13614 PL-I

DECISION

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

[Protest of Army Contract Award Involving Sole Source Procurement

FILE: B-194838.2 DATE: May 1, 1980

MATTER OF: Security Assistance Forces & Equipment International Inc. - Reconsideration

DIGEST:

Prior GAO decision is affirmed where arguments made in protester's request for reconsideration present no evidence demonstrating any error of fact or law and no arguments not previously considered.

Security Assistance Forces & Equipment International Inc. (Safe) requests reconsideration of our decision in Security Assistance Forces & Equipment International Inc., B-194838, February 6, 1980, 80-1 CPD 95, denying its protest concerning request for proposal (RFP) No. DAJA37-79-R-0152 issued by the United States Army Procurement Agency, Europe.

In that decision, Safe challenged the contracting officer's determination that its unsolicited proposal on a sole-source procurement for the repair of alarm systems was unacceptable because there was no evidence that Safe could furnish the necessary spare parts. Safe contended that its word that it would furnish the spare parts should have been good enough. We found that since the record indicated that the Army had entered into discussions with Safe notwithstanding the fact that the procurement had been solicited on a sole-source basis, the real issue in the protest was whether the Army's determination that Safe's proposal was unacceptable was reasonable. From our review of the record, we concluded that the company was unable to convince the Army that it could provide spare parts and, therefore, the Army properly rejected the company's proposal. In this regard, we noted that at the time of award the contracting officer had no evidence from Safe that it could obtain spare parts from anyone other than the eventual (Franz Garny) awardee which had refused to supply other companies with such spare parts.

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Safe asserts that the contracting officer's determination was unreasonable for the following reasons:

> 1. The fact that the contracting officer actually negotiated with Safe is de facto evidence that the sole-source determination was erroneous and that the contracting officer was aware of the error. Consequently, the contracting officer should have at that point resolicited on a competitive basis.
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> 2. The contracting officer acknowledged that he was aware that the awardee, Franz, Garny GmbH & Co. (Franz Garny), was violating United States restraint of trade laws. Therefore, there was no need for the contracting officer to require further evidence from Safe that it could provide spare parts since he knew Safe could obtain the parts pursuant to the requirements of these laws.
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> 3. Safe was not charging a possible violation of restraint of trade laws as our decision indicates. Rather, Safe was requesting our opinion as to whether the contracting officer should contract with a company that he knows is violating United States law. In this regard, Safe alleges that the facts show that the contracting officer was aware that Franz Garny was in violation of United States law.

In addition, Safe calls our attention to the Army's representation to us that it would make a determined attempt to secure competition on the follow-on requirements for alarm repair services. According to Safe, the Army has given only a vague reply to its recent request that it be solicited for the follow-on requirement. As a consequence, Safe believes that the Army has exercised its option to extend services and requests our opinion whether this violates the spirit of the Army's representation to us.

The foregoing contentions are without merit.

With regard to the first contention, rather than showing that the sole-source determination was erroneous, the record shows that the Army's decision to hold discussions with Safe was made in order to preclude a possible protest by the company even though Safe's unsolicited proposal was deemed to be unacceptable. The Board of Award recommended that the contracting officer contact Safe and inform Safe that its proposal was unacceptable essentially because of the company's failure to supply a repair parts and price list. If the contracting officer obtained assurance that Safe would comply with this requirement of the RFP, the Board of Award further recommended that Safe furnish a letter from Franz Garny to the effect that the latter would supply Safe with spare parts. The Board believed such a letter was necessary because it appeared that only Franz Garny had access to the supply of spare parts from the manufacturer of the alarm systems. Since Safe was unable to provide the necessary assurance, the Army properly proceeded with the sole-source award.

The basis for Safe's second contention, that the contracting officer was aware that Franz Garny had violated United States restraint of trade laws, is the contracting officer's May 3, 1979, letter informing Safe that an award had been made to Franz Garny. In that letter the contracting officer stated:

> "(i) Application of the Robinson-Patman Act (15 U.S.C. 13c) or otherwise known as the Robinson-Patman Price Discrimination Act (15 U.S.C. Sections 13, 13a, and 21a) and/or Magnusson-Moss Act, also known as the Magnusson-Moss Warranty-Federal Trade Commission Improvement Act (15 U.S.C. Sections 45, 46, 49, 50, 52, 56, 57a, 57b, 57c, and 2301-2312) are statutes whose primary purpose is to protect small merchants from discriminatory practices of manufacturers or suppliers from favoring large purchasers. Enforcement of this type of statute is under jurisdiction of the United States Federal Trade Commission, and any complaint pertaining to a violation of this Act should be referred to them."

We do not believe that the above statement in any way shows that the contracting officer knew Franz Garny violated restraint of trade laws. At most, it merely shows an acquaintance by the contracting officer with the contents of these laws. Moreover, it was only after award that Safe demonstrated that the manufacturer of the alarm systems was willing to directly provide it with parts. Even then the Army made no reference to any violations of United States law by Franz Garny. Instead, the Army pointed out that while the manufacturer and Franz Garny have differences of opinion regarding their respective rights under a Dealers Agreement they entered into, neither our Office nor the Army was the proper forum to settle differences between third parties arising out of their agreements. In any event, it should be noted that since Franz Garny apparently is a foreign firm, it would not be subject to laws of the United States.

Since there is no indication in the record that the contracting officer knew of any violation of United States law by Franz Garny, we see no point in responding to Safe's third point, its request for our opinion whether the contracting officer should contract with a company that he knows is violating United States law.

With respect to Safe's request to the Army that it be solicited for the follow-on requirement, we do not think that the company has shown that the Army intends to exercise its option to extend Franz Garny's contract. In any event, our prior decision did not recommend that the Army not renew Franz Garny's contract. Rather, we merely noted that because Safe now had the capability of obtaining spare parts from the alarm system manufacturer the Army informed us that it would make a determined effort to secure competition on the follow-on requirement for repair services.

Our decision of February 6, 1980, is affirmed.

Milton J. Socolar

For the Comptroller General
of the United States