DOCUMENT RESUME

02352 - [A1372354]

[Protest against the Award of a Sole-Source Contract to Produce Crude Shale Oil]. B-187776. May 10, 1977. 21 pp.

Decision re: Tosco Corp.; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Department of the Navy; Department of the Interior; Development Engineering, Inc.
Authority: Freedom of Information Act (5 U.S.C. 552 (Supp. V)). Naval Petroleum Reserves Production Act of 1976 (P.L. 94-258). National Environmental Policy Act of 1969 (42 U.S.C. 4321). 90 Stat. 307. 10 U.S.C. 7438. 10 U.S.C. 2310(b). 10 U.S.C. 2306(c). 10 U.S.C. 2304(a)(10-11). 10 U.S.C. 7421-7422. 4 C.F.R. 20. 40 C.F.R. 1500. B-182794 (1975). B-172061 (1975). B-181543 (1975). B-184330 (1976). B-181015 (1974). B-170762 (1974). B-178716 (1974). 54 Comp. Gen. 1107. 55 Comp. Gen. 1019. 54 Comp. Gen. 830. 52 Comp. Gen. 801. 55 Comp. Gen. 1362.

Protester objected to the award of a sole source contract for the production of crude shale oil. The protest, which was filed after the initial awards in the overall program, was timely since the protester was not aware of the protested procurement until receipt of documents indicating the final selection of contractor. The sole source award was not improper since it was one of a series of contracts. Also, the determination to contract sole-source was made in the interests of national defense. There were reasonable bases for the cost-plus-a-fixed-fee contract and for allowing the contractor to retain patents. (Author/SC)

B Kreshtool
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DECISION

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

FILE: B-187776 DATE: May 10, 1977

MATTER OF: Tosco Corporation

DIGEST:

1. Protest filed after initial awards in overall program is timely since there is no showing that protester was aware or had been informed that "overall" program would include protested procurement before receipt of documents under Freedom of Information Act indicating final selection of contractor.

2. Fact that determination to contract sole-source in interests of national defense under Naval Petroleum Reserves Act was not advanced as justification before award was made does not affect validity of determination. Review encompasses whether decision was supportable in light of circumstances as they existed and not whether decision was supported at time.

3. Sole-source award to develop naval oil shale reserves was not improper where award was one of a series to effectuate purposes of Naval Petroleum Reserves Act via existing lease.

4. It is inappropriate for GAO to review protest that contracting agency did not file sufficient environmental impact statement under National Environmental Policy Act, 42 U.S.C. § 4321 (1970), since matter is primarily for agency's decision.

5. When contracting officer issues determination and findings (D&F) for cost-plus-a-fixed-fee contract on basis that it would be impracticable to secure services of kind or quality required without that type of contract,

determination will not be questioned in light of 10 U.S.C. § 2310(b) (1970), which affords finality to findings, and D&F comports with requirement of 10 U.S.C. § 2306(c) (1970), which sets forth conditions under which cost-plus-a-fixed-fee method of contracting is permissible.

6. Although normally Government would retain all right to patents developed under contract, where lease with contractor under which contract is being performed provided that "exceptional circumstances" existed within Government Patent Policy, this would provide reasonable basis for including patent clause provision for retention by contractor.

BACKGROUND

On May 11, 1972, an agreement by the Department of the Interior to lease the Navy's Anvil Points experimental and demonstration facilities near Rifle, Colorado, to Development Engineering, Inc. (DEI), was approved by the President. This lease was executed pursuant to 10 U.S.C. § 7438 (1970), which conferred upon the Secretary of the Interior authority to use the facility for research, development, test, evaluation and demonstration work relating to oil shale. The purpose of the lease arrangement was to permit DEI to conduct "* * * an Oil Shale research and development program * * * to investigate the technical feasibility of mining, crushing, and retorting techniques for oil shale." The term of the lease was 5 years from the date of approval, plus 5 additional years at the option of DEI, unless the Secretary of the Interior determined within stipulated timeframes that extension would not be in the best interest of the public. The lease also permitted DEI to add or modify whatever equipment it deemed necessary..

To test the process developed by DEI, called the Paraho process, contract N00014-75-C-0055 was awarded by the Navy during fiscal year 1975 to refine 10,000 barrels (bbl) of crude shale oil into fuel for military application in accordance with military specifications. The fuel was distributed to various agencies for use and testing. The results indicated that the fuel refined from crude shale oil could meet most of the military specifications, but certain undesirable physical characteristics exhibited by the fuel prompted a decision that extensive, full-scale testing was necessary before it could be qualified for military use. It also appeared

that modification of the Paraho process would be necessary to overcome those undesirable physical properties. However, the results were considered sufficiently positive to warrant further development efforts. It is the award of a sole-source contract to DEI to produce 80,000 additional bbl of crude shale oil to support the further development efforts that Tosco protests.

