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**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** Pegasus Global Strategic Solutions, LLC

**File:** B-400422.3

**Date:** March 24, 2009

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David Z. Bodenheimer, Esq., Angela B. Styles, Esq., and Puja Satiani, Esq., Crowell & Moring LLP, for the protester.

Brian E. Toland, Esq., Lea E. Duerink, Esq., and James F. Ford, Esq., U.S. Army Materiel Command, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Protest challenging agency's justification and approval for the sole source modification of a contract on an urgency basis for upgraded counter improvised explosive device electronic warfare systems is denied, where agency reasonably determined from market research and testing that only the contract holder could meet its urgent requirements.

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### **DECISION**

Pegasus Global Strategic Solutions, LLC of Reston, Virginia, protests the modification by the U.S. Army Communications-Electronics Command of a contract with SRCTec, Inc., of North Syracuse, New York, to provide for the order of an upgraded Counter Remote Control Improvised Explosive Device (RCIED) Electronic Warfare (CREW) system.<sup>1</sup> The protester contends that the modification violates the competition requirements of the Competition in Contracting Act of 1984 (CICA).

We deny the protest.

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<sup>1</sup> The CREW system consists of a software programmable, radio frequency countermeasure system packaged in a primary unit, associated antenna, remote control unit, installation kit, and cabling for installation on a variety of wheeled and tracked vehicles. Agency Report (AR), Tab 14b, Revised Statement of Work ¶ 1.3.

## BACKGROUND

When major combat operations for Operation Iraqi Freedom ceased in May 2003, United States and coalition forces transitioned to stabilization operations. Since that time, U.S. forces have come under frequent and deadly attacks from insurgents using such weapons as improvised explosive devices (IED), mortars, and rocket launchers. The Congressional Research Service (CRS) states that IEDs have caused 70 percent of all American combat casualties both killed and wounded in Iraq. Although U.S. forces counter the use of these devices in a number of ways, including by disrupting portions of the radio spectrum that insurgents use to trigger IEDs, insurgents quickly adapt to countermeasures, and new, more sophisticated IEDs are increasingly used.<sup>2</sup> See Improvised Explosive Devices (IEDS) in Iraq and Afghanistan: Effects and Countermeasures, CRS Report for Congress, No. RS22330, Feb. 8, 2008, at 1; see also Defense Management: More Transparency Needed over the Financial and Human Capital Operations of the Joint Improvised Explosive Device Defeat Organization, GAO-08-342, Mar. 6, 2008, at 1.

Reflecting the agency's need for an increased capability to use the electromagnetic spectrum to prevent or inhibit the operation of RCIEDs, on June 30, 2005, the agency competitively awarded a 4-year indefinite delivery/indefinite quantity contract (with a maximum contract ceiling of \$550 million) to Syracuse Research Corporation (the parent of SRCTec)<sup>3</sup> for the next generation CREW system, or CREW Spiral 2 (CREW-2).<sup>4</sup> The CREW program was described as an Army-managed, evolutionary acquisition program that employs a "spiral development" approach to allow for rapid fielding of incremental CREW capabilities. AR, Tab 14b, Revised Statement of Work ¶ 1.2. To satisfy the contract requirements, Syracuse offered its Duke electronic countermeasure (ECM) device version 2 (Duke ECM V(2)). The contract included a time and materials requirement that, among other things, provided for system upgrades (engineering change proposals (ECP)) for "growth/technology insertion." Id. ¶ 3.11.

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<sup>2</sup> IEDs are also a significant threat to U.S. forces operating in Afghanistan, and CRS states that IEDs have caused 50 percent of all American combat casualties in Afghanistan. See Improvised Explosive Devices (IEDS) in Iraq and Afghanistan: Effects and Countermeasures, CRS Report for Congress, supra, at 1.

<sup>3</sup> The contract was subsequently novated to SRCTec. AR, Tab 25a, Novation Agreement, Oct. 1, 2006.

