

J. Vickers
Proc I



DECISION

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

8870

FILE: B-193270

DATE: January 17, 1979

MATTER OF: Singer Company, Inc., Kearfott Division

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DIGEST:

[Protest Challenging Cancellation of three Requests for Proposals by Prime Contractor]

1. Where prime contractor is conducting competitive procurement designed to develop second source for subsystem and after proposals are received Government encourages prime to consider alternate proposal from licensee of subsystem contractor, participation by Government is sufficient under Optimum Systems standard for GAO to hear protest by potential second source against cancellation of solicitation and proposed award of subcontract to licensee.
2. Argument that choice of licensing proposal as opposed to proposals for development of second source was preprocurement action under Maremont Corporation, 55 Comp. Gen. 1362, to preclude GAO review is found to be without merit since Government and prime contractor were not determining minimum needs so much as they were comparing alternative proposals for meeting those needs.
3. While protester knew alternative method was being considered at least 2 months prior to final decision being made, protest is timely where filed within 10 working days of final decision because to have protested earlier would have been premature.

Singer Company, Inc., Kearfott Division (Singer), protests actions taken by McDonnell Douglas Corporation, McDonnell Douglas Astronautics Company (MDAC), in connection with MDAC's performance of its prime

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contract with the Department of Defense (DOD). This prime contract is for the design, development and furnishing of AN/DSW-15 Cruise Missile Land Attack Guidance Sets and Navigation/Guidance Equipment for the AGM-86-B Air Launched Cruise Missile.

Singer's protest challenges the cancellation of three requests for proposals (RFP's) issued by MDAC to develop a second source for the Cruise Missile inertial guidance subsystem and the choice of a licensing approach instead to fulfill the requirement.

Because of various issues raised, this decision is limited solely to the jurisdiction of our Office to hear the protest and the timeliness of Singer's protest under our Bid Protest Procedures (4 C.F.R. part 20 (1978)).

The first issue for resolution is whether our Office should exercise jurisdiction, so as to rule on the merits of the protest, since the protest is against the award of a subcontract by a Government prime contractor.

Generally, the contracting practices and procedures employed by prime contractors--who are normally acting as independent contractors--in the award of subcontracts are not subject to the statutory and regulatory requirements governing direct procurements of the Federal Government. 49 Comp. Gen. 668 (1970). However, we (will consider protests by subcontractors) under certain limited circumstances, including (where the active or direct participation of the Government in the selection of a subcontractor has the net effect of causing or controlling the rejection or selection of potential subcontractors, or of significantly limiting subcontractor sources.) Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Both Singer and the Government procuring activity, the Joint Cruise Missile Project Office (JCMPO), agree that, if our Office is to entertain the protest, our jurisdiction would be founded under that criterion.

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The following history is relevant. MDAC was awarded the above-noted prime contract in 1975 by DOD with Litton Industries, Inc., Guidance and Control Systems Division, (Litton), Woodland, California, as the subcontractor for design and production of the inertial guidance subsystem.

On January 14, 1977, DOD established the JCMPO to manage the Cruise Missile Program and to direct the development of both the Navy and Air Force versions of the missile. One of the policies to be followed by JCMPO was to encourage subsystem/second-source competitive procurement by which major Cruise Missile subsystems would be procured from two contractors who would be competing with each other for a portion of the total production order.

In late 1977, MDAC sent requests to industry for planning information concerning the cost to the Government of developing and qualifying an alternate production source or a "second source." Following evaluation of the information submitted by industry, MDAC briefed JCMPO regarding its proposed second-source competition which envisioned competition through either a form, fit and function approach or redevelopment of the system utilizing new technologies. The second-source development, through the demonstration phase, would be funded by the subcontractors themselves. MDAC requested JCMPO approval of this approach, but JCMPO advised that, since it had no control over how MDAC or its potential subcontractors expended their funds, such approval or disapproval would be presumptuous.

On March 17, 1978, MDAC issued three RFP's to a number of prospective offerors. Each RFP was for a portion of the inertial guidance subsystem, i.e., computer subsystem, power subsystem and reference measuring unit.

At a briefing with offerors held on March 24, 1978, MDAC advised that it would obtain commitments from JCMPO, prior to authorizing a supplier to proceed, that:

1. establish JCMPO intent to fund and support FSD (Full Scale Development) if the Competitive Evaluation Phase System development is successful;
2. confirm JCMPO policy that development of a second-source system is required and will be actively supported through FSD and full production; and
3. confirm that JCMPO plans do not include procurement of Cruise Missile Guidance Systems from any source other than MDAC and that the Guidance System developed during this program will be the only second-source system considered for Cruise Missile application.

Because of numerous complaints received from offerors, JCMPO advised MDAC, on April 6, 1978, that it would fund the second-source competition and, therefore, it wished to review the source selection criteria and written procurement plan for the second-source solicitations and also to review and approve the proposed source selection.