TIMELINESS OF THE PROTEST

The Navy maintains that the protest is untimely filed under our Bid Protest Procedures, 4 C.F.R. part 20 (1976), and should not be considered on its merits. The Navy recounts the following chain of events to substantiate its contention:

> "As early as 16 June 1976, Mr. John Whitcombe, Executive Vice President of TOSCO wrote RADM [Rear Admiral] Hart questioning the non-competitive award of the retorting phase of the program. On 30 July 1976, Dr. Peter Waterman, Special Assistant for Energy, Office of the Secretary of the Navy, answered this letter specifically indicating that the program was proceeding to complete the baseline data obtained during the initial Paraho shale oil study. ERDA also furnished a similar letter, dated 30 July 1976, which acknowledged TOSCO's request to be put on the bidders' list for future procurements within the program. Again on 30 July 1976, John Whitcombe wrote a seven page inquiry to Mr. Robert Seamans, Jr., Administrator of ERDA [Energy Research and Development Administration] questioning the replies from both Navy and ERDA and the May 17, 1976, news release concerning the DOD [Department of Defense]/ERDA decision to pursue the DEI approach. This correspondence was again answered by ERDA on behalf of DOD/ERDA.
>
> "On 4 August 1976, Mr. Whitcombe and Mr. Sisk represented TOSCO at a meeting called by ERDA at TOSCO's request. Again the basis for the source selection was discussed as well as other points concerning the refining aspects and the general subject of ERDA's interest in funding additional R&D projects pertaining to oil shale development.
>
> "A similar meeting was held by the Department of the Navy at the request of Mr. Howard Feldman, General Counsel Senate Permanent Investigating Committee. At that meeting,

19 August 1976, Mr. Sisk represented TOSCO. The Department of the Navy was represented by Dr. Waterman, CAPT Skrinak, Lt. Lukens and other representatives of the Secretary of the Navy. At this meeting the entire program was discussed, and Mr. Sisk was informed that it was the Navy's decision to pursue its present course of action to pursue the Paraho process and follow up on its initial contract.

"In addition to these exchanges of correspondence and meetings, the DOD/ERDA program has been well publicized. TAB 11 contains a number of articles that were published in newspapers and journals pertaining to this program. Although it is impossible to prove that TOSCO was aware of these except for the 17 May 1976 notice which they acknowledged in their letters, they do indicate that the program was widely publicized and highly visible. In this regard, it should also be kept in mind that the program was extensively discussed with Congress. TOSCO participates and follows these actions with great interest and certainly this program was no different as indicated by the inquiries from Congress on their behalf. Also, the Congressional hearings, such as Mr. Marcy's statement (TAB 2) were freely available to the TOSCO firm.

"It is, therefore, our opinion that TOSCO had not only actual knowledge but also constructive knowledge of the grounds for protest prior to 5 November 1976. Further, to allow the protester to participate in the planning stages of a major procurement involving multiple contract awards, to allow the government to make initial awards, thus implementing the technical program resulting in the expenditure of considerable appropriated funds and then allow a protest regarding individual contracts which would render the remaining contracts meaningless, is inequitable to all parties concerned, and clearly not within the letter and spirit of the GAO Guidelines.

"Certainly, TOSCO had knowledge no later than the 19 August 1976 meeting requested by TOSCO and specifically organized by the Secretary of the Navy's staff to discuss this program. At that time, TOSCO had the opportunity to present its position and was subsequently informed at that meeting that the Department of the Navy had considered their capability but still would pursue the DEI approach.

> "Although it could be shown that TOSCO had constructive knowledge back as far as 1975, TOSCO had actual knowledge of the basis for a protest during the period May 1976 through 19 August 1976. Therefore, it is our opinion that the above-cited correspondence, meetings and supporting documentation, would be sufficient to show both actual and constructive knowledge of the basis to protest at various times during this period but certainly no later than 3 September 1976. On the basis of the foregoing, it is maintained that the protest has been untimely filed and consideration of the merits should be denied under 4 C.F.R. 20.2(b)(2) (MB Associates, B-184564, September 24, 1975)."

Tosco interprets the same events in a totally different manner. Tosco states that it was led to believe until November 1, 1976, that the contract was in a pre-decisional mode. Significantly, Tosco indicates that it believed that no decision had been made to contract on a sole-source basis because ERDA had been consistently named responsible for source selection, and ERDA was throughout that time period waiting for congressional approval of its participation in the funding of the project. Further, Tosco states that it had no knowledge of the final selection of DEI until it received Navy documents on November 1, 1976, obtained pursuant to a request made under the Freedom of Information Act, 5 U.S.C. § 552 (Supp. V 1975).

To infer that Tosco knew that a decision had been made to contract sole-source with DEI from the announcement of the Administrator, ERDA, at a press conference in May 1976, that award had been consummated with DEI is improper. The announcement was made in error and when Tosco sought confirmation immediately after the announcement, it was advised that no contract had been awarded.

