

DECISION



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

FILE: B-205155

DATE: June 2, 1982

MATTER OF: Bird Electronics Corporation

DIGEST:

1. A sole-source procurement is justified where the Government's minimum needs can be satisfied only by one firm which could reasonably be expected to produce the required item without undue technical risk within the required timeframe.
2. It is not improper to exercise a portion of an option at the time of the award of a sole-source contract, merely because competition may become feasible at some future date, so long as the option exercise is properly justified at the time it is made.
3. Exercise of option contained in sole-source contract should be delayed where practicable where competition may become feasible in the interim between the award of the sole-source contract and the need to exercise the option because of the acquisition of a data package as part of the sole-source contract.

Bird Electronics Corporation protests the sole-source award of a contract to Cincinnati Electronics Corporation under solicitation No. DAAK80-81-R-0238 issued by the Department of the Army. We deny the protest.

The contract calls for the furnishing of 5300 AN/PRM-34 radio test sets plus ancillary items and a full set of specifications and drawings for use in future competitive procurements. It contains an option for increased quantity up to 100 percent of the basic quantity. Award was made to Cincinnati on September 29, 1981, at which time the option was partially exercised for an additional 920 test sets.

Bird primarily bases its protest on the assertion that it can supply an equivalent or better test set at a lower cost within the same time as Cincinnati. Thus, Bird alleges that a sole-source procurement from Cincinnati is not justified.

Timeliness

The Army argues that Bird's protest, filed here after contract award, is untimely because it relates to an apparent solicitation impropriety which must be protested prior to the closing date set for receipt of initial proposals, 4 C.F.R. § 21.2(b)(1)(1981). Bird contends that it did not receive a copy of the solicitation until after the July 17 closing date and that the copy it did receive did not contain the cover sheet indicating the closing date or that the solicitation was issued on a sole-source basis. The Army argues that the protest is untimely in any event since Bird obviously knew that the solicitation was sole-source in late June but did not protest until nearly three months later. In this regard, the Army points out that Bird admits it called the contracting office in late June and was told that the solicitation involved a Cincinnati "part" and that Bird could not "get involved." Assuming for purposes of argument that the Army's position concerning Bird's knowledge is correct, we nevertheless are not persuaded that the protest is untimely under the circumstances of the case.

Bird states that it received a copy of the solicitation from the Army in late July, after having telephoned several times to express an interest in participating in the procurement. Bird also states that thereafter it continued to press the Army to consider its test set and in late August presented a prototype unit for testing. The Army proceeded to test the unit and subsequently met with representatives of Bird to discuss the proposed contract. According to Bird, it was advised by Army personnel that a meeting would be held with Cincinnati in mid-September and that Bird would be informed of the status of the matter afterwards. Bird states that it believed fruitful discussions had taken place and that it was never advised of any problem with the timing of its submission.

The Army did not contact Bird again until September 22, at which time it informed Bird that the contract would be awarded to Cincinnati. Bird states that it immediately lodged an oral protest against any such award and that it reiterated its position on at least two subsequent occasions. On October 9, Bird filed its protest with this Office.

In our view, Bird was not required to protest until after it learned on September 22 that award would be made to Cincinnati. Before that time, it appears that Bird reasonably believed its test set was under consideration for award. The Army contends that this was not in fact so and that it did nothing to encourage Bird in this belief. Nevertheless, it did accept Bird's unit for testing, evidently without giving any indication that Bird was not considered a competitor for the contract. Under these circumstances, Bird reasonably could have assumed that it had successfully persuaded the Army to consider its set. Thus, its basis of protest did not arise until September 22, when it learned that the Army intended to proceed with a sole-source award to Cincinnati.

The Army argues that even if timeliness is measured from September 22, Bird's protest is still untimely because it was not filed here until October 9, more than 10 working days later. See 4 C.F.R. § 21.2(b)(2). The Army also denies that Bird ever lodged an oral protest with it and thus asserts that the protest cannot be considered timely under section 21.2(a) of our Procedures. That section provides that if a timely protest is initially filed with a contracting agency, any subsequent protest here will be considered timely if filed within 10 working days of initial adverse agency action.

