

Zelkowitz



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ship Analytics Inc.; The Maritime Training and
Research Center
File: B-230647
Date: July 12, 1988

DIGEST

1. Where General Services Administration (GSA) advises contracting agency that Brooks Act, 40 U.S.C. § 759, does not apply to procurement of ship-handling research to be performed at a full-featured ship simulator, and that there thus is no need to obtain a delegation of procurement authority, General Accounting Office will not question the validity of proposed award with respect to compliance with the Brooks Act because the agency is entitled to rely on GSA's authorization to proceed.

2. The Maritime Administration is authorized under the Competition in Contracting Act of 1984, 41 U.S.C. § 253(c)(3), to use other than competitive procedures in instances where it is necessary for national emergency or industrial mobilization purposes to award a contract to a particular source or sources.

DECISION

Ship Analytics, Inc.; and The Maritime Training and Research Center, protest the Maritime Administration's (MARAD) determination to award a task order contract on the basis of other than full and open competition to Marine Safety International (MSI). Under the terms of the proposed contract, MSI is to perform for a period of 1 year, and possibly for 4 additional option years, ship-handling research studies for MARAD and other government agencies at the Computer Aided Operations Research Facility (CAORF), a ship maneuvering research simulator located at the United States Merchant Marine Academy at Kings Point, New York.

We deny the protest.

C-42701

MSI currently operates CAORF, a government-owned facility, pursuant to a cooperative agreement executed with MARAD during 1987; under the terms of the agreement, MSI is responsible for the operation and maintenance of this facility and also for the upgrade of its equipment at no cost to the government. In exchange for these services, MSI has exclusive authority to market research and training on the simulator to government and commercial entities and to retain the income generated from such activities. MSI contemplates that approximately 80 percent of the revenues earned from marketing research and training will come from studies conducted for various government agencies. MSI is required to contribute 10 percent of most revenue to a capital improvement fund.

MARAD executed a Justification and Approval (J&A) to use other than full and open competition procedures for this procurement pursuant to the provisions of the Competition in Contracting Act of 1984, 41 U.S.C. § 253 (c)(3) (Supp. IV 1986), which allows the head of an executive agency to use other than competitive procedures in awarding a contract where such action is necessary to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of national emergency, or to achieve industrial mobilization. MARAD's J&A found that award of the contract to MSI would allow it to maintain the CAORF facility, personnel resources, and simulation capabilities at the level considered necessary to provide required services in a national emergency or for industrial mobilization.

The protesters initially raise two issues regarding MARAD's authority to conduct this procurement. First, they characterize the procurement as concerning the acquisition of automated data processing equipment (ADPE) and services, and maintain that, consequently, the procurement is governed by the Brooks Act, 40 U.S.C. § 759 (Supp. IV 1986), which generally requires that such procurements be coordinated with the General Services Administration (GSA) for economy and efficiency. Specifically, the Act gives GSA exclusive federal purchasing authority for ADPE (including services), 40 U.S.C. § 759(b)(1), and authorizes the Administrator of GSA to delegate this authority where deemed appropriate. 40 U.S.C. § 759(b)(2). The protesters assert that MARAD failed to obtain the necessary delegation of procurement authority (DPA) and that it therefore lacked the requisite authority to conduct this procurement. We disagree.

The record shows that MARAD contacted GSA regarding the need to obtain a DPA for this procurement and was advised that in as much as the CAORF computer facility operates exclusively as a simulator, the contract effort constitutes only ADPE

support services, for which no DPA was required under the Federal Information Resources Management Regulations. See 41 C.F.R. § 201-23.104-6 (1987). In view of GSA's determination and advice, which we have no reason to dispute, we find no basis for questioning MARAD's authority to conduct this procurement; MARAD was entitled to rely on GSA's authorization to proceed with the procurement. See PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD ¶ 35.

Secondly, the protesters assert that MARAD lacks the requisite authority independently to plan for industrial preparedness in times of national emergency, and instead must coordinate such planning with the Department of Defense (DOD) or the Federal Emergency Management Agency. The protesters contend that since there was no approval from either of these agencies here, MARAD was not authorized to invoke the national emergency exception as justification to acquire goods or services through other than competitive means.