We do not believe that cited correspondence between Tosco, the Navy and ERDA in June and July 1976 provided Tosco with a reason to protest. In all the correspondence, Tosco was informed that no award had been made and that the project was still in the pre-decisional stage. Nor do we believe that the cited August 4 and 19, 1976, meetings required Tosco to protest. There is no evidence of record that the final selection of DEI as the sole-source contractor had been made. Apart from the statement of the Navy quoted above that Tosco was informed of its decision to pursue the Paraho process, and thus contract with DEI, the record contains no information to that effect. Rather, this assertion is disputed by Tosco and the only memorandum of that meeting fails to disclose such a discourse.

Further, Tosco's attempts to influence the direction of the synthetic fuel R&D program cannot serve as the basis upon which our time limitations for filing a timely protest can be started to run. A firm seeking to do

business with the Government, faced with an on-site contractor, realizes that there must be some change in order for it to replace the incumbent. It is in this light that we view Tosco's efforts. The Navy asserts that it is inequitable to permit a firm to participate in the planning of a program, allow initial awards to be made on what is considered an overall program and then protest those actions. However, there is no information in the record that shows that Tosco, as the Navy, considered that the "overall" program would include the protested procurement. Moreover, even if it had such an understanding, there is no showing that there was ever communicated to it before November 1, 1976, that the program was unalterable and that DEI would be used exclusively.

Without restating the details of the August 4 and 19 meetings and the various interpretations of them, we believe that Tosco reasonably construed the events to mean that no final award decision had been made. Even viewing the substance of the meetings most favorably to the Navy's position, we think that Tosco reasonably believed that no basis then existed to protest. Even if that assumption was a misunderstanding, we have held that a reasonable misinterpretation of the substance of a conversation does not operate to deny a party of its right to protest in an otherwise timely manner. Hansen Company, B-181543, March 28, 1975, 75-1 CPD 187. Therefore, we will consider the protest on its merits.

Pre-Procurement Actions

Due to the possibly wide application of the retorting of oil shale into useable fuel both in terms of commercialization of the process and the costs involved, DOD and ERDA initially determined to jointly fund the DEI efforts. Documentation for this expectation may be found in the "Reply to Questions of U.S. House of Representatives Committee on Science and Technology," Hearings before the Subcommittee on Energy Research, Development and Demonstration (Fossil Fuels) of the Committee on Science and Technology on Loan Guarantees for Commercial-Size Synthetic Fuels Demonstration Plants, 94th Cong., 1st Sess., October 7, 1975, p. 298, 300.

In further exploration of the joint funding, on April 15, 1976, Rear Admiral Hart, Office of the Secretary of Defense, wrote the Administrator, ERDA:

> "The details to the Joint Agency Research and Development Phase effort * * * describe as the first step, a two year, 100,000 barrel investigation program. The 100,000 barrel size emerged as the smallest quantity that could be refined economically and as such the continuation of the

research efforts beyond the first two years are based upon the size of syncrude increment.

"The current 'two year' effort is projected to cost $12.4M summed across FY76, 'TT, '77 and '78. To carry out this program, ERDA support in the amount of $900K in FY76, $644K in FY7T, $3.76M in FY77 and $840K in FY78 for a total of $6.144M for phase I is requested."

In response to this letter, on May 10, 1976, the Administrator, ERDA, after expressing his support for the program, stated:

"Funding for ERDA's share of this joint effort is contingent upon Congressional concurrence and this is presently being explored. In anticipation of such concurrence, Dr. Philip C. White, Assistant Administrator for Fossil Energy, has already set in motion task groups to coordinate ERDA's activities with those of the Navy's * * *."

The first indication of record of a funding problem for ERDA appears in a July 27, 1976, letter from the Assistant Administrator for Fossil Energy, ERDA, to the Special Assistant for Energy, Navy:

"You may be aware that the Energy Research and Development Administration (ERDA) has been requested by the Office of Management and Budget (OMB) to provide justification for the size of the proposed joint project and the need for 100,000 barrels, rather than something less."

While this correspondence was occurring, on June 23, 1976, the Assistant Secretary of the Navy (R&D) was requested by the Counsel, House Committee on Science and Technology, to specify the Navy's "* * * budget authority/appropriations for 1975 (actual), 1976 (estimated), the transition quarter (estimated), and 1977 (estimated) for oil shale reserves, and R&D related to the testing and evaluation of shale-derived fuels." The July 20, 1976, response was, in part:

"FY-1975 (Actual)	$ 95,000
FY-1976 (Estimated)	$ 600,000
FY-197T (Estimated)	$ 250,000
FY-1977 (Estimated)	$1,300,000

"Under the expanded joint DOD/ERDA program, our intent is to contract with the Paraho group to produce up to an additional 80,000 bbl of crude shale oil, the total of 100,000 bbl of crude will then be processed into specification fuels by a refiner to be selected through a competitive RFP * * *.

