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DECISION



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

*J. Cohen
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**FILE: B-190798
B-191007
MATTER OF:**

DATE: June 13, 1978

Pioneer Parachute Co., Inc.

DIGEST:

1. Protest against sole-source nature of procurement is denied, since contracting agency's position that it does not possess or have rights in technical data necessary for competitive procurement is not unreasonable and protester has not shown that performance could be accomplished without data.
2. Air Force (AF) could have ordered reprocurment data under deferred ordering provision in previous contracts for parachute recovery systems, but allowed rights to order such data to lapse, and reason is not clearly set out in record. Since all procurements should be conducted on competitive basis to maximum extent practicable, and result of AF inaction is that subsequent system procurement had to be on sole-source basis because of lack of data, matter is being brought to attention of Secretary of AF.

Pioneer Parachute Co., Inc. (Pioneer), protests the award by the Air Force Logistics Center (AFLC) on November 8, 1977, of contract F41603-78-C-0220 on a sole-source basis to M. Steinthal Division of Steinthal Corporation (Steinthal) for mid-air recovery parachute systems (MARPS) applicable to the BQM-34F Drone. In addition, Pioneer protests the issuance by the Air Force Systems Command Aeronautical Systems Division (ASD) of sole-source solicitation No. F33657-78-R-0149 to Steinthal for similar items. No award has been made pending resolution of the protest. Pioneer contends that it should have been afforded the opportunity to participate in the procurements.

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BACKGROUND

Contract F33657-70-C-0305 was awarded by ASD to Ryan Aeronautical Company (Ryan) on January 14, 1970, as sole source for the design and development of an Air Force configuration of the BQM-34E Aerial Target Drone being supplied by Ryan to the Navy. Ryan, the designer, developer and sole-source producer of the Drone, was considered the only source familiar enough with the vehicle to be able to complete development of the Air Force model within the necessary timeframe.

Pursuant to modification P00005 of the contract, data representing the design work was to be delivered to the Government with unlimited rights thereto on a deferred basis in accordance with Armed Services Procurement Regulation (ASPR) § 9-203(e) (1964 ed.), which provided in pertinent part:

"DEFERRED ORDERING OF TECHNICAL DATA (MAY 1964). The Government shall have the right to order, at any time during the performance of this contract, or within two (2) years from either acceptance of all items (other than data) to be delivered under this contract or termination of this contract, whichever is later, any data called for in the Schedule of this contract, and the Contractor shall promptly prepare and deliver such data as is ordered. However, the Contractor shall be relieved of the obligation to furnish data pertaining to an item obtained from a subcontractor upon the expiration of two (2) years from the date he accepts the item. * * *

Ryan subcontracted for the MARPS, a portion of the contract effort. A MARPS is comprised of a main parachute, an engagement parachute, and a load line packed within a deployment bag.

The Government did not order data concerning the MARPS to be delivered within the 2-year period prescribed in the above clause.

The Government subsequently entered into a number of contracts involving the MARPS. The contracts were either awarded to Steinthal on a sole-source basis, or included Steinthal as the subcontractor for the MARPS work. In each case, the justification for the use of Steinthal as the sole source for any MARPS work was that the Air Force did not possess the technical data necessary for a competitive procurement. In those contracts where Steinthal was the prime contractor no data delivery was required, and where Steinthal was the subcontractor data rights available under a deferred ordering provision were never exercised within the prescribed period.

PRESENT PROTESTS

Solicitation No. F41608-77-R-3061 was issued to Steinthal by AFLC on April 29, 1977, for 94 MARPS canopies "with Phase I Kelvar Line System." The total included 10 first articles and 84 production units. The solicitation resulted in the November 8 award of contract -0220.

ASD issued solicitation -0149 to Steinthal for the modification of sixteen 79.6-foot diameter MARPS, needed to satisfy Air Force requirements until AFLC could obtain the more advanced items involved in contract -0220. The MARPS in the ASD solicitation are Government-furnished property that are to be unpacked, inspected, repaired, modified, repacked and returned to the Air Force. The sole-source nature of the procurement was justified on the basis that the Government does not possess data on the system sufficient for a competitive procurement; there is not adequate leadtime for data generation; and only Steinthal has all the tooling required for packing.

Pioneer's protests against the sole-source procurements are based primarily on its position that

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the Air Force has perpetuated a sole-source situation by failing to order procurement data to which it was entitled under the deferred ordering clause of contract -0305 and subsequent contracts. Pioneer argues that the Air Force's actions in that regard, or rather lack of action, represent poor management judgment at the least. In this connection, Pioneer contends that, based on its facilities and experience, if provided the data it would be entirely capable of fulfilling the Air Force's requirements.

Pioneer also argues that, in any case, data rights that were proprietary under contract -0305 have been relinquished to the Air Force on the following basis:

"Ongoing events and the poor performance of the then developed system relegated future development to * * * [ASD]. Additional development was accomplished utilizing Air Force personnel to redevelop the system into a condition which would be a viable, flyable unit. Data rights to the best of our knowledge would have at that point been totally relinquished since the development work to correct the system's poor flying characteristics and operation was accomplished utilizing Air Force personnel."

