



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Rex Systems, Inc.

File: B-239524

Date: September 5, 1990

Paul G. Dembling, Esq., Schnader, Harrison, Segal & Lewis, for the protester.
 James R. Worsley, Jr., Esq., Ober, Kaler, Grimes & Shriver, for Stewart-Warner Electronics Corporation, an interested party.
 Harry D. Boonin, Esq., Department of the Navy, for the agency.
 Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's contention that it was prejudiced by agency's failure to cancel a request for proposals (RFP) before placing a sole-source order based on an urgent requirement is denied where the agency notified unsuccessful offerors under the RFP in time for those offerors to challenge the sole-source award on a timely basis.
2. Challenge to sole-source award is denied where agency reasonably determines only one source can provide the needed items in time to meet the agency's requirements.
3. Protest that agency has violated statutory bar against limiting competition when agency has failed to perform advance planning is denied where agency has not failed to plan but has planned unsuccessfully; likewise, agency error in attempting to obtain competition does not constitute failing to plan.
4. Argument that agency exceeded its immediate needs in placing a sole-source order is denied where protester is not the low-priced offeror for any portion of the purchased quantity it might conceivably be able to deliver.

049367/142148

DECISION

Rex Systems, Inc. protests the purchase by the Aviation Supply Office, Department of the Navy, of supplies of three electronic components from Stewart-Warner Electronics Corporation via exercise of an option under Basic Ordering Agreement (BOA) No. F34601-89-G-6659-GB01 between Stewart-Warner and the Air Force. The Navy purchased the components using the Air Force BOA after soliciting and receiving offers pursuant to Navy request for proposals (RFP) No. N00383-89-R-2825. Rex challenges the Navy's rejection of its offer submitted in response to the RFP and the subsequent sole-source award to Stewart-Warner. Rex argues that the Navy improperly applied requirements not stated in the solicitation, awarded to other than the low offeror, and awarded under terms and conditions, and for quantities, different from those stated in the solicitation.

We deny the protest.

BACKGROUND

The three electronic components covered by the Navy RFP comprise the AN/ARA-63 Receiving Decoding Group (ARA-63). This system is used in seven different types of Navy aircraft to assist pilots flying in bad weather and/or at night in making precision landing approaches to aircraft carriers. The three components of the system--the control receiver, the pulse decoder, and the radio receiver--receive radio signals from transmitters aboard aircraft carriers and translate the signals into flight guidance displayed in the cockpit. These components are purchased by the Navy for use as replacement parts, and as government-furnished equipment (GFE) for installation by manufacturers building Navy aircraft. In purchasing and scheduling deliveries of the ARA-63 components, the Navy balances its projected usage of spare replacement components with its ongoing obligations to provide the components as GFE for new aircraft.

On December 27, 1989, the Navy issued the RFP calling for basic and option prices for various alternate quantity ranges for the three components of the ARA-63 system; specifically, the RFP sought prices for five quantity ranges of each of the three components as set forth below:

Quantity Ranges

<u>Pulse Decoder</u>	<u>Radio Receiver</u>	<u>Control Receiver</u>
1-20	1-25	1-10
21-50	26-55	11-30
51-80	56-95	31-55
81-115	96-140	56-80
116-160	141-190	81-110

The RFP also included a first article approval requirement resulting in alternate delivery schedules depending upon whether first article approval of a particular contractor's product was required. The delivery schedule called for initial shipment within 510 days of contract award if first article approval was needed; the schedule required initial delivery within 120 days if first article approval could be waived.

On March 8, 1990, offers were received from Rex, Rodale Electronics, and Stewart-Warner in response to the RFP. The Rex and Rodale proposals were forwarded by the contracting officer to the Navy's Source Development Division within the Aviation Supply Office for review. The Stewart-Warner proposal was not forwarded for review since Stewart-Warner was already producing the ARA-63 system. On March 27, the Navy's Source Development Division advised the contracting officer via memorandum that, in its view, first-time manufacturers of the ARA-63 needing first article approval--i.e., Rex and Rodale--would require 1,130 days between contract award and initial delivery, substantially more than the 510 days specified in the RFP.