* * * * *

"4. The projected cost for the DOD/ERDA 100,000 bbl shale oil project over the two year life of the program is estimated at 12 to 15 million dollars. Joint DOD/ERDA funding is being sought subject to congressional approval. Other participants (i.e., FAA and NASA) are actively being sought, as well. The following table lists Navy apportionment for synthetic fuels projects:

"Year	Amount (In millions of dollars)
FY-76	1.2
FY-7T	.3
FY-77	2.5"

Concurrent with the foregoing, a request for authority to negotiate (RAN) a class of contracts under 10 U.S.C. § 2304(a)(11) (1970) was forwarded by the Office of Naval Research on June 23, 1976, for approval. As stated therein, the class of contracts is:

"* * * to provide for the mining, surface retorting, storage, transportation, refining, and test and evaluation of synthetic fuels obtained from crude shale oil obtained from Naval Oil Shale Reserves #1 and 3 (Colorado). During the retorting phase, studies and experiments will be performed to further optimize the Paraho extraction process and improve processing techniques. Proposed process improvements will be experimentally incorporated in the retort operations during normal turnarounds to evaluate pilot plant experimentation results and obtain scale up data for ERDA process and economic studies.

* * * * *

"Shale will be mined at the Naval Oil Shale Reserves [NOSR] in Colorado and retorted by Development Engineering, Inc. (DEI) using the Paraho process. DEI performed a similar

function in 1975 for the DOD/ERDA 10,000 barrel shale project and has the only retort currently operating on the NOSR. The crude shale oil will be processed in a large scale commercial refinery to be chosen by competitive solicitation. The program is a joint DOD-ERDA effort with the Navy providing overall coordination and project management. * * *

"Procurement Plan

* * * * *

"A cost plus fixed fee type contract has been negotiated with Development Engineering Incorporated to determine the need for refurbishment, modification and/or replacement of existing contractor and Government-owned facilities at the Anvil Points, Colorado facility. This services type contract was negotiated under 10 U.S.C. 2304(a)(10) since much of the equipment and facilities are owned by Development Engineering Incorporated.

* * * * *

"Selection of Contractor

"The selection of Development Engineering Incorporated to undertake the mining and retort operation and the related studies and experimentation involves the mutual interests of DOD and ERDA, both of which will share the cost of the program in approximately equal amounts.

* * * * *

"Continuation of the Paraho Oil Shale Research Project, of which Development Engineering Incorporated is the operating unit, offers unique opportunities for meeting initial DOD synfuel requirements and for furthering development of manufacturing technology under ERDA regulation. These opportunities may be summarized as follows:

"a) Qualification of Military Fuels

* * * * *

"b) Development of Retorting Technology

* * * * *

"c) Regulation by the Federal Government

* * * * *

"d) Assessment of Environmental and Safety Factors

* * * * *

"e) Support of Other Oil Shale Projects

* * * * *

The RAN also incorporated the essential points of the sole-source justification for selection of DEI, prepared by the Scientific Officer assigned to the 100,000 bbl shale oil project on June 21, 1976, to perform the preparatory work to enable the instant shale retorting project to commence.

The class determination and findings (D&F) was signed by the Assistant Secretary of the Navy (Installation & Logistics) on August 3, 1976. The D&F provided authority to negotiate the contemplated contracts pursuant to 10 U.S.C. § 2304(a)(11) (1970). Additionally, the D&F provided, in part:

> "* * * It will be necessary to enter into several contracts to accomplish the overall task as set forth in Exhibit A. Each of these contracts is within negotiation authority provided by this Determination and Findings."

Exhibit A to the D&F listed the contractual process of the program with DEI having been pre-selected in 3 of 6 instances.

"Program	Source
"1. Refurbishment of Surface Retort Facilities at Anvil Points, Colorado	Development Engineering, Inc.
"2. Maintenance of the surface retort facilities and modification as required to improve retort operations	Development Engineering, Inc.
"3. Shale Mining and Retorting, pilot plant operation and studies to improve retorting techniques	Development Engineering, Inc.
"4. Shale Refining	To be selected competitively
"5. Test and Evaluation of Military Fuels in Specific Systems	Engine Manufacturers as appropriate
"6. Related Studies of Fuel Characteristics	To be determined"

Implementation of this plan was being pursued by the Navy prior to, or sometimes simultaneously with, the consideration of the KAN. Thus, contract N00014-76-C-1000, effective April 15, 1976, and signed on July 7, 1976, was awarded DEI to "* * * determine the need for refurbishment, modification and/or replacement of the Government-owned and contractor-owned equipment * * * as may be necessary to permit the retorting of 80,000 barrels of crude shale oil during a 22-month period of operation." The estimated cost of the contract was $114,192. Contract N00014-76-C-1074, effective May 1, 1976, but not signed until September 2, 1976, required DEI to refurbish, modify and/or replace those items identified by DEI under contract -1000. The estimated cost-plus-a-fixed-fee was $411,187. Amendment P00001, signed on September 22, 1976, effective May 1, 1976, forwarded the applicable wage determination of the Department of Labor referenced in section J.6 of the contract. Amendment P00002, effective September 7, 1976, signed October 29, 1976, reduced the scope of work due to damage sustained in a fire on September 7, 1976, while providing for additional work to repair damage sustained in the fire. The total increase was $502,129, which raised the total estimated amount of the contract to $913,316.

