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DECISION



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

FILE: B-202875

DATE: December 14, 1981

MATTER OF: H. Koch & Sons

DIGEST:

1. Protest against sole-source procurement, filed prior to closing date for receipt of initial proposals and within reasonable time after publication of intent to negotiate requirement in Commerce Business Daily (when mailing time is taken into account) is timely.
2. Agency is not precluded from making sole-source award once urgent requirement arises which can only be satisfied by one source within the required time frame. Where, however, agency overestimated time in which other sources could begin to supply urgently needed part, sole-source award improperly exceeded scope of justification.

H. Koch & Sons, a division of Gulf & Western Industries, Inc., protests the award of a sole-source contract to Teledyne McCormick Selph Company under request for proposals (RFP) F33657-81-R-0259 issued by the Department of the Air Force. The procurement is for parachute harness and riser release fittings for the F-16 aircraft. The Air Force procured the fittings on a sole-source basis because it found that Teledyne was the only firm that could deliver the fittings in time to meet its urgent needs. H. Koch contends that the Air Force improperly put itself into the sole-source situation and that the Air Force erred in determining the relative lengths of time it would take to procure competitively and on a sole-source basis. We find the protest to have merit.

The riser release fitting is a component of the buckle which secures the F-16 pilot's harness to the ejection seat. It is part of each individual pilot's torso release harness and not a part of the aircraft. For a

number of years the Air Force had been procuring a predecessor fitting for use by F-4 aircraft pilots from H. Koch on a sole-source basis. For the specific purpose of removing itself from this sole-source position with H. Koch, the Air Force in the early 1970's developed, in cooperation with Teledyne, a new fitting which differed in design and construction from H. Koch's fitting. The Government owns the drawings, specifications and data concerning the new fitting.

In 1978 the Air Force made the first production purchase of the new fitting (1500 units) from McDonnell Douglas Corporation. This purchase apparently was made on a sole-source basis. Teledyne actually produced and supplied the fittings purchased from McDonnell Douglas.

The Air Force delayed any further purchase of the part and did not prequalify any potential suppliers other than Teledyne due to ongoing design improvements. In December 1980 and January 1981, however, the Air Force became aware of a critical need for more fittings caused by the increase in the number of F-16 pilots and the activation of additional bases. Any shortfall in the supply of fittings requires the transfer of the fitting from individual torso harnesses, a practice which unacceptably impacts upon F-16 readiness and deployment.

At the time the critical need became evident, Teledyne was the only prequalified producer of the fitting. Additionally, Teledyne at that time had 500 castings for the fittings on hand. Thus, after assessing the amount of time it would take to procure the part competitively as opposed to procuring it sole-source, the Air Force determined that it could obtain the fittings in time to meet its urgent needs only by awarding a noncompetitive contract to Teledyne. Pursuant to the authority to negotiate in cases in which it is impracticable to obtain competition, 10 U.S.C. § 2304(a) (10) (1976), the Air Force negotiated and awarded a contract to Teledyne for the 1729 units, which represent the Air Force's needs through fiscal year 1982.

TIMELINESS

On February 24, 1981, a synopsis stating that the Air Force contemplated negotiations with Teledyne for riser release fittings and listing the RFP number was published in the Commerce Business Daily (CBD). H. Koch filed a protest with the Air Force on March 16, contesting the contemplated negotiations. The Air Force denied this protest on the merits on April 1, and H. Koch filed a protest with our Office on April 9.

The Air Force points out that our Bid Protest Procedures, 4 C.F.R. §§ 21.2(a) and (b)(2) (1981), required H. Koch to file its initial protest with the Air Force within 10 working days of the date upon which the basis of protest was known or should have been known. The Air Force contends that H. Koch knew or should have known the basis of protest on February 24, 1981, the date of publication of the synopsis and, therefore, H. Koch's protest more than 10 working days thereafter was untimely filed.

We find this protest to be timely. The initial protest to the agency was filed well in advance of the initial closing date, Micro-Mil, Inc., B-202703, May 1, 1981, 81-1 CPD 335, and within a reasonable time after the initial CBD publication date, considering the mailing time necessary to receive the CBD, Delphi Industries, Inc., 58 Comp. Gen. 248 (1979), 79-1 CPD 67.

Since H. Koch filed the current protest with our Office within 10 working days after notification of initial adverse agency action (the Air Force's denial of the initial protest), we will consider H. Koch's contentions. 4 C.F.R. § 21.2(a).

PROPRIETY OF PROCURING ON A SOLE-SOURCE BASIS

H. Koch objects to the procurement on a number of grounds. H. Koch contends that the Air Force improperly created the sole-source situation in which it found itself in January 1981. In the protester's view, the Air Force should have taken steps to prequalify any known potential suppliers of the fitting at some time before the requirement became urgent. H. Koch also maintains that the Air Force has not established that the 1729 fittings were urgently needed. Finally, H. Koch argues that the Air Force erred in estimating the amount of time it would take to procure the fittings competitively.