Finally, and specifically regarding ASD's sole-source justification for solicitation -0149, Pioneer contends that, even without the Steinthal data, on the basis of technical information in fact in ASD's possession, augmented by the expertise of ASD technical personnel, Pioneer could perform the contract work, assuming any necessary unique tooling located at the Steinthal plant could be transferred to the Pioneer facility.

TIMELINESS

As a threshold issue, the Air Force contends that Pioneer's protest against the award of contract

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-0220 was untimely filed and should not, therefore, be considered on the merits. The basis for that view is that the procurement, its sole-source nature, and the date that Steinthal's proposal was due, May 19, were synopsisized in the Commerce Business Daily (CBD) on April 28. The Air Force argues that in such case Pioneer's protest should have been filed by May 19 in accordance with section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures), which provides in pertinent part:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals."

The protest was not filed with the Air Force until November 30 and with our Office December 1.

In response, Pioneer points out that in regard to the quantity of items being procured, the CBD notice only stated "First Articles Approval - 10 each." Pioneer argues that the notice could be viewed as involving only 10 first articles with an unspecified number of production units, or one first article and 10 production units. Pioneer contends that it was not until a November 29 award notice in the CBD of 94 units under that solicitation that sufficient interest was generated on its part to have a basis for protest. In this connection, the Air Force admits that it erroneously failed to include in the CBD notice the number of production units to be procured, but argues that 10 first articles were clearly indicated, and Pioneer should therefore have known that a substantial number of production units were involved.

The protest involving solicitation -0149 is clearly timely and, as already indicated, its bases

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are the same as those in the contract -0220 protest. Thus, we will address below the merits of the matter, notwithstanding whether the protest against the November 8 contract award was timely or not. In view of our conclusion below that the protest against sole-source solicitation -0149 must be denied, it is not necessary that we resolve the timeliness issue raised by the Air Force.

DISCUSSION

In determining the propriety of a sole-source solicitation, the standard to be applied is one of reasonableness--unless it is shown that the contracting agency acted without a reasonable basis, this Office will not question an award thereunder. Bingham, Ltd., B-189306, October 4, 1977, 77-2 CPD 263. We have consistently held that where adequate data is not available to an agency to enable it to conduct a competitive procurement within the necessary timeframe, we will not take exception to the legality of a sole-source award to the only firm which the agency believes capable of producing the item. See Engineering Research, Incorporated, B-180193, September 12, 1974, 74-2 CPD 161.

In view of these standards, the issue for our consideration is not whether the Air Force was remiss in failing to order MARPS data under past procurements, but whether its position that it does not have unlimited rights in such data is unreasonable (see Applied Devices Corporation, B-187902, May 24, 1977, 77-1 CPD 362), or, if not, whether the data is actually necessary to the procurement. The Government's rights in any data developed concerning MARPS is controlled by the ASPR "Rights in Technical Data" clause, some form of which was incorporated by reference in contract -0305 and subsequent MARPS development contracts. ASPR § 7-104.9(a) (1969 ed.), included in contract -0305, provided in pertinent part:

"(b) Government Rights

"(1) The Government shall have unlimited rights in:

"(i) technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

"(ii) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense * * *."

In 52 Comp. Gen. 312, 315 (1972), we quoted the following statement as representing the Department of Defense position in such matters:

"Where there is a mix of private and government funds, the developed item cannot be said to have been developed at private expense. The rights will not be allocated on an investment percentage basis. The government will get 100 percent unlimited rights, except for individual components

which were developed completely at private expense. Thus, if a firm has partially developed an item, it must decide whether it wants to sell all the rights to the government in return for government funds for completion or whether it wants to complete the item at its own expense and protect its proprietary data. On the other hand, if the government finances merely an improvement to a privately developed item, the government would get unlimited rights in the improvement or modification but only limited rights in the basic item. Hinricks, Proprietary Data and Trade Secrets under Department of Defense Contracts, 36 Mil. L.R. 61, 76."

Pioneer in effect contends that Air Force personnel have become so involved in the development of the MARPS that the technical data could not be said to have been generated at private expense. Pioneer argues that the Air Force should, therefore, assert its unlimited rights in the data for purposes of a competitive procurement.

In response, the Air Force states that consistent with its management responsibility for the MARPS program and Air Force policies and guidelines governing interface between contractors and Air Force program management personnel, its involvement in MARPS-related efforts since contract -0305 has essentially concerned the monitoring and assessment of performance. The Air Force contends that at no time has it assumed responsibility for development or redevelopment and design requirements of the contractor. It states the performance under contract -0305 was satisfactory and that design efforts subsequent to that contract were only to enhance system stability and improve reliability.