Bird, however, has produced a copy of a transcript allegedly prepared by an independent shorthand reporter (at Bird's expense) during a meeting between Bird and Army personnel on September 29. In this transcript, Bird's counsel is quoted as protesting contract award to any other firm. The Army disputes the transcript's accuracy. We believe, however, that it constitutes sufficient evidence of a timely oral protest to the agency and that any doubt in this regard should be resolved in the protester's favor. See Applied Devices Corporation, B-199371, February 4, 1981, 81-1 CPD 65. Since Bird's protest to this Office was filed within eight working days after its timely protest to the agency, we will consider it. 4 C.F.R. § 21.2(a).

Sole-Source Award - Background

In 1978, the Army determined that there was an urgent need to improve its communications posture in Europe, and specifically identified a serious problem with FM radio communications due to inadequate testing equipment. As

a result, a search for a commercially available test set which could be easily modified to meet the Army's requirements was undertaken.

Approximately ten manufacturers were contacted with the Army's requirements; Cincinnati was found to have the only test set which could be readily modified to meet them. Consequently, in December 1978, fifty-five prototypes of the Cincinnati test set (AN/PRM-34) were procured for testing on the AN/VRC-12 vehicular radio. After a series of tests, it was determined that with minor modifications the AN/PRM-34 would be viable for use with the AN/VRC-12, as well as with the AN/PRC-77 and AN/PRC-68 radio sets. This would enable radio mechanics to use only one test set for the three primary radios employed in the field.

In September 1980, a sole-source contract was awarded to Cincinnati for 305 test sets containing the required modifications. Although the Army attempted to purchase the necessary specifications and drawings for future competitive procurements at that time, Cincinnati refused to sell. The contract contained an option for 300 additional sets which was exercised in December 1980. The modified sets were tested and found to meet the Army's needs:

In April 1981, the Vice Chief of Staff of the Army directed that emphasis be placed on getting the AN/PRM-34 into the field because the lack of proper testing equipment was contributing to continued deterioration in radio performance. The instant sole-source solicitation was issued in June 1981. The justification for the sole-source restriction was based on the urgent need for the items and the lack of adequate specifications and drawings for a competitive procurement.

As previously stated, after securing a copy of the solicitation from the Army, Bird submitted a prototype test set for evaluation. This set, which was designed around performance specifications contained in the solicitation, was tested by the Army and found to have the potential for offering better performance at lower cost. However, the prototype was an initial and incomplete design which could not be fully evaluated. Due to the urgent need to get adequate test sets into the field, the Army proceeded with a sole-source award to Cincinnati.

Sole-Source Justification

In determining the propriety of a sole-source award, the standard we apply is one of reasonableness, unless it is shown that the contracting agency justification for a sole-source award is unreasonable, our Office will not question the procurement. Diesel Parts of Columbia, B-200595, July 20, 1981, 81-2 CPD 50. We have recognized that noncompetitive awards may be made where the minimum needs of the Government can be satisfied only by one firm which could reasonably be expected to produce the required item without undue technical risk within the required timeframe. Vermont Division, Dynamics Corporation of America, B-198197, September 9, 1980, 80-2 CPD 184.

Here, we find that the sole-source award was adequately justified in view of the urgent need for the test sets and the fact that Bird's prototype had not been completed and could not be fully tested prior to contract award. While Bird asserts that it now has a completed prototype available for testing, this was not the case when the Army made its award decision. Further, as the Army points out, it does not yet have the necessary specifications and drawings for a competitive procurement of the AN/PRM-34. Bird's prototype is thus not an AN/PRM-34 but instead a set which Bird believes can perform the same functions. Consequently, in the Army's view, even a fully developed prototype would present unacceptable technical and delivery risks unless subjected to extensive testing.

The Army estimates that at a minimum, it would need 18 months to adequately test and field a new test set. While Bird challenges the accuracy of this estimate, we consider it to be a matter within the sound discretion of the agency, and in view of the extensive preprocurement development of the AN/PRM-34, find no basis to question it. See Julian A. McDermott Corporation, B-191468, September 21, 1978, 78-2 CPD 214.

Bird also disputes that there is actually an urgent need for the test sets since the first deliveries under the contract are not required until nine months after award. We believe, however, that the record adequately documents the urgent need to improve the Army's communications posture in Europe, and we are not convinced that a nine month lead time of itself invalidates the Army's position.

When weighed against the technical and delivery risks associated with Bird's test set, we believe that the Army acted reasonably in choosing the Cincinnati set, which had

been developed in an orderly fashion over a period of years, subjected to the required testing, and found capable of meeting the agency's needs. See Vermont Division, Dynamics Corporation of America, supra.

