



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Freedom Marine

File: B-229809

Date: April 20, 1988

DIGEST

Although agency was justified in awarding a sole-source contract for boats where it reasonably determined that the urgent nature of its requirement mandated award to the only firm whose product has been tested and found to comply with the agency's needs, sole-source award was not proper to the extent that it included a quantity of boats greater than that which could be delivered before delivery could begin following a competitive procurement.

DECISION

Freedom Marine protests the award of a sole-source contract to Boston Whaler, Inc., by the United States Marine Corps for 122 rigid raiding craft. Freedom Marine asserts that the sole-source award was improper because the Marine Corps did not give Freedom Marine an opportunity to participate in the procurement even though in the months preceding the award Freedom Marine had expressed interest to the Marine Corps in providing the boats.

While we do not object to the sole-source award of a contract to meet the Marine Corps' immediate requirement, we sustain the protest to the extent the award included a quantity of boats that could have been purchased competitively and delivered in time to meet the agency's later needs.

The contract was awarded to Boston Whaler to provide 18-foot long rigid raiding craft to be used by the Marine Corps' special operations amphibious units. The Marine Corps maintains six special operations units and deploys two at a time for 6 months on a rotating basis, one each in the Mediterranean Sea and the Pacific Ocean.

In December of 1986 the Marine Corps identified a need for rigid raiding craft with which to conduct amphibious raids, and in February of 1987 the agency completed a draft Required Operational Capability (ROC) statement detailing the specific requirements with which the boat would have to comply in order to meet the agency's needs. Among other things, the

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ROC identified a boat that needed little or no development, would fit inside a CH-53 helicopter, and was no longer than 19 feet. The Marine Corps then began to search for a boat that would comply with the ROC. The Navy recommended the Boston Whaler 18-foot Guardian, and the Marine Corps subsequently purchased two Guardians, subjected them to testing and evaluation, and determined that the Guardian met all the ROC requirements.

In October of 1987, the Marine Corps executed a justification and approval (J/A) to purchase 122 boats from Boston Whaler on a sole-source basis, premised on unusual and compelling urgency. The justification provided that the boats were needed for the special operations units; that they were required sufficiently in advance of the units' deployment for training purposes; and that the 18-foot Boston Whaler Guardian was the only known, fully tested boat that met the Marine Corps' requirements as stated in the ROC. The J/A further provided that due to the urgency of the requirement the Marine Corps did not have sufficient time to conduct a competitive procurement and test other boats. In this regard, the J/A provided that it would take approximately 6 months to conduct a competitive procurement and an additional 90 days lead time before another manufacturer could deliver the boats. Purchase of 122 boats would allow for 15 boats for each special operations unit, and 32 craft for war reserve, training, and education purposes.

Freedom Marine asserts that during the months preceding the contract award Freedom Marine contacted the Marine Corps to express its interest in supplying boats to the agency, and provided the Marine Corps with video tapes and technical information. Freedom Marine complains that despite this expressed interest the Marine Corps neither evaluated the firm's boat nor permitted Freedom Marine the opportunity to participate in the procurement. The protester concludes that because the Marine Corps was aware of Freedom Marine's interest, the agency should not have proceeded with a sole-source award. In the alternative, Freedom Marine argues that while the Marine Corps may have been justified in purchasing 15 boats for the special operations unit that was being deployed in March of 1988, Freedom Marine should have been given the opportunity to compete for the balance of the 122 boats required.

The Marine Corps responds that it did review information concerning Freedom Marine's ability to meet the agency's need, but that Freedom Marine provided information concerning a 27-foot long boat--the smallest boat in Freedom Marine's Kevlar line--which was unacceptable in light of the ROC requirement for a boat no longer than 19 feet. Thus, argues

the Marine Corps, it was not aware that Freedom Marine could provide an acceptable boat and the agency properly did not consider the firm further before awarding the contract to Boston Whaler. The Marine Corps also reports that the requirement for a boat no longer than 19 feet may not be waived because a larger boat will not fit inside a CH-53 helicopter, which is necessary to transport the boat to and from the site of a mission, and because of space limitations on the craft where the boats will be stored.

Moreover, the Marine Corps argues, it properly purchased the entire quantity of 122 boats from Boston Whaler on a sole-source basis. The Marine Corps reports that the six special operations units will be deployed from March of 1988 through June of 1989 and the agency requires the boats in sufficient time to train the units. The Marine Corps states that a competitive procurement will take at least 8 months from the time a solicitation is issued until an award is made plus additional time before any boats are delivered and that this delay would require, unacceptably, that troops be deployed without boats.^{1/} In addition, the Marine Corps argues, all boats must be standardized for purposes of training, maintenance and support equipment.

Freedom Marine replies that with little or no development effort it can, in fact, provide the Marine Corps with a 19-foot boat. Freedom Marine further states that within 2 months of award it can meet Boston Whaler's delivery schedule, and thus can supply the Marine Corps with many of the 122 boats. Finally, Freedom Marine asserts that it can provide a boat that is standardized against the Boston Whaler Guardian.

