



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: FXC Corporation
File: B-257697.2; B-257973
Date: December 1, 1994

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DIGEST

Agency's urgent sole-source acquisition of automatic testers of parachute releases is reasonable, and not the result of a lack of advance planning by the agency, where only one source had previously designed, built, and demonstrated automatic testers; so that as of the time of award it was reasonably found to be the only source capable of satisfying the urgent requirement, which only includes those testers needed immediately while other sources seek qualification.

DECISION

FXC Corporation protests the sole-source award to Scot, Inc. by the Air Force of contract No. F41608-94-C-1235, for 80 automatic testers for automatic parachute releases. FXC also requests that we declare it entitled to its costs of pursuing a protest of an earlier solicitation for these testers that was canceled after FXC protested.

We deny the protest and claim for entitlement.

The Air Force currently uses and tests automatic parachute releases of three different manufacturers, including FXC and Scot. Since the releases are life support mechanisms on parachutes and are critical to the safety of the user, the Air Force tests the releases on a 120-180 day cycle to ensure proper operation at the required altitude. If the cycle expires before a release is retested, the release is out of service until it is successfully retested.

The Air Force currently uses a manual tester manufactured by, and purchased from, FXC on a sole-source basis since the early 1980s. The FXC tester requires the operator to manually control and monitor the tester throughout the testing sequence. In order to record the altitude at which the release activates, the operator has to listen for a "click" indicating activation and, at the same instant, the operator needs to determine the activation altitude from an altimeter, which continues to display decreasing altitude after the release activates. If the operator cannot hear the release activate or otherwise misses the altimeter reading at the time of activation, the test must be redone. In addition, the FXC tester requires an expensive adapter in order to test the Scot automatic parachute releases. Use of this adapter increases the procedure and time needed to test each Scot release.

In 1987, Scot submitted to the Air Force an unsolicited proposal offering an automatic tester to accommodate any automatic parachute release used by the agency. This tester required the placement of the release in the tester and pushing a button to activate the testing sequence. After the operator initiates the testing sequence, the tester automatically tests the release without operator oversight or intervention, preserving the altimeter reading at the instant the release activates and displaying the reading until the operator manually clears it. Scot's unsolicited proposal stated that the tester would be capable of testing all releases then in the agency's inventory or subsequently added to the inventory. Scot was already using automatic testers in its facilities for testing its own releases and demonstrated this technology to Air Force staff. The Air Force approved Scot's proposal but did not commit to procuring the automatic tester.

In 1991, Scot demonstrated for the Air Force a prototype of the automatic tester proposed in its previously submitted unsolicited proposal. The agency engineer currently assigned to the contract team responsible for procuring testers first reviewed Scot's automatic tester at this demonstration. The unique feature of Scot's tester, distinguishing it from the FXC tester, was the incorporation of a microprocessor into the design, which was what enabled the Scot tester to function automatically. At this demonstration, the Scot tester successfully tested the automatic parachute releases manufactured by Scot and FXC, which are still used by agency personnel, as well as a release which has since been removed from use. The Air Force informed Scot that it could not project acquisition of the tester because funding to procure testers was not available.

Beginning around 1992, concern within the agency began building with regard to the condition of the FXC testers in use since the early 1980s,¹ as well as the additional expense and time required to use the adapter for testing Scot releases. Also, the conclusion of the Cold War triggered a reduction in Air Force man power, an increase in worldwide regional conflicts that often require immediate or sustained Air Force intervention, and an expansion of the Air Force's mission, which includes providing humanitarian aid under austere conditions. To satisfy these new operational demands with reduced man power, the Air Force found that it needed its parachute release testers to operate quickly, with minimal oversight and in noisy conditions (e.g., a temporary aircraft hangar in a remote location), as well as to be highly portable and reliable. In addition to the tester wearing out mechanically, the agency was finding that the manual tester could not be operated efficiently under conditions existing during deployment because high levels of noise at temporary facilities made it difficult to hear the "click" of the release activating,² or the operator was otherwise distracted so he was unable to observe the altitude at the instant the release activated. Thus, the release either had to be retested, or testing had to be postponed until the noise subsided.

