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DECISION



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

B-218786

FILE:

DATE: August 20, 1985
Bartlett Technologies Corp.

MATTER OF:

DIGEST:

1. Sole-source award is justified where agency reasonably believes at the time of award that only one vendor can provide a product that is compatible with its existing system and meet its needs.
2. Where there is no indication of any necessity for procuring 26 loop extenders on a noncompetitive basis from the same source where dial number recorders are justifiably being obtained sole-source, agency acquisition of loop extenders on a noncompetitive basis is improper.
3. The Buy American Act does not provide a basis for challenging a sole-source procurement since the act does not impose an absolute prohibition on the purchase of foreign-made products, but merely requires a price comparison between competing foreign and domestic offers.

Bartlett Technologies Corp. (Bartec) protests the award of a sole-source contract to Pamco Electronics, Inc. (Pamco), under solicitation No. CS-085-19, issued by the United States Customs Service (Customs) for 76 dial number recorders (DNR), 26 loop extenders and 25 shipping cases.

We deny the protest in part and sustain it in part.

A DNR is a device used by Customs to document and record telephone numbers called from phones being monitored by Customs' personnel. In April 1984, a market survey was conducted which indicated that Pamco's DNR was the only product capable of meeting Customs' requirements. Thereafter, Customs published a notice in the Commerce

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Business Daily (CBD) inviting interested vendors who could provide this equipment to submit technical and cost information for evaluation.

Two vendors, the protester and Pamco, submitted proposals in response to the notice. Pamco was requested to provide its DNR Model 3570 for evaluation and complied. Pamco's DNR Model P-3000 was already being used by Customs and Customs indicates that Pamco Model 3570 is merely a repackaging of its earlier model. Bartec was asked to submit its DNR Model TTS-2000, but failed to do so on a number of occasions stating that additional development was still necessary. On August 30, 1984, Bartec submitted its product for testing and the record indicates that the DNR did not perform in accordance with Bartec's specifications. Bartec delivered a DNR to Customs on September 11, 1984, and on that same date Customs issued a report recommending that the contract be awarded to Pamco.

Subsequently, Customs issued a request for proposal (RFP) to Pamco and negotiations were conducted. Because Bartec alleged that Customs did not fairly evaluate its DNR, Customs reevaluated Bartec's product and its technical specifications. Customs again determined that the Bartec DNR was unacceptable and on April 8, 1985, Customs awarded the contract to Pamco.

Bartec argues that its current product will meet Customs' needs and that the agency determination that its DNR was unacceptable was not justified. Bartec complains that no product specifications were available and that, as a result, Pamco had an unfair advantage. Also, the protester alleges that Customs improperly increased the quantity of DNR's procured from what was specified in the original CBD notice.

In addition, the protester contends that Customs should have competitively procured the 26 loop extenders. Bartec notes that the loop extenders were not included in the original CBD notice, but were added at a later date and that there is no reason to procure these items on a sole-source basis from Pamco. Lastly, Bartec contends that the procurement should have been set aside for small business and that the award to Pamco violated the Buy American Act.

Because of the general requirement that procurements be conducted on a competitive basis to the maximum practical extent, Federal Acquisition Regulation (FAR), § 15.105, 48 C.F.R. § 15.105 (1984), agency decisions to procure on a sole-source basis must be adequately justified and are subject to close scrutiny. Such decisions, however, will be upheld if, at the time of award the agency reasonably believed that there clearly was but one possible source of supply. In addition, we have recognized that an agency may justify a noncompetitive award where only a single source can provide an item which is compatible and interchangeable with existing equipment. Precision Dynamics Corp., B-183501, June 30, 1975, 75-1 CPD ¶ 402; ROLM Corp., and Fisk Telephone Systems, Inc., B-202031, Aug. 26, 1981, 81-2 CPD ¶ 180.