<sup>4</sup> The Counter RCIED CREW program is one of only eight programs in the Department of Defense (DoD) that has a "DX" rating, a rating which is reserved for programs that are of the highest national defense urgency based on military objectives. AR at 4; AR, Tab 277, DoD Priorities and Allocations Manual.

Shortly after award, the Army's need for the Duke ECM V(2) increased significantly such that the agency reached the maximum dollar value allowed under the contract in 2006, earlier than anticipated. As a result, the agency raised the contract ceiling to \$610 million through a modification to acquire, through an engineering change proposal (ECP), a high powered amplifier for the Duke ECM V(2) system. AR, Tab 20, Contract mod. 7. Over the next 2 years, the agency issued various modifications to the contract to purchase additional Duke ECM V(2) devices, spare parts, and support services, ultimately increasing the contract ceiling to \$1.2 billion.<sup>5</sup>

In 2008, the Army determined that it needed "an immediate update to the Duke system to extend Duke's performance and meet operational needs." AR, Tab 262, Within Scope Determination, at 1. The Duke ECM V(2) system provided protection against threats in the Band A frequency range.<sup>6</sup> The agency concluded, however, that it needed significantly enhanced protection against [deleted] specific threats across bands A, B, and C.<sup>7</sup> AR at 5, 8-9. The agency accepted an engineering change proposal from SRCTEC for "a standalone subsystem, i.e. the 'Adjunct,' which when integrated with the Duke Primary Unit [] will provide significantly increased performance against threat systems." AR, Tab 262, Within Scope Determination, at 1. On May 22, 2008, the agency issued a delivery order to SRCTEC for 354 upgraded Duke ECM V(3) devices, and approximately 2 months later, modified the delivery order for an additional 4,771 upgraded Duke devices.

Pegasus protested to our Office the modification of SRCTEC's contract and issuance of the delivery order to that firm, arguing that the "adjunct systems" being procured were beyond the scope of the original contract because the agency had exhausted the amount it was allowed to procure under the contract's ceiling value. Pegasus argued that the Army was required to compete the requirement on a full and open basis. After developing the record, the GAO attorney assigned to the case conducted an alternative dispute resolution conference, at which he informed the parties that

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<sup>5</sup> These contract modifications were supported by justification and approval (J&A) documents, stating that only SRCTEC could meet the agency's needs.

<sup>6</sup> At the time the contract was awarded, all radio-control IED threats were in the Band A frequency range; however, the contract identified countering threats in other frequency ranges (ultimately bands B and C) as being desired contract objectives. AR, Tab 3b, Contract Statement of Objectives, at 5. Designating frequency bands as either A, B or C is a way to refer to the frequencies in an unclassified setting; the exact values for the frequencies are set out in a classified specification document. See Declaration of CREW Product Manager, Jan. 8, 2009, at 2.

<sup>7</sup> These [deleted] threat bands are small sub-bands of frequency ranges within which potential threats or groups of threats operate. Declaration of CREW Product Manager, Jan. 8, 2009, at 4.

Pegasus's protest appeared meritorious, given that the agency's delivery order, and the modification to that order, exceeded the contract's ceiling value, and thus the modification to the delivery order was beyond the contract's scope and could not be accomplished noncompetitively absent an appropriate justification and approval.<sup>8</sup> This is so because the delivery order, and modification to that order, would result in a contract materially different from that for which the original competition was held, and absent a valid sole-source determination would be subject to the CICA requirements for competition. See, e.g., Liebert Corp., B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413 at 11-12. In response, the agency took corrective action, canceling the contract modification, and we dismissed Pegasus's protest as academic.

