

DECISION



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

10,383

FILE: B-193270

DATE: June 6, 1979

MATTER OF: Singer Company, Inc., Kearfott Division

[Protest of RFP Cancellation] DL600633
DIGEST:

1. Contrary to allegations of protester, record reflects that competitive range was established and that negotiations were conducted with offerors. Moreover, in view of establishment of competitive range only 3 days prior to request for cancellation of RFP, receipt of best and final offers at that time would have been useless act.
2. Whether proposal based on licensing arrangement, submitted after date for receipt of initial proposals under ongoing RFP, was solicited or unsolicited is immaterial, because procurement activity is entitled to receive information concerning procurement at any time and utilize that information to assess or reassess its procurement needs.
3. Review of sole-source award by GAO is not confined to specific reasons advanced by contracting activity at time of award, but is to determine if contracting actions comport with statutes and regulations in light of totality of circumstances as they existed at time of award.
4. While protester argues that it was not permitted to compete on equal basis with sole-source awardee, there was no method whereby any firm could compete because licensing arrangement offered by awardee has been determined to be

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Government's need and it was only available to awardee. Determination to award sole-source, in view of lower technical risk and schedule requirements, was justified.

5. Where only one firm can supply system deemed necessary, there is no violation of "Leader Company Procurement" regulations (DAR § 4-701).
6. In view of conclusion that cancellation of RFP and award of sole-source contract was proper, GAO does not find arbitrary or capricious action toward protester-claimant to support claim for proposal preparation costs.

Singer Company, Inc., Kearfott Division (Singer), has protested the award of a subcontract by McDonnell Douglas Astronautics Company (MDAC) to Litton Systems Canada Limited (Litton-Canada) as the second source for the Cruise Missile inertial guidance subsystem.

DLG 00631
DLG 01731
In a previous decision of our Office (Singer Company, Inc., Kearfott Division, 58 Comp. Gen. 218 (1979), 79-1 CPD 26), we found the protest to be timely filed and accepted jurisdiction under the standards enunciated in Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975), 75-1 CPD 166. This is a decision on the merits of the protest following development of the matter and a conference with all the parties.

MDAC holds a prime contract with the Department of Defense (DOD) 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. Litton Industries, Inc., Guidance and Control Systems Division, Woodland, California (Litton), is MDAC's subcontractor for design and production of the inertial guidance subsystem. *DLG 01730*

DLG 00632

On January 14, 1977, DOD established the Joint Cruise Missile Project Office (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.

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.

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-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. 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.

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.

Singer alleges that it was unfair to compare the proposal of Litton to those received under MDAC's RFP and advances numerous arguments to support this contention. Singer contends that there were procedural shortcomings in the MDAC RFP and the reasons given by JCMPO to justify the cancellation of the MDAC RFP and the sole-source award to Litton-Canada are invalid.

Initially, Singer argues that no competitive range was established under the RFP, no negotiations were conducted and there was no common cutoff date for best and final offers.

We believe these three contentions must be viewed in the light of the ultimate outcome of the RFP, namely, the cancellation, which effectively rendered some actions which normally occur in a procurement moot or unnecessary.

However, it does appear that certain firms competing under the MDAC RFP were eliminated from further consideration on October 13, 1978, and were so advised by MDAC, leaving only Singer and two other firms in the competition.

Also, the record reflects that MDAC did discuss Singer's proposal with Singer during May, June and July 1978. Further, since the competitive range was established only 3 days prior to the cancellation of the RFP, it appears that a request for best and final offers under the RFP at that time would have been a useless act.

The protester's
Singer's major contention in its protest is that it was denied the opportunity to compete on an equal basis with Litton-Canada and that it was improper to compare the two approaches (~~licensing versus form, fit and function~~) in making the determination to cancel the RFP and award sole source to Litton-Canada.

Since Litton-Canada's proposal was not submitted until 4 months after the closing date for receipt of proposals under the MDAC RFP, Singer contends the proposal was late and should not have been considered under Defense Acquisition Regulation (DAR) § 3-506 (1976 ed.). JCMPO and Litton argue that as the Litton-Canada proposal was unsolicited, the time constraints of the RFP do not apply to the submission of the proposal. Whether the Litton-Canada proposal was solicited or unsolicited is immaterial. In our view, notwithstanding late proposal provisions, a procurement activity is entitled to receive information concerning a procurement at any time and use that information to assess or reassess its procurement needs.

