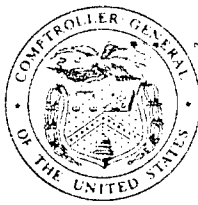


DECISION



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

FILE: B-196170

DATE: April 8, 1980

MATTER OF: T M Systems, Inc.

DIGEST:

1. Where record indicates critical supply shortage of urgently required item, agency's decision to negotiate sole-source purchase from only manufacturer that could qualify for waiver of first article testing so as to meet required delivery schedule was justified.
2. Contracting officer's determination that price negotiated under sole-source contract was reasonable will not be disturbed unless fraud or bad faith is shown.

T M Systems, Inc. (TM) ^{Against} protests the procurement procedures employed by the Navy Ships Parts Control Center (Navy), Mechanicsburg, Pennsylvania, in noncompetitively awarding delivery order No. K001 for a quantity of frequency converters to Data Products New England, Inc. (DNE), under Basic Ordering Agreement (BOA) No. N00104-77-A-0027. TM contends that it is a capable source for these items and, therefore, should have been solicited. TM further alleges that the item unit price which was definitized by the Navy and DNE subsequent to the placement of the delivery order was excessive. For the reasons that follow, we deny the protest.

The Navy advises that the award constituted an interim buy on an urgency basis from the only source that was able to qualify for waiver of first article testing, a process which reportedly would otherwise have delayed delivery of the needed items for an unacceptable length of time. The history of the sole-source award to DNE reveals that in July, 1979, the item, required to support critical ship alteration programs, was

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declared to be in a "stock out position," with numerous urgent back orders remaining unfilled. As a result, the Navy decided to procure a quantity of frequency converters as quickly as possible and determined that the most expeditious manner of procurement would be a sole-source award to DNE under the BOA. Accordingly, on July 5, 1979, the contracting officer made a determination and findings to negotiate an individual contract with DNE since it was "the only manufacturer, having First Article waived and [capable of furnishing] the special support equipment in the time required." Approval to award a sole-source contract to DNE was thereupon granted by the agency's Contract Review Board.

The delivery order was awarded to DNE on August 11, 1979 for 54 frequency converters, and while initially unpriced, contained estimated unit and total prices which fixed the limit on the Government's maximum price liability. The unit price was subsequently definitized at \$3125.00 each. The Navy explains that DNE had these items in stock and thus was able to make delivery by September 14, 1979, less than the 60 days originally anticipated. A competitive solicitation for an additional quantity of 31 of these items was issued to TM and DNE in October 1979.

Defense Acquisition Regulation (DAR) § 3-410.2(a) (1) and (2) (1976 ed.) describes a BOA as an agreement which sets forth the negotiated contract clauses which shall be applicable to future procurements entered into between a procuring agency and a contractor, as well as a description of the supplies or services to be furnished when ordered and a method of determining the prices to be paid. In this regard, a BOA itself is not a contract; it does not provide or imply that the Government agrees to place future orders or contracts with the BOA contractor. Also, the issuance of orders under a BOA is restricted as follows:

"(2) Supplies or services may be ordered under a basic ordering agreement only under the following circumstances:

"(i) if it is determined at the time the order is placed that it is impracticable to obtain competition by either formal advertising or negotiation for such supplies or services; * * *." DAR § 3-410.2(c).

In short, the BOA cannot be used in any way to restrict competition. See DAR § 3-410.2(a)(1) and (c)(1). Consequently, placement of the delivery order to DNE under the BOA was proper only if the circumstances present justified a sole-source procurement. See, generally, Rotair Industries; D. Moody & Co., Inc., 58 Comp. Gen. 149 (1978), 78-2 CPD 410.

The Navy contends that DNE was the only source with which it could have negotiated, as the circumstances dictated expeditious delivery and as DNE was the only manufacturer it knew which qualified for waiver of the first article test requirements. The Navy believes that a contract with a firm other than DNE would have required first article testing which would have consumed approximately 240 additional days. TM does not dispute that it did not qualify for first article waiver nor does it allege that any other firm could have so qualified. Our Office has recognized that time of delivery can assume controlling importance in urgent procurement situations, and we have not objected to a sole-source award to the only offeror qualifying for waiver of first article testing when such a waiver is essential to the fulfillment of required delivery schedules. Modular Devices, Inc., B-182288, August 20, 1975, 75-2 CPD 119; Piasecki Aircraft Corporation, B-181913, June 27, 1975, 75-1 CPD 391.

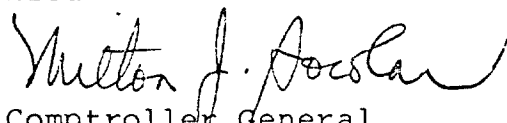
TM argues, however, that the delivery order placed with DNE was assigned a priority rating of "DO" under the Department of Commerce's Defense Priority System (DPS), 32A C.F.R. Part 651 (1979), which TM considers a "low priority" tending to cast doubt on the urgency of the procurement. However, as the Navy correctly points out, we see no inconsistency between a DPS rating of "DO" and the propriety of a sole-source procurement

under the stated circumstances. Stated somewhat differently, a justifiable sole-source procurement does not necessarily require that the contract awarded be assigned the highest priority under the DPS (a "DX" rating). The record does not provide any basis to otherwise question the stated urgency of the procurement.

TM also argues that it is skeptical that DNE had these items in stock and alleges that DNE diverted these items from other Navy contracts. TM argues alternatively that the Navy should have issued a "change order" to an unspecified contract "directing [DNE] to ship a total of 54 frequency converters to satisfy this urgent requirement." The Navy responds by stating that all deliveries under prior contracts were completed on December 21, 1978, and that the Navy has no current contract with the firm. Under the circumstances, we need not address these issues since TM has not met its burden of affirmatively proving its assertions. Telectro-Mek, Inc., B-185892, July 26, 1976, 76-2 CPD 81.

With respect to the reasonableness of the negotiated definitized unit price of \$3,125.00, we note that TM itself in a previous competitive procurement unsuccessfully bid \$3,085.00 for the item (112 units in 1977). While in that particular procurement DNE substantially reduced its unit price to \$1,980.00, we cannot say that this fact alone demonstrates the unreasonableness of the current contract price. In this regard, the Navy states that the price negotiated was supported by the results of a Defense Contract Audit Agency report, a price analysis, and the submission of actual costs incurred. In any event, contracting officers have broad discretion in determining the reasonableness of prices submitted and our Office will object to a contracting officer's finding only upon a showing of bad faith or fraud, which has not been made here. Reza Seyyedini Art and Film Production, B-191470, August 21, 1978, 78-2 CPD 138.

The protest is denied.


For the Comptroller General
of the United States