Following the dismissal of Pegasus's protest, the Army conducted market research "to ascertain the capability of industry to meet this requirement." AR at 6. Specifically, the agency contacted 8 sources, including SRCTec and Pegasus; four firms immediately stated that they could not meet the agency's requirements. Declaration of CREW Product Manager, Jan. 8, 2009, at 3. With respect to the remaining 3 sources (not including SRCTec), the Army evaluated product information (provided by Pegasus and the other 2 firms) and concluded that none of these sources could meet the agency's urgent requirements.<sup>9</sup> See AR, Tab 302, J&A for Duke ECM V(3) Devices, at 5-9. With regard to Pegasus's ability to meet the agency's needs, the Army noted that Pegasus informed the agency that the firm's existing system--the Jukebox Alpha--could not [deleted] and that its developmental system--the Jukebox Alpha Upgrade--would [deleted].<sup>10</sup> Pegasus also confirmed that

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<sup>8</sup> In outcome prediction ADR, the GAO attorney handling a protest conducts a conference, at a party's request or at GAO's initiative, and explains what the GAO attorney believes the likely outcome will be and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. Where the party predicted to lose the protest takes action obviating the need for a written decision (either the agency taking corrective action or the protester withdrawing the protest), our Office closes the case. See Alaska Structures, Inc.--Costs, B-298575.4, Jan. 22, 2007, 2007 CPD ¶ 15 at 4 n.4.

<sup>9</sup> Three of the eight firms solicited (including SRCTec but not Pegasus) are currently working under contract with the Navy to develop a CREW Spiral 3.2 system, which the Army states is compatible with the Army's requirements here but that, "based on the schedule associated with that research and development effort," would not satisfy the agency's urgent requirements. AR, Tab 290, Market Research Report, at 1.

<sup>10</sup> In 2006, Pegasus's Jukebox system was tested by the Navy as "a quick reaction solution" to counter one specific IED threat that had emerged in Iraq. Declaration of CREW Product Manager, Jan. 8, 2009, at 10. The protester states that it subsequently received a contract from the Navy for 1,001 jamming systems. Protester's Comments at 31.

there were other Army requirements that its system could not satisfy, including [deleted].<sup>11</sup> Declaration of CREW Product Manager, Jan. 8, 2009, at 3-4; AR, Tab 302, J&A for Duke ECM V(3) Devices, at 7. Also, the Army noted that Pegasus's Alpha Jukebox Upgrade had not been [deleted], as was required by the agency.<sup>12</sup>

The Army also invited Pegasus to demonstrate its system's capability and provided the firm, in mid-November 2008, with a list of [deleted] threat bands spread across Bands A, B and C. The Army tested Pegasus's Jukebox Alpha Upgrade system December 2-4 and found that Pegasus's system lacked the capability to meet the agency's needs.<sup>13</sup> Specifically, the agency found, contrary to Pegasus's assertions in response to the agency's market research, that the Jukebox Alpha Upgrade could not [deleted] and could [deleted]. In addition, the agency found that Pegasus's system could not meet other Army's requirements, such as [deleted],<sup>14</sup> [deleted]<sup>15</sup> and [deleted].<sup>16</sup> The Army also concluded from its testing that the Jukebox Alpha Upgrade was only at Technology Readiness [deleted] and not [deleted] as the firm had claimed during the market survey.<sup>17</sup> The Army concluded that the earliest

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<sup>11</sup> [Deleted] refers to the system's ability to [deleted]. See Declaration of CREW Product Manager, Jan. 8, 2009, at 6.

<sup>12</sup> Although Pegasus's Jukebox Alpha had undergone environmental, compatibility, interoperability and EMI testing under the Navy contract, the Army found that the system [deleted]. AR, Tab 302, J&A for Duke ECM V(3) Devices, at 8.

<sup>13</sup> Pegasus declined both the Army's offer to test the firm's system earlier on November 20 - 21, and the offer to test the system over the weekend of November 21- 23. AR, Tab 290, Market Research Report, at 6.

<sup>14</sup> A [deleted] system allows users to change the frequency bands being "jammed" through [deleted], rather than through [deleted]. Declaration of CREW Product Manager, Jan. 8, 2009, at 6.

