DECISION

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

50848

97128

FILE: B-182577 DATE: June 30, 1975

MATTER OF: Hoffman Electronics Corporation

DIGEST:

1. Protest against refusal of agency to consider proposal for award of production contract from firm which, although not selected as development contractor, independently develops allegedly comparable product is timely under 4 C. F. R. §20. 2(a). Although solicitation leading to award of development contracts warned that production contract would be awarded only to development contractor, protester could not know for certain that it would not be permitted to submit proposal until it was so notified after issuance of solicitation for production contract.

2. Refusal of Air Force to consider proposal from protester for TACAN was not unduly restrictive of competition contrary to maximum competition mandate of 10 U. S. C. 2304(g) where development contracts provided that follow-on production would be limited to development contractor (dual prototype method of contracting), since Air Force has demonstrated that such restriction was reasonably necessary to assure that prototype selected would meet technical and cost objectives and because testing of protester's equipment could not be accomplished within time constraints of procurement.

This procurement calls into question the propriety of restricting competition for the award of production contracts to development contractors under the Department of Defense's "prototype" or "parallel development" method of procuring major defense systems when another company claims and attempts to demonstrate that it has developed and can furnish equipment comparable to the prototypes furnished by the development contractors.

PUBLISHED DECISION
54 Comp. Gen.....

The equipment involved is a solid-state airborne TACAN (designated as AN/ARN-XXX) set designed to replace existing vacuum tube type sets in Air Force aircraft. The Air Force, in 1972, conducted a competitive procurement (request for proposals (RFP) F19628-73-R-0025) leading to the award of contracts calling for the development of this type of new TACAN at a design-to-cost goal of $10,000 per set. Five companies, including Hoffman Electronics Corporation, submitted offers. Although Hoffman's proposal was one of three found to be in the competitive range, awards were made, in April 1973, to General Dynamics Corporation Electronics Division and to the Collins Radio Company (now the Collins Radio Group of Rockwell International). The solicitation and the resulting development contracts contained a provision stating that follow-on production contracts would be "limited only to contractors selected for participation" in the development efforts.

On September 19, 1974, the Air Force, through the Electronic Systems Division, Air Force Systems Command, issued RFP F19628-74-R-0078 which solicited proposals from Collins and General Dynamics for an initial production contract involving either 500 or 1,000 TACAN sets. This RFP also contained a statement restricting the procurement to the two development contractors. Hoffman requested and received a copy of the RFP, but by letter dated October 23, 1974 and received by Hoffman on October 28, 1974, Hoffman was told by the Air Force that a proposal from Hoffman would not be considered. Hoffman then protested to this Office, claiming that it had developed a comparable TACAN and was entitled to an opportunity to compete.

The Air Force states that under this dual prototype method of contracting, the award of a production contract is a subsequent phase of a procurement that was initiated by the award of competitively negotiated development contracts. According to the Air Force, the competition sought and obtained prior to the award of the development contracts satisfies all statutory and regulatory requirements for competition. In fact, the Air Force states, this procurement method "enables an agency to retain a competitive aspect a step further in the award process" since two contractors remain in competition for a production award through the development phase of a procurement. Accordingly, the Air Force believes it need not permit Hoffman to compete at this juncture.

Hoffman, on the other hand, claims that the restriction on the production award is contrary to the statutory requirement for maximum competition, particularly since, according to Hoffman, General Dynamics and Collins have not achieved "key requirements of the development contract." Hoffman claims that it "is in the best position to satisfy the Government's needs" since its TACAN, which it developed at its own expense, is currently in production and is equal to and interchangeable with the TACANs developed by General Dynamics and Collins.

