

DECISION

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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-182536

DATE: February 26, 1975

MATTER OF: Stewart-Warner Corporation

DIGEST:

1. Where record indicates prior unavailability of data adequate to permit competitive procurement, existence of stringent delivery schedules based upon bona fide military exigencies, and a need for preproduction testing for new producers, there is no objection to rejection of proposal of new supplier requiring preproduction testing and to sole-source procurement from the only prior manufacturer on the basis of waiver of preproduction testing in order to meet agency delivery schedules.
2. Failure to timely synopsisize procurement in Commerce Business Daily was not prejudicial to protester since action was not deliberate attempt to deny protester opportunity to compete and agency properly determined to make sole-source award to only prior manufacturer because of tight delivery schedule.
3. Intended future use of Qualified Products List, which appears motivated by agency desire to increase, rather than restrict, competition is within discretion of agency to implement.

Stewart-Warner Corporation has protested as anticompetitive two procurements of AN/APN-194 radar altimeters by the Department of the Navy on a sole-source basis from Honeywell, Incorporated. The firm also protests that the Navy's efforts to establish a Qualified Products List (QPL) for the item, and its intention to restrict all future procurements of the item to qualifying firms, is restrictive of competition.

The procurement history of the item reveals that it was first procured from Honeywell in 1970 pursuant to a two-step formally advertised solicitation under which five firms, including Honeywell and Stewart-Warner, responded to the first step of the procurement. Of the five proposals, two, including Stewart-Warner's, were determined technically unacceptable, thereby precluding their participation in the second step. The ensuing award was executed with Honeywell on the basis of the lowest bid submitted under the second step. Subsequently, sole-source contracts for the item were awarded to Honeywell by the Naval Air Systems Command (NAVAIR) in 1972 and 1973.

The two procurements under protest are PR Number 5331-364-4, issued by NAVAIR, pursuant to which contract N00019-75-C-0099 was executed with Honeywell on October 23, 1974, and request for proposals (RFP) N00383-75-R-0448, issued October 1, 1974, by the Navy Aviation Supply Office (ASO), Philadelphia, Pennsylvania.

Counsel for Stewart-Warner contends that the conduct of the two procurements on a sole-source basis is violative of 10 U.S.C. 2304(g), requiring the solicitation of proposals from a maximum number of qualified sources, and of various implementing Armed Services Procurement Regulation (ASPR) provisions.

With regard to the NAVAIR procurement, it is contended that ASPR 1-1003 was violated since notice of intent to negotiate for the requirement was not published in the Commerce Business Daily (CBD) until September 27, 1974, after completion of negotiations with Honeywell. Stewart-Warner states that it has built, at its own expense, a prototype receiver-transmitter, "which is the heart of the radar altimeter." It believes the prototype meets the applicable specifications and would be interchangeable with the Honeywell equipment. Stewart-Warner believes it can undertake quantity production and begin deliveries within 1 year of the date of award, and has informed the Navy of this fact and of its desire to compete.

NAVAIR and ASO are further charged with failure to organize their procurements so as to facilitate competition through reasonable lead times, whenever feasible. In this regard, NAVAIR is accused of adopting delivery schedules which are more restrictive than either Honeywell or Stewart-Warner can meet. Moreover, long-term delivery requirements which could have been fulfilled by Stewart-Warner were allegedly grouped with short term deliveries to thwart competition. It is charged that the Navy had made no effort to facilitate competition but rather has precluded it through the use of delivery schedules tailored approximately to Honeywell's production capacity. Accordingly, it is requested that all units under either procurement which are to be delivered 12 months or more after award be severed from these procurements and awarded through competition.

With regard to the ASO procurement, counsel cites ASPR 1-305.2 (a), providing that delivery and performance schedules which are unreasonably tight or difficult of attainment are inimical to full competition. Protester argues that 12 months should be the minimum lead time applicable to anyone not already in production.