<sup>15</sup> A [deleted] capability allows a user to quickly [deleted]. Declaration of CREW Product Manager, Jan. 8, 2009, at 2.

<sup>16</sup> The [deleted] allows users to access the full functionality of the ECM device from [deleted], even though the device itself is [deleted]. Declaration of CREW Product Manager, Jan. 8, 2009, at 2, 5.

<sup>17</sup> The Army states that, based upon its experience, it takes from 18 to 24 months to go from Technology Readiness [deleted] to [deleted], and that even if Pegasus's system was production ready, it would still need to undergo first article testing which would ordinarily takes 4 to 5 months. Declaration of CREW Product Manager, Jan. 8, 2009, at 9.

Pegasus could begin fielding a system that met the Army's technical requirements was February of 2010. Declaration of CREW Product Manager, Jan. 8, 2009, at 8.

On December 10, the Army executed a J&A to modify the contract to increase the contract's ordering ceiling and to procure on an urgent basis 6,000 Duke ECM V(3) systems under SRCtec's contract. AR, Tab 302, J&A for Duke ECM V(3) Devices. The Army found that radio-controlled IED attacks on U.S. and coalition forces were "seriously impacting mission operations and putting Warfighters in harm's way." Id. at 3. In this regard, the Army noted that, based on classified intelligence, additional Band B and C threats were expected to emerge imminently and that the agency therefore had an urgent need for enhanced protection from these threats. Id. Based upon its market research and testing of Pegasus's Jukebox Alpha Upgrade, the Army found that only the Duke ECM V(3) system would meet its immediate needs. In this regard, the Army stated

SRCTec is the developer and only manufacturer of the Duke and the only source capable of meeting the Army's urgent requirements. SRCTec is the only source that possess the drawings and documentation for the Duke, and SRCTec maintains configuration control for this item . . . . The Duke V3, in its prototype phase, has previously undergone extensive testing . . . . It is currently undergoing First Article Testing (FAT) and preliminary results have been excellent . . . . SRCTec can commence deliveries of the urgently required Duke V3 configuration by January 2009 and complete all deliveries by June 2009 . . . . No other source was identified that can meet the Army's immediate needs. Based on the Army's technical experts' assessment, the soonest any other source could begin fielding systems is February 2010.

Id. at 4. The Army also stated that its immediate need was to equip all of its [deleted] current CREW-equipped vehicles in Iraq with upgraded devices, but that it currently had funding for only 6,000 devices. The Army anticipated that future actions for sustainment and upgrades might need to be conducted on a sole-source basis, but stated that the agency would conduct future market research and monitor the Navy's Spiral 3.2 contract to ascertain whether future follow-on actions could be competed. Id. at 5.

Also, on December 10, a delivery order was issued to SRCtec for 6,000 upgraded Duke ECM V(3) devices. The Army states that, by January 27, 2009, SRCtec had delivered 430 upgraded devices units, and the agency anticipated that another 370 units would be delivered by February 5, 2009, earlier than the order's incremental delivery schedule. Supplemental AR at 2.

## DISCUSSION

The protester challenges the Army's J&A for the noncompetitive modification of SRCTec's contract to provide for the order of upgraded Duke ECM V(3) devices. Pegasus contends that, had the agency disclosed its requirements earlier, Pegasus would have had time to develop a system that satisfies the Army's urgent requirements here.<sup>18</sup> In this regard, the protester argues that SRCTec had an unfair and unlawful "headstart" on providing an upgraded system inasmuch as the agency allegedly provided SRCTec with funds to develop and produce an upgrade, provided SRCTec with the agency's requirements for the [deleted] threat bands that allowed the firm to begin developing the adjunct system earlier,<sup>19</sup> and provided SRCTec with access to testing facilities. The protester characterizes the Army's failure to earlier disclose its requirements to Pegasus and the Army's aborted attempt to modify SRCTec's contract as a lack of advanced procurement planning.