The threshold question is whether Hoffman's protest is timely. The bid protest procedures governing this procurement require that protests based on solicitation defects which are apparent prior to the closing date for receipt of proposals be filed prior to the closing date. In other cases, the procedures require the filing of a protest not later than 5 days after the basis for protest is known or should have been known. 4 C.F.R. § 20.2(a) (1974 ed.). The Air Force and Collins state that since the development RFP warned that a production contract would be awarded only to a development contractor, any objections Hoffman had to that provision should have been registered prior to the award of the development contracts rather than after completion of the development phase in which Hoffman had actively but unsuccessfully competed for a development contract without having objected to the production award limitation. The Air Force also asserts that subsequent to the award of the development contracts, Hoffman was informed verbally in February and May 1974 that it would not be permitted to submit a production proposal and therefore was on notice at least from those dates of the Air Force's intention. Hoffman claims, however, that it was in no position to protest until after RFP -0078 was issued and it was formally denied an opportunity to compete for the production contract.

We believe the protest is timely. In essence, Hoffman is protesting not against the restriction per se, but against its use in circumstances, which Hoffman believes exist here, where development goals were not met and where a firm other than the development contractors had developed independently a product satisfying the agency's requirements. In this connection, our decisions have recognized that agencies are not precluded from awarding contracts to firms other than those to which a solicitation appears to limit the procurement. See 48 Comp. Gen. 605, 610 (1969); 52 id. 546 (1973); B-176861, January 23, 1973; B-177949(1), June 15, 1973. Accordingly, despite the language contained in RFP -0025 and the informal indications that Hoffman received in February and May 1974, Hoffman could not actually know it would not be permitted to compete for the production contract until after the Air Force refused to

consider Hoffman's proposal under RFP -0078. Therefore, Hoffman was not required to protest until after receipt of the Air Force's decision to restrict the procurement, and since it did so prior to the closing date for receipt of proposals under RFP -0078, we must view the protest as timely. However, for reasons explained below, we believe the protest should be denied.

With regard to the merits of the protest, the Air Force believes that its procurement objectives under the Airborne TACAN program cannot be satisfied unless the competition for a production contract is limited to the development contractors. It also denies Hoffman's allegations regarding the failure of the development contractors to attain certain goals and regarding the acceptability of Hoffman's TACAN.

The contracting officer reports that the Airborne TACAN program originated in 1972 with requirements for competitive development of a state-of-the-art TACAN subject to the "then innovative procurement techniques such as design-to-cost, failure-free warranty, and life cycle costing * * *." Originally, priced options for limited production were to be included in the development contracts so that there could be a "price limited 'fly-off'" resulting in selection for production of "the superior unit from the development." However, although "the approach of having contractors commit to production price ahead of prototype selection was altered * * * the concept remained that production prices, when received, would come only from the development contractors." According to the contracting officer, "This would retain the application of 'try before buy,' would retain the ability to examine economic risk factors in avionics procurements, and would assure the Government procurement of a known product at a known price." The contracting officer states that these objectives "cannot be satisfied if a proposal is permitted by a company not involved in the development effort."

This is further explained by the contracting officer as follows:

> "When the Air Force decided to enter into the present dual development program it did so due to the sophisticated and advanced nature of the product desired. It was realized to insure the confidence necessary to make a clear and informed decision to commit the large amount of Government funds required to procure the production quantities of TACAN sets the Air Force would be required to constantly oversee and test

> the prototypes through their development phase. It is the belief of the Contracting Officer that without this type of surveillance and constant qualification testing there could be no assurance that the desired goals of the program could be attained. The restriction of awarding the production phase to one of the development contractors was based on this need for confidence in the proposer's product."

In support of its protest, Hoffman states that it developed its own solid-state TACAN, now designated the AN/ARN-113, which in 1972 was installed in the C-9B aircraft and on which "a complete Government witnessed Qualification Test Program in accordance with MIL-E-5400 for Class II equipment" was conducted. Subsequently, "Hoffman developed and produced additional mount-adapters and converters, which utilized the identical bearing and range couplers and digital to analog conversion circuitry, but with the sheet metal exterior conforming to the specific contours" of tube type TACANs. According to Hoffman, these items, together with the receiver/transmitter of the AN/ARN-113, were bought by the Air Force and denominated the AN/ARN-84(V). This AN/ARN-84(V), according to Hoffman, was nearly identical to the AN/ARN-113 and therefore the Air Force "saw no need to repeat" the MIL-E-5400 Class II testing. Thus, states Hoffman, "the AN/ARN-84(V)) had been qualified by similarity to the AN/ARN-113."

