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DECISION



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

FILE: B-188622

DATE: December 8, 1977

MATTER OF: Christie Electric Corporation

DIGEST:

Sole source award will not be questioned when only one source could deliver type classified item within required time frame. However, recommendation is made that regulations governing type classification provide procedure for testing of items which may meet the Government's needs equally as well as those which have been type classified.

Christie Electric Corporation (Christie), through counsel, has protested the negotiated, sole-source procurement and subsequent award to Utah Research and Development Company, Inc. (Utah) of a contract for battery analyzer chargers for the Lance missile system. They will be used to charge and maintain 24-volt nickel-cadmium batteries and to detect those batteries which are not capable of delivering their rated capacity.

Request for proposals (RFP) No. DAAH01-77-R-0471 was issued by the U. S. Army Missile Materiel Readiness Command (MIRCOM), Redstone Arsenal, Alabama, on February 28, 1977; closing date was March 21, 1977. The RFP called for 15 each Analyzer Charger, Battery, Army-designated AN/GSM 261, and one lot of associated repair parts to be delivered during September, 1977.

Christie requested and was furnished a copy of the RFP on March 18, 1977, but was informed that only Utah was being solicited because that company had produced the AN/GSM 261 charger, so that first article testing could be waived and delivery dates met. Christie's protest was filed the same date but, despite its pendency, award of a \$92,595 contract to Utah was made on May 13, 1977.

Christie alleges that MIRCOM violated applicable procurement regulations and made an invalid determination of urgency, justifying

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the sole source procurement from Utah, because Christie battery analyzer chargers, capable of meeting the Government's needs, were a stock item which could have been furnished within the time required. In addition, Christie charges that MIRCUM failed to follow the recommendations of an Army user report favoring Christie chargers.

MIRCUM replies that a determination to negotiate was made under 10 U.S.C. 2304(a)(2) (1970), which authorizes this method of procurement if " * * * the public exigency will not permit the delay incident to advertising." In addition, Armed Services Procurement Regulation (ASPR) 3-202.2(vi) (1976 ed.) indicates that a purchase request citing a priority designator of 1 through 6, under the Uniform Materiel Movement and Issue Priority System, justifies negotiation. The purchase request for the battery analyzer chargers in this case carried a priority designation of 05.

The contracting officer justified and received approval for noncompetitive procurement on February 16, 1977, on grounds that the chargers were urgently required to maintain Lance operational capability. Lance then was using borrowed units, a situation characterized as an "unreliable and high risk means of maintaining Lance Readiness, particularly in case of an alert situation." First article testing, which the contracting officer found would be required of any producer of the AN/GSM 261 other than Utah, would take three months; in addition to production leadtime of five months, such testing would unduly delay delivery by eight months, the sole source justification concluded.

Sole source awards are subject to close scrutiny by our Office. They may be made where the minimum needs of the Government can be satisfied only by items or services which are unique; where time is of the essence and only one known source can meet the Government's needs within the required time frame; where data is unavailable for competitive procurement, or where only a single source can provide an item which must be compatible and interchangeable with existing equipment. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402, and cases cited therein.

In applying these principles, we have approved sole source awards in circumstances similar to the instant case, as when the decision to negotiate was based on a priority designator and the contracting officer reasonably determined that only one source could meet the delivery schedule, Aydin Corporation, Vector Division, B-188729, September 6, 1977, 77-2 CPD 175; Emerson Electric Company, Rantec Division, B-185399, August 10, 1976, 76-2 CPD 143, and when only one firm qualified for waiver of first article

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testing. See Piasecki Aircraft Corporation, B-181913, June 27, 1975, 75-1 CPD 391, and cases cited therein. But see Non-Linear Systems, Inc., 55 Comp. Gen. 358 (1975), 75-2 CPD 219, cited by Christie, in which we held that when an off-the-shelf item can meet the legitimate needs of the Government, a public exigency determination and past satisfactory past performance by one producer are insufficient justifications for a sole-source procurement.