CICA requires "full and open competition" in government procurements except where otherwise specifically allowed by the statute. 10 U.S.C. § 2304(a)(1)(A) (2006). One exception to this competition requirement is where the agency's needs are of such an unusual and compelling urgency that the United States would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2); Federal Acquisition Regulation (FAR) § 6.302-2(a)(2). Although the agency must request offers from as many sources as practicable under the circumstances, 10 U.S.C. § 2304(e), FAR § 6.302-2(c)(2), the agency may still limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. National Aerospace Group, Inc., B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 at 5; Hercules Aerospace Co., B-254677, Jan. 10, 1994, 94-1 CPD ¶ 7 at 3.

If noncompetitive procedures are used pursuant to 10 U.S.C. § 2304(c)(2), such as here, the agency is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority. See 10 U.S.C. § 2304(f)(1)(A), (B); FAR §§ 6.302-1(d)(1), 6.302-2(c)(1), 6.303, 6.304. Our review of the agency's decision to conduct a noncompetitive procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. Signals & Sys, Inc., B-288107, Sept. 21, 2001, 2001 CPD ¶ 168 at 9. However, noncompetitive procedures may not properly be used where the agency created the urgent need through a lack of advanced planning. 10 U.S.C. § 2304(f)(5)(A); Worldwide Language Resources, Inc.;

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<sup>18</sup> Pegasus does not contend that the acquisition is not urgent or that the Army is buying more devices than is required to meet its urgent needs.

<sup>19</sup> The protester asserts that it was only provided with the [deleted] threat bands in mid-November, 2008, whereas the awardee had this information in November, 2007. Protester's Comments at 36.

SOS Int'l Ltd., B-296984 et al., Nov. 14, 2005, 2005 CPD ¶ 206 at 12. In addition, the urgency justification cannot support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement. See Immunalysis/Diagnostixx of Calif. Corp., B-254386, Dec. 8, 1993, 93-2 CPD ¶ 309 at 5.

Military mission readiness and personal safety are important considerations in judging the reasonableness of an agency's determination that unusual and compelling urgency prevents the agency from conducting a procurement on the basis of full and open competition, as provided for by CICA. See McGregor Mfg. Corp., B-285341, Aug. 18, 2000, 2000 CPD ¶ 151 at 7; Logics, Inc., B-256171, May 19, 1994, 94-1 CPD ¶ 314 at 2. It is beyond cavil that an agency need not risk injury to personnel or property in order to conduct a competitive acquisition. Signals & Sys. Inc., supra, at 10.

Here, from our review of the agency's J&A and the record, we find reasonable the agency's determination that only SRCTec could meet the agency's urgent requirements within the time required. The record specifically supports the Army's arguments that it has a continuing and urgent need to address the use of more sophisticated IEDs on other frequency bands to protect its personnel and property. See Improvised Explosive Devices (IEDS) in Iraq and Afghanistan: Effects and Countermeasures, CRS Report for Congress, supra, at 1; Declaration of CREW Product Manager, Jan. 8, 2009, at 1. In this regard, SRCTec's contract here and the Navy's Spiral 3.2 contract reflect the need to continually evolve and upgrade CREW systems to counter the threat of radio-controlled IEDs in other frequencies. Moreover, as the GAO attorney noted to the parties in the ADR conference in Pegasus's earlier protest, upgrading SRCTec's Duke ECM system was within the scope of SRCTec's contract, but for the fact that the upgrade was accomplished by a contract modification that exceeded the contract's maximum ceiling value.

