DECISION

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

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FILE: B-185892 DATE: July 26, 1976

MATTER OF: Telectro-Mek, Inc.

98909

DIGEST:

1. Where subject of protest is before court of competent jurisdiction, GAO will normally not consider protest; however, where court requests GAO decision on merits, protest is for consideration under § 20.10 of GAO Bid Protest Procedures.

2. Where agency and 15-year sole-source supplier reached impasse on terms of proposed new sole-source contract, subsequent sole-source procurement from newly solicited concern is not objectionable, because in prevailing circumstances contracting officer could reasonably conclude that prior supplier would not agree to conditions which contracting officer could or had to apply.

Telectro-Mek, Inc. (TMI), has protested the award of a sole-source contract by the Navy Ships Parts Control Center (SPCC), Mechanicsburg, Pennsylvania, to Gulton Industries (Gulton) for a quantity of contaminated fuel detectors (CFD's).

On July 28, 1975, the SPCC issued request for proposals (RFP) No. N00104-75-R-D307 for 128 CFD's to TMI, the only manufacturer of the item and the sole source of supply for the last 15 years. On August 8, 1975, TMI's proposal was submitted offering a unit price of $3,895. TMI's proposal also requested the deletion or modification of several clauses in the RFP and contained an executed DD Form 633-7 ("Claim for Exemption from Submission of Certified Cost or Pricing Data"). After receipt of the proposal, the contracting officer determined that additional information was required to support the claim for exemption from furnishing cost or pricing data based on established catalog prices and, further, that a preaward survey should be conducted.

The preaward survey contained a recommendation for award based on a satisfactory rating in all areas surveyed (i.e., technical capability, production capability, financial, past performance, etc.). However, the contracting officer, because of information revealed by the preaward survey, requested a cash flow projection from TMI, which was submitted on October 7, 1975.

After the gathering of the above information, a request for authority to negotiate was made by the contracting officer to the SPCC Contract Review Board. The Board determined that the DD Form 633-7 and the supplemental data submitted by TMI were not sufficient for the granting of an exemption and that TMI should be requested to submit certified cost or pricing data.

There is a dispute in the record as to exactly what transpired with regard to the request for cost or pricing data. The contracting officer contends that direct requests were made of TMI for the information, which TMI refused to submit. TMI alleges essentially that the Navy asked only for more information to support the DD Form 633-7 and that it was never advised that the request for exemption had been denied.

In any event, it is clear that the contracting officer decided to attempt to find an alternate source of supply. He contacted Gulton, which expressed an interest in supplying CFD's and in submitting a proposal. As the contracting officer was unaware of any specifications or drawings for the unit, Gulton was given a TMI unit to inspect. Following the inspection, Gulton entered into a letter contract with SPCC to furnish the required CFD's at a cost not to exceed $2,500 per unit. This contract included a performance type specification, MIL-D-22612B(AS), dated December 19, 1975, which was a revision of MIL-D-22612A(WEP), a design type specification dated April 17, 1962. SPCC reports that it was unaware of the existence of these specifications until Gulton brought them to its attention on February 4, 1976.

On February 11, 1976, TMI protested the award to Gulton to the contracting officer and on February 12, 1976, filed a protest with our Office.

Also, on April 27, 1976, TMI filed Civil Action No. 76-736 in the United States District Court for the District of Columbia for a declaratory judgment and injunctive relief in the form of a temporary restraining order (TRO) to halt performance by Gulton under the letter contract. On April 29, 1976, the district court denied the request for a TRO and also for a preliminary injunction and stayed further proceedings pending receipt by the court of our decision in the matter. On May 21, 1976, TMI appealed the above order to the United States Court of Appeals for the District

of Columbia Circuit requesting summary reversal of the district court's order. This appeal was denied on June 14, 1976.

While normally our Office will not consider a protest which is currently before a court of competent jurisdiction, where, as here, the court specifically requests our decision, we will consider the matter on the merits. See section 20.10 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

TMI's protest is based, in the main, on the allegation that there was no basis for SPCC to negotiate a sole-source letter contract with Gulton when SPCC was well aware of TMI's past successful performance in supplying the CFD's for 15 years.