With regard to the NAVAIR requirement for 335 units, the record shows that it was negotiated on a sole-source basis with Honeywell pursuant to 10 U.S.C. 2304(a)(10) on the grounds that it was impracticable to obtain competition. This determination was predicated upon two essential considerations: the unavailability of data adequate for competitive procurement; and inasmuch as deliveries were to commence during November 1974 and to be completed in November 1975, only Honeywell, the one firm with an existing altimeter capable of satisfying the referenced delivery schedule, could fulfill NAVAIR's delivery requirements. In this regard, NAVAIR has explained that all of the radar altimeters being purchased are for delivery as Government-furnished property to several airframe manufacturers currently producing aircraft under contracts with the Navy. Consequently, any failure to deliver the necessary equipment would prevent the airframe manufacturers from installing the equipment at the planned point in production or could delay acceptance of the aircraft since the altimeters are stated to be essential to operational status. Such a delay would further subject the Navy to possible claims for increases in cost and/or schedule extensions.

Moreover, many of the aircraft involved are reported to represent foreign military sales commitments of the United States Government, and timely delivery is stated to be essential to the fulfillment of such commitments. Stewart-Warner conceded that it could not commence deliveries any earlier than 12 months which was inconsistent with the short lead time requirements.

The Navy reports that under the 1970 contract with Honeywell, it purchased a Category F data package for use in future competitive procurements, and the subsequent contracts awarded in 1972 and 1973 required Honeywell to update the basic drawings as changes were incorporated into the equipment. It was estimated that a data package suitable for competitive procurement would normally have been delivered and validated by early 1973. NAVAIR reports that in January 1974, after repeated attempts to obtain a complete and acceptable data package from Honeywell were unsuccessful, DCASO Minneapolis, was requested to withhold payments under the 1972 and 1973 contracts. Recently, the Navy has advised that it now has available a validated data package that will permit it to compete future requirements for the item.

We note that the delivery schedule for the NAVAIR procurement was predicated upon a requirement for immediate deliveries continuing through November 1975 in order to meet the current production schedules of airframe manufacturers and a delay would have unacceptable

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consequences. Under somewhat similar circumstances, wherein electronic equipment was urgently required for installation on board war vessels being constructed and a delay would have jeopardized their completion dates, our Office has not objected to a sole-source award to the only concern deemed able to meet imperative delivery schedules. A&J Manufacturing Company, B-178426, February 25, 1974; see also Janke and Company, Inc., B-181064, August 29, 1974; B-177557, July 23, 1973. Moreover, this Office has consistently held that where adequate data is not available to an agency to enable it to conduct a competitive procurement within the necessary time frame, it will not question the legality of a sole-source award to the only firm possessing the requisite data. See Engineering Research, Inc., B-180893, September 12, 1974; Electro Impulse, Inc., B-180577, May 7, 1974; A&J Manufacturing Company, *supra*; B-173148, August 13, 1971. There is no evidence in the record before us that the unavailability of drawings sufficient to permit a competitive procurement under these two solicitations was the product of any misfeasance by the Navy. In fact, the record indicates Navy resorted to economic sanctions against Honeywell under prior contracts in an attempt to obtain the data package. In view of the fact that all NAVAIR deliveries were to be completed by November 1975, and of Stewart-Warner's admission that it could not commence deliveries sooner than 12 months from award, there is no basis to object to NAVAIR's sole-source award to Honeywell.

While NAVAIR admits failing to timely synopsize the requirements as required by ASPR 1-1003, the matter was synopsized once the error was discovered. In the absence of any indication in the record that the delay was part of a deliberate effort to deny Stewart-Warner an opportunity to compete, and in view of the fact that Stewart-Warner could not have met NAVAIR's delivery requirements, we are unable to conclude that Stewart-Warner was prejudiced by the referenced publication defect. See NORTEC Corporation, B-180429, May 23, 1974.

The ASO procurement is being negotiated under the authority of 10 U.S.C. 2304(a)(2) on the basis that the public exigency would not permit the delay incident to formal advertising. This procurement is for 241 units, with specified quantities of accessories such as indicators, antennae, blankers and installation kits. The requirement was synopsized in the CBD on October 4, 1974, subsequent to which Stewart-Warner requested and was furnished a proposal set. It is reported that timely proposals were received from Honeywell and Stewart-Warner.