Under the Competition in Contracting Act of 1984, an agency may use noncompetitive procedures to procure goods or services where the agency's need is of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 41 U.S.C § 253(c)(2) (Supp. III 1985). This authority, however, does not automatically justify a sole-source award due to urgency. Rather, the agency is required to request offers from as many potential sources as is practicable under the circumstances. See IMR Systems Corp., B-222465, July 7, 1986, 86-2 CPD ¶ 36. Consequently, a sole-source award is proper only where due to urgent circumstances the agency

^{1/} We note a conflict here in that the J/A provides that it would require 6 months to conduct a competitive procurement plus an additional 90 days until any boats could be delivered.

reasonably believes that only one firm promptly and properly can perform the required work. Id.

The record supports the Marine Corps' position that it had no reason to think that Freedom Marine was capable of supplying a boat that met the ROC requirements when the agency proceeded with the sole-source award. The clear focus of the preaward contacts between Marine Corps personnel and Freedom Marine was the latter's attempt to convince the Marine Corps that while a rigid raiding craft as described in the ROC might be desirable in terms of logistics, transport, and storage, Freedom Marine's 27-foot craft offered greater operational competence and capability, and that boat users would prefer the 27-foot Freedom Marine boat to the smaller Boston Whaler Guardian. Freedom Marine's suggestion to the Marine Corps was that the agency purchase six of each boat, test them, and decide which to buy for the special operations units. Moreover, until a conference in our Office on Freedom Marine's bid protest the crux of the firm's protest position was that its 27-foot Kevlar craft offered so many advantages over the Guardian fiberglass boat that the ROC requirements should not be determinative. The first time during the protest process that Freedom Marine clearly asserted that it was offering to supply, or could supply, anything shorter than the 27-foot boat was in its response to the Marine Corps' administrative report and the conference.

The record is clear that the ROC's 19-foot maximum requirement is not debatable, and we cannot conclude that the Marine Corps was or should have been aware that Freedom Marine might be able to supply a boat that would meet the agency's needs in that respect. In this regard, we recognize that the record includes an August 25, 1987, letter from Freedom Marine to the Marine Corps to the effect that Freedom Marine could provide a boat that would conform to the draft specifications and meet all stated operational requirements. We do not think that this letter necessarily should have put the Marine Corps on notice that Freedom Marine was offering to provide an 18-foot boat, however. We reach this conclusion because the balance of the letter, as well as a subsequent November 12 memorandum from Freedom Marine to the Marine Corps, proceeds to question the agency's statement of its needs and attempts to convince the Marine Corps that it should purchase Freedom Marine's larger boat. Consequently, since the need for the boats was urgent and Boston Whaler had the only tested boat that could meet the Marine Corps' needs, we will not object to the Marine Corps' decision to award a contract to Boston Whaler on a sole-source basis.

We sustain the protest, however, because we do not think the Marine Corps had sufficient justification to award the entire quantity of 122 boats to Boston Whaler on a sole-source

basis. In its comments on the bid protest conference the Marine Corps concedes that if a competitive solicitation was issued other boat manufacturers could develop a boat to meet the agency needs. The Marine Corps argues, however, that it would take approximately 8 months to conduct a competitive procurement and at least 1 month additional lead time until boats under a competitive solicitation could be delivered. Even accepting this timeframe (which we note does not appear to envision an expedited procurement procedure), we think the Marine Corps could have bought almost half its requirements competitively. The agency's conference comments show that other than the 32 boats the Marine Corps needs for war reserve, education, and training, the units for which the agency needs 15 boats each are to be deployed in February, June, and August of 1988, and in January, March, and June of 1989. Also, Boston Whaler delivered only 15 units in February of 1988, and is scheduled to deliver 15 units each on May 1, July 1, and September 15, and 30 boats on September 30, 1988.^{2/}

Thus, if the Marine Corps issued a competitive solicitation in October of 1987, when the sole-source J/A was executed, a successful contractor could have delivered some boats on July 1, 1988. If the contractor delivered 15 in July and 45 in September, the contractor would be performing on the same delivery schedule as that required of Boston Whaler. Thus, the Marine Corps' urgency requirement in fact did not provide justification for a sole-source award insofar as it concerned 60 boats.

Finally, while the Marine Corps argues that it required the boats to be standardized, we fail to see why the agency could not make standardization with the Boston Whaler a requirement of a solicitation.

In view of the above we sustain the protest. We cannot recommend corrective action, however, since at this time the Marine Corps clearly could not tolerate the delay attendant to a competitive procurement. Instead, we find that Freedom Marine is entitled to recover the costs of filing and

^{2/} The conference comments do not indicate when Boston Whaler will deliver the remaining 32 units.

pursuing its protest, including any reasonable attorneys' fees. 4 C.F.R. § 21.6(e) (1987). Freedom Marine should submit its claim for such costs directly to the Marine Corps. 4 C.F.R. § 21.6(f).

The protest is sustained.

for 
Comptroller General
of the United States