In May 1992, at the Worldwide Life Support Conference, major commanders from field units worldwide expressed a need to procure a better tester. The agency informed the major commanders of Scot's approved unsolicited proposal for automatic testers. The field users subsequently converted their back-ordered acquisition requests for manual testers to requests for automatic testers. Thus, in the fall of 1992, the agency began planning for the acquisition of automatic testers.

The agency estimated the date for contract award to be in late 1993. During this period, the agency planned to address the issue of failing testers by having operators on bases without testers take releases to be tested to bases with testers on a weekly basis. Although this placed a

¹The agency noted seal leakage and repeated pump failure rendering testers unusable until repaired. The agency states that these problems were not product deficiencies, but rather resulted from the age and continued use of the testers. Most of the testers are now approximately 15 years old, are wearing out, and are often out of service while being repaired.

²Operators were using stethoscopes to listen for the "click" when conditions were less than ideal.

hardship on the agency as to maintaining military readiness, the Air Force determined that it could manage this hardship for the 8 to 12 months it would take to plan and execute the procurement for replacement testers.

By letter of February 5, 1993, Scot submitted to the agency a written document, which described the design of its tester, including specifications; tolerances; and performance requirements. Although the agency started processing a purchase request in March 1993, this request required revision, including additional data and a finalized statement of work. The agency estimated that 6 to 8 months would be needed to complete the information to support the purchase request.

In July, a turnover in management personnel occurred, resulting in a new buyer, contracting officer, and program manager for this procurement. A revised but still incomplete purchase request was submitted to the contracting office in August and a complete purchase request was assembled in late September 1993. The agency synopsisized the anticipated sole-source solicitation in the Commerce Business Daily (CBD) on October 22. The Air Force issued request for proposals (RFP) No. F41608-94-R-0138 on December 14, contemplating a sole-source award of a 3-year requirements contract to Scot.

On January 5, 1994, a Justification and Approval (J&A) document for the sole-source acquisition was approved. The J&A stated that Scot was the only known source for this automatic tester and was the only known manufacturer possessing "the engineering knowledge, expertise, and complete drawing package to provide/build this item."

On January 6, FXC requested a meeting with the agency to discuss its tester requirements. Concurrently, the contract management team was considering the possibility that other manufacturers of release testers could meet the agency's minimum requirements because the team, at the time, did not necessarily consider automatic functioning of the tester to be a minimum requirement. The solicitation was suspended indefinitely while other options were considered. The contract management team concluded that sources other than Scot might be able to offer modified or alternative testers with either manual or automatic function that may satisfy the agency's minimum requirements.

On February 16, the agency sent a source development letter to four potential sources, including Scot and FXC. This letter stated the agency's minimum requirements as: (1) ability to test all models of automatic parachute releases used by the Air Force (specific part numbers for releases manufactured by FXC and Scot were stated, and a

release of a third manufacturer, Irvin Industries, was also identified); (2) capability of being deployed; (3) 110 and 220 volt operating capacity; and (4) ability to test release activation at varying altitudes. The letter also stated:

"It is desirable that tester contain an 'automatic' test function. Air Force personnel should be able to install the release unit into the tester, initiate the test, and have the tester automatically perform the test and record/display the activation altitude."

The letter further invited the sources to demonstrate their candidate testers on March 8 or 9. FXC and Scot both demonstrated their testers on March 8.³

FXC demonstrated a modified version of its manual tester currently used by the Air Force. The modification addressed the FXC tester's capability to test all manufacturers' releases without need for an adapter. This modified tester did not have the desired automatic function. The tester failed to successfully test any releases during the demonstration.⁴

Scot demonstrated an automatic tester that was configured similarly to the model proposed in its unsolicited proposal, and tested the automatic parachute releases "in rapid succession" without failure. Scot stated during the demonstration that the tester being demonstrated was used on the Scot production line to test releases and indicated that this tester housed two pumps, while the tester to be produced for the Air Force would have one pump and be smaller and lighter.⁵ Scot also stated that it manufactures to a stricter standard than the Air Force generally requires. The agency engineer examined the construction of the demonstration tester and reviewed a set of detailed drawings of the production model which Scot

³Another source mailed its tester to the Air Force for testing without sending any personnel to demonstrate it. The Air Force examined this tester and found that it did not operate on both 110 and 220 volts and, upon questioning, the source declined to propose a tester that would satisfy this minimum requirement. The fourth source did not participate in the demonstration.

