

DECISION

*G. Cohen #1
7808*

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

FILE: P-191468

DATE: September 21, 1978

MATTER OF: Julian A. McDermott Corporation

DIGEST:

1. Army source-search for lights compatible with hand emplaceable minefield marking set system (HEMMS) resulted in purchase of small number of one firm's commercial lights, which were then redesigned and submitted to substantial testing over 2-year period. Protest against Army's intention to enter into sole-source contract with such firm for production of HEMMS lights is denied. Army's position that data necessary to prepare specifications for competitive procurement is unavailable, and that any proposed lights would require substantial redesign and testing at considerable cost and delay, is not unreasonable.
2. Protest that, in view of allegedly poor past performance by firm to which Army intends to award sole-source contract for hand emplaceable minefield marking set lights, performance under sole-source contract will be inadequate will not be considered. Cited performance was under R&D contract for such lights, which after redesign passed all tests. Moreover, matter involves firm's responsibility, and GAO does not review protests against affirmative determinations of responsibility except under circumstances not applicable here.
3. Whether performance complies with contract requirements is matter of contract administration and is not for consideration by GAO.

Based on an operational capability requirement issued in October 1975, the United States Army conducted a source-search for modified commercially available lights compatible with the Hand Emplaceable Minefield Marking Set (HEMMS) system. HEMMS is a

rapidly deployable marking system used to direct personnel and vehicles away from or through minefields.

Ten lights, including a number of different types of lights, were obtained from five manufacturers and tested. Of the 10, a light manufactured by ACR Electronics (ACR) was determined to have the greatest probability of fulfilling the Army's minimum needs.

Two hundred and thirty prototypes of the ACR light were procured for further testing. The lights failed to pass certain reliability tests and were returned to ACR for redesign. The redesigned lights passed the tests. The approximate cost of the testing was \$500,000 over a 2-year period. The Army then defined its minimum needs in terms of the redesigned light, ACR model number LCM-1 B2.

Sole-source solicitation No. DAAK70-78-Q-0405 for 108,576 HEMMS lights was issued on February 22, 1978, to ACR as well as to two other firms that requested the procurement package as a result of a published synopsis for subcontract opportunities.

At a meeting with the contracting officer and his technical representative prior to the date set for the receipt of the sole-source proposal, one of the two firms other than ACR that received the solicitation, the Julian A. McDermott Corporation, (McDermott), attempted to convince the Army representatives that it could supply an item that would meet the Government's requirements. McDermott also suggested that paragraph 4.7.3 of the purchase description attached to the solicitation, entitled "Luminous Intensity," was ambiguous and misleading. The paragraph expresses the required luminous intensity of the HEMMS light as 90 percent of the average luminous intensity of 50 of the 230 lights originally obtained from ACR and redesigned. McDermott contended that the requirement could be expressed without reference to the ACR light.

In response, the Army advised McDermott that in view of the preprocurement history of the development of the ACR light to a state compatible with the HEMMS system, the Army considered that only ACR could meet the Army's needs within the necessary timeframe. Regarding Paragraph 4.7.3 of the purchase description, it was the Army's position that there was no known procedure to guarantee that two independent luminous intensity measurements will be comparable, and that, therefore, it was necessary under the circumstances to define its needs by referring to the ACR light.

McDermott was also advised that it would have little chance to be awarded a contract for HEMMS lights unless it had furnished similar lights to the Government or to private industry which had been tested in similar environmental conditions. Otherwise, some testing of the type to which the ACR light was subjected would be necessary with regard to any light proposed to determine the light's ability to meet critical requirements concerning performance in extreme climates. The cost and time involved in such testing would be weighed in evaluating a proposal from McDermott.

McDermott then filed a protest in our Office against the contemplated sole-source award to ACR. In addition to the matters raised by McDermott before the Army, McDermott contends that ACR's past performance on contracts for minefield marking lights has been poor, and that in view of the problems encountered by the Army with regard to the ACR prototypes tested during the preprocurement process, the lights to be delivered by ACR if awarded a contract under the solicitation will fail to meet the Government's needs.

Generally, 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, our Office will not question an award thereunder. Pioneer Parachute Co., Inc., B-190798, B-191007, June 13, 1978, 78-1 CPD 431. Further, we have held that where the legitimate needs of the Government can only be satisfied by a single source, the law does not require that those needs be compromised in order to obtain competition. See Manufacturing Data Systems Incorporated, B-160608, June 28, 1974, 74-1 CPD 348.