As stated above, the issue for resolution is whether the Air Force's position that it does not

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have unlimited rights in data developed under contract -0305 and subsequent MARPS efforts is without reasonable basis. See Applied Devices Corporation, supra. We do not believe that Pioneer has shown that to be the case. Although the MARPS-related contracts clearly had developmental aspects, based on the record presented by the parties, we cannot say that the Air Force did more than merely finance modifications and improvements to an already developed system. Cf. Harvey W. Neeley, B-189361, March 31, 1978, 78-1 CPD 255. Contrast the situation in 52 Comp. Gen. 312, supra, where our Office did not object to the Air Force's assertion of unlimited rights in certain end formulas after noting the Air Force's technical assessment that massive Government-financed development efforts had resulted in wholly new and independent end formulas which were not merely routine extensions of earlier formulas.

Concerning whether even absent the subject data the Air Force could conduct a competitive procurement based on Pioneer's capabilities and Air Force expertise, again the standard the protester must meet is to show that the Air Force's judgment in that regard was unreasonable. Bingham, Ltd., supra; Applied Devices Corporation, supra. The protester has the burden of affirmatively proving its case. Reliable Maintenance Services, Inc. -- Request for Reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. Although Pioneer may well be otherwise capable of the effort required under solicitation -049, it has offered no concrete basis for our Office to conclude that the contract performance could be accomplished without the data that could have been but was not ordered under previous MARPS contracts.

The protest is denied.

Notwithstanding the above characterization and treatment of the issues raised by Pioneer, there remains the matter of the Air Force's sole-source MARPS procurements excluding Pioneer as the result of the agency relinquishing its rights in data. As Pioneer states:

"* * * [The Air Force has] allowed their error in relinquishing data rights to pyramid into faulty rationale that supports the premise that only Steinthal has the necessary capability, expertise, and technology to tear down, modify, and repack a 166 [parachute recovery] system.

"* * * [data] rights are only valid if they are enforced and protected. If they are allowed to lie fallow and lapse, they have no value and do not protect the integrity of the procurement system."

Although, as indicated above, we believe that the Air Force is not unreasonable in treating individual MARPS-related procurements on sole-source bases, we question that agency's failure to order the data necessary for competitive procurements while the opportunity was available. That opportunity existed not only under contract -0305, but also on at least three occasions involving refinement of the MARPS system subsequent to that contract. The Air Force's comments on its failure to initially order the delivery of the necessary data are as follows:

"* * * The contract file is silent as to why reprourement data was never procured. This is not unusual as the contract file documents and supports actions taken, as opposed to documenting actions which are not taken. A review of the situation at the time, however, suggests a number of reasons why reprourement data may not have been obtained. First of all, the BQM-34E Aerial Target Drone had already been designed and developed by the Navy and was being placed on a production contract with Ryan Aeronautical. The Air Force configuration was developed with a relatively minor expenditure of funds and consisted of installation design of

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USAF avionics subsystems and design of a recovery system to make the vehicle more compatible with an Air Force environment. Both the Navy and Air Force versions of the vehicle were procured by the Navy from Ryan, the developer and only producer of the BQM-34E and F. At that time, it did not appear essential to obtain procurement data on a small portion of the effort as only one firm could be involved in its production. As a matter of fact, Ryan is the only firm that has ever produced the BQM-34E and F vehicle. Later when thought was given to breaking out the MARPS system and procuring it separately, it was found that the government had no data with which to compete the procurement. Other factors which may have influenced the decision to not obtain data on the basic contract were lack of funds or an unwillingness to buy procurement data on a system still undergoing design improvement. It is also possible that through management oversight no data requirement was generated. * * *

It is incumbent upon a contracting agency to ensure that procurements are made on a competitive basis to the maximum practicable extent. See ASPR § 1-300.1 (1976 ed.). The record does indicate that ASD in fact attempted to procure the data necessary for a competitive procurement from Steinthal in 1976. However, Steinthal responded with a "no-bid," stating that the technical data requested was developed entirely at private expense and is not available for sale at this time." Although it questioned Steinthal's position, ASD decided not to pursue the matter at that time.

In addition, ASD states that it considered including provision for obtaining procurement data in AFLC's contract -0220. However, the estimated cost involved was determined to be too high even

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considering the savings that might result from a competitive procurement. ASD contends that other factors militating against the purchase of procurement data under contract -0220 were time constraints and the facts that no other BQM-34F procurements are planned, and the final MARPS version has yet to be tested in its production configuration. The Air Force states that "If any of the above factors change significantly this matter will be reevaluated."

Notwithstanding ASD's 1976 effort and subsequent consideration of the matter, we must agree with Pioneer's view that had the Government exercised its rights to reprocurement data, rather than allowing them to lapse, sole-source MARPS-related procurements may not have been necessary. In view of the sole-source cycle created by the Air Force's failure not to order the data, we are bringing the matter to the attention of the Secretary of the Air Force for consideration.


Acting Comptroller General
of the United States