In his report on the protest, the contracting officer stated, in part, the following as to the reasons for procuring the CFD's on a sole-source basis from Gulton:

> "19. The decision to satisfy the Navy's critical inventory position by entering into a letter contract with Gulton, without re-opening the prior negotiations with Telectro-Mek or otherwise inviting Telectro-Mek into direct competition with Gulton, was based upon a number of considerations. First, Gulton's 'not-to-exceed' price of $2,500 per unit, which the contracting officer felt would probably be reduced through negotiation of the definitive contract, was so much lower than Telectro-Mek's unit price of $3,895 that the contracting officer did not believe further discussions with Telectro-Mek held any prospect of Telectro-Mek becoming price-competitive with Gulton. Second, even if the introduction of price competition might have alleviated the impasse with Telectro-Mek over the submission of cost and pricing data, the fact remained that Telectro-Mek was unwilling to accept the clause of ASPR 7-104.41(a), 'Audit by Department of Defense,' required to be included in all negotiated contracts. Based on the recent negotiations with Telectro-Mek, it was the contracting officer's belief that Telectro-Mek would not change its stated position regarding this clause, and SPCC could not afford the

delay incident to seeking an ASPR deviation to omit this clause from a contract with Telectro-Mek. Third, though both Telectro-Mek and Gulton promised essentially the same delivery date of one year from date of contract, Gulton's delivery date was understood to be a 'maximum' delivery time which, even with a first article approval requirement, Gulton expressed confidence in being able to substantially improve. The contracting officer believed that the chance of obtaining earlier delivery was clearly better with Gulton than with Telectro-Mek. Based on the above considerations, the contracting officer concluded that further discussions with, or solicitation of, Telectro-Mek concerning this requirement would not be meaningful and that the delay incident thereto was not justified. Gulton has emerged as the logical best choice for filling the Government's immediate requirements, and further discussions with Telectro-Mek held no prospect of altering that choice."

In the Determination and Findings (D&F), dated February 3, 1976, the contracting officer cited 10 U.S.C. § 2304(a)(10) (1970) ("impracticable to obtain competition") as implemented by paragraph 3-210.2 of the Armed Services Procurement Regulation (ASPR) (1975 ed.) as authority for the negotiations with Gulton. The D&F contained the following findings to justify the determination:

"FINDINGS

"1. The contemplated procurement is for specialized supplies previously manufactured by only one company. It is now desired to solicit another company, or companies, which have the requisite engineering skills and experience, tooling, equipment and labor essential to economical and timely manufacture, to compete for these supplies. The intent is to create another source for proper logistical management of the supplies and to create a competitive atmosphere for future procurements. The Government will obtain, as the result of this procurement, a complete set of manufacturing drawings to assure that future procurements will be competitive, also provisioning

technical documentation and complete test data approvals will be received.

"2. However, to award this procurement to the lowest bidder, after formal advertising for bids, might result in the award either to a prospective contractor who has unwisely made a low bid or does not have the requisite engineering skills to properly produce the item or to the existing sole source producer.

"3. The use of the negotiated procurement procedure will provide a basis for obtaining cost and pricing data for use in analyzing the proposal received and comparing the price structure with the prices paid to the sole source producer. This would give the greatest assurance that supplies meeting the Government's technical requirements will be timely delivered at the lowest price available.

"4. The price is not fixed by law or regulation."

The above findings led to the determination that the use of negotiation was justified as a second source of supply was essential.

TMI has submitted numerous arguments in support of its position. All of the contentions presented have been considered, but we intend to focus in this decision upon those issues we believe to be dispositive of the matter.

One of TMI's major points is that negotiation with Gulton was not authorized in this case. TMI believes that none of the 17 exceptions to formal advertising listed in 10 U.S.C. § 2304(a) (1970) are applicable. As for the authority relied on in the D&F, 10 U.S.C. § 2304(a)(10) ("impracticable to obtain competition"), TMI asserts that none of the circumstances permitting use of this authority set forth in ASPR § 3-210.2 are applicable here.

Further, even if negotiation were authorized, TMI contends that sole-source negotiation with Gulton clearly is not. TMI points out that sole-source negotiation is rarely justified and must be subjected to close scrutiny, citing Ainslie Corporation, B-183658, August 7, 1975, 75-2 CPD 90, and other decisions of our Office. TMI states that a

thorough review of our Office's decisions and other precedent reveals no support for the proposition that sole-source negotiation in order to break away from reliance on an incumbent supplier is justified. The protester believes that the award to Gulton is clearly illegal and must be canceled.