After reviewing the Source Development Division's memorandum regarding production leadtimes, the contracting officer determined that neither Rex nor Rodale could produce the ARA-63 components to meet the Navy's requirement that deliveries begin in November 1990 and continue until October 1992. However, the Navy did not accept Stewart-Warner's offer submitted in response to the RFP; nor did the Navy cancel the RFP. Instead, the contracting officer exercised an option under an existing BOA between Stewart-Warner and the Air Force because the price in that contract was lower than the price Stewart-Warner offered in response to the Navy RFP. On April 23, the contracting officer notified Rex that its offer had been rejected and that award had been made to Stewart-Warner under the Air Force BOA. On May 2, Rex protested to our Office.

ANALYSIS

Initially, Rex protested the Navy's rejection of its offer on the basis that the Navy improperly applied requirements not stated in the solicitation and awarded to other than the low offeror under terms and conditions, and for quantities, different from those in the RFP. The Navy responds that it did not make an award under the RFP and that its notification to Rex on April 23 was, in effect, a cancellation of the RFP. In the Navy's view, the subsequent sole-source award to Stewart-Warner was a separate contract action justified by an urgent need for the ARA-63 components. The Navy argues that Rex was not harmed by its failure to cancel the RFP formally because the notification letter to Rex permitted the company to challenge the award to Stewart-Warner on a timely basis.

To cancel an RFP after receipt of proposals an agency need only have a reasonable basis, as opposed to the cogent and compelling reason required for cancellation of an IFB after receipt of sealed bids. ACR Elecs., Inc., B-232130.2, B-232130.3, Dec. 9, 1988, 88-2 CPD ¶ 577. Here, the agency's need for the components, its failure to include an engineering source approval requirement in the solicitation,^{1/} and its view that given the revised production leadtimes for first-time manufacturers only one company can meet those needs, indicate that the agency had sufficient justification for canceling the RFP. See Logics, Inc., B-237411, Feb. 1, 1990, 90-1 CPD ¶ 140, aff'd, B-237411.2, Apr. 25, 1990, 90-1 CPD ¶ 420. Further, by providing timely notification to Rex of the sole-source award to Stewart-Warner, the Navy afforded Rex the opportunity to challenge the decision. In our view, although the Navy should have formally canceled the RFP, Rex has not been injured as a

^{1/} In the contracting officer's letter notifying Rex that it was an unsuccessful offeror under the RFP, Rex was told the agency had inadvertently failed to advise potential offerors of the need for engineering source approval for manufacturers of the ARA-63 components. According to the Navy, since such approval was needed and would add additional time to the process, Rex would not be able to manufacture the components in time to meet the agency's needs. The agency's report on this protest rescinds the claimed need for engineering source approval; however, the agency's written comments, filed after the protest conference, state that the Navy has reinstated its decision that future first-time manufacturers of the ARA-63 components will be subjected to engineering source approval.

result of the Navy's failure to do so. See Avondale Indus., Inc., B-237874, Mar. 22, 1990, 90-1 CPD ¶ 319 (agency's failure to cancel request for quotes before awarding a sole-source contract on industrial mobilization grounds will not be disturbed if mobilization base determination is otherwise proper).

In its post-conference comments, Rex further argues that the Navy improperly awarded a sole-source contract to Stewart-Warner because the Navy did not conduct adequate advance planning for this procurement, and did not limit the award to urgently needed quantities. The Navy responds that it has properly justified its award to Stewart-Warner, that its advance planning--although unsuccessful--was not the cause of the current urgency, and that the sole-source purchase was properly limited to the quantities necessary to meet its immediate needs.