We find no merit to this aspect of the protest. Under CICA, 41 U.S.C. § 253(c)(3), and the implementing Federal Acquisition Regulation (FAR) § 6.302-3, executive agencies are authorized to use other than competitive procedures where necessary to award a contract to a particular source or sources in order to establish or maintain sources of supply for goods or services in case of national emergency, or to achieve industrial mobilization. The protesters' assertions notwithstanding, we are unaware of any directly applicable statutory or regulatory impediment that would preclude MARAD from invoking this express authority for this procurement. To the extent that the protesters believe that MARAD may not have complied with an executive order or policy calling for coordination of this procurement with another agency, such policy matters are for resolution within the executive branch rather than through the bid protest process. See generally Ramal Industries, Inc., B-224375, Oct. 6, 1986, 86-2 CPD ¶ 397.

The protesters primarily argue that it was not necessary to restrict the procurement to MSI in order to maintain the availability of a simulator in times of national emergency. According to the protesters, CAORF is not a unique simulator having capabilities not possessed by other facilities; the protesters maintain that the technical characteristics of their own equipment compare favorably with those of CAORF and, thus, that they also would be able to perform whatever simulations the government might require during the term of the proposed contract.

Although it is established policy of our Office to scrutinize closely sole-source procurement actions, see Jervis B. Webb Co., et al., B-211724, et al., Jan. 14, 1985, 85-1 CPD ¶ 35, it is also our view that decisions as to the producers or facilities that need to be maintained in case of national emergency involve complex judgments that must be left to the discretion of the agency charged with responsibility for maintaining such sources of supply. See Wayne H. Coloney Co., Inc., 64 Comp. Gen. 260 (1985), 85-1 CPD ¶ 186. We will question those decisions only where the evidence convincingly shows that the agency has abused its discretion. Martin Electronics, Inc., 65 Comp. Gen. 57 (1985), 85-2 CPD ¶ 504. We limit our standard of review in such cases because the normal concern of maximizing competition is secondary to the needs of the country in case of national emergency. See NI Industries, Inc., Vernon Division, B-223990.2, June 10, 1987, 87-1 CPD ¶ 597.

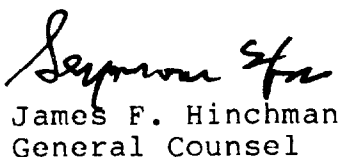
The record does not show that MARAD abused its discretion here. MARAD has responsibility for maintaining a steady flow of defense and essential civilian cargo and ships through United States ports. See generally 46 C.F.R. §§ 315 to 347 (1987). MARAD has concluded that to carry out this mission, on its own behalf and for other government agencies such as the Corps of Engineers, the Department of the Navy, and the United States Coast Guard, it needs routine access to sophisticated facilities, like CAORF, to perform simulations critical to making assessments regarding the protection of vital ports and harbor facilities during periods of national emergency.

MARAD has determined that the research capabilities of a full-featured ship-handling simulator must be maintained in order to ensure the readiness of such a facility to perform critical simulations in times of national emergency. Our Office recognizes such a need as a proper basis upon which to restrict a competition in the interests of national security. See Orlite Engineering Company, Ltd., B-228373, Jan. 26, 1988, 88-1 CPD ¶ 76; NI Industries, Inc., Veron Division, B-223990.2, supra. The fact that other facilities are available, such as those operated by the protesters, which are capable of performing many of the required simulations essential during periods of emergency, does not render MARAD's restriction of this competition improper; the J&A shows that CAORF is unique among simulator facilities in that it not only possesses the instrumentation necessary to address each of the crucial problems associated with national emergencies but, in addition, and unlike the others, it is located at a government facility considered to be more readily and easily protectable during such critical

periods. See Orlite Engineering Company, Ltd., B-228373, supra; Lister Bolt & Chain, Ltd., B-224473, Sept. 15, 1986, 86-2 CPD ¶ 305. In this regard, we note that in the proposal Ship Analytics submitted in the course of the competition that resulted in the award of the original cooperative agreement to MSI, Ship Analytics itself described CAORF as the "world's most sophisticated ship maneuvering research simulator," possessing research and simulation capabilities to analyze many research problems "which are beyond the capabilities of other facilities."

Accordingly, we have no reason to question MARAD's proposed award of a task order contract to MSI, the firm with exclusive rights to operate CAORF, to perform simulations at CAORF as individual needs arise so as to assure the availability of the facility and staff in a ready state for use during periods of national emergency.

The protest is denied.


James F. Hinchman
General Counsel