TMI further contends that only one solicitation is involved in this procurement--the RFP issued to TMI in July 1975. Only one timely proposal was received (TMI's) and the RFP was never canceled. TMI therefore believes that Gulton's proposal should have been rejected as late under the provisions of ASPR §§ 3-506 and 7-2002.4 (1975 ed.).

The protester further asserts that even if the Gulton proposal is not late, the award was improper because TMI was never informed of the change in the Government's requirements--i.e., the use of the performance specification in the Gulton procurement which had not been included in the RFP issued to TMI. TMI asserts that the requirements of ASPR § 3-805.4 (1975 ed.) were thereby violated. In this connection, TMI cites decisions of our Office where offerors were disadvantaged by lack of notice from the contracting agency that requirements had been changed or that new competitors had become involved in the procurements. These include Instrumentation Marketing Corporation, B-182347, January 28, 1975, 75-1 CPD 60; B-170276, March 25, 1971; 48 Comp. Gen. 605 (1969); 47 id. 778 (1968).

While we have carefully considered these and other contentions of the protester, we believe its analysis of the issues fails to fully take into account the realities of the procurement situation. In issuing the RFP in July 1975, the Navy was dealing with a sole-source supplier of 15 years' duration. The Navy had a need for CFD units, which presumably it could satisfy only through TMI; at the same time, the Navy did not wish to enter into a contract on terms and conditions which it found unacceptable.

One of the pertinent conditions set forth in the RFP, for instance, was that TMI furnish cost or pricing data--the submission of which is required, generally, prior to awards of negotiated contracts exceeding $100,000 in amount. ASPR § 3-807.3 (1975 ed.). TMI did not furnish cost or pricing data. Instead, it submitted DD Form 633-7, claiming an exemption from the requirement.

On this and other points in contention, TMI characterizes its position (during the period from roughly August to December 1975)

as being one of openness, cooperativeness and willingness to reach an acceptable agreement. There were apparently numerous contacts between TMI and the Navy during this period by telephone, letter and in person. TMI points out that it furnished additional data in support of its claimed exemption from the cost or pricing data requirement in response to the Navy's request. TMI's Treasurer and General Manager, in an affidavit dated June 4, 1976, states that the Navy made only one request for cost or pricing data per se (by telephone October 22, 1975) and that later in the same conversation the request was withdrawn. The substance of these statements is flatly contradicted in an affidavit by one of the responsible Navy officials dated June 23, 1976, which states that TMI was repeatedly requested to furnish cost or pricing data in October and November 1975. The Navy official's affidavit also states that TMI was advised in November 1975 that the additional information it had submitted in support of its DD Form 633-7 was "inadequate."

Where the only evidence with respect to a disputed question of fact consists of contradictory statements by the protester and the contracting agency, the protester has failed to carry the burden of affirmatively proving its assertions. James R. Parks Co., B-186031, June 16, 1976, 76-1 CPD 384. On the record before us, we conclude that an impasse between the parties had been reached by November 1975. TMI was willing to make a bargain, but the terms of the bargain were not acceptable to the Navy.

This raises the question of what the Navy should have done at that point; more precisely, the issue which must be decided is whether the course of action chosen by the Navy is subject to legal objection upon review by our Office.

If an agency is unable to reach a satisfactory agreement with a sole-source supplier, its only alternative is to explore other possible sources of supply to meet its needs. This the Navy did. It located one possible source (Gulton).

As to whether the Navy should then have undertaken a competitive procurement, we note initially that there is no conclusive showing in the record that the responsible SPCC personnel were aware (prior to about February 4, 1976) that the performance specification cited in the Gulton letter contract was available for use. Further, so far as the record shows it is doubtful that the performance specification, even if available, would have been suitable for a formally advertised procurement. Specifications in an advertised solicitation must be definite enough so that bidders can realistically price their bids and compete on a common basis, and so that the Government can thereby be

assured that acceptance of the low bid will result in contract performance which meets its needs. Cf. Page Airways, Inc., et al., 54 Comp. Gen. 120 (1974), 74-2 CPD 99. The flexibility of negotiated procurement permits the use of less definite specifications, but the solicitation must still contain a clear statement of work which affords a common basis for competition among the offerors. See Fiber Materials, Inc., 54 Comp. Gen. 735 (1975), 75-1 CPD 142.