With regard to the sole-source award to Stewart-Warner, under the Competition in Contracting Act of 1984 (CICA), an agency may use other than competitive procedures to procure goods or services where the agency's requirements are of such an unusual and compelling urgency that the government would be seriously injured if the agency were not permitted to limit the number of sources from which it seeks bids or proposals. 10 U.S.C. § 2304(c)(2) (1988). This authority permits an agency to limit a procurement to the only firm it reasonably believes can properly perform the work in the available time. Support Sys. Assocs., Inc., B-232473; B-232473.2, Jan. 5, 1989, 89-1 CPD ¶ 11. We will object to the agency's determination to limit competition based upon unusual and compelling urgency only where we find that the agency's decision lacks a reasonable basis. Gentex Corp., B-233119, Feb. 13, 1989, 89-1 CPD ¶ 144.

In support of its decision here, the Navy prepared a Justification and Approval (J&A), signed by the contracting officer on April 4, explaining that Stewart-Warner is the only available approved source which can be granted a waiver of first article testing and meet the time requirements necessary to avoid delay in the production of new aircraft. Specifically, the J&A states that the ARA-63 components are needed for installation in new aircraft between November 1990 and October 1992. Among the three potential sources for the ARA-63 components--i.e., Rex, Rodale, and Stewart-Warner, the companies that responded to the RFP--only Stewart-Warner has prior manufacturing experience. According to the Navy, Rex and Rodale are not approved sources and due to the approval process, the requirement for first article testing, and the complexity of manufacturing these components, neither company will be able to begin

deliveries until 1,130 days from contract award-- approximately May 1993 based on an April 1990 award date. Therefore, only Stewart-Warner, able to begin delivery in October 1990 and finish by December 1991, can provide the Navy with the needed items in time to avoid delaying the production of new aircraft.

Rex does not dispute that the Navy has an urgent need for delivery of the items to begin in October 1990. Rather, Rex's challenge to the sole-source award to Stewart-Warner is based on its disagreement with the conclusion in the J&A that Rex would require 1,130 days from the contract award to begin deliveries of the ARA-63 components.^{2/} According to Rex, it can produce the ARA-63 components within 510 days (as offered in response to the RFP), and the Navy's estimate of 1,130 days is arbitrary, lacks a rational basis, and would have been easily refuted by a pre-award survey of Rex.^{3/} Rex argues that the Navy's revised leadtime estimates should receive close scrutiny by our Office, because it is these revised estimates--from 510 days including first article approval in the RFP to 1,130 days in the J&A--that have created the need for a sole-source award to Stewart-Warner, not any change in the Navy's need for the ARA-63 components after the RFP was issued.

^{2/} Although the J&A states that 1,130 days is the earliest possible time that Rex or Rodale could begin deliveries, the Navy has since determined that such deliveries might be made slightly earlier. In its post-conference comments, the Navy revised its estimate of the earliest delivery date to 1,070 days after contract award. This revision is based on a 60-day reduction in the time for Navy review (from 240 days to 180 days) due to a decision that the ARA-63 is not a flight critical item.

^{3/} Rex also argues that the Navy's conclusion that Rex could not meet the 510-day delivery schedule in the RFP was a determination that Rex was not a responsible offeror. Since Rex is a small business, Rex argues that the Navy was required to refer an unfavorable responsibility determination to the Small Business Administration for review. For the reasons stated above, we will not review this argument because we have decided that the Navy effectively canceled the RFP and awarded a sole-source contract to Stewart-Warner. Thus, no determination of Rex's responsibility was made by the Navy.