Pegasus argues, however, that the lack of competition to satisfy these requirements was caused by the agency's lack of advance procurement planning. Pegasus advances a variety of arguments in support of this assertion, including that the Army improperly modified SRCTec's contract to obtain the upgraded systems rather than seeking to test other firms' products, such as Pegasus's Jukebox Alpha and Jukebox Alpha Upgrade systems. In this regard, Pegasus continues to complain that SRCTec had an unfair "headstart" because of the agency's earlier modification of that firm's contract to obtain SRCTec's upgraded system.<sup>20</sup>

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<sup>20</sup> Pegasus generally complains that the Army had not adequately identified its requirements in a way that would promote competition. See Protest at 11. We find no basis from the record to conclude that the Army did not adequately describe its performance requirements to Pegasus in conducting the agency's market research and testing of Pegasus's device.

Although, as we note above, an agency may not justify a noncompetitive award on the basis of urgency where the agency's urgent requirements are the result of a lack of advance planning, see 10 U.S.C. § 2304(f)(4)(A), such planning need not be entirely error-free or successful. See Sprint Commc'ns Co., L.P., B-262003.2, Jan. 25, 1996, 96-1 CPD § 24 at 8-9. Here, the record shows that the Army's procurement planning was not error-free, given the agency's improper modification of SRCTec's contract that exceeded the maximum contract value. Nevertheless, we do not find unreasonable, as explained below, the agency's conclusion that only SRCTec could satisfy the agency's urgent requirement, nor do we find that Pegasus has shown that it could have satisfied the agency's requirements, even if the agency had conducted error-free advance planning, given the agency's estimate of the time that would be required for Pegasus to develop a device that would meet the agency's requirements.<sup>21</sup>

As a result of market research and testing of Pegasus's device in December 2008, the Army found that Pegasus did not have a device that would satisfy the agency's technical requirements. In fact, the Army found that Pegasus's Jukebox Alpha Upgrade device could not counter most of the threat bands that the Army required and that Pegasus's device otherwise failed to satisfy [deleted]. The agency concluded, given the time that would be required to develop a system to satisfy these requirements and the time needed to test an upgraded device, that the earliest that Pegasus could field a system meeting the agency's current requirements would be February 2010.<sup>22</sup> In this regard, Pegasus has not shown, even 3 months after the agency's testing of the firm's device, that Pegasus has a product that would satisfy the agency's current urgent requirements.

Pegasus disagrees with the Army's assessment of how long it would take for Pegasus to develop a system, and states that within 6 months it could meet the agency's needs. See 2<sup>nd</sup> Declaration of Pegasus's Chief Operating Officer, at 2. Pegasus, however, has offered no testing data, or any other evidence, to support these

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<sup>21</sup> We do not agree with Pegasus that SRCTec had an unfair "headstart" in developing its upgraded system. As described above, SRCTec's contract with the Army specifically provided for system upgrades that would include the upgraded Duke ECM V(3) system. In this regard, we informed the parties during the ADR conference in Pegasus's prior protest that, apart from the fact that the agency improperly modified SRCTec's contract to exceed the stated maximum contract value, the Army's order of SRCTec's upgraded system was within the scope of the contract. In fact, SRCTec was developing prototypes of its upgraded system on its own prior to the contract modification that Pegasus earlier protested. Declaration of CREW Product Manager, Feb. 2, 2009, at 4.

<sup>22</sup> Pegasus does not dispute that its Jukebox Alpha Upgrade device failed to satisfy many of the Army's requirements during the December testing.

assertions, and the chief operating officer's declaration is at best an admission that the firm needs additional time to provide these items. Pegasus's disagreement does not show that the agency's technical judgment was unreasonable. See Foster-Miller, Inc., B-296194.4, B-296194.5, Aug. 31, 2005, 2005 CPD ¶ 171 at 9. Moreover, the protester's admission that it would need 6 months to develop a device that would meet the agency's needs establishes that Pegasus cannot satisfy the agency's urgent requirements. Under these circumstances, we find reasonable the agency's urgency J&A supporting the modification of SRC Tec's contract, and thus there is no basis to sustain the protest.

The protest is denied.

Gary L. Kepplinger  
General Counsel