⁴The agency states that FXC later identified the problem as a pump failure in the unit demonstrated.

⁵The agency engineer stated that the prototype tester, which Scot had previously demonstrated for the agency in 1991 with full success, had only one pump.

brought to the demonstration. The engineer determined that the design for the automatic test function was the same in both models and that the changes in design allowing use of one pump in a smaller enclosure would not affect the functional requirements of the tester. The engineer states that he also noted that the design for the mounting of components would enable the tester to withstand the treatment associated with transporting the tester during deployments. The agency determined that the Scot tester satisfied all of the stated minimum requirements, as well as having the desired automatic test function feature.

On April 19, at FXC's request, the Air Force again permitted FXC to demonstrate its modified manual tester. This time the FXC tester successfully tested all of the releases. The Air Force determined that the FXC tester satisfied the stated minimum requirements.

The 1994 Worldwide Life Support Conference was held on April 26-28, at which time the contracting officer informed the major commanders that the agency had two sources for testers, one offering an automatic function (Scot) and the other a manual function (FXC). The major commanders discussed the problems associated with overseeing the manual test sequence and recording the activation altitude, and unanimously agreed that an automatic test function was a minimum requirement for its testers.

The commanders further expressed an urgent need for new testers due to the depleted state of the test capability of the bases, which created potentially life threatening dangers associated with untested or improperly tested parachute releases. Specifically, 14 bases were reportedly completely without a tester, and all of the remaining bases had no backup tester and thus the bases were not considered combat ready. According to the Air Force, when a unit is deployed, it takes a tester with it in order to continue testing releases in use during the deployment. Bases with only one tester are thus left without a tester during deployment. Even with units deployed, bases still have to test the bulk of releases used by the base. Any base without a tester, due either to deployment or mechanical failure, must send personnel and releases to a base with a tester in order to keep the releases in service. The agency states that the testers still in service are thus subject to accelerated wear from increased use, which results in increased instances of mechanical failures. The agency also states that operators have been working 14-hour days to test releases in order to keep the agency's stock of releases in service. According to the Air Force, these long work days fatigue operators and increase the need for retesting due to increased errors or distraction during the test sequence. More critically, fatigue among operators poses risks to

human life, if errors result in improperly tested releases being recertified for use.

On May 16, the agency canceled the suspended solicitation. On May 23, the agency adopted qualification requirements, which essentially restated the minimum requirements previously stated in its February 16 source development letter and added, as a minimum requirement, the automatic function previously identified as a desired feature.⁶ The qualification requirement also required contractors to submit two pre-contract units with a test report showing compliance with referenced standards for high and low temperature, vibration, and shock.

The agency issued RFP No. F41608-94-R-0425 on May 23, contemplating an "emergency" award of a 3-year requirements contract for automatic testers with an initial order quantity of 80 testers. The agency distributed this solicitation to Scot, the only known source for an automatic tester meeting the agency's minimum requirements. Proposals were due by June 23. Scot submitted its offer on June 9.⁷

By letter dated June 3, the Air Force notified FXC that its modified manual tester had successfully qualified under the requirements stated in its February 16 letter. By separate letter of June 3, the agency also provided FXC with a copy of its May 23 requirements for automatic testers and invited FXC to submit a source approval package to qualify under these requirements. The Air Force did not inform FXC of the RFP issued on May 23. On or about June 20, FXC asked the agency if a solicitation for automatic testers had been issued, whereupon the agency provided FXC with a copy of the RFP the next day.

On June 23, FXC submitted an offer for automatic testers. FXC's offer included a conceptual drawing of the face plate of its proposed tester and described in notes on the drawing that the tester had the automatic testing function stipulated in the May 23 qualification requirements.⁸ FXC did not submit any other technical information or any pre-contract units or test reports.

⁶Notice of these qualification requirements was published in the CBD on August 4, 1994.

⁷Scot did not provide any technical documentation or the pre-contract items with the test reports required by the May 23 qualification requirements and RFP.

⁸The drawing indicated that it was drawn and reviewed on June 22, 1994.

Also on June 23, FXC protested to our Office, alleging that the RFP was defective and unduly restrictive of competition. After the protest was filed, the Air Force decided to limit its acquisition to the immediate order quantity of 80 units and make a sole-source award to Scot based on a finding that urgent and compelling circumstances required this action. Without stating these intentions, the agency canceled the RFP on July 8, and requested summary dismissal of the protest. We dismissed FXC's protest on July 14 as academic since the solicitation protested had been canceled.