The Navy's revised estimated leadtimes for first-time manufacturers were based on several factors: (1) the requiring activity's recommendation that first-time manufacturers be subjected to engineering source approval; (2) the view of the Navy's Source Development Division that production testing and approval of the first article would require 490 days, rather than the 390 days established in the RFP; and (3) the Source Development Division's view that initial deliveries of the ARA-63 components would require an additional 400 days after first article approval, not 120 days as set out in the RFP. The extension of time for first article review and initial deliveries was based on past experience. For example, the Navy's revised estimate for first-article production testing and approval was supported by a historical survey of first article testing leadtimes for other electronic components used for navigation--including the ARA-50, a predecessor to the ARA-63 system. Likewise, the revised estimate for initial deliveries was based on a review of the time required for initial deliveries of 166 electronic receivers of similar complexity.

In response to the Navy's explanation of its calculation of estimated leadtimes, Rex asserts that these calculations are arbitrary and inapplicable because they are based on an average of other companies' performance times, not on that of Rex. Further, Rex argues that the Navy estimates are flawed because the Navy used average delivery times, and failed to consider the specific delivery timetable set forth in each contract reviewed by the Navy. Rex also complains that no consideration was given to Rex's individual ability to meet the production schedule.

We have reviewed the supporting information behind the Navy's estimates with respect to first-article production testing and approval, and initial deliveries, in response to Rex's challenge and we find this information provides a sufficient basis for the agency's determination of estimated leadtimes. In our view, historical information regarding actual leadtimes for similar equipment provides a reasonable basis for estimating future leadtimes. See Howmet Corp., B-232421, Nov. 28, 1988, 88-2 CPD ¶ 520. The fact that the supporting information used by the Navy relates to other companies, and not Rex, does not render the Navy analysis invalid.

In addition, while the revised estimate is considerably higher than the delivery time in the RFP, it is based on the procuring activity's consultation with the requiring activity, which clearly is in a better position than either the contracting activity or the protester, a first-time

manufacturer of the item, to predict how long the production process would take. In this regard, the agency notes that it is very unlikely that Rex could produce the items in 120 days, as contemplated by the RFP and as Rex maintains it could, since that time exceeds by 60 days the accelerated production capability claimed by Stewart-Warner, a company that has been producing these items for more than 10 years. Finally, contrary to the protester's contention, we see no basis to conclude that the agency was required to perform a pre-award audit of Rex's production capability before it developed its revised estimate of the production leadtime.

Given our finding that the Navy's revised leadtime of 1,130 days was not unreasonable, we conclude that the Navy properly determined that Rex could not provide the components by the time needed and thus properly limited the procurement to Stewart-Warner, the only source which could meet the required delivery schedule. Logics, Inc., B-237411, supra.

Rex also argues that the Navy did not properly plan for this procurement and hence violated the statutory bar against limiting competition based on a lack of advance planning. See 10 U.S.C. § 2304(f)(5)(A); Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579, aff'd, B-225685.2, Sept. 29, 1987, 87-2 CPD ¶ 313. While the Navy ultimately was unsuccessful in achieving competition, the record shows that this was due to a series of events and responses by the Navy which, while in hindsight may show questionable judgment, do not constitute a lack of advance planning.

The Navy initially awarded a contract for the ARA-63 components to LaPointe Industries, Inc. in May 1986, with deliveries scheduled to begin in March 1987. When LaPointe failed to make the deliveries as scheduled, the Navy began a prolonged series of attempts to resolve its disagreements with the firm and get the deliveries made. According to the Navy, it was interested in resolving the difficulties with Lapointe both in order to maintain the firm as a viable alternate source and avoid continuing to make sole-source awards, and because it had made \$700,000 in progress payments to LaPointe which the Navy wanted to ensure would be recouped. The Navy's attempts to negotiate with LaPointe were unsuccessful, and the firm ultimately declared bankruptcy in January 1989.