During May 1978, several discussions were held between JCMPO and MDAC regarding the status of the second-source competition, the alternate vendor technical approaches and how MDAC would evaluate the responses to the RFP's.

In this same time period, May 1978, following preliminary contacts by Litton during March and April regarding the possibility of licensing production of Litton's equipment to another manufacturer, JCMPO met with Litton on several occasions to explore acquisition alternatives to MDAC's second-source competition.

During these discussions, it became evident that, while Litton was willing to license another contractor to produce most of the components of the guidance system, it was unwilling to license production of the

gyroscopes and accelerometers, two essential components of the subsystem. Litton suggested that Litton Systems, Canada, Limited (Litton-Canada), Litton's Canadian division, could supply these components to the second-source contractor. It was determined that the licensing of another contractor would require too long a leadtime at an unreasonable cost for such a contractor to reach production capability.

The discussions then turned to the possibility of licensing Litton-Canada as the second source for the entire inertial guidance subsystem as a less expensive, lower risk alternative to the MDAC second-source competition. On June 27, 1978, JCMPO visited Litton-Canada to review its capabilities and facilities. Subsequently, a Memorandum of Agreement (MOA) was drafted between JCMPO and Litton to establish Litton-Canada as the second source for the guidance subsystem. The purpose of the MOA was to:

- a. agree on steps to establish a dual-source capability for cruise missile guidance and control components in Litton-Canada including the necessary transfer of technology from Litton Guidance and Control Division;
- b. assure independent competition in pricing between Litton-Canada and Litton Guidance and Control Division;
- c. preclude royalty charges or license fees to the Government;
- d. limit profits charged to the Government; and
- e. provide for Litton capitalizing equipment needed to achieve production capability with an appropriate capital investment incentive for inclusion in applicable procurements.

Returning now to the MDAC second-sources competitions, on August 4, 1978, MDAC presented JCMPO with

its methodology, requirements and approach being utilized in the second-source RFP's.

On August 11, 1978, JCMPO requested that MDAC include the licensing approach in its evaluations and on August 31, 1978, MDAC advised JCMPO of its conclusions regarding the second-source RFP responses and its preliminary evaluation of the licensing approach. Also, in the early part of September, Litton-Canada submitted an unsolicited proposal to MDAC to produce the inertial guidance subsystem under license from Litton. Between September 7-14, 1978, JCMPO reviewed MDAC's evaluation of the technical proposals under the RFP's. On September 15, 1978, in a presentation to JCMPO, MDAC advised that none of the second-source offerors offered as low a risk at minimal cost as the licensing approach and on October 13, 1978, MDAC, with the concurrence of JCMPO, decided no awards would be made under the RFP. By letter of October 16, 1978, MDAC advised the offerors of the above decision and on October 20, 1978, Singer protested the cancellation of the RFP to our Office.

JCMPO, MDAC and Litton all have taken the position that the involvement of JCMPO in these proceedings was not sufficient to invoke the jurisdiction of our Office under the standards enunciated in Optimum Systems, supra, and its progeny.

JCMPO contends that its actions in the instant matter are comparable to the actions of the National Aeronautics and Space Administration (NASA) in Structural Composites Industries, Inc. (SCI), B-184938, October 28, 1975, 75-2 CPD 260, affirmed, 55 Comp. Gen. 1220 (1976), 76-1 CPD 417, wherein we declined to take jurisdiction of the subcontractor protest. In that decision, NASA's prime contractor, Rockwell International, was attempting to procure gas storage pressure tanks for the space shuttle. Rockwell and NASA developed a specification which SCI maintained mandated the selection of another firm as the subcontractor.

Our holding in the decision, based on the above facts, stated as follows:

"* * * NASA denies that it either suggested, approved or directed a sole-source award to

Brunswick or directed that the award not be split. While we recognize that SCI strongly disputes NASA's position with respect to the foregoing matters, we do not believe on the basis of the record that SCI has carried the burden of proof to establish that NASA's involvement or alleged bias justifies our consideration of the protest under the first Optimum Systems standard.

We do not find Structural Composites, Industries Inc., controlling in this case. Moreover, while numerous other cases are cited by JCMPO, Litton and Singer, we do not find any controlling in the present factual situation. We believe JCMPO's involvement was more substantial than merely approving the prime's selection of a subcontractor, the offered equipment or the subcontractor's experience. Flair Manufacturing Corp., B-187870, December 14, 1976, 76-2 CPD 486; Lyco-ZF, B-188037, January 17, 1977, 77-1 CPD 36; Industrial Boiler Co., B-187750, February 25, 1977, 77-1 CPD 142; William M. Bailey Company, Industrial Products Division, B-190682, December 8, 1977, 77-2 CPD 447; and Teledyne Brown Engineering, B-186221, May 21, 1976, 76-1 CPD 336, affirmed, December 15, 1976, 76-2 CPD 489.