ASO states that the procurement includes requirements of both the Navy and various foreign governments under the Foreign Military Sales program. The latter requirements are funded by foreign

governments which have designated Honeywell as the only acceptable source of supply and the protester does not contest the sole-source procurement of these requirements. The Navy deliveries are required in the period June 1975 through June 1976, while the delivery dates for foreign government requirements extend through January 1977. ASO has estimated the production lead time for a new supplier of the item to be 18 months. ASO takes the position that the fact that Stewart-Warner has built a prototype receiver-transmitter would not significantly improve this lead time since there are other components of the system also subject to extensive production testing which ASO understands have never been manufactured by Stewart-Warner. ASO estimates that if a contract had been placed, as planned, with Honeywell in January 1975, delivery could have been obtained in accordance with the required schedule, whereas any award to Stewart-Warner would preclude any deliveries prior to 18 months since extensive preproduction (first article) testing delays would be encountered. In this regard, the solicitation contains a requirement for first article testing, but also provides for a waiver for a previous supplier of the item. Accordingly, the contracting officer has proposed to reject Stewart-Warner's unsolicited proposal and to make an award to Honeywell for all articles covered by the RFP, and is of the position that to do otherwise would disrupt aircraft delivery schedules, incur excess costs, and ultimately jeopardize the National Defense Program.

Counsel requests that all units to be delivered more than 12 months after award be severed and reprocured on a competitive basis. However, the Navy has a requirement for prequalification testing based upon a need to insure a high level of quality and reliability. The Navy, in a conference conducted at our Office, has pointed out that the item is of critical importance to aircraft safety inasmuch as 14 lives were lost during the last year in aircraft that crashed due in part to defective instrumentation. Accordingly, the Navy feels that it cannot sever those units scheduled for delivery during the last 6 months of the solicitation schedule covering the Navy's requirements because of the necessity for preproduction qualification and the concomitant 18 months required as lead time.

While Stewart-Warner implies that the full period required for preproduction qualification testing may be unnecessary with regard to its proposal, our Office has taken the position that the responsibility to determine the degree of testing necessary is a matter of administrative discretion. Moreover, we are not equipped to evaluate the technical sufficiency of such administrative determinations. See 52 Comp. Gen. 778 (1973). The mandate for competition set forth in 10 U.S.C. 2304(g) and implementing regulations cannot be considered independent of an agency's essential needs. In view thereof, and of

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the criticality of the item to human and aircraft safety, we are unable to object to the imposition of a preproduction testing requirement which is considered necessary by the using activity notwithstanding its anti-competitive effect on prospective contractors.

In light of the foregoing considerations, our Office has recognized that time of delivery can assume controlling importance in urgent procurement situations, and we have not objected to a sole-source award to the only offeror entitled to first article waiver (as is Honeywell in the instant case), when the waiver is essential to fulfillment of required delivery schedules. 49 Comp. Gen. 639 (1970).

We have reviewed the cases cited in support of protester's position. Our decisions 32 Comp. Gen. 384 (1953); B-122751, April 26, 1955 and 16 Comp. Gen. 207 (1936) involved specifications requiring unique qualities or attributes of the product of a particular manufacturer, and the procurements therefore were alleged to be restrictive of competition. However, we do not consider those cases to be germane to the issue involved here concerning the ability of a contractor to comply with an agency's essential testing and delivery requirements. With regard to B-169370, August 12, 1970, counsel quotes from the last paragraph of that decision wherein we called attention to the fact that a 150-day delivery schedule was considered to be incompatible with maximum competition, and so advised the Secretary of the Air Force with regard to future procurements. However, it should be noted that we also stated in that decision that the Government does not violate the letter or spirit of the competitive bidding statutes merely because only one firm can supply its needs, provided the specifications are reasonable and necessary for the purpose intended. Inasmuch as the delivery schedule in that case was considered essential to prevent the grounding of C-141 aircraft, we concluded that the short delivery requirements were based upon a bona fide determination of the actual needs of the Air Force, and we therefore could not consider that the delivery schedule was restrictive under the circumstances.

