



Comptroller General
of the United States

83391

Washington, D.C. 20548

Decision

Matter of: Magnavox Electronic Systems Company

File: B-258076.2; B-258076.3

Date: December 30, 1994

Alfred J. Verdi, Esq., Magnavox Electronic Systems Company; David A. Gerber, Esq., and Jonathan Fraser Light, Esq., Nordman, Cormany, Hair & Compton; and Walter G. Birkel, Esq., and Eric L. Lipman, Esq., Griffin, Birkel & Murphy, for the protester. Thomas J. Madden, Esq., James F. Worrall, Esq., and Carla Draluck Craft, Esq., Venable, Baetjer, Howard & Civiletti, for Hughes Aircraft Company, an interested party. Gregory H. Petkoff, Esq., and Wayne A. Warner, Esq., Department of the Air Force, for the agency. Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Sole-source award of a follow-on contract for highly specialized equipment is unobjectionable where the agency reasonably determined that award to any other source would be likely to cause unacceptable delays in fulfilling the agency's requirements.

DECISION

Magnavox Electronic Systems Company protests the award of a sole-source contract to Hughes Aircraft Company under request for proposals (RFP) No. F08626-94-R-0041, issued by the Department of the Air Force for the supply of weapon data link units used in certain weapon systems. Magnavox contends that the agency has not adequately justified the award of a sole-source contract to Hughes.

We deny the protest.

This protest concerns the procurement of a component of weapon systems that include a guidance mechanism to ensure that the weapons (airborne bombs) reach their target. When equipped with the guidance system, the weapon is referred to as the GBU-15; a more sophisticated version, which includes a propulsion system, is denominated the AGM-130. In both versions, the guidance system consists of three parts: a

console inside the aircraft, where the weapons system operator works; a control pod mounted on the outside of the aircraft, which receives data from, and transmits guidance directions to, the bomb; and a video camera or infrared seeker located on the bomb, which transmits data to, and receives instructions from, the aircraft control pod through an electrical unit referred to as the weapon data link (WDL), which is also mounted on the bomb. While the console and control pods are designed for repeated use, the stock of WDLs needs to be replenished as the bombs are used, since the WDL is destroyed when the bomb explodes. This protest concerns the Air Force's replenishment of its stock of WDLs.

WDLs were developed more than 15 years ago. Hughes has manufactured several thousand of them, and it is currently the sole WDL manufacturer. Hughes has most recently provided the items to the Air Force under a 1992 contract to replace units used during Operation Desert Storm.

The Air Force did not plan further procurements of WDLs after the delivery under that contract was completed, because the WDL was to be replaced by a more sophisticated data link system, referred to as the improved data link (IDL). The Air Force awarded a contract to a joint venture of Magnavox and Harris Corporation to develop the IDL in 1986. The primary anticipated advantage of the IDL was its resistance to jamming, which the Air Force viewed as a significant concern in the event of conflict with the former Soviet Union. Each IDL weapon data terminal (which corresponds to the WDL) costs nearly twice as much as a WDL. The development of the IDL systems has been behind schedule and only limited numbers have actually been produced.

Due to overall budget constraints, the funds available for the AGM-130 program were substantially reduced in early 1994. In determining how to absorb the budget reduction, the Air Force took into account the dissolution of the Soviet Union, which reduced the need for the IDL's jam-resistant qualities, and the difficulties and cost of the IDL program. Against that background, the Air Force decided in May 1994 not to continue the IDL program and to revert instead to the less sophisticated, but also less costly WDLs. Prior to that decision, the remaining stock of WDLs had been depleted, as WDLs were removed from inventory, where they were intended for use on GBU-15 bombs, and mounted on AGM-130 bombs being produced, because IDL terminals were not yet available. In order to replenish the stock for the GBU-15 bombs and have adequate supplies on hand for the new AGM-130s being manufactured, the Air Force determined that it needed to acquire approximately 410 WDLs promptly, with October 1995 set as a target date for the first 155 of that quantity.