In a memorandum dated March 12, 1976, TMI listed what it saw as inadequacies in the performance specification, including a lack of usable drawings and design criteria. TMI stated that the specification would have to be upgraded and made more definite before it could be used in competitive procurement. TMI's view was apparently that the specification was so inadequate that no competitive procurement of any kind was possible, whether advertised or negotiated. It does not appear that SPCC has formally assessed the suitability of the specification for competitive procurement; in this regard, SPCC points out that Gulton's "not to exceed" $2,500 offered price was based upon examination of the CFD unit, not upon the performance specification.

We believe that it might have been provident for the contracting officer, after he had developed an alternate source (Gulton), to explore the possibility of conducting a competitive procurement. This assumes the contracting officer had a reasonable basis to conclude that the alternate source was willing to compete on that basis and that the former sole source would have been willing to compete on terms which it had apparently refused as a sole source and which the contracting officer had a right, if not a duty, to impose. In this case, the contracting officer understood that TMI refused to accept a clause required by ASPR § 7-104.41(a) (1975 ed.) to be included in all negotiated contracts (and we believe, given the absence--as he understood it--of acceptable specifications, that negotiation could have been justified even if there were more than one source) and to provide certified cost or pricing data. Cost or pricing data is required to be obtained in all negotiated contracts over $100,000 with certain exceptions. The only exception for possible application here permits waiving the requirement if the price is based on adequate price competition. See ASPR § 3-807.3(a) (1975 ed.). However, whether price competition exists is recognized at ASPR § 3-807.1(b)(1) (1975 ed.) as a matter of judgment. Given the stated circumstances we believe the contracting officer could have concluded that cost or pricing data would be required and could not be obtained from TMI.

Accordingly, we conclude that the contracting officer acted reasonably, and within his authority, in awarding the contract to Gulton.

In reaching this conclusion, we do not disagree with some of TMI's criticisms of the Navy's D&F. The D&F conveys the impression that the only reason for the procurement initiated in February 1976 was to attempt to move away from reliance on the incumbent supplier. The findings do not fully explain why this is necessary in circumstances present--i.e., a prior unsatisfactory sole-source procurement with the incumbent and an urgent need for the supplies. Nonetheless, we think that the facts of record in this case support the determination to negotiate with Gulton.

TMI has also asserted that the award to Gulton must be canceled because the performance specification included in the letter contract is seriously defective. TMI contends at some length that many defects in the specification make it impossible for Gulton to furnish a satisfactory unit. The result, TMI contends, will be additional costs to the Navy.

In this regard, we believe the question before us is not whether the Navy's purchase from Gulton will prove to be either a wise or an improvident one. Rather, the question is whether the award itself is subject to legal objection. For the reasons already indicated, we do not believe that it is.

Additionally, TMI has contended in effect that there is an appearance of bad faith actions on the Navy's part in connection with certain events after the award to Gulton. After the protest was filed, there were discussions between TMI and Navy representatives. The details are rather involved, but essentially the discussions covered (1) whether the Navy would issue a stopwork order on the Gulton contract; (2) the circumstances under which Navy CFD units would be sent to TMI for repairs; and (3) the timing of certain steps TMI would take in pursuing its protest against the Gulton contract. TMI alleges that the Navy breached certain promises it made during these discussions.

We believe these subjects were and remain matters for resolution between TMI and the Navy. For instance, we have pointed out that deciding whether to issue a stopwork order during the pendency of a protest is up to the contracting agency; a protester can request the agency to take such action, but if the protester is dissatisfied with the agency's response, its remedy is in the Federal courts, not at our Office. Corbetta Construction Company of Illinois, Inc., B-182979, April 9, 1976, 55 Comp. Gen. ____, 76-1 CPD 240. Likewise, the other points raised do not, in our opinion, directly impact on the propriety of the award to Gulton. Accordingly, further consideration of these matters is unnecessary.

The protest is denied.

Deputy Comptroller General
of the United States