Protested Procurement

Contract N00014-77-C-0019, was signed on October 29, 1976, effective on December 29, 1976. For an estimated cost-plus-a-fixed-fee of $831,082, DEI was requested to, in part:

> "* * * direct his best efforts towards the research and development of the Paraho retorting technology leading to improved operational reliability (stream factor), increased rates of crude shale oil production, and improved quality of crude shale oil. At the same time, the oil will conform to the minimum requirements of task #2 of this statement of work. * * *.
>
> "2. Produce an estimated 15,798, but no less than 12,500 barrels of crude shale oil. * * *"

The Navy justifies its decision to contract on a sole-source basis on a number of factors. First, the Navy desired to test the oil shale in the Naval Oil Shale Reserve at Anvil Points to determine whether the shale could be refined into military specification fuel. The Navy states that "[A]lthough other shale sources would ultimately be tested and utilized, confirming the availability of this source was considered essential to the national defense." Since the Anvil Points Reserve is encompassed in

the Naval Petroleum Reserves Production Act of 1976, P.L. No. 94-258, which charges the Secretary of the Navy with responsibility to oversee its operation in support of the national defense, the decision is considered in discharge of that responsibility and discretionary with the Secretary of the Navy.

Additional reasons were that this production run was considered:

> "* * * necessary to improve the retorting process and additional crude oil was necessary to extend the data baseline to confirm and substantiate the initial results. The technical personnel considered the continued use of the Government's shale source and the constant use of the initial retorting technology to be essential to confirming the availability of military specification fuels derived from shale. ERDA technical personnel who are charged with the responsibility of furthering the oil shale technology * * * were anxious to pursue further research efforts involving the DEI technology which utilizes a different approach to retorting of shale than other competing technologies. Based upon careful technical evaluation, DOD and ERDA agreed that the facilities at Anvil Points and the data requirements of DOD could accommodate a crude production effort coupled with a closely controlled development program designed to improve the overall retorting technology while also addressing the problems encountered in the testing of the military specification fuels stemming from the composition and character of the original crude oil. Therefore, based on the evaluation of all the factors, it was determined that DEI was the only source that could meet the Government's current requirement."

Tosco protests that it has conducted extensive work on shale oil retorting and possesses technological abilities equal to or greater than DEI. Further, Tosco maintains that it has access to shale oil reserves sufficient to provide the amount of crude shale oil desired by the Navy. Moreover, Tosco owns a retorting facility that, although presently dormant, could be made operational in a timeframe sufficient for the instant needs. Thus, it is Tosco's overall position that DEI was not the sole source for this procurement.

Tosco selects as initial points of inquiry the bases advanced by the Navy as justifying the sole-source award. First, Tosco challenges the ability of DEI to produce the necessary quantities of crude shale oil as

justification of a sole-source award. In conjunction with this premise, Tosco also disputes the need of the Navy to complete the data base established by the first 10,000 bbl production run. Tosco notes that although it and DEI presently employ different methods of retorting (Paraho uses a direct fire mode while Tosco utilizes an indirect firing), the crude shale oil produced under contract -0019 will encompass both methods. Since the two products will be commingled, Tosco perceives no reason to exclude it on the basis of the type of firing method used.

Tosco also does not view the existing lease between DEI and ERDA as a justification for the sole-source award. While the lease presents the Government with broad access for observation and regulation of all the applicable activities, Tosco is willing to grant similar access.

Tosco also challenges whether the contract award comports with the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970) (NEPA), because no environmental impact statement under section 102(e) of NEPA has been prepared for the proposed retorting project. Tosco maintains that the environmental statement prepared by the Department of the Interior in February 1972, in conjunction with the initial lease, is inadequate for the present project. For example, Tosco states that under NEPA and the present Council on Environmental Quality "Guidelines for Statements on Proposed Federal Action Affecting the Environment," 40 C.F.R. § 1500 (1976), a detailed statement including baseline information is required prior to a decision to contract. Tosco alleges that no significant baseline monitoring has been conducted at Anvil Points, which, if correct, might require up to a year's delay.

