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DECISION



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

[Protest of Sole-Source Contract Award]

FILE: B-200947

DATE: April 22, 1981

MATTER OF: Electronic Systems U.S.A., Inc.

DIGEST:

1. Apparent nonproprietary unsolicited proposal which offers installation and implementation of system that is available from another source is unacceptable basis for sole-source award.
2. Where agency made no effort to determine existence of other sources, fact that incumbent contractor's familiarity with agency's present system will facilitate contract performance and future maintenance and possibility that change of contractor will require additional time and expense do not necessarily constitute adequate legal justification for sole-source procurement.

Electronic Systems U.S.A., Inc. (ESUSA), *[*protests the award of a sole-source contract by the Federal Communications Commission *]* (FCC) to Honeywell Corporation for the fabrication and installation of phase protection circuitry and an energy management system in the amount of \$20,339 for the FCC Laboratory in Laurel, Maryland.

On July 2, 1980, *[*the Honeywell Corporation, *]* which has maintained the laboratory physical plant for 2 years, *[*submitted to the FCC an unsolicited proposal to add phase protection to the existing compressors for phase differential. *]* On September 15, *[*pursuant to the joint efforts of FCC and Honeywell personnel, Honeywell submitted to the FCC an additional proposal for the installation and implementation of the energy management system *]* to alleviate the numerous incidents of power failure, which have resulted in the loss of extensive electrical equipment and decreased operational efficiency of the plant.

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On September 25, [the FCC] mailed to the Commerce Business Daily (CBD) an announcement, for "informational purposes only," of its sole-source negotiations with Honeywell, and on September 26 it [awarded the contract.]

[Upon noticing the synopsis of the sole-source procurement in the October 6 CBD publication, ESUSA informed the FCC by telephone of its specialization in the installation and maintenance of the Honeywell system and requested proposal documents so that it could submit a proposal.] ESUSA confirmed this conversation and request by letter dated October 8. In response, [the FCC contracting officer informed ESUSA by letter of October 15 that the contract had been awarded to Honeywell.] ESUSA protests the award of this contract on a sole-source basis prior to public notice which deprived ESUSA of the opportunity to compete with Honeywell.]

Under the provisions of Federal Procurement Regulations (FPR) § 1-3.101(d) (1964 ed. amend. 194), [procurements must be conducted on a competitive basis to the maximum practical extent.] Procurement on a noncompetitive basis is authorized when the legitimate needs of the Government so require, e.g., when the minimum needs of the procuring agency can be met only by items or services which are unique; when time is of the essence and only one known source can meet the agency's need within the required timeframe; when it is necessary to insure compatibility between the procured and the existing equipment; or when an award to other than the proposed sole-source contractor would result in unacceptable technical risks. Kent Watkins & Associates, Inc., B-191078, May 17, 1978, 78-1 CPD 377; Northwest Marine Technology, Inc., B-191511, July 13, 1978, 78-2 CPD 33. However, because of the requirement for maximum practical competition, [the agency's decision to procure on a sole-source basis is subject to close scrutiny and, therefore, must be supported by adequate legal justification.] Kent Watkins and Associates, Inc., supra. [A decision to procure on a sole-source basis will not be disturbed by this Office when the agency's written Findings and Determinations of the need to negotiate on a noncompetitive basis is supported by the record.] Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402.

In its Findings and Determinations in support of the decision to procure these systems on a sole-source basis, the FCC states that the procurement "has its origin in an unsolicited proposal" and that "the intellectual property of the proposal is proprietary-original in concept, unique to its proposer," thus, precluding formal advertising of the procurement of the system.)

With respect to a proprietary unsolicited proposal, FPR § 1-4.906(a) (1964 ed. amend. 180) requires the identification of proprietary data as provided by section 1-4.913. Section 1-4.913(a) provides that [if the offeror wishes to impose a nondisclosure restriction on its unsolicited proposal, the title page is to be so marked and each page of the proposal which contains proprietary or restricted material is to be marked also.]

Further, [the regulations require that an unsolicited proposal contain sufficient technical and cost information so as to permit a meaningful and comprehensive evaluation,] FPR § 1-4.909(b), and that a favorable comprehensive evaluation is not, in itself, sufficient for negotiating on a noncompetitive basis if it is not otherwise sufficiently unique to justify acceptance, FPR § 1-4.910.

[The Honeywell proposal,] as submitted to this Office by the FCC, [contains little technical information and bears no proprietary identification or marking.] Furthermore, the Honeywell energy management control systems have apparently been made available to other contractors since they are installed and maintained by ESUSA. Thus, [we see no basis for concluding that Honeywell's proposal for the installation and implementation of the system was unique or proprietary.] In such an instance, 41 C.F.R. § 1-4.910 (1980) provides that:

"When a document qualifies as an unsolicited proposal but the substance (1) is available to the Government without restriction from another

source * * * the unsolicited proposal shall not be acceptable. When procurement is intended and competition is feasible, the proposal shall be returned to the offeror together with the reasons for the return."

[In the instant case, the record doesn't support the conclusion that competitive procurement was precluded.]

In further justification of its decision, [the FCC states that Honeywell is best qualified to install the system because it is well acquainted with the electrical features and design of the existing equipment and, therefore, would require less time and expense to install the system. In addition, the agency states that it is reasonable to have one contractor maintain sole responsibility for the function of the system.]

However, [these statements do not constitute adequate justification for conducting a noncompetitive procurement.] A company's prior experience with the procuring agency which may facilitate the company's performance of the required services and enable it to better anticipate problems in the implementation of the system is not a legally adequate justification to support a sole-source procurement. Furthermore, [the fact that a particular contractor may be able to perform the services with greater ease than any other contractor does not justify a noncompetitive procurement to the exclusion of others.] Kent Watkins and Associates, Inc., supra; Systems Group Associates, Inc., B-195392, January 17, 1980, 80-1 CPD 56.

[Neither does the possibility of incurring additional costs by employing the services of another contractor constitute adequate justification, for a sole-source award may not be justified on the basis of costs to be incurred as a result of a change in contractors.] Instead, this cost factor may be considered in the evaluation of proposals submitted by competitors of the incumbent. Systems Group Associates, Inc., supra.

The agency's indication that its decision to sole-source this contract was based in part on the urgency of the need for the system is, likewise, an unacceptable justification in the absence of a definite required timeframe and evidence that there was only one known source. See Las Vegas Communications, Inc., B-195966, July 22, 1980, 80-2 CPD 57. There is, in fact, no indication that the agency made any effort to determine the existence of other commercial sources or the feasibility of a competitive procurement prior to conducting the procurement as required by FPR § 1-3.101(d), supra.

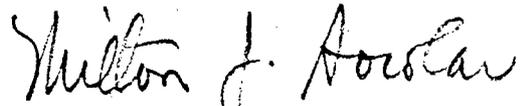
Thus, we conclude that this sole-source procurement was improper for failure to comply with the applicable procurement regulations. Therefore, the protest is sustained.)

Since the objectionable second phase of this procurement, the installation and implementation of the energy management system, has not been substantially performed, we recommend that the FCC assess the feasibility of conducting a competitive procurement for this work. If this assessment should indicate that a competitive procurement is feasible, we recommend that the requirement be resolicited on that basis. If a proposal is received which is more advantageous to the Government than that of Honeywell, the contract with Honeywell should be terminated for the convenience of the Government and the system installed by the new contractor.)

By letter of today, we are advising the Chairman of the Federal Communications Commission of our recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and

Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.

A handwritten signature in cursive script, reading "Milton J. Aorolar".

Acting Comptroller General
of the United States