Here, MDAC had surveyed the industry concerning possible costs involved, in a second-source competition and then had issued RFPs to numerous prospective contractors and received proposals. While MDAC was in the process of evaluating these responses, JCMPO asked MDAC to evaluate the licensing approach, following discussions between JCMPO, Litton and Litton-Canada which lasted from March 1978 to August 1978. MDAC had not been involved in these meetings.

Therefore, it appears that without encouragement from JCMPO, MDAC would not have considered Litton-Canada to be an acceptable source under a licensing arrangement in view of its relationship to Litton, the second primary source. In fact, Litton must have recognized that MDAC would not have considered a proposal from Litton-Canada without JCMPO's prior approval, since Litton initially approached JCMPO rather than MDAC with the idea of using Litton-Canada under a licensing arrangement. Also, because of JCMPO's discussions with Litton, JCMPO knew that the use of the licensing approach would necessarily limit the number of firms to which Litton would license to only Litton-Canada.

The basis of the protest is that it was unfair to compare Litton-Canada's proposal to the RFP proposals. While the parties and our Office have not found any past decisions directly on point with the instant factual situation, we believe the actions of JCMPO were sufficient to meet the test of Optimum Systems, supra.

However, JCMPO also argues that our Office should not review the merits of the protest because the actions of both MDAC and JCMPO were merely "preprocurement" actions under our decision in Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. In Maremont, our Office held that the conduct of "side by side" tests of American and Belgian machine guns by the U.S. Army was not a procurement such as to require compliance with applicable procurement rules and regulations but was a preprocurement action to determine the Army's minimum needs. JCMPO contends that the MOA is not a Government contract because it did not procure anything and was not entered into by a designated contracting officer, but was merely a "preprocurement" document which establishes the basis for future competitions between Litton and Litton-Canada.

There has been much discussion in the briefs submitted to our Office as to whether this factual situation was comprised of two separate and distinct acquisition approaches, licensing and second-source competition, or was a single procurement action to determine an alternate contractor for the inertial guidance subsystem. We believe the facts before our Office, when viewed from the standpoint of MDAC, show that MDA was attempting to fulfill the mandate of JCMPO for a second source, when interrupted by the introduction of the possibility of a licensing arrangement by JCMPO.

While JCMPO takes the position that the RFP's and the MOA were merely attempts to define the minimum needs of the program (i.e., the technical approach to be utilized, either a form, fit and function approach or licensing), it appears that JCMPO and MDAC were not determining minimum needs so much as they were comparing alternative proposed methods of meeting those needs. We believe it is appropriate for our Office to review the merits of such a protest.

Finally, JCMPO has challenged the timeliness of Singer's protest under our Bid Protest Procedures by arguing that Singer knew or should have known that licensing was being considered as an alternative to the second-source competition more than 10 working days prior to the filing of its protest with our Office on October 20, 1978. JCMPO cites Brandon Applied Systems, Inc., 57 Comp. Gen. 140 (1977), 77-2 CPD 486, as authority for the proposition that a protest should be filed if the protester's interests are being directly threatened under a then-relevant factual scheme. JCMPO states that Singer had knowledge that the licensing approach was being explored by JCMPO as early as June 2, 1978, when an interview with the head of JCMPO was published in an industry publication and certainly no later than July 28 or July 29, 1978. On July 28, 1978, a congressional source from Singer's State wrote to JCMPO inquiring as to consideration being given to licensing. On July 29, 1978, the head of JCMPO visited Singer's facilities and was shown charts by Singer comparing licensing with Litton-Canada and other acquisition approaches. Therefore, JCMPO concludes that Singer

knew of the possibility of the utilization of the licensing approach to Singer's detriment by July 29, 1978, and should have protested within 10 working days thereafter.

However, JCMPO admits, and the record reflects, that a decision to cancel the RFP's and choose the licensing approach was not made until October 13, 1978, with the offerors being notified of the decision by letter of October 16, 1978. In a letter of September 18, 1978, JCMPO advised a congressional source that JCMPO was considering both alternatives but that "no decision will be made until full consideration is given to all possibilities."

Since no decision had been made prior to October 13, 1978, we believe a protest filed by Singer prior to that time would have been premature under our Procedures, since no action had been taken adverse to Singer. Accountor Systems USA, Ltd., B-192337, August 18, 1978, 78-2 CPD 131; Clifford Industries, Inc., B-191075, February 8, 1978, 78-1 CPD 107; and Imperial Products Company, Incorporated, B-188297, May 12, 1977, 77-1 CPD 340. Accordingly, we find the protest of Singer to be timely. Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329.

For the foregoing reasons, we will proceed to consider the protest on the merits, in accordance with our Bid Protest Procedures, upon receipt of a report responsive to the protest from JCMPO.

R. F. K. 114
Deputy Comptroller General
of the United States