On July 14, the agency orally solicited Scot for an emergency quantity of 80 automatic testers.⁹ On July 15, the agency approved a J&A authorizing the sole-source award to Scot under the unusual and compelling urgency exception to the general requirement for full and open competition in the Competition in Contracting Act of 1984 (CICA), while FXC sought qualification as an alternate potential source for automatic testers. Award was made that same day to Scot at a total price of \$493,032. This protest followed.

FXC alleges that the Air Force unnecessarily restricted this acquisition to a sole source and that the urgency of this procurement was due to a lack of advance planning by the agency.

Under 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 was 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 is limited by the requirement of 10 U.S.C. § 2304(e) that agencies seek offers from as many potential sources as is practicable under the circumstances. An agency, however, has the authority under 10 U.S.C. § 2304(c)(2) to limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. Essex Electro Eng'rs, Inc., B-250437, Jan. 28, 1993, 93-1 CPD ¶ 74; Logics, Inc., B-237411, Feb. 1, 1990, 90-1 CPD ¶ 140; Factech Corp., B-225989, Mar. 26, 1987, 87-1 CPD ¶ 350. Award of a contract using other than competitive procedures may not be made where the urgent need for the requirement has been brought about by a

⁹The urgent requirement consisted of 71 existing priority back orders, 7 priority back orders which will arise prior to contract delivery, and 2 production units which will be subjected to destructive testing.

lack of advance planning by contracting officials, 10 U.S.C. § 2304(f)(5)(A); K-Whit Tools, Inc., B-247081, Apr. 22, 1992, 92-1 CPD ¶ 382; Service Contractors, B-243236, July 12, 1991, 91-2 CPD ¶ 49.

We find that the Air Force reasonably determined that an unusual and compelling urgency existed and justified a sole-source award to Scot, and this was not the result of a lack of procurement planning by the agency. The agency's initial plan to address the mounting failure of its aging stock of manual testers was extended well beyond schedule by an ill-fated attempt to open the procurement to competition. At the time the award was made, the manual testers were difficult, and sometimes impossible, to use under the noisy conditions faced by deployed units, thus placing the military readiness of such units at risk. Moreover, operators were working under fatiguing conditions for well over a year and this was potentially life threatening to the users of parachute releases. While FXC asserts that the agency could have acquired more manual testers from FXC to fill the gap while a competitive procurement for automatic testers was processed, FXC has not shown that the agency's actual requirements do not mandate an automatic tester. Under the circumstances, we find that the agency had an unusual and compelling urgency for the automatic testers. See Essex Electro Eng'g, Inc., *supra*; Dayton-Granger, Inc., B-245450, Jan. 8, 1992, 92-1 CPD ¶ 37 (risk to human life and maintaining military readiness justify acquisition because of unusual and compelling urgency).

The Air Force also reasonably determined that Scot was a readily available source for automatic testers, while FXC was not. Scot had successfully demonstrated for the Air Force, on three occasions since 1987, various configurations of its automatic tester, which it used in its own facilities to test automatic parachute releases. The agency engineer responsible for releases and release testers had reviewed Scot's detailed design drawings for the automatic tester and concluded that he had a high degree of confidence that the tester would meet the agency's minimum requirements.

Furthermore, the agency had reason to believe that there was no alternative source in the position to begin producing automatic testers. During its recent invitation to potential sources to demonstrate testers, the agency expressly notified the sources that an automatic function was a desired feature. Scot was the only source with an automatic tester to demonstrate. The agency states that it specifically asked FXC during its demonstration if it had an automatic tester; FXC did not have one. Moreover, FXC's commercial literature provided to the agency did not suggest that it had an automatic tester. Although FXC did propose

an automatic tester in the weeks prior to this award, FXC produced no evidence that it had completed the design of this proposed tester--it only submitted a hastily prepared conceptual drawing of how the control panel of the proposed tester may look and provided no technical detail of the tester design. Nor did FXC allege during the course of this protest that it had completed the design of, or built, an automatic tester prior to award.