The Air Force decided to obtain the WDLs from Hughes on a sole-source basis. The determination relied on Hughes's status as the sole manufacturer of WDLs and the need, on any other firm's part, for special tooling and special test equipment that only Hughes possessed. In addition, the Air Force did not have a technical data package that it believed would be adequate for another firm to rely on to manufacture the WDLs. The Air Force had concern that any firm other than Hughes would need to spend considerable time acquiring or developing the technical data, tooling and test equipment; performing flight tests; and qualifying vendors.

The Air Force published a notice in the Commerce Business Daily (CBD) on June 8, 1994, stating its intent to issue a sole-source, fixed-price contract to Hughes for the follow-on production of 155 WDLs in fiscal year 1994, with options for 163 and 92 WDLs in fiscal year 1995. The notice also stated that the agency did not possess a complete technical data package for the WDLs. The notice explained that Hughes was the only known source that could satisfy the government's requirements, and included Note 22, advising that other firms that believed they were capable of meeting the government's needs should submit a statement of capability. The notice indicated that such submissions would be reviewed to determine whether the firm possessed sufficient technical knowledge of the WDL to produce, test, and deliver the units in the required timeframe without a data package from the Air Force.

Magnavox responded to the CBD notice. Its response stated that the firm possessed "technical knowledge sufficient to manufacture, test, and deliver the WDL receiver" through its work as part of the joint venture working on the IDLs.

In particular, Magnavox pointed out that the joint venture had been required to ensure that the IDL control pods could communicate with the Hughes WDLs. Magnavox further stated that, in working to satisfy this compatibility requirement, the firm "obtained from Hughes current drawings, interface documents, and specifications which provided the detailed information needed to design into the [IDL] system" a mode of operation compatible with the WDLs. In addition, Magnavox claimed that it had developed and qualified components that were functionally identical to those required by Hughes for the WDL. Several specific Magnavox components were said to be superior to, or less costly than, the components used by Hughes. As for the components that Hughes obtained from subcontractors, Magnavox asserted that it had developed and qualified alternate sources of supply. Magnavox's submission stated that the firm was "confident" that it could meet the schedule constraints set forth in the CBD notice.

In reviewing Magnavox's submission, the Air Force consulted agency technical personnel familiar with Magnavox's performance under the IDL contract as well as with personnel familiar with the agency's needs for the WDLs. The Air Force determined that "no source other than Hughes has the capability to meet the schedule needed for this acquisition." In reaching that determination, the Air Force focused on Magnavox's lack of the special tooling and special test equipment needed for the WDLs and the gaps in the technical data package. The Air Force concluded that the non-recurring investment in time and funds required to achieve a level of expertise required to successfully perform this work made qualification of a new source economically impractical.

In late June, the Air Force prepared a document justifying acquiring 410 WDLs from Hughes on a sole-source basis. The justification relied on the exception which permits contracting without full and open competition for:

"a follow-on contract for the continued development or production of a major system or highly specialized equipment, including major components thereof, when it is likely that award to any other source would result in (A) substantial duplication of cost to the Government that is not expected to be recovered through competition, or (B) unacceptable delays in fulfilling the agency's requirements."

Federal Acquisition Regulation (FAR) § 6.302-1(a)(2)(ii). See also 10 U.S.C. § 2304(d)(1)(B) (1988). After it was advised orally on July 26 that award to Hughes would proceed, Magnavox filed a protest with our Office on August 3. Once minor changes were made, the justification document received approval of the Air Force Senior Procurement Executive, the Deputy Assistant Secretary for Acquisition, on September 9, 1994.

Magnavox contends that the Air Force lacked a reasonable basis for its conclusion that only Hughes could deliver the WDLs without substantial duplication of cost by the required October 1995 delivery date. In Magnavox's view, the real reasons for the sole-source award were the agency's lack of advance planning and its concern about funding availability.

Because the overriding mandate of the Competition in Contracting Act (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(3)(A), our Office will closely scrutinize sole-source procurements

conducted under the statutory exceptions to that mandate. Marconi Dynamics, Inc., B-252318, June 21, 1993, 93-1 CPD ¶ 475.

