

DECISION

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

FILE: B-207200

DATE: February 16, 1983

MATTER OF: W.H. Mullins

DIGEST:

1. GAO will review a protest that a Department of Energy (DOE) cost-type management contractor modified an existing contract in lieu of conducting a competitive procurement to determine if the modification fell within the scope of the competition initially conducted for the contract, since the contractor must adhere to the Federal norm which includes the requirement for maximum practicable competition.
2. A modification of an existing requirements contract for an estimated 1,700 tons of a specified grade of magnetite which permits the purchase of 5,000 tons of a reduced grade of magnetite at a newly negotiated price does not fall within the scope of competition for the original contract and therefore is tantamount to a sole-source acquisition requiring adequate justification.
3. The decision to acquire needed magnetite on a sole-source basis, because the source made the ore available for a limited time and the acquiring activity was not aware of another source, lacked adequate justification where the activity did not attempt to solicit other sources that previously had submitted offers to supply magnetite or had asked to be included on the bidders mailing list. The activity should have made a reasonable attempt to ascertain whether the alternative sources could meet its needs, and could have conducted an expedited negotiated procurement if time restraints precluded the conduct of a regular competition.

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4. The propriety of a particular procurement is judged with regard to the Government's interest in obtaining reasonable prices through competition, unless there is evidence that the purchasing activity consciously attempted to exclude someone from competing. GAO therefore does not object to an award where the activity negligently failed to solicit the protester but sought competition from two known sources and made award at a reasonable price.
5. A disappointed potential contractor cannot recover anticipated profits or other similar monetary damages even if it was wrongfully denied a contract.

W.H. Mullins--doing business as P&M Ores and Pima Mining Company--protests that Reynolds Electrical & Engineering Co., Inc. (REECo) purposefully prevented him from competing for any contracts to supply REECo with magnetite ore during January and February 1982. REECo makes purchases for the Government under a cost-type management contract (No. DE-AC08-76NV00410) with the Department of Energy (DOE). The protester alleges that REECo ordered magnetite under an existing requirements contract pursuant to a contract modification which significantly changed the nature of the contract and circumvented the competitive procurement process, and complains that REECo failed to inform him of this and one other procurement opportunity. The protester also requests damages.

We sustain the protest against the contract modification, but we do not find that there was a purposeful effort to exclude Mullins from any competition. We deny the request for damages.

I. Background

REECo purchases magnetite to stem holes drilled for the testing of nuclear devices. For this purpose, the Government requires various grades of magnetite. REECo routinely purchases unprocessed magnetite in bulk--the firm apparently maintains its own facility for processing bulk magnetite--and processed magnetite in 100-pound bags.

The protester and REECo disagree about the date when REECo should have considered Mullins an available source for the purpose of soliciting offers from him. In any case, it

is clear that in September 1981 a senior buyer in REECO's special contracts section discussed with Mullins the possibility of his supplying magnetite, and advised Mullins to submit certified laboratory reports on the condition of his ore. Mullins submitted the reports in mid-October but, according to REECO, the buyer was on sick leave and remained unavailable through December. Mullins submitted an application in December and received a letter dated December 18 from REECO confirming his placement on the bidders mailing list. The purchases which the protester challenges were made after Mullins was placed on the mailing list.

On December 30, 1981, REECO modified an existing requirements contract with Penney's Gemstones in order to acquire 5,000 tons of bulk magnetite. The original contract was due to expire on December 31 and was for an estimated 1,700 tons of magnetite of a specified grade, although REECO required and actually procured 2,300 tons under the contract. REECO needed to acquire more magnetite, however, because the size and moisture content of the purchased ore was higher than specified in the contract, and the ore itself was too large to be processed efficiently by REECO's facility--REECO estimated that processing would reduce the yield by 40 percent. In December, Penney's Gemstones offered to provide 5,000 tons of magnetite from a source in Utah for delivery in January if REECO extended the contract 1 month. While this magnetite also was wet and oversized, REECO modified the requirements contract to permit the purchase. The modification included a reduced price negotiated by the parties to reflect the reduced value of the ore.

In a separate procurement, REECO purchased 1,000 bags of magnetite on March 8, 1982, under an IFB sent to two potential bidders, excluding Mullins. According to REECO, separate procurement sections handle its acquisitions of bulk magnetite and bagged magnetite, and the bagged-magnetite buyer, working in REECO's small purchasing section, was not aware of Mullins' interest in being solicited since Mullins was on the bidders mailing list only in the special contracts section, which handles contracts for bulk magnetite. In an affidavit to this Office, the buyer from the small purchasing section states he consulted several buyers in the special contracts section and no one mentioned Mullins as a potential source.

The crux of Mullins' protest is that REECO failed to consider Mullins as a potential source to supply the magnetite procured in these two acquisitions.