Thus, as of the time of award, Scot was the only source which the Air Force had reason to believe had already designed and built an automatic tester and could move immediately into production of testers upon contract award. See Space Vector Corp., 73 Comp. Gen. 24 (1993), 93-2 CPD ¶ 273 (where time is critical, the only source with significant design processes already completed which significantly reduces risk of delivery delays is a proper sole source); Logics, Inc., supra (sole-source acquisition of the only readily available product that would meet agency's urgency requirement is justified even where the agency has received proposals for development of an acceptable product). It is also significant that in the July 15 J&A, the agency represents that future acquisitions will be competed among all sources obtaining source approval.¹⁰ Under the circumstances, the Air Force properly limited this procurement to the quantity of testers that will satisfy only the agency's urgent immediate requirement.¹¹ See Factech Corp., supra (sole-source purchase of the only readily available product is justified where the award is limited to a quantity that would satisfy the agency's urgent requirements).

The protester has not shown that the urgency of the requirement was created by a lack of advance procurement planning. The record shows that the agency initially planned to acquire automatic testers before the end of 1993,

¹⁰The J&A stated:

"Source development efforts with . . . FXC Corp. are underway in an effort by the Government to enhance the competitive status of this item."

We understand that in September 1994, FXC submitted to the agency the automatic testers and the test report required by the May 23 qualification requirement, and that this submission is under review.

¹¹For this same reason, the agency properly canceled RFP No. F41608-94-R-0425, which contemplated a sole-source award for the Air Force's automatic tester requirements for the next 3 years to Scot.

and that the urgency was precipitated by the efforts of the replacement contract management team to open the acquisition up to competition, which delayed contract award well past the date originally projected. Thus, while the agency's planning was ultimately unsuccessful, the urgency was not caused by a lack of planning. See Rex Sys., Inc., B-239524, Sept. 5, 1990, 90-2 CPD ¶ 185; Abbott Prods., Inc., B-231131, Aug. 8, 1988, 88-2 CPD ¶ 119.

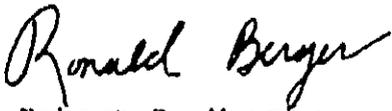
FXC alleges that it was treated unequally because the agency waived the pre-contract qualification testing requirements for Scot, but would not do so for FXC. Although the record shows that the agency did waive "pre-contract" testing for Scot, the agency reasonably found that Scot was the only source with an automatic tester available at the time of award and that the agency's needs mandated that there be no further delay in obtaining the 80 automatic testers. The agency did not waive the testing requirement, but rather delayed it until after award to permit Scot to move to production sooner and thus satisfy the agency's urgent need more quickly. The agency determined that it could delay complete qualification testing of Scot's automatic tester, based on the analysis and advice of the agency's engineer who had witnessed Scot's automatic tester and had reviewed pertinent data regarding the automatic tester to be supplied. He found that although Scot proposed some changes for the production units, it had already designed and disclosed in detail these changes, and that he was highly confident that these changes would not affect the functional performance of the tester.¹²

FXC was not prejudiced in any case by this delay in testing Scot's tester because FXC had not even designed an automatic tester as of the time of award, despite being apprised as early as February 1994 of the desirability that the tester be automatic. Thus, notwithstanding FXC's hastily prepared conceptual drawing submitted to the agency, the agency reasonably found that FXC was not a practicable source at the time of its sole-source award. Nor does the record substantiate FXC's allegation that the Air Force intentionally made it impossible for FXC to compete; to the contrary, the agency delayed the sole-source purchase in an abortive effort to obtain competition and only proceeded to the sole-source award when circumstances so mandated.

¹²We note that the engineer's confidence was apparently well-founded because Scot's production units in fact satisfied the qualification tests and Scot began delivery under the contract in October, months before the contract contemplated.

FXC also seeks the costs of protesting noncompetitive RFP No. F41608-94-R-0426, which contemplated a 3-year requirements contract for the automatic testers and which was canceled by the agency after FXC's protested its noncompetitive nature. Since the agency canceled the RFP, thus rendering FXC's first protest academic, promptly (within 2 weeks) after the protest was filed, FXC is not entitled to its costs relating to that protest. See R.J. Sanders, Inc.--Claim for Costs, B-245388.2, Apr. 14, 1992, 92-1 CPD ¶ 362.

The protest and request for entitlement are denied.

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