

DECISION



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

82-2 cpd 541

FILE: B-207629

DATE: December 16, 1982

MATTER OF: Allied Repair Service, Inc. ✓

DIGEST

1. A contracting officer in negotiated procurement need only establish a reasonable basis for cancellation of a solicitation after receipt of proposals; protest that such cancellation was improper is denied since record indicates increase in scope of work of about 46 percent was required.
2. Protest that agency's failure to resolicit requirement after cancellation of initial solicitation is denied since procurement was conducted under Arms Export Control Act, 22 U.S.C. § 2751 et seq., and foreign government on whose behalf procurement was conducted requested award be made to a specific source.
3. Protest that provisions in Defense Acquisition Regulation requiring contracting officer to honor request of a foreign government to sole-source procurement are unlawful because they violate requirement for competitive procurement in 10 U.S.C. § 2304(a) is without merit because that provision is not applicable to foreign military sales procurements if the foreign government requests a sole-source procurement.

Allied Repair Service, Inc. protests the cancellation by the Department of the Navy of request for proposals No. N626-78-82-R-0026, which called for proposals for the overhaul of a Royal Saudi Naval Forces ship. Allied also protests the failure of the Navy to resolicit the requirement competitively and its sole source award to the Norfolk Shipbuilding & Drydock Corporation. The protest is denied.

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The procurement was conducted under the authority of the Arms Export Control Act, 22 U.S.C. 2751 et seq. (1976), and was funded by the Government of Saudi Arabia. Three proposals were received and neither Allied nor Norfolk submitted the offer with the lowest price. After pre-award surveys were conducted on Allied and the low offeror, the Navy concluded that the specifications required changes which would increase the scope of work by approximately 46 percent and determined the changes were so substantial as to require cancellation of the solicitation under the authority of Defense Acquisition Regulation (DAR) § 3-805.4 (1976 ed.). It was further decided that the overhaul of two additional Saudi vessels should be combined with the first into one contract because the repairs required were similar. Thereafter, the Senior Representative, Royal Saudi Naval Forces, requested that overhaul of the three vessels be awarded to Norfolk on a sole-source basis. The contracting officer negotiated and awarded a sole-source contract to Norfolk for the overhaul of the three vessels pursuant to the Saudi request, under the authority of DAR § 6-1307(a), which provides that a Foreign Military Sales customer may request that a defense article or service be obtained from a particular source and that the contracting officer "shall honor" the request.

1. The Cancellation

The Navy contends that the cancellation was reasonable because the changes required an increase in the scope of work of about 46 percent on the first ship. We agree. In negotiated procurements, the contracting officer need only have a reasonable basis for cancellation as opposed to the "cogent and compelling" reason required for cancellation of advertised procurements. This distinction is based on the public exposure of competitive positions which occur as a result of the public opening of bids in advertised procurements--an event which does not occur in negotiated procurements. See Management Services Incorporated, B-197443, June 6, 1980, 80-1 CPD 394. In our view, a 46 percent change in its scope of work is a reasonable basis for cancellation.

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Allied contends, however, that increases in the scope of work in ship repair contracts of 35-40 percent are considered normal and by general business standards are not unusual, and suggests that the changes here should have been handled through change orders after contract award. The "Changes" clause in Government contracts is designed to permit the agency and the contractor to modify the contract to reflect conditions which were not anticipated at the time of award. Brumm Construction Company B-201613, October 6, 1981, 81-2 CPD 280. However, a contracting officer may not award a contract under a specification knowing that the Government's needs are different from that identified in the specification and that the specification must be changed after award. Worldwide Direct Marketing, B-200371, April 2, 1981, 81-1 CPD 253. We therefore find that the cancellation was proper. X61 C.G.6

2. The Sole-Source Award

Allied contends that the sole-source award to Norfolk is improper even if the cancellation of the original RFP was appropriate. Allied asserts that if the DAR authorized the Navy to award a sole-source contract in this case, the regulations are unlawful because they violate 10 U.S.C. 2304(a) which requires that procurements be competitive except in extraordinary circumstances where competition is not feasible, which it alleges is not the case here. We find no legal merit to this assertion.

The Department of Defense (DOD) acts as an agent for a foreign government when it conducts procurements under the authority of the Arms Export Control Act, using the foreign government's funds that have been deposited in the Foreign Military Sales Trust Fund Account in the Treasury. While the funds are appropriated in a technical sense, they are administered by the United States in the capacity of a trustee; by law, these funds can only be disbursed in compliance with the term of the trust. 31 U.S.C. § 1521 (formerly section 725s). DAR 6-1307(a), then, is no more than a reasonable implementation of the statutory requirement of 31 U.S.C. § 1521. For that reason, the legal framework for our review of these procurements is the DAR and not the procurement statutes that govern purchases made by the military departments on their own behalf using U.S. funds appropriated by the Congress for that purpose. See Procurements Involving Foreign Military Sales, 58 Comp. Gen. 81 (1978), 78-2 CPD 349, Saudi Maintenance Company, Ltd., B-205021, June 8, 1982, 82-1 CPD 552.

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Since the government of Saudi Arabia specifically requested the award of this contract to Norfolk, the contracting officer acted properly in negotiating the sole-source contract.

The protest is denied.

Milton J. Fowler
for Comptroller General
of the United States