In a report on the protest the Army has expanded on its position that a sole-source procurement is appropriate. The Army states that at this time it does not possess the data or knowledge to define its minimum needs in terms other than the characteristics of the ACR light. The Army contends that in order to conduct a competitive procurement, additional data concerning "photometric requirements, life and reliability testing, impact testing, and electronic circuitry parameters" must be obtained. That data is to be provided by ACR under the sole-source RFP.

The Army also points out that the purchase description attached to the solicitation "was not intended to be a competitive document but only to insure consistent quality throughout production." Thus, a light meeting the purchase description requirements would not necessarily fulfill the Army's needs. The Army states:

"Competitive procurement based on the PD [purchase description], without reference to the ACR light, is not considered a viable alternative. Either the light from each prospective source would have to pass qualification testing, or data would have to be obtained to definitize the requirements in those areas stated above [photometric requirements, etc.]."

Qualification testing would require the design of a test plan similar to the developmental testing performed on the ACR light, and would require coordination with the development activities. An engineering estimate of the minimum required testing is two field missions at the Arctic Test Center. By necessity, this testing would be conducted during the winter months, resulting in a corresponding delay to the HEMMS program. Obtaining the information needed to upgrade the PD was considered and rejected on the basis that the information furnished by ACR would not be verifiable until the first production procurement, requiring the Government to assume an unacceptable amount of risk. In addition, the estimated one to two years' delay in the HEMMS program if this alternative had been implemented precluded this course of action."

Specifically, in regard to the method indicated in the purchase description to measure luminous intensity, the Army's production engineer explains:

"* * * to produce meaningful photometric results all persons performing the measurements must perform the measurements by the same procedures with comparable equipment that has been calibrated to a common source - as opposed to independent performance. * * * As long as the test set-up procedure, and calibration methods state the same, absolute values can be obtained. The absolute values

are meaningful only when validated against a large sample of lights. In this instance the large sample of lights will not be available until production."

The Army further states that the capabilities of lights presently manufactured by McDermott differ substantially from those required, and that, therefore any lights proposed by McDermott would have to be redesigned and subjected to the type of testing indicated above.

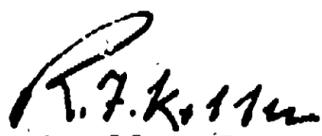
Concerning the Army's justification for the sole-source procurement, and in addition to the general principles set out above, we have consistently held that where adequate data is not available to an agency to enable it to conduct a competitive procurement, we will take no exception to a sole-source award to the only firm which the agency believes capable of producing the item. Pioneer Parachute Co., Inc., supra. Moreover, regarding the testing that the Army states would be necessary in view of the extensive preprocurement development of the ACR light, we consider that a matter of administrative discretion. Stewart-Warner Corporation, B-182536, February 26, 1975, 75-1 CPD 115.

In view of these considerations, we cannot conclude on the basis of the record as set out above that the Army's position that only ACR can satisfy its needs at this time is unreasonable. The fact that McDermott may disagree with certain Army technical judgments, which are the responsibility of that procuring agency and not our Office, see METIS Corporation, 54 Comp. Gen. 612 (1975), 75-1 CPD 44, and which form the basis for the agency's position, does not invalidate them. See Design Concepts, Inc., B-186880, December 22, 1976, 76-2 CPD 522. In this connection, we point out that the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc., --request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Accordingly, the protest on this issue is denied. In view thereof, it is not necessary to consider further the adequacy of paragraph 4.7.3 of the purchase description.

In regard to ACR's past performance on contracts for minefield marker lights, much of McDermott's concern involves the failure of the ACR lights that were initially procured for development and testing to pass certain tests. However, in view of the nature of that process, such failures would be expected. Moreover, after redesign and repeated testing the lights were ultimately found acceptable. In any case, ACR's past performance as it relates to the present sole-source solicitation involves the firm's responsibility. See Armed Services Procurement Regulation § 1-903.1(iii) (1976 ed.). The Army has apparently determined that ACR is a responsible firm. Our Office does not review protests against affirmative determinations of responsibility unless either fraud on the part of procuring officials is alleged, or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Meyers Industries, Inc., B-192128, July 21, 1978, 78-2 CPD 60. Neither exception is applicable here.

Whether the ACR lights will in fact meet contractual requirements is a matter of contract administration and is not for our consideration. See Virginia-Maryland Associates, B-191252, March 28, 1978, 78-1 CPD 238.


Acting Comptroller General
of the United States