LaPointe's failure to make deliveries resulted in a shortage of the ARA-63 components. While the Navy for a time satisfied its ongoing need for the items by transfers from the spares supply system and sole-source orders to Stewart-Warner during the period when it was negotiating with

LaPointe, it ultimately needed to conduct a reprocurement to replace the items LaPointe failed to deliver. According to the Navy, it could not do so until the LaPointe contract was terminated for default, and the funds committed to it were freed for reuse. LaPointe's filing for bankruptcy in February 1989, however, prevented termination of the contract without the bankruptcy court's approval. Finally, after various proceedings in the bankruptcy court, the Navy was able to terminate LaPointe's contract in December 1989. The RFP, which the Navy had begun preparing the spring of 1989, ultimately was issued in December 1989.

Rex concedes that the problems experienced with LaPointe, including LaPointe's bankruptcy, led to a shortage and ultimately a depletion of inventory of the items. Rex maintains, however, that the Navy knew it was facing a shortfall well in advance of the issuance of the RFP in December 1989, but failed to take steps to meet the requirement before it became urgent and required a sole-source award to Stewart-Warner.

We do not think that the Navy's actions reflect a failure to adequately plan for competition; rather, the sole-source award at issue here was due to the scheduling pressures and shortfalls related to LaPointe's inability to complete the ARA-63 and the Navy's attempts to alleviate the shortages created by the shortfall. From March 1987 to February 1989, the Navy attempted to resolve the problems with LaPointe. While in hindsight--particularly in view of LaPointe's eventual filing for bankruptcy--we might disagree over how long the Navy should have continued negotiating with the firm, we cannot say the Navy's actions were unreasonable at the time they were made, given the Navy's legitimate interest in resolving problems with LaPointe, maintaining the firm as viable alternate source, and recouping the progress payments to the firm. The Navy's efforts all were related to procurement planning and to fostering competition by establishing LaPointe as an alternate source, and the fact that they ultimately were unsuccessful is not dispositive.^{4/} Although, as Rex correctly asserts, CICA requires

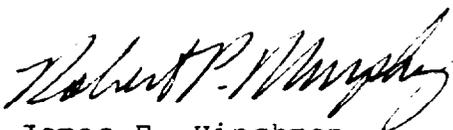
^{4/} Also, despite Rex's contention to the contrary, we do not view the Navy's failure to include the source approval requirement in the RFP as dispositive evidence of failure to conduct advance planning. The fact that the procuring activity did not communicate with the requiring activity about production leadtimes for first-time manufacturers is agency error, not failure to plan. See Allied Materials and Equip. Co., Inc., B-235585.2, Oct. 4, 1989, 89-2 CPD ¶ 302

(continued...)

advance procurement planning, it does not require that the planning be successful. Honeycomb Co. of Am., B-225685, supra.

Finally, Rex argues that the Navy failed to limit its sole-source purchase from Stewart-Warner to the quantity necessary to meet its immediate needs. Agencies must limit such purchases to amounts necessary to satisfy needs that cannot await the anticipated competitive environment. See Arrow Gear Co., 68 Comp. Gen. 612 (1989), 89-2 CPD ¶ 135. Here, the Navy calculates that the earliest possible date it could have awarded a contract to Rex was October 1, 1990. Assuming that Rex would abandon certain challenges to the interchangeability requirements of the RFP,^{5/} and that there would be no first article or production problems, Rex's earliest delivery date would be April 1, 1993. The Navy explains that there would be a total of 67 radio receivers remaining to be delivered on that date, but that Rex was not the low offeror on this component for any quantity above 25 units. Accordingly, Rex has no basis to claim that it should be awarded this portion of the purchase.

The protest is denied.



for James F. Hinchman
General Counsel

4/(...continued)

(procuring activity's reliance on erroneous inventory data provided by requiring activity, and subsequent urgency due to corrected inventory data constitutes agency error, not failure to perform advance planning).

5/ Prior to and during this protest, the Navy and Rex have discussed whether Rex would provide pulse decoders meeting the bid and piece part interchangeability requirements of the pulse decoder specification. Rex has challenged the need for this requirement creating reasonable doubt on the Navy's part about whether Rex will meet the requirement.