Stewart-Warner also objects to any future procurement of the items only from firms listed on a QPL. Its objections are as follows:

1. The proposed establishment of a QPL would be contrary to paragraph 4-106.2 of Defense Standardization Manual 4120.3-M (January 1972), providing that the QPL shall not be used with intent to discourage possible additional sources of supply;

2. The establishment of a QPL would not fulfill the requirements of Paragraph 4-105 of the referenced manual, holding that prior to inclusion of qualification in a specification, the preparing activity shall determine, inter alia, that sources, sufficient in number to provide an adequate base of supply, are available and willing to submit their products for qualification;

3. Notice of the establishment of the QPL did not comply with ASPR 1-1105 providing that publicity of requirements for qualification testing shall include notice that in making future awards consideration shall be given only to such products as have been accepted for inclusion on a QPL;

4. Stewart-Warner knows of no previous instance where an entire electronics system, such as the AN/APN-194 altimeter, has been placed on a QPL and

5. Use of the QPL is inappropriate and restricts competition in that:

a.) a contractor must incur considerable cost to qualify its system with no assurance that its efforts and expenditures will be rewarded with a procurement. This risk factor is exacerbated by the lack of a commercial market to absorb the systems should they fail to be procured by the Government.

b.) the time required for placing an altimeter on the QPL would consume a substantial portion of the anticipated period during which peak procurements of the altimeter are expected to transpire. Stewart-Warner estimates that no AN/APN-194 altimeter would be included on the QPL for 2 years, during which period the item would be procured from Honeywell without competition.

With regard to the establishment of a QPL for the item, the Navy advises that while a validated data package now permits a competitive procurement, a competitive solicitation in and of itself would not insure timely delivery of the needed equipment. Therefore, in an effort to create a competitive environment and at the same time to reduce the manufacturing and testing lead time, the cognizant technical desk initiated action for the establishment of a QPL in April 1974. The Navy states that this action was undertaken with the sole intention of creating a competitive environment for procurement of the equipment by establishing other sources which could furnish a product of acceptable quality which could meet Navy delivery requirements. Accordingly, the Navy announced in the November 8, 1974, issue of the CBD that it was establishing a QPL for the item conforming to specification MIL-A81605C(AS), dated October 24, 1974. Since that

notification, the Navy reports that a total of 10 companies have indicated their interest. In this connection, however, the protester believes that of those responding only Honeywell and itself are sufficiently competent to manufacture the item.

While Navy admits that the notice published in the CBD did not specify that future awards would be made only for products included on a QPL, the applicable specification referenced in the notice contained essentially this information. In any event, the Navy has agreed to make the necessary changes to clarify the announcement to avoid a possible misunderstanding.

In our decision 36 Comp. Gen. 809, 815-16 (1957) we considered similar objections to the imposition of a QPL requirement where the item affected flight safety and it was necessary to coordinate the procurement with aircraft production schedules. We stated in that decision as follows:

"* * * To the extent that the cost of qualifying a product is significant, and is required to be borne by the prospective supplier, the requirement that products be 'qualified' before bids will be considered for award clearly tends to restrict competition, particularly * * * where a firm must * * * invest substantial amounts of money to qualify products on the mere possibility that it be awarded a contract. However, * * * since * * * the individual agencies are vested with a reasonable degree of discretion to determine the extent of competition which may be required consistent with the needs of the agency, we do not feel justified in questioning the qualified products system as a proper method of procurement. It should be noted in this regard that legitimate restrictions on competition in Government procurement have been determined to be valid when the needs of the agency require it * * *.

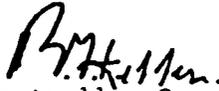
"Therefore while the Qualified Products List involves an element of restriction on full and free competition, the procedures and safeguards of the Armed Services Procurement Regulation and Defense Standardization Manual are within the proper bounds of discretion conferred by law upon the procuring agencies."

Also see 50 Comp. Gen. 542 (1971). In our opinion the above-quoted discussion regarding the application of a QPL requirement is apropos to the instant case. Although Stewart-Warner objects to a QPL

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requirement for an entire system such as the AN/APN-194 and believes such action is unprecedented, we are aware of no legal basis prohibiting such action under the compelling circumstances of this case.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States