II. Timeliness

REECO contends that Mullins' protest, filed with this Office on April 15, 1982, is untimely under our Bid Protest Procedures' requirement that a protest such as this be filed within 10 working days after the basis for protest was known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(b)(2)(1982). REECO points out that the purchases made under the extension of Penney's Gemstones' contract took place more than 2 months prior to Mullins' protest. Regarding the March purchases of 1,000 bags of magnetite, REECO argues that unless Mullins can demonstrate he learned of this award within 10 days of his filing the protest, we should not consider the matter. Mullins, in response, alleges that he did protest within 10 working days after learning the particulars of the procurements, although Mullins admits that he cannot identify a precise date on which the bases for protest arose. Mullins argues that in such case the timeliness issue should be resolved in his favor. We agree.

When reasonable doubt exists as to when a protester knew or should have known the basis for protest, that doubt is resolved in favor of the protester. Hermes Products, Inc., B-204487.3, July 6, 1982, 82-2 CPD 15. Mullins did not receive a solicitation for either of the procurement actions, and neither REECO nor DOE has offered any evidence as to when Mullins was informed of the procurement actions or their details. Therefore, there is no way of knowing precisely when the bases for protest arose, and any doubt about the timeliness of the protest must be resolved in Mullins' favor.

III. Analysis

A. Modification of Penney's Gemstones' Contract

Protests concerning contract modifications by Federal agencies generally are not appropriate for review by this Office since such matters involve contract administration, which is primarily the procuring agency's responsibility. Sierra Pacific Airlines, B-205439, July 19, 1982, 82-2 CPD 54. We do review, however, an allegation that a modification exceeded the scope of the original contract or violated requirements for competition since such a modification, in lieu of a competitive procurement, may be tantamount to a sole-source award without adequate justification. See National Data Corporation, B-207340, September 13, 1982, 82-2 CPD 222. The test is whether the modification

materially altered the contract to such an extent that the competition for the contract as modified would be significantly different from the competition originally obtained. American Air Filter Co.--DLA request for reconsideration, 57 Comp. Gen. 567 (1978), 78-1 CPD 443.

Essentially the same standard of review applies to the contract modification made by REECO. The standard for reviewing the propriety of acquisitions made by prime contractors acting as purchasing agents for the Government, as here, is the "Federal norm," which means that the prime contractor's procurements must be consistent with and achieve the same policy objective as Federal statutes and regulations. Piasecki Aircraft Corporation, B-190178, July 6, 1978, 78-2 CPD 10 at p. 10. An essential element of the Federal norm is the requirement for maximum practicable competition. National Data Corporation, B-202953, April 6, 1982, 61 Comp. Gen. _____, 82-1 CPD 313. We therefore will review this modification to determine whether it fell within the scope of the competition initially conducted for the contract.

In direct Federal procurements, a modification falls within the scope of the original competition if potential offerors reasonably could have anticipated it under the changes clause of the contract. American Air Filter Co.--DLA request for reconsideration, supra. This clause permits the agency to order changes within the scope of the contract, and authorizes an equitable adjustment in the contract price if appropriate. We believe the modification in this case exceeds that standard.

Since the original contract was a requirements contract, REECO was entitled to order during the contract's term whatever quantity REECO actually required without regard to the estimated quantity listed in the solicitation. See 52 Comp. Gen. 732 (1973); U.C.C. § 2-306 (1977). In this respect, it appears that REECO issued the purchase order for its additional requirements of magnetite within the time frame of the initial contract. The modification, however, significantly altered the terms pertaining to quality and price from those which formed the basis for competition for the original contract. Penney's Gemstones' contract resulted from formal advertisement under which REECO received four responsive bids. It is inconceivable that any of those bidders reasonably could have anticipated that REECO might change the contract's quality specifications and negotiate a new price to acquire a reduced grade of magnetite in almost three times the quantity of the

Government's estimated requirements under the original contract. See Memorex Corporation, 51 Comp. Gen. 42 (1981), 81-2 CPD 334; American Air Filter Co.--DLA request for reconsideration, supra. We believe the modification was tantamount to a sole-source award under a new procurement. The issue, then, is whether a sole-source award was appropriate..

REECo argues that a sole-source award to Penney's Gemstones for the 5,000 tons of magnetite was justified. The 2,300 tons of magnetite which REECo already had acquired were not sufficient to satisfy the Government's requirements due to 40 percent losses experienced in processing. REECo explains that there are few suppliers willing to sell usable magnetite to REECo at a reasonable price, and that in December 1981 the scarcity of sources was further diminished by wet conditions in Arizona and snowfall in Utah, the principal sources of magnetite for both Mullins and Penney's Gemstones. Since Penney's Gemstones' offer to supply an additional 5,000 tons in January 1982 was conditioned upon REECo's acceptance by December 31, REECo decided it would be in the Government's interest to purchase the available 5,000 tons rather than to conduct a competitive procurement during which time the 5,000 tons might become unavailable. Considering the scarcity of supply and often sudden requirements for magnetite, REECo determined it also would be beneficial to acquire a stockpile of magnetite--in addition to permitting REECo to meet its present requirements, the 5,000 tons would probably suffice to meet the Government's demand over the next year.

