

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

50846

FILE: B-183501

DATE: June 30, 1975 97/30

MATTER OF: Precision Dynamics Corporation

**DIGEST:**

1. Protest against sole-source award which is filed prior to closing date for receipt of proposals is timely under 4 C. F. R. 20.2(a), notwithstanding fact that contract was awarded prior to date of filing.
2. Agency's determination to procure sole-source on basis that item can be obtained from only one firm is not justified where record indicates that determination was predicated on preference of agency personnel for one particular item rather than on determination that only that item could satisfy agency's minimum needs.
3. Award of contract, prior to RFP closing date for receipt of proposals, upon receipt of proposal by only offeror solicited was improper since such action precluded consideration of proposals by other firms not directly solicited and denied such firms equal opportunity to compete.

Precision Dynamics Corporation (Precision) has protested against the sole-source award of a contract to Hollister, Incorporated (Hollister) by the Veterans Administration (VA) Marketing Center, Hines Illinois, for quantities of a 7/16-inch wide (2 line) patient identification band. In substance, it is Precision's position that the sole-source procurement stemmed from an unwarranted restriction on competition which in turn resulted in an unjustifiably high price for the procured items. For the reasons indicated below, the protest is sustained.

Request for proposals No. M1-Q173-75 was issued on March 10, 1975, and specified that offers would be received until "11 AM March 28, 1975 or until negotiation is completed." Page 1 of the solicitation carried the notation "SOLE SOURCE - ALL ITEMS PAGE 8." Page 8 contained a 9-line description of the identification band, including the words "(Iden-A-Band) Hollister, Inc., No. 6709." On March 20, 1975, award was made to Hollister on the basis of a proposal submitted by that firm on the previous day. Subsequently, by letter dated March 21, 1975, Precision forwarded to the purchasing activity two proposals, each offering a different identification band manufactured by the protester. The letter stated that the "proposals are submitted in response to Request for Proposal No. M1-Q173-75 as equivalent products or as unsolicited proposals to provide

products that meet the needs underlined in [the solicitation.]" The letter also stated that a protest would be filed against any sole-source award to Hollister. Precision's protest was filed on March 24, as a result of which the VA directed Hollister to suspend performance pending resolution of the protest.

The contracting officer states that the protest is untimely because it was filed after award was made. He further stated that the products offered by Precision did not conform to the product description of the RFP and therefore could not be accepted.

We do not agree that the protest is untimely. Although award was made on March 20, the RFP indicated that proposals would be received at least until March 28. The bid protest procedures applicable to this procurement provide that protests based upon alleged improprieties in any type of solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that date. 4 C. F. R. § 20.2 (a)(1974). Since the protest was filed on March 24, it cannot be regarded as untimely.

We do agree with the contracting officer that the bands offered by the protester do not conform to the item description in the RFP. However, this does not compel the conclusion that the award to Hollister was valid.

Sole-source awards are authorized in circumstances when needed supplies or services can be obtained from only one person or firm. Federal Procurement Regulations (FPR) 1-3.210(a)(1)(1964). However, because of the general requirement that procurements be conducted on a competitive basis to the maximum practical extent, see FPR 1-3.101, agencies must adequately justify determinations to procure on a sole-source basis. Such determinations, while subject to close scrutiny, see e. g., Winslow Associates, 53 Comp. Gen. 478 (1974) and B-178740, May 8, 1975; BioMarine Industries; General Electric Company, B-180211, August 5, 1974, will be upheld if there is a reasonable or rational basis for them. Winslow Associates, B-178740, supra; H. J. Hansen Company, B-181543, March 28, 1975; North Electric Company, B-182248, March 12, 1975.

In applying these principles, our Office has recognized that non-competitive awards may be made where the minimum needs of the Government can be satisfied only by items or services which are unique, B-175953, July 21, 1972; where time is of the essence and only one known source can meet the Government's needs within the required time frame, 52 Comp. Gen. 987 (1973), Hughes Aircraft Company, 53 Comp. Gen. 670 (1974), California Microwave, Inc.,

B-183501

54 Comp. Gen. 231 (1974); where data is unavailable for competitive procurement, B-161031, June 1, 1967; or where only a single source can provide an item which must be compatible and interchangeable with existing equipment, B-152158, November 18, 1963 and B-174968, December 7, 1972. On the other hand, we have objected to sole-source procurements when the circumstances did not justify noncompetitive awards. 52 Comp. Gen. 987 (1973) and B-166506, July 26, 1974; see also Environmental Protection Agency sole-source procurements, 54 Comp. Gen. 58 (1974).