In our view, the record establishes that at the time of award, April 8, 1985, Customs reasonably determined that there was only one possible source of DNR's. Although Customs' original justification for its sole-source procurement was dated April 9, 1984 (a year before contract award on April 8, 1985), Customs reevaluated Bartec's DNR on March 27, 1985, and determined that it was unacceptable and would not meet the agency's needs. Customs' evaluation indicates that Bartec's DNR was operated by a computer program that would require sending the entire DNR to Bartec's factory for updating, modifications and special operational changes thereby disrupting Customs' ongoing activities. The evaluation also states that Bartec's product would not be compatible with Customs' existing DNR Analysis Systems. Our Office will not make an independent determination of the technical acceptability of a proposal nor will we substitute our judgment for the agency's determination that a proposal was unacceptable absent a clear showing that the action was arbitrary or unreasonable or in violation of procurement statutes or regulations. Steiny-Vorhees, B-205867, Aug. 24, 1982, 82-2 CPD ¶ 171. The protester, although alleging that its DNR will meet Customs' needs, has not provided sufficient evidence to support such a finding. We, therefore, have no basis upon which to find Customs' evaluation unreasonable.

With respect to Bartec's allegation that Customs' specifications for the DNR were inadequate, the CBD notice stated that Customs required DNR's with 2100 Hertz and Epson HX20 capability for computer interfacing. Customs informally advised our Office that the term "2100 Hertz"

advised vendors that industry standard loop extenders that generate a 2100 Hertz tone were required and that "Epson" is the brand name of the computer to be used. Under FAR, Part 10, 48 C.F.R. part 10 (1984), specifications may be stated in terms of brand names and an agency may express its minimum needs in terms of performance specifications. See Honeywell Information Systems, Inc., B-215224, Oct. 9, 1984, 84-2 CPD ¶ 389. See Magnaflux Corp., B-211914, Dec. 20, 1983, 84-1 CPD ¶ 4. In addition, since Customs determined that only Pamco's DNR could meet its needs, we fail to see how Bartec was prejudiced by the lack of more detailed specifications or how Pamco received an unfair advantage.

Bartec has also alleged that Customs improperly procured 26 loop extenders on a noncompetitive basis and improperly increased the number of DNR's purchased from 60 to 76. With regard to the latter allegation, we find that the increase did not prejudice Bartec because its product was unacceptable. However, we find nothing in the record which justifies the sole-source procurement of the 26 loop extenders. We note that this is not the procurement of a single large system for which the requirement of a single contractor is an acceptable restriction on competition. Honeywell Information Systems, Inc., B-215224, supra. Bartec indicates that it could supply the loop extenders and there is no indication in the record of any necessity of procuring the loop extenders on a sole-source basis. Masstor Systems Corp., B-215046, Dec. 3, 1984, 84-2 CPD ¶ 598. Although Customs argues that the loop extenders comprised only a small part of the contract to Pamco, their overall cost was \$19,500 and we cannot find this to be de minimus. While we conclude that the loop extenders should have been competitively procured, Customs has advised our Office that all items under this contract have been delivered and, under the circumstances, it is impracticable for our Office to recommend corrective action. We are, however, by letter of today, bringing this matter to the attention of the Secretary of the Treasury.

Finally, we find Bartec's allegation that this procurement should have been set aside for small business and that the award to Pamco violated the Buy American Act to be without merit. Although the Small Business Act, 15 U.S.C. § 637 et seq. (1982), evidences a congressional policy that some procurements be set aside for small businesses, and the Department of the Treasury has a similar policy, whether a particular procurement should be

set aside is up to the discretion of the contracting agency and our Office will not question an agency's determination not to set aside a procurement. Detroit Broach and Machine--Reconsideration, B-213643.2, July 12, 1984, 84-2 CPD ¶ 43. Concerning the Buy American Act, Customs states that, although the parent company is located in Canada, most of the labor and materials used to produce the DNR's are of domestic origin. In any event, we note that the Buy American Act does not provide a basis for challenging a sole-source procurement since the act does not impose an absolute prohibition on the purchase of foreign-made products, but merely requires a price comparison between competing offers, domestic and foreign. Design Pak, Inc., B-212579, Sept. 16, 1983, 83-2 CPD ¶ 336. In this case, only Pamco's DNR was acceptable and the Buy American Act does not prohibit an award to that firm.

The protest is denied in part and sustained in part.

Harry R. Van Cleve
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General Counsel