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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Nomura Enterprise, Inc.--Request for  
Reconsideration and Protest

**File:** B-260977.2; B-260977.3

**Date:** November 2, 1995

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John W. Reimers and Al Weed, Esq., for the protester.  
Caridad Ramos, Esq., and Jeffrey I. Kessler, Esq., Department of the Army, for the agency.

Laurence Schor, Esq., Smith, Somerville & Case, for Barnes & Reinecke, Inc., an interested party.

M. Penny Ahearn, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest against award of sole source contract for engineering support services related to the M109 self-propelled howitzer is denied where agency reasonably concluded that unacceptable delays would occur if award were made to another source prior to completion of current production due to massive amount of materials and equipment which would have to be transferred to new contractor.

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## DECISION

Nomura Enterprise, Inc. (1) requests reconsideration of our May 5, 1995 dismissal of its protest against the intended award by the Department of the Army, Army Materiel Command, of a sole source contract to Barnes & Reinecke, Inc. (BRI), and (2) protests the subsequently issued solicitation--request for proposals (RFP) No. DAAE20-95-R-0101--for a sole source award to BRI, for engineering support services related to the M109 self-propelled howitzer. The Army justifies the proposed sole source award to BRI on the basis that only BRI can provide the services without unacceptable delays and substantial duplication of costs that will not be recovered through competition. Nomura challenges both of these conclusions.

We dismiss the request for reconsideration as academic and deny the protest.

## BACKGROUND

The M109 howitzer provides artillery support to armored/mechanized infantry divisions for the Army and several foreign military sales customers. The services being procured include: engineering and maintenance of the M109 technical data

package, technical manuals, and depot maintenance work requirements; development and incorporation of engineering change proposals; engineering studies; failure analysis; and life-cycle engineering.

The original "class" justification and approval (J&A) for use of other than full and open competitive procedures concluded that a sole source award to BRI was justified under the authority of 10 U.S.C. § 2304(c)(1), on the basis that the firm was the only known source that could supply the services. It provided that BRI was to perform the services for a period of approximately 5 years. The J&A recognized Nomura as an interested source, but concluded that the firm would need at least an 18- to 24-month start-up period, a delay the M109 program could not then accommodate.

On March 21, 1995, a synopsis of the intended award to BRI was published in the Commerce Business Daily (CBD). On April 3, Nomura protested the sole source procurement, alleging that it could perform the work based on its past performance of a technical support contract for the M110 self-propelled howitzer. (At the time of the protest, the firm did not have a copy of the J&A, and thus did not specifically challenge it.) On May 5, we dismissed Nomura's protest (B-260977) as premature, based on the agency's representation that the sole source award to BRI was under consideration and had not yet received the necessary approvals. If and when the procurement approval was made on a sole source basis, the Army indicated it intended to resynopsise the procurement in the CBD. In response, Nomura first requested reconsideration of our dismissal and then, after issuance of the solicitation for a sole source award to BRI, protested the agency's rationale for a sole source procurement.

Subsequently, on August 3, the Army issued amendment No. 1 to the original class J&A. The amended J&A concluded that a sole source award to BRI, the developer of the M109 howitzer, was necessary because a competitive procurement would result in program delays of 6 to 10 months and duplication of costs not expected to be recovered through competition in the amount of \$2,000,000. The amendment decreased the dollar value of the contract contemplated in the original J&A by almost half and the 5-year term of the original J&A to 1 year plus two 6-month options. It also provided for competition for future M109 engineering services in the near future; the agency expects to issue a competitive solicitation by February 1996 and estimates a resulting award by October 1996.

#### REQUEST FOR RECONSIDERATION

In its request for reconsideration, Nomura argues that its initial protest was against the original J&A and not the then unapproved sole source procurement, as we interpreted the protest, and that its protest therefore in fact was not premature. Even if we were to agree with this interpretation of the protest, which we do not,

since the original J&A has now been superseded and substantially changed by amendment No. 1, any protest against the original J&A is of purely academic interest. Consequently, the request for reconsideration on the basis of the original J&A is also academic. Since it is not our practice to consider academic questions, see East West Research, Inc.-Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379, we dismiss the request for reconsideration.

#### PROTEST OF SOLE SOURCE PROCUREMENT

Nomura argues that the amended J&A fails to support the sole source procurement. Nomura claims that it has done work similar to that covered by the procurement. The protester questions the Army's estimate of the costs associated with conducting a competitive procurement, and asserts that any delays that might be experienced as a result of pursuing a competitive procurement are the result of the Army's lack of foresight and planning.

Because the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), we will closely scrutinize sole source procurements conducted under the exception to that mandate authorized by 10 U.S.C. § 2304(c)(1). Test Sys. Assocs., Inc., 71 Comp. Gen. 33, (1991), 91-2 CPD ¶ 367, aff'd, B-244007.3, Mar. 17, 1992, 92-1 CPD ¶ 287. Sole source awards are authorized by 10 U.S.C. § 2304(c)(1) where the agency reasonably concludes that only one known source can meet the government's needs. Sperry Marine, Inc., B-245654, Jan. 27, 1992, 92-1 CPD ¶ 111.<sup>1</sup> In this regard, 10 U.S.C. § 2304(d)(1)(B), as implemented by Federal Acquisition Regulation § 6.302-1(a)(2)(iii), provides that for purposes of applying subsection (c)(1), highly specialized services may be deemed to be available only from the original source and procured through other than competitive procedures (1) when it is likely that award to any other source would result in substantial duplication of cost to the government that would not be recovered through competition, or (2) where a competition would result in unacceptable delays in fulfilling the agency's needs.