Therefore, the basic question presented by the protest is whether the ongoing competition based solely on form, fit and function proposals was properly canceled in favor of a sole-source contract based on a licensing arrangement.

At the time the RFP was canceled, MDAC advised the offerors that based on total performance and cost, the proposals submitted were not sufficiently competitive to justify an award. In justifying the sole-source award to Litton-Canada, the Director of the JCMPO stated that the Litton-Canada proposal offered the lowest cost and most expeditious scheduling of all the proposals submitted.

Singer argues that these reasons were insufficient to cancel the RFP and make a sole source-award because Singer and the other two offerors in the competitive range had never competed on an equal basis with Litton and, therefore, it was improper to compare the proposals. The major differences in the terms under which the proposals were reviewed were that the Litton-Canada proposal was based on (1) licensing, (2) an accelerated delivery schedule, (3) utilizing Government-owned data not available to Singer, (4) a Capital Investment Incentive Clause, (5) a guaranteed minimum order of 4,000 units, and (6) firm prices, whereas the RFP proposals were on a not-to-exceed price basis.

In addition to the reasons noted above, JCMPO has now advanced other reasons which it contends justify the selection and which our Office should consider under the holding in Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329. Tosco contains the following statement:

"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."

While Singer attempts to distinguish Tosco on its facts, we hold that the above standard applies to any sole-source award and, therefore, will consider the additional bases now stated by JCMPO. Moreover, in view of the relationship between technical risk and delivery requirements, as discussed below, we are not certain technical risk constitutes an additional basis not previously considered.

JCMPO states that only through the licensing approach can the goal of commonality for the subsystems be obtained. As noted above, dual sources for the major subsystems of the cruise missile is one of the policies to be followed by JCMPO. In the memorandum of January 14, 1977, which established the JCMPO, the Deputy Secretary of Defense noted:

"In conducting the above tasks, the JCMPO is to maximize subsystem/component commonality and quantity buy, to utilize fully joint test and evaluation, to encourage subsystem/second-source competitive procurement, and to otherwise derive maximum benefit from the joint service management of several separable cruise missile programs."

Singer points to a statement by JCMPO, made in October 1978, that "Common should not be read as meaning exactly the same." Therefore, as commonality does not

require that the second source produce the identical item the other source is supplying, Singer argues it was improper to award the sole-source contract based on the fact that the design is identical.

While it is true that commonality does not require that an identical item be produced by the second source, it is permissible and within the procuring activity's discretion as to which of two technical approaches it believes will better fulfill the Government's needs.

Here, JCMPO and MDAC found that the lower technical risk presented by the licensing approach would assure meeting the schedule requirements of the program. JCMPO states that it requires the second source to have a capacity of 40 units per month by May 1982. While this constitutes an acceleration over the initial timeframe required in the MDAC RFP of January 1984, the program production schedules furnished our Office show that JCMPO has always had a need for 40 units per month. While Singer argues that it was not permitted to compete on an equal basis, which is true, there was no method whereby any other firm could offer the identical guidance system because of the limited data rights available to the Government. While competition could have been equalized in most of the areas which Singer noted, the licensing arrangement was only available to Litton-Canada and, therefore, it was the only firm which could supply what is now considered necessary to meet the Government's need.

Singer contends that it could meet the 1982 delivery schedule required by JCMPO. JCMPO states that Singer's proposed delivery schedules in response to the MDAC RFP were highly optimistic, especially in view of the fact that the system which MDAC rated the highest of those proposed was the Singer reference measuring unit integrated with the Lear Siegler computer. This combination would require additional time for testing and interfacing of the two units.

MDAC, in its final evaluation of the RFP proposals and Litton-Canada proposal, found that

Litton-Canada offered the lowest risk. JCMPO concurred in this finding.