Option Exercise

Bird contends that even if its set properly was excluded from consideration for the initial contract award, the Army was not justified in its partial exercise of the option for additional quantities. Bird evidently believes that its set at least could be tested and approved in time for it to fulfill any additional Army needs for test sets.

The Army argues that procuring two different test sets (Bird's and Cincinnati's) would present serious logistical difficulties and defeat the goal of putting one test set with interchangeable parts into the field. Bird asserts that this argument is invalid because the current version of Cincinnati's set is different from that procured under the initial production contract. The Army denies that there are any significant differences in the sets, and we find nothing in the record to demonstrate that any differences which may exist would have any effect on logistics or interchangeability of parts.

Further, we consider the Army's determinations concerning logistic supportability and interchangeability of parts to be discretionary agency decisions in defining the minimum standards for the test sets. See Frequency Engineering Laboratories Corporation, B-202202, December 15, 1981, 81-2 CPD 468. In our view, Bird has not shown them to be unreasonable.

Bird also argues that the option exercise was improper because the specifications and drawings necessary for a competitive procurement of the AN/PRM-34 will become available before production of the basic procurement quantity is complete. We disagree.

The Army's justification for the option exercise states that the additional equipment is needed to satisfy its urgent requirements in Europe; that due to lack of an adequate data package, Cincinnati is the sole-source of supply, and that the option exercise will result in considerable savings due to continuity of production.

On this record, we find no basis to disagree with the Army's position, that it had an immediate and urgent need for an additional quantity, we therefore conclude that at the time the option was partially exercised the Army had an adequate basis to justify the sole-source award of the option quantities. See Fraser-Volpe Corporation, B-193192, January 29, 1979, 79-1 CPD 60. The fact that competition may become available at some point in the future does not negate the propriety of a sole-source award to fulfill current needs. Consequently, we consider the option exercise reasonable here.

We do believe, however, that if the data package becomes available in the interim between contract award and the proposed further exercise of the option, the Army should consider whether competition for the additional requirements is feasible. If so, the option should be further exercised only if a more advantageous offer is not obtained. See Aero Corporation--Navy Request for Advance Decision, B-194445.4, March 27, 1981, 81-1 CPD 229.

Other Issues

Bird alleges that the Army has engaged in discriminatory and deceptive conduct toward it. Bird contends that the Army tried to prevent it from participating in the procurement by refusing it a copy of the solicitation and later supplying only an incomplete copy, by downgrading certain of the original specifications in the solicitation because Cincinnati could not meet them although Bird could, and by delaying a meeting with Bird to discuss the intended award to Cincinnati until after the award had been made.

The Army denies that it refused a copy of the solicitation to Bird or that an incomplete copy was supplied. It also states that while some changes were made to the original specifications, they were minor and that the AN/PRM-34 meets the Government's minimum needs. The Army asserts that it made every effort to accommodate Bird's request for a meeting prior to contract award but could not do so because it came at a very busy time--the end of the fiscal year. The agency generally denies any discriminatory or deceptive conduct toward the protester.

Based on our review of the record, we are not convinced that the Army engaged in any intentional discriminatory or deceptive acts toward Bird. While it appears that the Army

was not as cooperative as Bird might have liked, this can in large part be attributed to the Army's determination that a sole-source award to Cincinnati was the appropriate course of action, a determination which we consider reasonable. Further, the Army did accept Bird's incomplete prototype for evaluation and apparently did consider the feasibility of procuring it instead of or in addition to Cincinnati's product.

Bird also alleges that it is an American company while Cincinnati is foreign owned, and that it is a small business while Cincinnati is not. Neither of these allegations provides any basis on which to sustain this protest. See Umpqua Research Company, B-199014, April 3, 1981, 81-1 CPD 254; Fire & Technical Equipment Corp., B-203858, September 29, 1981, 81-2 CPD 266.

Finally, Bird contends that award to Cincinnati is improper because of its alleged poor performance on the initial AN/PRM-34 production contract. Cincinnati's past performance as it relates to this sole-source award pertains to the firm's responsibility, a matter our Office reviews only in limited circumstances, none of which are present here. See Julian A. McDermott Corporation, supra.

The protest is denied.

for *Milton J. Fowler*
Comptroller General
of the United States