Furthermore, Hoffman asserts that there is data within the Air Force which verifies the qualification of the AN/ARN-84(V). Hoffman admits that its TACAN has been formally tested only to the less stringent reliability requirements, but claims that the TACAN is subjected to a "burn in" at the higher test level prior to delivery, and that the Air Force can easily verify that AN/ARN-84(V) production units have in effect been tested at the higher level for more than a year; Hoffman also offers to guarantee that its TACAN will pass "full tests * * * within two months after award of a contract to it." In addition, Hoffman claims there is no need for it to furnish a prototype, and asserts that its current price for the AN/ARN-84(V) is not indicative of what it might offer in response to a solicitation with a design-to-cost requirement.

In support of this claim, Hoffman has submitted copies of documents which purportedly indicate that the Air Force has accepted and approved qualification test data furnished by Hoffman under its AN/ARN-84(V) contract. Hoffman also refers to the "thousands of hours flown" by the AN/ARN-84(V) in Air Force aircraft and the data resulting therefrom as providing a reliable indication of the

performance capability of its TACAN in actual operation. In essence, Hoffman claims that there is already available sufficient test and operational data to enable the Air Force to evaluate the AN/ARN-84(V).

The Air Force, on the other hand, claims that "there remains serious doubts as to performance capability" of the Hoffman TACAN. According to the Air Force, any design difference between the AN/ARN-113 and AN/ARN-84(V), "no matter how apparently slight, can cause significant differences in performance. Only in unusual urgent circumstances would qualification of important aircraft navigation equipment be made by similarity rather than direct test." The Air Force further claims that:

(1) the test data furnished does not "really support" the conclusion that the Hoffman AN/ARN-113 passed the MIL-E-5400 Class II qualification tests;

(2) the Hoffman TACAN has not been tested against stringent environmental and reliability requirements imposed on the prototypes. In this regard, the Air Force points out that the prototypes were tested for mean time between failure (MTBF) within a temperature range of -54 to 71 degrees centrigrade with a "confidence factor" of 90 percent, while the Hoffman TACAN was tested within a range of -54 to 55 degrees centrigrade with an 80 percent confidence factor;

(3) there are differences between the ARN-XXX specification and the AN/ARN-84(V) with respect to "burn in" time, automatic self-testing, and mean time to repair, which means that the prototypes and the Hoffman TACAN have been tested against different standards and requirements, all of which directly "relate to user confidence";

(4) the 400 AN/ARN-84(V) sets now flying "do not represent a quasi-certification of the equipment" because "the full range of data accumulated * * * do not indicate that the set meets the program objectives for field reliability";

(5) the AN/ARN-84(V) is being delivered at a price in excess of $18,000, well over the $10,000 per set design-to-cost goal.

The Air Force sums up its position as follows:

> "The Air Force has very little confidence that the Hoffman product can meet the qualification standards already met by the development prototypes at its present cost and zero confidence that these standards can be met within the design-to-cost goal. In addition, the time necessary to allow Hoffman to prepare a proposal, prepare a prototype that would allegedly meet the qualification standards and allow for Air Force testing comparable to that performed on the prototypes would delay this urgently needed program a prohibitive amount of time. This would also mean that because of the delay the Air Force would be forced to buy more of the AN/ARN-84(V) sets to fulfill its requirements. * * *"

In addition, the Air Force points out that the restriction on the production phase of this TACAN procurement is a reasonable one since "prototype contracting constitutes a rational response to the problems posed by the more traditional methods of procurement" and is supported by the Congress, the Commission on Government Procurement (COGP), and a Department of Defense (DOD) Directive.

In the past, we have recognized that the use of dual prototype contracting has merit. See Report B-39995, "Evaluation of Two Proposed Methods For Enhancing Competition In Weapons Systems Procurement," July 14, 1969. We also note that its use is consistent with COGP recommendations concerning development of alternative systems by competing contractors. See 2 Report of the Commission on Government Procurement 79-86. As noted above, the Air Force feels that by employing the parallel development approach to the program, it was able to sustain a competitive range of two active competitors for the production award instead of committing itself, at an earlier point in time, to a single source.