Sole-source procurements are authorized under 10 U.S.C. § 2304(a)(10) and Defense Acquisition Regulation (DAR) § 3-210 (1976 ed.). Because of the requirement for maximum practical competition in the conduct of Government procurements, agency decisions to procure sole-source must be adequately justified and are subject to close scrutiny. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402. Such decisions

will be upheld if there is a reasonable basis for them. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14. In this connection, we note that a sole-source award may be justified if time is of the essence and only one known source can meet the Government's need within the required time frame. Design and Evaluation, Inc., B-193128, June 28, 1979, 79-1 CPD 466. Bearing these principles in mind, we will examine each of H. Koch's three contentions separately.

Failure to Prequalify H. Koch

H. Koch points out that the Air Force knew of H. Koch's ability to produce the fitting and yet took no steps to prequalify the firm in advance of its needs. As noted above, H. Koch provided the predecessor fitting for the F-4 on a sole-source basis prior to the Air Force's development of the new fitting. The Air Force developed the new part specifically to break H. Koch's sole-source position. Although there is some disagreement as to the extent of similarity of the new F-16 fitting and the previous F-4 fitting, the Air Force admits that H. Koch is capable of producing the new fitting. Thus, H. Koch argues that the failure of the Air Force to take any steps whatsoever to prequalify it and to promote competition in the last eight years contravenes the requirement to procure on a competitive basis to the maximum extent possible.

The Air Force responds that it did not prequalify H. Koch or any other potential supplier because it did not intend to procure any fittings until it finalized the design of the part. Since it did not contemplate any procurement of the part until the design was "frozen," the Air Force argues that it was not required to undertake the time and expense of prequalifying suppliers.

Although we agree that an agency need not take steps to prequalify competitors when it does not anticipate procuring an item in its then current design, the circumstances surrounding this procurement give us some cause to question the Air Force's inaction. The reasonableness of the Air Force's belief that it would not need to procure fittings prior to the finalization of the design is somewhat undermined by the fact that it had to make two large purchases (1500 and 1729 units) of the fitting within a three-year period. The Air Force's reason for not prequalifying H. Koch further erodes in light of the admission by the Air Force that the design, when finalized, will incorporate only "minor changes."

Although these observations alone do not compel a conclusion that the Air Force acted improperly, we note that the Air Force, after investing Government time and funds in the development of a new fitting specifically (and apparently solely) to break out of a sole-source mode with H. Koch, has remained in a sole-source situation with Teledyne for eight years merely because it anticipated minor changes in design, and we question whether the Air Force in this instance has taken seriously its obligation to procure on a competitive basis to the maximum extent possible.

Nonetheless, although the Air Force may have overlooked its obligation to promote maximum competition, the action or inaction of the Air Force prior to January 1981 did not preclude it from employing the sole-source exception once doing so became necessary to relieve the critical situation. See 46 Comp. Gen. 651, C55 (1967); R&E Cablevision, B-199592, February 19, 1981, 81-1 CPD 110; Vega Precision Laboratories, Inc., B-191432, June 30, 1978, 78-1 CPD 467.

Urgency

H. Koch points out that we have held that urgency is an unacceptable justification in the absence of a definite required time frame. Electronic Systems U.S.A., Inc., B-200947, April 22, 1981, 81-1 CPD 309. H. Koch contends that the Air Force has not established that it needs the fittings within a definite time frame. In this connection, H. Koch claims that the justification documentation contains internal inconsistencies which make it unclear whether the Air Force requires the fittings in fiscal 1981, 1982, or 1983, and that, therefore, the Air Force has failed to establish urgency with regard to this procurement.

We disagree. Upon examination of the documentation, we find that although the presentation of time frames and requirements may be somewhat confusing, the documentation coherently establishes that the Air Force requires 1729 units spread variously from the second quarter of fiscal 1981 through the fourth quarter of fiscal 1982. H. Koch may have been misled by the inclusion in the justification documentation of fiscal 1983 needs which are not included in the procurement. In any event, we find that the Air Force needs the fittings in accordance with a definite time frame and that the urgency justification is in this case acceptable.

H. Koch further contends that once the Air Force became aware of its urgent need for the fittings, it overestimated the amount of time it would take to procure the parts on a competitive basis. We agree.

The Air Force estimated that it would take 25 weeks to prepare and issue a request for proposals, evaluate proposals, and make an award. This compares with a figure of approximately 10 weeks which it would take to award on a sole-source basis. Both these figures appear to be reasonable.

The Air Force also estimated that first article testing would require four to six weeks. First article testing could be eliminated completely in a sole-source procurement because Teledyne already had been qualified. Although, as noted above, perhaps the Air Force should have prequalified H. Koch also, under the circumstances we cannot object to the use of this first article testing estimate.

The Air Force also estimated that if the awardee had no castings available at the time of award, it would take 50 weeks to obtain castings. It is this estimate to which H. Koch most vehemently objects, asserting that it could obtain castings in 12 weeks or less.

