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DECISION



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

FILE: B-202879

DATE: October 20, 1981

MATTER OF: Hoffert-Marine, Inc.

DIGEST:

1. Fact that agency enters into basic ordering agreement with firm does not in itself unduly restrict competition, although agency must justify any sole-source orders placed against the basic ordering agreement.
2. Protester's disagreement with agency's judgment that it lacks adequate technical data for a competitive procurement does not meet protester's burden of proving that agency's justification of sole-source award on that basis is unreasonable.

Hoffert-Marine, Inc., protests the Naval Supply Systems Command's noncompetitive award of delivery orders for various replacement pumps, pump parts, and spare parts to Worthington Pump Corporation under basic ordering agreement (BOA) No. N00104-77-A-0024. Hoffert-Marine contends that the Worthington BOA is being used to restrict competition and asks that it be canceled. For the following reasons, we deny the protest.

Background

The Navy and Worthington entered into the BOA in 1977 for ordering certain Naval Fleet replacement equipment including impeller pumps, sleeves, liners, shafts, rotating elements, pump units, rotor assemblies, bearings, and piston rods. The Navy states that before placing an order under the BOA, it reviews whether the Government has adequate technical data available to conduct a competitive procurement which would assure receipt of parts capable of performing the same function as the original Worthington equipment. Where the Navy concludes that adequate technical data is not available, and a proposed order

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under the Worthington BOA is estimated to exceed \$10,000, the Navy synthesizes the requirement in the Commerce Business Daily (CBD).

The Navy reports that in response to several of these CBD announcements, Hoffert-Marine informed the Navy of its belief that it could supply the items. The Navy states that each time Hoffert-Marine requested permission to submit an offer for an item published in the CBD as sole-source to Worthington, the proposed placement of the Worthington BOA order was withheld and Hoffert-Marine granted the opportunity to submit a proposal. In all cases, the Navy determined that the data upon which Hoffert-Marine based its proposal were inadequate and the Hoffert-Marine proposals therefore were rejected and orders were placed with Worthington under the BOA. The Navy has placed over 230 non-competitive sole-source orders with Worthington since the inception of the BOA.

Propriety of the BOA

Hoffert-Marine urges cancellation of the BOA, contending that its existence restricts competition in violation of Defense Acquisition Regulation (DAR) § 3-410.2(c)(1) (1976 ed.), which states, in pertinent part, that:

"Basic ordering agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor shall they be used in any manner to restrict competition."

In support of its contention that the BOA restricts competition and should be canceled, Hoffert-Marine cites our decision in RAM Enterprises, Inc., B-198681, October 14, 1980, 80-2 CPD 274, in which we sustained a protest that the Navy improperly used a BOA to restrict competition.

In RAM Enterprises, supra, we stated the following with regard to using a BOA:

"DAR § 3-410.2 (1976 ed.) describes a BOA as an instrument of understanding between a procuring activity and a contractor which:
(1) applies to future procurements between the two during its term; (2) includes a

description of the supplies to be furnished, the negotiated contract clauses which shall be applicable to future procurements, and a method for determining the prices to be paid; and (3) specifies the circumstances under which an order becomes a binding contract, but it is not itself a contract. While a BOA may be used to expedite procurement, it may not be used in any manner to restrict competition. DAR § 3-410.2(c)(1). Thus, an order under a BOA is proper if a sole-source procurement would have been justified. * * *

We found that the Navy improperly had used a BOA to restrict competition because, among other things, the facts showed that the Navy failed to make a proper sole-source determination prior to the issuance of the protested order under the BOA. See also Rotair Industries; D. Moody & Co., Inc., 58 Comp. Gen. 149 (1978), 78-2 CPD 410.

In the instant case, however, the Navy's course of conduct in issuing orders under the Worthington BOA correctly has been to treat each order as an individual sole-source procurement which requires its own justification each time by an individual sole-source determination. The Navy's treatment of each sole-source BOA order independently is evidenced by the fact that, as previously stated, those orders exceeding \$10,000 in value were synopsisized in the CBD and were withheld pending receipt and consideration of any proposals in response to the CBD announcement. Accordingly, we find nothing objectionable in the Navy's decision to use the BOA which in itself would warrant our recommendation that the BOA between Navy and Worthington be terminated.