A sole-source acquisition is authorized when the legitimate needs of the Government so require, e.g., when time is of the essence and only one known source can meet the agency's needs within the required time frame. See International Business Machines Corporation, B-198094.3, September 29, 1981, 81-2 CPD 258. Because of the requirement for the maximum competition practicable, however, a decision to buy supplies without competition is subject to close scrutiny. A decision to make a sole-source award based on urgency is unreasonable if the agency had adequate time to assess its needs and to conduct a more competitive procurement, see Las Vegas Communications, Inc. -- Reconsideration, B-195966.2, October 28, 1980, 80-2 CPD 323, but failed to do so or otherwise took improper action which created the urgency. International Business Machines Corporation, supra. It is well-established that administrative expediency or convenience by itself provides

no basis for restricting competition, and an agency must reasonably attempt to ascertain the existence of alternative sources. Las Vegas Communications, Inc. -- Reconsideration, supra.

We believe REECO's reliance on the wet conditions in Arizona and Utah to show the scarcity of any source aside from Penney's Gemstones is unreasonable since the weather conditions only suggested that no one in those states would be able to supply dry magnetite. Even the magnetite offered by Penney's Gemstones was wet. The weather conditions in themselves thus provide no reason why other sources could not also supply such magnetite within the required time frame. Despite the fact that four other bidders had submitted responsive bids for the original requirements contract and Mullins' name recently had been added to the bidders mailing list, the record does not indicate that REECO made any effort to contact these sources to determine if they also could supply a significant quantity of magnetite. Instead, REECO apparently only assumed they could not, notwithstanding the fact that Mullins had expressed interest recently in obtaining contracts to supply magnetite.

Consequently, while we recognize that the short duration of Penney's Gemstones' offer placed REECO under a time constraint precluding the conduct of a regular competition, REECO should have contacted potential sources and, unless that investigation was unavailing, conducted an expedited negotiated procurement. Rather than conducting such a procurement, REECO significantly modified Penney's Gemstones' contract for reasons of expediency and convenience. As stated previously, however, administrative expediency or convenience by itself does not justify a sole-source acquisition.

We therefore sustain the protest as it relates to REECO's modification of Penney's Gemstones' contract. Since the magnetite has been delivered, no corrective action is feasible, but we are recommending to the Secretary of Energy that he take appropriate steps to prevent such modifications in the future.

B. Acquisition of 1,000 Bags Without Soliciting Mullins.

While purchasing activities generally should seek maximum practicable competition, we judge the propriety of a particular procurement not on whether every potential contractor was included, but from the perspective of the

Government's interest in obtaining reasonable prices through adequate competition, unless there is evidence that the purchasing activity consciously attempted to exclude someone from competing. See 52 Comp. Gen. 281 (1972). Therefore, we generally will not object to an award where the purchasing activity inadvertently precluded a particular firm from competing so long as the purchasing activity made a significant effort to achieve competition and awarded the contract at a reasonable price. See Electro Marine Industries, Inc., B-205999, July 21, 1982, 82-2 CPD 65.

Regarding REECO's purchase of 1,000 bags of magnetite, the protester states that REECO told him he had not been solicited because REECO did not know he could supply bagged magnetite, only bulk magnetite. REECO, however, makes no such representation in its report, but concedes there may have been an oversight by its buyers.

At best, the record indicates that the buyer from the purchasing office negligently failed to check the bidders mailing list of potential magnetite suppliers in the special contracts office, and consequently was unaware of Mullins as a potential source. We will not infer from this circumstance that the buyer or other REECO personnel made a conscious attempt to exclude Mullins. See Electro Marine Industries, Inc., supra. The protester has the burden of affirmatively proving its case, and we will not attribute improper motives to procurement personnel on the basis of inference or supposition. See Alan-Craig, Inc., B-202432, September 29, 1981, 81-2 CPD 263.

REECO attempted to obtain competition from two known suppliers of bagged magnetite, and determined the award price was reasonable. Under these circumstances, and since there is no evidence that REECO intentionally excluded Mullins from competing, we do not object to REECO's acquisition of 1,000 bags of magnetite from another source.

IV. Damages

Mullins requests \$600,000 damages. There is no legal basis, however, that would permit a noncompetitor to recover anticipated profits or similar monetary damages even if it was wrongfully denied a contract, which Mullins has not proven in any event. See Jekyll Towing and Marine Services Corporation, B-199199, December 2, 1980, 80-2 CPD 413.

V. Conclusion

Although we do not find that REECO deliberately excluded Mullins from obtaining contracts to supply

magnetite, we sustain the protest to the extent that REECO modified an existing requirements contract in derogation of the requirement for competition. Since the contract modification has been performed, no corrective action is feasible, but we are recommending to the Secretary of Energy that he take appropriate steps to prevent such modifications in the future. We deny the protester's claim for damages.

for Milton J. Fowler
Comptroller General
of the United States