptable multimeter, although MICOM has known what its design and performance parameters were for the multimeter since 1969. Throughout this period, it has made no efforts to abide by the competitive procurement requirements of 10 U.S.C. § 2304(a) (1970), and the Armed Services Procurement Regulation. We believe that the present procurement is a good one for MICOM to implement the competitive mandate of the applicable statute and regulations. Accordingly, by separate letter of this date, we are advising the Secretary of the Department of the Army of our views.


Acting Comptroller General
of the United States