The validity of the Air Force's restriction on competition in this case must be measured against the requirement of 10 U. S. C. 2304(g) (1970) that proposals shall be solicited "from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured." We have recognized that this requirement for maximum competition "is the cornerstone of the competitive system." 53 Comp. Gen. 209, 211 (1973). At the same time, we have also recognized that restrictions on competition may be imposed when the legitimate

needs of the agency so require. See 53 Comp. Gen. 102 (1973). Thus, a determination as to whether a limitation on competition is proper turns not on the restrictiveness per se of the limitation, but on whether the limitation is unduly restrictive under the circumstances. 53 Comp. Gen. 102, supra; 53 id. 209, supra.

In applying these principles we have regarded as unduly restrictive of competition the establishment of a qualified offerors list, 53 Comp. Gen. 209, supra, and other methods of prequalifying offerors. Department of Agriculture's Use of Master Agreement, B-182337, January 20, 1975, 54 Comp. Gen. ___; VAST, Inc., B-182844, January 31, 1975; METIS Corporation, B-181387, January 24, 1975, 54 Comp. Gen. ___. We have also objected to sole-source procurements when the circumstances did not justify noncompetitive awards. See, e.g., 52 Comp. Gen. 987 (1973) and B-166506, July 26, 1974.

On the other hand, we have upheld as not unduly restrictive the use of two-step procurement, 40 Comp. Gen. 40 (1960); qualified products lists, 36 Comp. Gen. 809 (1957), 50 Comp. Gen. 542 (1971), and Stewart-Warner Corporation, B-182536, February 26, 1975; a qualified manufacturers list, B-135504, May 2, 1958 (discussed in 53 Comp. Gen. 209, 211, supra); procurements restricted to previous suppliers or suppliers of items previously approved by agency technical personnel, 52 Comp. Gen. 546, supra, and B-177949(1), supra; a requirement to demonstrate prior manufacture of a complex system meeting specified performance requirements, 49 Comp. Gen. 857 (1970); and various solicitation provisions regarding product experience, 48 Com. Gen. 291 (1968); geographic requirements, 54 Comp. Gen. 29 (1974) and 53 id. 522 (1974); requirements for state and local licenses, 53 Comp. Gen. 51 (1973); restrictions based on possible conflicts of interest, 51 Comp. Gen. 397 (1972) and Gould, Inc., Advanced Technology Group, B-181448, October 15, 1974; and other allegedly restrictive requirements. See, e.g., 52 Comp. Gen. 640 (1973).

Here the record shows that the Air Force restricted the competition for the TACAN production contract to the development contractors because of its determination that the data and testing information obtained during the course of the development contract was essential to assure that the prototypes selected for the production contract would meet the technical and cost objectives of this program. The Air Force insists that in order to obtain sufficient data to evaluate the acceptability of the Hoffman TACAN to the extent that the other two TACANs have been evaluated under the

controlled environment of the development contract, it would need about 6 to 9 months. Although Hoffman vigorously disputes this estimate, we are not in a position to disagree with the Air Force's technical judgment. The extent to which testing of a product is necessary to determine if the product would meet an agency's needs is a matter within the sound discretion of the agency. 52 Comp. Gen. 778 (1973); Parametric Industries, Inc., B-180800, July 25, 1974; Stewart-Warner Corporation, B-182536, February 26, 1975. Under the circumstances, we must conclude that the Air Force's restriction of competition was reasonable.

With regard to Hoffman's assertions regarding the alleged failure of the development prototypes to meet the objectives of the Airborne TACAN program, the Air Force maintains that the goals have been met, and we do not find that the record establishes anything to the contrary. As to Hoffman's claim that it is entitled to see the specifications developed by Collins and General Dynamics pursuant to their development contracts, we agree with the Air Force that the specifications are applicable only to each development contractor's TACAN and need not be made available to other parties prior to the award of a production contract.

Accordingly, Hoffman's protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States