Tosco disputes the efficacy of the Navy's view of DEI as the principal source of shale for laboratory projects as a determinative factor in the decision to contract sole-source with DEI. Tosco states that it presently makes sample quantities of oil shale available for research free of charge.

Tosco raises additional points. Tosco states that while the contract with DEI is cost-plus-a-fixed-fee, Tosco would be willing to negotiate a firm fixed-price offer below the $100/bbl estimate of the Navy. As for any additional quantities that may be necessary beyond the 80,000 bbl requirement, Tosco notes that DEI is not contractually bound to provide any further quantities. Tosco maintains that it would be willing to commit itself to a firm fixed price for quantities beyond the 80,000 bbl level at prices lower than available elsewhere.

Tosco also notes what it believes to be discrepancy between the RAN and the contracts. The RAN states that "* * * this program will be fully funded by the Government in accordance with ASPR and ERDA regulations."

Normally, when development contracts are wholly funded by the Government it retains all rights to patents developed under the contract. However, contracts -1000, -1074 and -0019 all incorporate by reference ASPR § 7-302.23(b) (1975 Aug.), Patent Rights--Retention by the Contractor (Long Form). Tosco points out that ERDA recognized that the existing lease did not permit the Government to control operating parameters and restricts public release of technical data.

Discussion

Generally, the required norm in Government procurement is competition. 10 U.S.C. § 2304(g) (1970). However, where the legitimate needs of the Government militate contracting with one firm only, our Office will not object. See Hoffman Electronics Corporation, 54 Comp. Gen. 1107 (1975), 75-1 CPD 395. Usually, sole-source awards are justified where time is of the essence, award to any other source would present unacceptable technical risks or only a single source can meet compatibility and interchangeability requirements. Control Data Corporation, 55 Comp. Gen. 1019 (1976), 76-1 CPD 276. However, where research and development work is involved, we subscribe to the view that a sole-source award is unjustified if fair consideration is denied to relevant advances accomplished by other firms at their own expense. Systems Technology Associates, Inc., B-184330, April 26, 1976, 76-1 CPD 280. If developmental work initially commenced by one firm presents attractive potential as a result of the preliminary work, the decision to "prove out" the prior work may properly justify a sole-source award to that firm. If the considerations which prompt the decision to continue with the prior contractor revolve about the engineering risks in transferring unfinished work to another contractor, they are discretionary technical judgments of the procuring agency, not to be overturned by our Office absent a showing of clear abuse of that discretion. Systems Technology Associates, Inc., supra.

While it initially appears that the reason advanced by the Navy to extend the baseline data by utilizing the same technology (direct or indirect mode) is governed by the principle in Systems Technology Associates, Inc., supra, as "proving out" the initial data, there is evidence in the record which tends to contradict this. The indication is that during production there will be a shift from the Paraho method to an indirect firing method of retorting. Since there is no evidence of record that the end products of the two different retorting methods will be segregated, we have doubt as to the validity of the technical reasons advanced by the Navy to support the sole-source contract.

Notwithstanding our doubt, we believe that the sole-source decision is properly supportable upon other considerations. 10 U.S.C. § 7421, as

amended by the Naval Petroleum Reserves Production Act of 1976, P.L. No. 94-258 (April 5, 1976), provides:

> "(a) The Secretary shall take possession of all properties inside the naval petroleum reserves that are or may become subject to the control of and use by the United States for national defense purposes, except as otherwise provided in this chapter."

In part, 10 U.S.C. § 7422, as amended, provides:

> "(a) The Secretary, directly or by contract, lease, or otherwise, shall explore, prospect, conserve, develop, use, and operate the naval petroleum reserves in his discretion, subject to provisions of subsection (c) and the other provisions of this chapter; except that no petroleum leases shall be granted at Naval Petroleum Reserves Numbered 1 and 3."

At the time the lease with DEI was executed, 10 U.S.C. § 7438 provided, as pertinent:

> "(a) The Secretary of the Interior shall take possession of the experimental demonstration facility near Rifle, Colorado, * * *
>
> "(b) The Secretary of the Interior, subject to the approval of the President, shall by contract, lease, or otherwise encourage the use of the facility described in subsection (a) above in research, development, test, evaluation, and demonstration work. * * *
>
> "(c) Nothing herein contained shall be construed --
>
> * * * * *
>
> (2) in diminution of the responsibility of the Secretary of the Navy in providing oil shale and products therefrom for needs of national defense."

Section 7438 was amended by the Naval Petroleum Reserves Production Act of 1976 by substituting "Administrator of the Energy Research and Development Administration" for "Secretary of the Interior" wherever it appeared in the section.

The Navy maintains that it contracted with DEI in the national defense under this statutory authority and to prove that the naval oil reserves can produce military specification fuels on a large scale. We note that the lease with DEI was approved by the President in May 1972 to comply with the provisions of 10 U.S.C. § 7438, supra. Prior to the Naval Petroleum Reserves Production Act of 1976, section 7422 predicated the use by the Secretary of the Navy of the oil shale reserves upon approval by the President.