In considering this protest, for the following reasons we cannot object to the decision to negotiate or to the sole source award to Utah. The contracting officer followed applicable regulations, ASPR 3-202.2, supra, in deciding that, because of the priority designator 05, use of formal advertising was not feasible or practicable because of inherent delays; our Office has not found it to be an abuse of discretion to negotiate in similar circumstances. Janke and Company Incorporated, B-181064, August 29, 1974, 74-2 CPD 126.

As for the sole source award to Utah, the AN/GSM 261, produced by Utah, had been type classified Standard, for Lance use only, by MIRCOM in January 1977. As MIRCOM points out in its report to our Office:

"According to Army Regulation (AR) 71-6 (1973), type classification is required of each non-expendable item of equipment separately authorized to be used by the Army in the field and/or requiring supply and maintenance support by the Army logistics system *** prior to procurement of production articles." (Emphasis added.)

MIRCOM cites a three-year history of attempts to have the Utah charger type classified and states that as a result of this procedure, a "firm set of documentation" was obtained. But for the urgency and the need for first article testing for any source other than Utah, the AN/GSM 261 chargers would have been procured competitively, MIRCOM adds.

Counsel for Christie has argued that first article testing was unnecessary because Christie previously had supplied battery analyzer chargers to the Air Force. In this regard, MIRCOM states:

"The first article requirement is for new sources building to the Government a documentation, which Christie is not proposing to do. Christie proposes introduction of its [own] charger into the LANCE missile system, which will require type classification."

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Thus, under MIRCUM' interpretation of AR 71-8, *supra*, Christie chargers, which were functionally different from the AN/GSM 261, could not have been procured either with or without first article testing, and the fact that they were in stock and immediately available made no difference. MIRCUM considered type classification of the Christie charger an unreasonable alternative which would have required months and been prohibitively expensive.

In addition, although users in the Modern Army Selected Systems Test, Evaluation and Review (MASSTER), conducted at Fort Hood, Texas, during September and October 1975, preferred Christie chargers, MIRCUM states that the test data raised questions as to the compatibility of Christie chargers with Lance generators.

Considering all these facts and circumstances, we cannot find that the contracting officer acted unreasonably or abused his discretion in deciding to negotiate with Utah, the only source qualified to produce the type classified AN/GSM 261 within the required time frame. Accordingly, Christie's protest is denied.

We note, however, that type classification appears to be inconsistent with the statutory and regulatory requirements for competition. See 10 U.S.C. 2304(g) (1970); ASPR 5-101(d). Although type classification encompasses control of equipment and supplies, it is essentially prequalification of a particular product. Our Office has upheld prequalification of both manufacturers and products--but only when we have determined that:

"*** no manufacturer or producer is necessarily precluded from competing for a procurement for which he is able to provide a satisfactory product and any such manufacturer or producer may become eligible to compete at any time that it demonstrates under applicable procedures that it is able to furnish an acceptable item meeting the Government's needs." Department of Agriculture's use of Master Agreement, 54 Comp. Gen. 606, 609 (1975), 75-1 CPD 40. (Emphasis added.)

The record indicates that although MIRCUM has type classified only Utah's equipment (or equipment made to identical specifications) for Lance use, Christie's equipment also is fully developed, has a national serial number, and has been tested and used by the Air Force, which has supplied it to foreign governments. Moreover, there apparently are several other manufacturers of battery analyzer chargers whose equipment may meet the Government's needs.

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While we are not in a position to judge whether these products actually meet the Government's needs, we believe there must be some procedure for determining this. See, for example, ASPR 1-1101 to 1111, regarding Qualified Products. We have carefully reviewed the regulations on type classification cited by MIRCOM, AR 71-6, supra, and find that they do not appear to provide any procedure for evaluation and testing of equipment which may meet the Government's needs equally as well as that which has been type classified. We believe that the regulations should provide for such a procedure in order to assure maximum competition, and by letter of today, we are advising the Secretary of the Army of our views.


Deputy Comptroller General
of the United States