Sole-Source Determinations

Hoffert-Marine questions the Navy's sole-source determinations on all of the BOA orders for which it responded to the CBD announcements and submitted proposals which ultimately were rejected. Hoffert-Marine argues that the Navy's basis in each instance for a sole-source order to Worthington -- lack of adequate data for a competitive procurement -- was unfounded. Hoffert-Marine essentially alleges that sufficient data to produce the required pump parts exist in the public domain and are available to Hoffert-Marine. The protester

further suggests that the Navy actually has unlimited rights to the Worthington data and should distribute them to interested firms to generate competition.

Our Office has recognized that noncompetitive awards may be made when data are unavailable for competitive procurement. See Environmental Protection Agency sole-source procurements, 54 Comp. Gen. 58 (1974), 74-2 CPD 59. Where a contracting agency justifies a sole-source procurement on the basis that adequate data are not available to conduct a competitive procurement, the protester has a heavy burden of presenting evidence which shows that the agency's position is arbitrary, capricious or an abuse of discretion. Allen and Vickers, Inc., 54 Comp. Gen. 1100 (1975), 75-1 CPD 399; Pioneer Parachute Co., Inc., B-190798, B-191007, June 13, 1978, 78-1 CPD 431.

In each instance when Hoffert-Marine submitted a proposal based on data which it contended were satisfactory to produce a required pump part, the Navy determined the Hoffert-Marine data were either insufficient or incomplete for competition. Hoffert-Marine disagrees with the Navy's assessments of the sufficiency of the data utilized in its proposals, but has provided no probative evidence that its data are sufficient for a competition which would result in end items that would satisfy the Navy's needs. Indeed, in one instance where Hoffert-Marine uses an example to support its argument that its data obtained in the public domain are sufficient to meet the Navy's needs, the protester concedes that those data include drawings calling for a different diameter dimension than the replacement part required by the Navy.

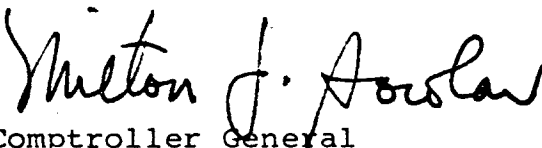
Where a procuring agency's decision that a sole-source purchase is necessary is based on the agency's technical conclusions concerning its needs, our Office will give great weight to those conclusions because we recognize that Government procurement officials, who are familiar with the equipment necessary to fulfill their requirements, are in the best position to conclude that the desired equipment may be obtained from only one source. The burden is on the firm objecting to the sole-source procurement to show that the agency's technical findings and conclusions are arbitrary. Industrial Acoustics Company, Inc., et al., B-194517, February 19, 1980, 80-1 CPD 139. This showing requires the

production of some probative evidence to substantiate the protester's assertions. See Bell & Howell Corporation; Realist Inc., B-193301, February 6, 1979, 79-1 CPD 82. Mere disagreement with the agency's grounds for a sole-source procurement is not sufficient for this Office to find the agency's conclusions unreasonable. EMI Medical Inc.; Picker Corporation, B-195487, February 6, 1980, 80-1 CPD 96. In view thereof, we cannot conclude that Hoffert-Marine has sustained its burden of proving the unreasonableness of the Navy's sole-source justifications.

With regard to Hoffert-Marine's contention that the Navy should generate competition by distributing Worthington data in which the Navy allegedly has unlimited rights, the Navy reports that it did not in the case of Worthington, and generally does not, procure unlimited rights to data for auxiliary equipment, including pumps and pump parts.

Conclusion

We deny the Hoffert-Marine protest because we cannot conclude from the record that either the existence of the Worthington BOA or the Navy's sole-source justifications for orders placed under the BOA based on lack of adequate data were improper. We are concerned, however, that the Navy may be failing to obtain or develop data needed to solicit competition for these requirements. In this regard, there is nothing in the record to show that the Navy has attempted to obtain data from Worthington during the past four years in which over 200 noncompetitive orders have been placed with Worthington. In order to maximize competition, we are suggesting to the Secretary of the Navy that this avenue be explored. See Metal Art, Inc., B-192901, February 9, 1979, 79-1 CPD 91.

for 
Comptroller General
of the United States