Here, the VA justifies the sole-source award on the basis of 41 U. S. C. 252(c)(10) and FPR 1-3.210(a)(1), which permit the negotiation of a contract on a sole-source basis when it is impracticable to secure competition because supplies can be obtained from only one person or firm. The "Determination and Findings" prepared by the contracting officer to support the award to Hollister on a sole-source basis reads, in its entirety as follows:

"We find that there are several I. D. Bands Available, however they differ in characteristics depending on the manufacturer. The item produced by Hollister has been found by a sufficient number of our Hospitals to be superior to other ID Bands in the following reports:

- (a) Band is tamper proof
- (b) It is leak proof
- (c) Item is patented and available, to our knowledge, from Hollister Inc., only

"This item has been approved for use in VA Hospitals.

"We have determined that procurement through negotiation under the provisions of FPR 1-3.210(a)(1) is best method of procurement."

This document does not state that the Hollister band is needed to satisfy the Government's minimum needs. Rather, it indicates only that the Hollister band is "superior" and "approved for use in VA Hospitals." This suggests, and other documents in the record support, the conclusion that the determination to negotiate sole source was based merely on the preference of VA medical personnel for the Hollister identification band. However, a preference for a particular item, even when that item has proven to be superior to other similar items, cannot support a sole-source award unless only that item can satisfy the Government's needs. See 50 Comp. Gen. 209 (1970), in which we objected to an intended sole-source procurement of sterilizers.

While we have consistently recognized that Government procurement officials are generally in the best position to know the Government's needs and to determine whether the product offered meets those needs, East Bay Auto Supply, 53 Comp. Gen. 771 (1974), we find nothing in the record which would enable us to conclude that the Government's minimum needs could be satisfied only by Hollister. In addition, we note that the VA procures 4-line bands on a competitive basis, and that the VA has paid less for competitively purchased 4-line bands than it must pay Hollister for its 2-line bands. We do not understand why the supposedly superior characteristics of the Hollister band should warrant a sole-source buy of 2-line bands when those same characteristics do not warrant a sole-source purchase of 4-line bands. Moreover, Precision's counsel asserts that both Precision and the other known company in the field in fact produce two 2-line bands. See, in this connection, 47 Comp. Gen. 175 (1967) and 44 Comp. Gen. 27 (1964). In addition, while Hollister has suggested reasons why a 2-line band is more advantageous than a 4-line band, we note that the VA has not offered any reason why its needs for patient identification bands cannot be satisfied entirely by competitively acquired 4-line bands.

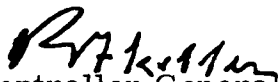
In view of the above, we must conclude that the noncompetitive award to Hollister was not justified. We are therefore recommending that the contract be terminated for the convenience of the Government and that the VA should procure all these items competitively.

In addition, we are also expressing our concern to the Administrator of the VA over the RFP provision which states that offers would be received until March 28, 1975 or "until negotiation is completed." FPR 1-3.802(c) requires RFPs to "specify a date and time for submission of proposals." The provision utilized in this procurement obviously does not specify a firm date. It is also ambiguous in that it can be read to indicate either that proposals submitted after March 28 might be considered (if negotiations had not been completed) or that proposals submitted as late as March 28 might not be considered (if negotiations with other offerors had been completed prior to that date). Here it is apparent that, in view of the sole-source restriction, the provision was intended to authorize and was in fact utilized by VA to award to the sole source prior to March 28. However, it is well established that agencies are not precluded from awarding a contract to a firm other than the one to which a solicitation appears to limit the procurement. 52 Comp. Gen. 546 (1973); NORTEC Corporation, B-180429, May 23, 1974; B-176861, January 23, 1973;

B-183501

B-177949(1), June 15, 1973. Accordingly, the use of this provision may well deny potential offerors an equal opportunity to compete if award is made to a sole source prior to a specific date set forth in the RFP. For these reasons, we are recommending that the provision not be used in subsequent procurements.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the Congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510.

  
Deputy Comptroller General,  
of the United States