Award of a contract using other than competitive procedures may not be made where the shortage of time cited as the justification was the result of a lack of advance planning by contracting officials. 10 U.S.C. § 2304(f)(5)(A). However, a change in conditions does not generally indicate a lack of advance planning by an agency. Magnavox NAV-COM, Inc., B-248501, Aug. 31, 1992, 92-2 CPD ¶ 143. Such changed conditions may include policy changes such as decisions to reduce budgets or to reorder procurement priorities. See Arthur Young & Co., B-221879, June 9, 1986, 86-1 CPD ¶ 536.

In this case, the expedited schedule required by the agency was not caused by a lack of advance planning on its part. Instead, it was the result of the IDL program problems, which caused the agency to deplete its WDL stock to take the place of planned IDL units while those problems were dealt with, and the final decision to halt that program, which meant that more WDLs would be needed shortly to replace the IDLs that would not be procured. The Air Force decided to halt the IDL program due to the unexpected problems in that program as well as external budgetary constraints and the unanticipated end of the Soviet threat, which had been a key justification for the program. Essentially, the Air Force policy decision not to continue the IDL program created an unforeseen need for substantial additional quantities of the WDL alternative. Accordingly, we find no basis for the protester's allegation that the scheduling constraints relied on by the Air Force were caused by a lack of advance planning.

We therefore turn to consider the rationale offered by the Air Force. When an agency uses noncompetitive procedures, it must execute a written justification and approval (J&A) with sufficient facts and explanation to support the use of the specific authority, and it is generally required to publish a notice in the CBD to permit potential competitors to challenge the agency's intent to procure without full and open competition. See 10 U.S.C. § 2304(f) (1988 and Supp. V 1993). Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When

the J&A sets forth reasonable justifications for the agency's actions, we will not object to the award. Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299. The protester's disagreement with the agency's rationale does not provide a basis to sustain the protest; rather, the protester must show that the agency's position is unreasonable. Allied Signal Inc., B-247272, May 21, 1992, 92-1 CPD ¶ 461. We conclude that the protester has not made that showing here.

The statutory exception on which the agency relied here applies only to "a follow-on contract for the continued development or production of a major system or highly specialized equipment, including major components thereof." Accordingly, before turning to the specific justifications offered for acquiring the WDLs without competition, we must first determine whether the procurement here is a qualifying follow-on contract. We find that it is. Magnavox argues that the WDLs cannot reasonably be viewed as highly specialized equipment, because they are a "20-year-old FM signal transmission system using low-level technology." We agree with the agency that the WDLs, which have been specially developed for the sole purpose of permitting the two-way transmission of particular kinds of data in unique circumstances, are fairly characterized as highly specialized equipment, regardless of the number of years that they have been manufactured and notwithstanding Magnavox's disparagement of the technology that they employ. Accordingly, we conclude that the Air Force reasonably found this procurement to be a follow-on contract for the continued production of highly specialized equipment.

¹We note that the protester complains that the J&A was modified and signed by the approving official after the lower-level officials had signed it and after the protest was filed. This sequence of events in itself provides no basis for invalidating the J&A.

²The protester argues that this protest is governed by our decision in Marconi Dynamics, Inc., *supra*. In that case, we sustained a protest of the proposed sole-source award of a contract because the protester was able to show that the agency's findings underlying the J&A were not supported by fact. In Marconi Dynamics, the agency failed to respond to specific arguments presented by the protester, thus leading our Office to conclude that the agency had not put forth a reasonable position in support of its determination that the procurement needed to be conducted on a sole-source basis. In the instant protest, as explained below, the Air Force has clearly responded to the protester's contentions and has offered reasonable support for the findings in the J&A.

The sole-source procurement would therefore be permissible if the Air Force reasonably found that award to any source other than Hughes would likely result in either "(A) substantial duplication of cost to the Government that is not expected to be recovered through competition, or (B) unacceptable delays in fulfilling the agency's requirements." Because either basis is sufficient and we find that the Air Force reasonably determined that acquisition from Magnavox (or any source other than Hughes) would likely cause unacceptable delays, we will not address the question of duplication of costs.