Using these estimates, the Air Force concluded that in a competitive procurement, a total of 32 weeks would elapse before deliveries could begin if the awardee had castings on hand and 78 weeks would elapse if the awardee did not have castings on hand. Additionally, the Air Force knew that Teledyne had 500 castings on hand and apparently was aware that H. Koch had no castings. Thus, the Air Force determined that a competitive procurement would take 78 weeks, a period which was unacceptable in terms of meeting its immediate needs, and decided to procure on a sole-source basis from Teledyne.

We believe that the 50 week estimate for obtaining castings is fundamentally inconsistent with certain other assumptions made by the Air Force in the course of this procurement. Teledyne had only 500 castings in stock. The delivery schedule contained in the RFP as well as in the eventual contract calls for the delivery of 500 fittings within two months after the effective date of the contract and 250 fittings each month thereafter until the total of 1729 is reached. Thus, Teledyne's supply of castings is sufficient for only the first delivery, which was to occur two months after the date of the contract. After this delivery, Teledyne would be

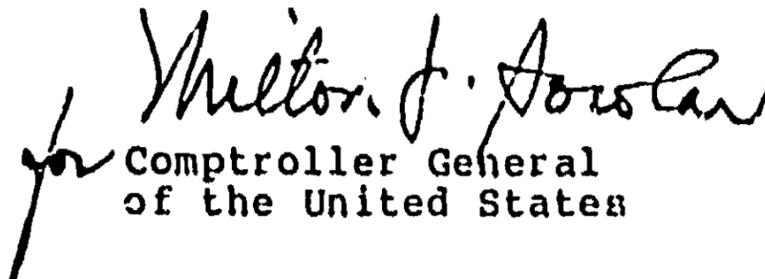
in precisely the same position as H. Koch would have been in that it would have to obtain new castings to meet the delivery schedule. The Air Force has not explained why it estimated it would take nearly 12 months for competitors to obtain an initial stock of castings but believed that Teledyne could obtain new castings within three months. In the absence of any indication whatsoever that Teledyne for some reason has the ability to obtain castings three times more quickly than H. Koch or any other competitor, we conclude that the 50 week estimate was unreasonable. Whatever the time for obtaining castings may be, the Air Force had to consider the time to be similar for the two firms in the absence of evidence to the contrary. Thus, in determining whether and to what extent a sole-source award would be justified the Air Force could recognize an advantage in the time required to obtain castings only to the extent of the 500 castings Teledyne had in stock.

We do not question that in January 1981 the Air Force had to procure sole-source to meet its urgent needs. Given the above analysis, however, we believe that the Air Force was justified in sole-sourcing fewer than the 1729 units it did. Justification documentation indicates a requirement for fittings from a period beginning in the second quarter of fiscal 1981 and extending through fiscal 1983. Under the erroneous Air Force estimate that the first delivery under a competitive source selection would take 78 weeks, or approximately until July 1982, it was reasonable to procure its needs through the end of fiscal year 1982, or 1729 fittings. However, using what appears to be a more reasonable estimate of 12 weeks for obtaining castings, the Air Force should have determined the quantity to be procured noncompetitively on the basis of a 43 week start-to-delivery estimate. This estimate would result in an anticipated first delivery from competitive sources in September 1981. Thus, we conclude that the Air Force apparently was justified in procuring only those fittings it needed through the last quarter of fiscal 1981, or 1105 fittings. The remainder of the requirement could and should have been procured competitively. See Aerospace Research Associates, Inc., B-201953, July 15, 1981, 81-2 CPD 36; Applied Devices Corporation, B-187902, May 24, 1977, 77-1 CPD 362. To approve the purchase of the entire quantity of 1729 fittings would be to sanction the extension of a sole-source award beyond the scope of its justification.

The protest is sustained.

Nonetheless, we do not recommend, as H. Koch requests, that the Air Force reconsider its decision to procure the 1729 fittings from Teledyne, since as a practical matter, partial termination of Teledyne's contract and recompetition for the remainder of the requirement does not appear to be feasible. Given our minimum estimate of 43 weeks for deliveries to commence in a competitive procurement, it would appear that the Air Force could not expect delivery before fiscal 1982 even if it initiated the competitive procurement process immediately. As noted above, the last of the 1729 fittings procured from Teledyne are required in the last quarter of fiscal 1982. Hence, a partial termination of Teledyne's contract would not be in the best interest of the Government. See Cohu, Inc., 57 Comp. Gen. 759 (1978), 78-2 CPD 175. For this reason, we believe that meaningful relief with regard to this particular procurement is impracticable.

We do recommend, however, that the Air Force take immediate steps to insure that it does not find itself in a sole-source situation again in subsequent procurements of the fitting. We note the Air Force's intention to finalize the design of the fitting in the near future and to then procure any further requirements competitively. If finalization for some reason does not appear imminent, the Air Force should take such steps as are necessary to prequalify interested manufacturers such as H. Koch for the production of the fitting in its existing stage of design in order to avoid a third procurement of this requirement on a sole-source basis.


Comptroller General
of the United States