Tosco argues that the characterization of the necessity to test the oil shale on the naval reserves as an action in the national defense is a "belated attempt to justify sole-source procurement after it has taken place * * *." Further, Tosco states that the oil shale available to it is in the same geological zone as the Anvil Points facility and would therefore not present materially different product results. Moreover, Tosco says that it was led to believe that ERDA was responsible for selection of the retorting contractor and that the Navy would not object if ERDA selected a contractor who proposed to use oil shale from outside of the naval shale reserve.

In reviewing a protest against a sole-source award, our Office is concerned with whether the action is supportable and not whether it was properly supported. The Intermountain Company, B-182794, July 8, 1975, 75-2 CPD 19. Under this standard, our review is not confined to the specific reasons advanced by the contracting activity at the time. Rather, our inquiry is to determine if the contracting actions taken comport with applicable statutes and regulations, in light of the totality of the circumstances as they existed at the time. Thus, we have held that, even where the reasons advanced by a contracting activity justifying a particular action were erroneous at the time the action was taken, a subsequent statement of different reasons which would have supported the action, if advanced initially, is acceptable. B-172061, August 24, 1971.

The Naval Petroleum Reserves Act (Act) charged the Secretary of the Navy with the responsibility to, among other things, develop in his discretion the naval oil shale reserves in the national defense. At the same time, the Secretary of the Interior was given the responsibility to utilize the Rifle facility to further research and development of the oil shale retorting technology. Under the legislation then extant, the Secretary of the Interior entered into the present lease with DEI to conduct a " * * * research and development program * * * to investigate the technical feasibility of mining, crushing and retorting techniques for oil shale. * * * The principal intent of the Oil Shale R&D shall be to demonstrate the reliability, efficiency and operability of the process

designed and developed by the Leasee [DEI]." The lease comported with the purposes stated by the Department of the Interior to the House and Senate committees which were considering the act. For example, H.R. Rep. No. 2141, 87th Cong., 2d Sess. 6 (1962), expresses the utilization concept for the Rifle facility:

> "If the bill [H.R. 5423] becomes law, the plans to offer to lease the Rifle facilities in such a manner that a research organization available to all interested parties will result. * * *
>
> "The proposed lease would be made by the Department of the Interior with an appropriate termination clause, to the organization making the most advantageous offer.

Tha intent of the lease was outlined in S. Rep. No. 2060, 87th Cong., 2d Sess. 2 (1962):

> "The committee [Armed Services] was informed that the Department of the Interior intended to offer the facility at Rifle for lease in a manner that would permit research on behalf of both the Government and private industry. In general the lease would be required to --
>
> * * * * *
>
> (f) Act as a source of oil shale and shale oil for research and development work for various public and private organizations; * * *."

We understand that the lease was awarded after receipt of competitive proposals and was approved by the President in May 1972 to comply with the provisions of 10 U.S.C. § 7438, supra, in effect at the time. This requirement was repealed by the Naval Petroleum Reserves Production Act of 1976, P.L. No. 94-258, § 201, 90 Stat. 307 (1976).

Both the Secretaries of the Navy and Interior are responsible to further the technology dealing with oil shale. In this case, the Secretary of the Navy determined that it was necessary to prove the worth of the oil shale within the confines of the naval reserve. This decision is committed by the terms of the 10 U.S.C. § 7422, supra, to the discretion of the Secretary of the Navy, which may not be overturned unless shown to be arbitrary, fraudulent or wholly unreasonable. Nicolai Joffe Corporation, 54 Comp. Gen. 830 (1975), 75-1 CPD 204; Curran v. Laird, 420 F.2d 122 (1969). There is no such evidence in the record.

In this light, it appears that the purpose of the protested award coincides with the purposes of the lease, i.e., develop oil shale technology. This purpose was explicitly approved by the President. Thus, since the term of the DEI lease runs until 1982, DEI must be viewed as the focal point for oil shale research and development at the Rifle facility, as envisioned by Congress. It was for this purpose that the facility was permitted to be revived and utilized. Moreover, the lease permitted, and encouraged, DEI to upgrade the facility with its own equipment. This was accomplished to such an extent that removal of DEI's equipment would virtually render the facility inoperable for a protracted period of time.

Further, reading the Act and legislative history together leads to the conclusion that the authority and actions of the Secretaries of the Navy and Interior were intended to be complementary. Thus, we do not believe that the Secretary of the Navy was free to ignore the existence and benefits flowing from the Rifle facility as an in situ research and development center.

Moreover, this award seems to be one of a series that have effectuated the purposes of the Naval Petroleum Reserves Act via the existing lease. At this point, we think it would have been illogical to have refurbished the Rifle facility to the point that it could serve as a demonstration model for large scale retorts and then stop short of utilizing the facility for that purpose.