The Air Force position is that, notwithstanding Magnavox's substantial experience under the IDL contract, Magnavox could not deliver WDLs without the likelihood of unacceptable delay. In this regard, the Air Force argues that delays will be caused by Magnavox's lack of a complete technical data package, tooling, and testing equipment, as well as the need for first article testing. Magnavox responds that it has enough technical data, either received from Hughes or developed under the IDL contract, to be capable of manufacturing the WDLs and delivering them essentially as promptly as Hughes can. Magnavox also points out that Hughes proposed delivering the WDLs in February 1996, rather than in October 1995, as the agency had stated was required.

The parties agree that the protester has access to much of the technical data needed for manufacture and is familiar with the technology due to its involvement in the IDL contract. The parties disagree, however, on the significance of the data that Magnavox lacks. Magnavox emphasizes that it has received extensive data from Hughes; the Air Force and Hughes counter that Magnavox is relying on data provided in the 1980s and that it lacks a current WDL technical data package, since that package has been modified significantly in the intervening years. While Magnavox argues that the missing information is minor and could easily be replicated or worked around, the agency has concern that Magnavox, if awarded the contract, might encounter unanticipated difficulties due to the missing data, the result of which would be unacceptable delays in delivery of the WDLs.

³For the same reason, we do not address the protester's allegations that the agency's action was driven by funding concerns and that the agency's evaluation of Magnavox's response to the CBD notice was based on criteria other than those set out in that notice. The dispositive question is whether the agency's concern about delay, which was set out in the CBD notice, was well founded.

A similar disagreement exists as to the requisite special tooling and testing equipment. Magnavox argues that it has all the tooling needed to manufacture the WDL except for one item, as to which Magnavox proposes to use an alternative methodology which it claims will be cheaper and more efficient than Hughes's approach; as to testing equipment, with one allegedly minor exception for testers, which the firm argues it can acquire at minimal cost, Magnavox states that it is capable of testing the WDLs on its existing IDL test station. In the protester's view, the Air Force would have learned of Magnavox's capabilities in this regard if the agency had conducted more than an allegedly cursory review of Magnavox's response to the CBD notice and had made an effort to obtain additional information from the firm.

Where the military advises that its stock of a key component of a weapon system needs to be replenished, we will accept the need for avoiding delay in replenishing that stock unless a protester shows that the agency's rationale is defective. See, e.g., Logics, Inc., B-256171, May 19, 1994, 94-1 CPD ¶ 314. The protester has not done so here. While Magnavox argues that Hughes may not be able to deliver the WDLs until several months after October 1995 (an assertion denied by Hughes), the fact remains that Hughes appears to be in the best position to supply WDLs as promptly as possible.⁴ As to Magnavox's ability to deliver acceptable WDLs in a timely manner, we conclude that the Air Force had a reasonable basis for its concern, since Magnavox had never manufactured the WDLs and might discover, after award of a contract, that the missing technical data, tooling, and testing equipment were more important than it is willing to concede now.⁵ At that point, the Air Force would be without an adequate stock of WDLs, which are essential components in the weapon systems at issue here, since without them the bombs cannot be guided to their targets. In order to avoid such a situation, CICA permits agencies,

⁴Hughes asserts that it proposed to deliver both the base and first option quantities in February 1996 as a less costly alternative for the agency, but that it was willing and able to deliver the base quantity by October 1995 (that is, within 13 months of the planned September 1994 contract award).

⁵Particularly in light of the Air Force's familiarity with Magnavox's performance under the IDL contract, we see no basis for Magnavox's assertion that, if the agency had conducted discussions with the firm or visited its facility, it would have agreed that Magnavox was likely to be able to deliver the WDLs without unacceptable delays.

in unusual circumstances such as those which led to this procurement, to obtain follow-on supplies without full and open competition.

The protest is denied.

\s\ Paul Lieberman
for Robert P. Murphy
General Counsel