Therefore, while the form, fit and function approach, as embodied in the MDAC RFP, appeared to satisfy the Government's needs at the time the RFP was issued, the complexion of the procurement changed when the possibility of licensing was presented. The lower technical risk, which would better insure delivery within the Government's 1982 schedule and allow competition between Litton and the second source for the production quantities at an earlier date, would justify the sole-source award to Litton-Canada.

the subsidiary.
We have recognized that noncompetitive awards may be made where the minimum needs of the Government can be satisfied only by one firm which could be reasonably expected to produce the required item without undue technical risk within the required timeframe. Hughes Aircraft Company, 53 Comp. Gen. 670 (1974), 74-1 CPD 137.

We believe the above test has been met in the present case. While Singer contends it is improper to compare the delivery schedules of Litton-Canada and Singer since they were not submitted on the same basis, such a comparison is not required. A procuring activity, taking into consideration technical risk, can judge the realism of a proposed delivery schedule and the fact that a prospective contractor claims to be able to comply with the requirement does not relieve the agency of that judgment. See Hughes, supra.

Accordingly, since there was nothing improper in the selection of the licensing approach, no purpose would have been served by amending the MDAC RFP and requesting best and final offers. The cancellation of a solicitation is proper where the specifications no longer accurately reflect the needs. See Praxis Assurance Venture, B-190200, March 15, 1978, 78-1 CPD 203, and cases cited therein.

Singer also contends that the sole-source award to Litton-Canada violates the provisions of DAR section 4, part 7 (1976 ed.), "Leader Company Procurement," pertinent portions of which read as follows:

"4-701 General. Leader company procurement is an extraordinary procurement technique under which the developer or sole producer of an item or system (the leader company) furnishes manufacturing assistance and know-how or otherwise enables a follower company to become a source of supply for the item or system. This technique is used to accomplish one or more of the following objectives:

(i) shortening the time for delivery;

* * * * *

(iv) achieving economy in production;

(v) assuring uniformity and reliability in equipment performance, compatibility or standardization of components, and interchangeability of parts;

(vi) eliminating problems in use of proprietary data not amenable to other more satisfactory solutions;
or

(vii) effecting transition from development to production and to subsequent competitive procurement of end items or of major components.

"4-702 Limitations on Use. Leader company procurement is to be used only when all of the following circumstances are present:

(i) the leader company possesses the necessary production know-how and is able to furnish the requisite assistance to the follower;

- (ii) no source of supply (other than a leader company) would be able to meet the Government's requirements without the assistance of a leader company;
- (iii) the assistance required of the leader company is limited to that which is essential to enable the follower company to produce the items; and
- (iv) the Government reserves the right to approve contracts between the leader and follower companies."

Singer alleges that the use by JCMPO and MDAC of the leader-follower procurement violates DAR § 4-702(ii) since there are other sources of supply which can furnish a suitable guidance system. In view of the determination to procure the identical system, there is no other source of supply other than Litton or its licensee (because of the limited data rights) that would be able to meet the Government's requirements. Therefore, we find no violation of the regulation.

Singer states that there will be no real price competition between Litton and Litton-Canada since both are part of the same corporate entity and that the Government would assure true competition by having a completely separate firm compete with Litton for the production requirements.

JCMPO advises that it has carefully considered the ramifications from a price standpoint of having the two firms compete against each other and believes that certain provisions in the MOA and the various antitrust statutes afford protection against either firm utilizing anticompetitive practices.

While Singer questions that the antitrust statutes would apply to the present situation, it recognizes that antitrust matters are not for our consideration.

From the record, it appears that JCMPO is satisfied that there will be adequate competition between Litton and Litton-Canada. That such condition will not prevail is purely speculative on Singer's part. In the circumstances, we find no legal basis for an objection to the arrangement set up by JCMPO to provide competition between Litton and Litton-Canada.

Singer also asserts a claim for proposal preparation costs. The standard for determining whether to allow recovery for bid or proposal preparation costs is whether the procurement activity's actions were arbitrary or capricious toward the offeror-claimant. The George Sollitt Construction Company, B-190743, September 25, 1978, 78-2 CPD 224. In view of the above, we do not find that JCMPO or MDAC acted arbitrarily or capriciously toward Singer. *The contracting*

agencies did not

The protest and claim ^{were} ~~are~~ denied.

R. F. Keller

Deputy Comptroller General
of the United States