We find that, consistent with the above authority, the Army has reasonably justified a sole source award to BRI for the interim period pending the competitive procurement of these services.

The amended J&A concluded that BRI, the developer and custodian of the M109 howitzer technical drawings and data, technical manuals, and provisioning data, is

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<sup>1</sup>CICA specifically provides, however, that agencies may not justify the use of noncompetitive procedures on the basis of a lack of advance planning. 10 U.S.C. § 2304(f)(5); TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700.

the only known contractor who has the expertise, technical production facility, configuration control, and overall management capability to satisfy the agency's requirements for uninterrupted services. This conclusion was based in part on the agency's determination that a competitive procurement would result in unacceptable program delays of 6 to 10 months due to the massive volume of data which would have to be moved to a new contractor and the associated start-up time. According to the J&A, the estimate of a 6- to 10-month delay is consistent with the observed historical start-up times for new contractors of 8 to 12 months due to time lost because of the transfer of technical drawings and government-furnished equipment. Here, specifically, the expected delay reflects the fact that the materials to be moved include 15,000 original mylar drawings, 1,000,000 associated configuration management documents and files, 11 vehicles (ranging in unit weight from 32,000 to 55,000 pounds), 13 spare engines, 2 transmissions, and approximately 2,500 miscellaneous items, including file cabinets and spare parts. The data in the project files includes engineering calculations, test data correspondence, video tapes, still photographs, and computer tape backup of original technical and publication data. The J&A estimated that a minimum of 10,000 man-hours would be required to catalogue, package and transport an inventory of this magnitude and an additional several weeks would be required for the receiving contractor to inventory and set up the equipment. Furthermore, the J&A states that 18 to 24 months would be required for the new contractor to familiarize itself with the configuration and associated documentation and otherwise develop the high level of expertise necessary to support full production and provide a level of support similar to the present level.

According to the J&A, such significant delays are unacceptable since continuity of services is critical to ensuring timely and successful production and any break in support would threaten production and present an unacceptable level of program risk. In this regard, the amended J&A stated that the government is currently involved in a number of ongoing M109 howitzer production programs, which will continue through February 1996, all of which are considered high priority and require substantial engineering support, including constant updating of drawings. According to the J&A, a transfer of drawings and associated documentation to a new contractor would require a "freeze" on the technical data package (TDP) with the result that no revisions could be made to the drawings during the transfer period. As a result, the government would be forced to utilize an outdated and fragmented TDP which would prevent the incorporation of required revisions to prevent or correct fit and/or functional problems.

Consequently, concluded the amended J&A, a competitive procurement could not be accommodated until February 1996, with contemplated award in October 1996, when current production obligations are completed and a scheduled design freeze (where no further nonemergency engineering change proposals will be introduced into the configuration) will be in place. (According to the amended J&A, while

delay as a result of transitioning and development of expertise will still be a concern, such delays can more easily be tolerated when full production is not underway and a design freeze is in place.)

We find that this determination is reasonable on its face, and that Nomura has not shown otherwise. Nomura argues that the "Department of Defense has many engineering services contracts with more volume and/or technical complexity than the M109 program that are competed and transitioned regularly" and that any purported delays here are due to the agency's lack of planning. In effect, the protester is arguing that, contrary to the agency's assertions, a competitive procurement could be undertaken during production without resulting in unacceptable delays. However, the protester has not rebutted the agency's specific findings here that a minimum of 10,000 man-hours would be required for the transitioning of materials and equipment and that such a massive transition effort would cause unacceptable delays in current production of from 6 to 10 months. Nor has it established that there were any specific planning or steps that the agency could have previously undertaken which would have permitted the agency to competitively procure the requirement during production without causing unacceptable disruption to production. General pronouncements to the effect that a competitive procurement can "be structured to address the technical and schedule concerns" provide us with no basis to disagree with the Army's determination that unacceptable delays would occur if the services were competitively procured during current production and prior to the scheduled February 1996 competition, when production will be completed. Further, while the protester may believe that the services can be competed on a more expedited schedule than the agency now plans, nothing in the record indicates this.

Finally, contrary to the protester's argument, the record indicates that the Army did in fact investigate the severability of the requirement as a means to promote competition. The amended J&A stated that breakout of the engineering effort was determined not to be feasible because it would entail establishment of portions of the original drawings at both the present and new contractor facilities and the resulting overlap in time, funding, administration, and government-furnished equipment would create an unmanageable and inefficient situation, resulting in delays for both contractors which would put the M109 program in jeopardy. The protester has not specifically rebutted this determination, nor is there anything in the record which shows it to be unreasonable.<sup>2</sup>

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<sup>2</sup>The protester complains that the agency did not conduct a market survey before reaching its sole source determination. However, since the record shows that the Army was well aware of Nomura's qualifications, but nevertheless reasonably concluded that a sole source procurement was warranted, Nomura was in any way prejudiced by the agency's failure to undertake a formal market survey.

Given our conclusion that the Army reasonably determined that a competition now would result in unacceptable delays in fulfilling the agency's needs, we need not decide whether a sole source procurement was also justified by the need to avoid the substantial duplication costs not expected to be recovered through competition. See Allied-Signal, Inc., B-247272, May 21, 1992, 92-1 CPD ¶ 461.

The protest is denied.

Comptroller General  
of the United States