Thus, a sufficient basis existed to award the contract to DEI in light of all of the circumstances: the discretionary determination to prove the worth of the oil shale within the naval reserve; the complementary nature of the authority of the Secretaries of the Navy and the Interior; DEI holds the lease until 1982; the purpose of the contract coincides with the purposes of the lease approved by the President; the equipment at the facility is so commingled that segregation is not plausible. Based upon the foregoing, we conclude that the award to DEI was proper.

Further, even conceding that Tosco may have been led to believe that the source selection would be ERDA's responsibility, there is no evidence that Tosco was deliberately misled. On the contrary, it appears that ERDA took all the necessary steps, albeit unsuccessfully, to secure congressional approval of its reprogramming of funds to enable it to participate in the oil shale development program. As early as May 1976, the Administrator, ERDA, publicly announced its participation via an erroneous statement that the protested contract had been awarded. Further, the record contains numerous correspondence between ERDA and the appropriate congressional committee concerning ERDA's proposed reprogramming

effort. Thus, the exclusion of ERDA from this contractual effort served to render inoperative ERDA's statements regarding its intentions to possibly select a contractor other than DEI.

The matter of compliance with NEPA, as raised by Tosco, poses the question whether the Navy has conducted a sufficient study and whether another environmental impact statement must be issued. Under NEPA, whether the action to be taken by the Government is a major one having a significant effect on the human environment is primarily for determination by that agency. Accordingly, we have concluded that it is inappropriate for our Office to consider this substantive issue. Arlington Ridge Civic Association, B-181015, December 23, 1974, 74-2 CPD 367. It follows that whether the impact statement issued is sufficient under NEPA is also a matter inappropriate for our review.

Tosco also questions the appropriateness of contracting on a cost-plus-a-fixed-fee basis. 10 U.S.C. § 2306(c) (1970) provides:

> "No cost contract, cost-plus-a-fixed-fee contract, or incentive contract may be made under section 2304 of this title, unless the head of the agency determines that such a contract is likely to be less costly to the United States than any other kind of contract or that it is impracticable to obtain property or services of the kind or quality required except under such a contract."

Section 2310(b) of title 10 U.S.C. states in part:

> "Each determination or decision under * * * section 2306(c), * * * shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that * * * clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract * * *. Such a finding is final * * *."

In this case, D&F No. 64,813 set forth as findings:

> "(2) The exact nature and extent of the work covered by the proposed contract and the precise method of performing that work, cannot be established in advance, but must be freely subject to improvisation and change as the work progresses.

"(3) The costs of performing the work under the proposed contract cannot be accurately forecast so as to permit the undertaking of such work for a fixed price."

The "determination" based upon those findings was that "It is impracticable to secure services of the kind or quality required without the use of the proposed type of contract."

Our Office is precluded from questioning the findings issued pursuant to section 2306(c). We may question the determination based upon the findings only if it is unreasonable or not based upon fact. 52 Comp. Gen. 801 (1973), and cases cited therein. Here, we conclude that the D&F properly justifies the use of a cost-plus-a-fixed-fee contract.

Lastly, Tosco questions the appropriateness of the patent clause used in the DEI contract. Tosco maintains that the Government should acquire the right to any invention under the contract, whereas the contract provides for retention by DEI. For the purposes of this protest and assuming arguendo that Tosco is correct, this contention does not afford a basis to overturn the award. The disbursement of patent rights under a contract is an administrative matter between the Government and the contractor to be governed by the applicable Government Patent Policy at 36 Fed. Reg. 16887 (1971) and implementing regulation. The inclusion of a particular patent clause is only one of the many specifications comprising the contract. It is the function of the contracting activity to draft its own terms and specifications. Particle Data, Inc., B-179762, B-178718, May 15, 1974, 74-1 CPD 257. Since the contracting activity is in the best position to know its own minimum needs and what best satisfies those needs, we will not question the determination unless there is a clear showing that the determination has no reasonable basis. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181.

It is true that the contract will be funded by the Government with Government-furnished equipment at a Government-owned facility on Government property. Under the applicable patent policy and implementing ASPR, normally the Government would retain the right to any patent developed as a result of the work undertaken here. However, the existing lease, article VII (B)(1)(b), provides:

"It is the understanding of the parties to this Agreement that subject to the licensing provisions of paragraphs B(2), (3) and (4) of this Article, all foreign and domestic patent rights in any Subject Invention are to be retained by the Lessee [DEI]. This is pursuant to a finding by the Solicitor that 'exceptional circumstances,' as set forth in the President's statement of Government Patent Policy of August 23, 1971, (36 Federal Register 16887-16892, August 26, 1971), are present in this case."

In our view, this would provide a reasonable basis for the Navy including a patent clause providing for retention by DEI.

Therefore, the protest is denied.

For The Comptroller General
of the United States