



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: AAI ACL Technologies, Inc.

File: B-258679.4

Date: November 28, 1995

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Vera Meza, Esq., and Tony K. Vollers, Esq., Department of the Army, for the agency.

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DIGEST

Agency's decision to procure four hydraulic test stands and central computer system by means of a sole source award is proper where: (1) agency's minimum needs require system to be compatible with existing hydraulic test station; and (2) only one source can provide compatible equipment since the software necessary to implement and run the system is proprietary and not available to the government for use in a competitive procurement.

DECISION

AAI ACL Technologies, Inc. protests the Department of the Army's sole source award of contract No. DAAJ09-94-C-0597 to Dayton T. Brown, Inc. (DTB) for four hydraulic helicopter component test stands and an integrating central computer system.

We deny the protest.

BACKGROUND

This equipment is being procured for the Corpus Christi Army Depot (CCAD) located at the Naval Air Station in Corpus Christi, Texas. CCAD is responsible for the repair and overhaul of hydraulic helicopter components—i.e., pumps, motors and actuators. With the exception of one test stand—which, as explained below, was procured from DTB under a January 1994 sole source procurement—the testing equipment currently used by CCAD is approximately 30 to 35 years old, and does

not meet the agency's repair and testing demands. (Tr. at 14.)¹ In fact, because of the current equipment's age, some of the required tests for newer hydraulic helicopter parts cannot be performed on CCAD's current machines. (Tr. at 112.)

In late 1990, the Army began conducting an engineering survey to study its hydraulic component testing equipment requirements to ascertain what steps could be taken towards modernizing and overhauling the CCAD facility. (Tr. at 14-15.) Although it did not yet have funding for this requirement, in 1992 the Army recognized that due to various and repetitive equipment failures, as well as the ongoing modernization and technological developments in helicopter aircraft, changes in the CCAD facility were necessary to better implement its mission and resolve critical backlogs of helicopter components awaiting repair. As a result of this engineering study, CCAD determined that its minimum needs required it ultimately to replace the existing, manually operated stand-alone testing stations with automated testing stations--also referred to as testing "stands"--that could be integrated via a computerized network into a unified testing system. (Tr. at 22; 102.)

Although CCAD concluded that it needed to upgrade the entire facility--and drafted a "concept" of what equipment units would comprise the ultimate testing system assembly--CCAD nonetheless recognized that its "money situation didn't allow [it] to go out with one package to procure it all competitively from one manufacturer." (Tr. at 22.) Consequently, CCAD decided to prioritize its testing needs, and procure each part of the equipment system on an as-needed basis, according to available funding allowances.

In late 1992, as a result of Operation Desert Storm, the Army was faced with a critical backlog of unrepairs UH-60 helicopter hydraulic pumps--and a downed fleet of UH-60 helicopters--which required immediate action by CCAD. After conducting a market survey of available commercial hydraulic helicopter component testing equipment manufacturers, CCAD determined that a testing station meeting its minimum needs was available from only one source, DTB. Consequently, on October 8, 1992, CCAD published a synopsis of its intended sole-source award to

¹References to the transcript of the hearing held in this case are identified by "Tr."

DTB in the Commerce Business Daily (CBD). Of significance to this protest, the CBD synopsis stated that the Army required a "hydraulic test stand with adapters and software for the UH-60, CH-47, and AH-54 Aircraft,"² and that:

"Offerors must meet a prequalification requirement in order to be eligible for award. The Government does not own specifications and drawings to permit full and open competition--Firms that recognize and can produce the required item(s) described above are encouraged to identify themselves to the Contracting Officer who can provide additional information regarding the qualification requirements--Information on meeting the qualification may also be obtained from [the Army] . . . all responsible sources may submit an offer that shall be considered by the agency."

The CBD synopsis also advised offerors that the proposed sole source award to DTB was authorized under Federal Acquisition Regulation (FAR) § 6.302-1; that provision implements 10 U.S.C. § 2304(c) (1994), which permits procurement on a sole source basis where the required item is available from only one source.

Although AAI ACL saw the CBD synopsis, the firm chose not to "solicit or try and bid" since, according to AAI ACL's president, "it was right at the time the company was being acquired." (Tr. at 166.) AAI ACL states that had it known that the agency hoped for a total facility upgrade--and consequently, would require all subsequently procured equipment to be compatible with the UH-60 hydraulic test stand and software--the firm "would probably have offered" to compete for that sole source requirement. (Tr. at 167.)

On March 18, 1993, the Army issued a sole source solicitation to DTB for the UH-60 hydraulic test stand and associated adapters and software; on January 25, 1994, the UH-60 contract was awarded to DTB in the amount of \$955,044.

This Requirement

In 1994, CCAD obtained enough funding to enable it to procure four more hydraulic test stands as well as a centralized computer system to link each of its automated hydraulic test stands--including the UH-60 test stand procured from DTB--into an integrated network system. Because CCAD had already procured one test stand from DTB--which was being used on a stand-alone basis--and because no other source's equipment was compatible with the DTB software which ran this station,

²The UH-60 test stand can test other helicopter components; however, its primary purpose is to test UH-60 hydraulic component repairs.

CCAD decided to sole source the requirement for the four test stands and integrating computer system to DTB under the authority of FAR § 6.302-1.

On July 21, CCAD synopsisized the proposed sole source award in the CBD. In response to the synopsis, AAI ACL requested a copy of the solicitation, which was issued on August 18, and received by AAI ACL on August 26.

On August 31, AAI ACL filed an agency-level protest with the Army challenging the specification for DTB equipment as unduly restrictive. By decision dated September 16, the Army denied this protest on the grounds that only DTB equipment would serve its needs and advised the protester that contract award was being made to DTB. On September 30, AAI ACL filed a protest at this Office reiterating its challenge to the proposed award to DTB. AAI ACL maintained that it had equipment which was differently configured, but which was otherwise equivalent to the DTB items specified in the RFP. During the course of that protest, AAI ACL and the Army began to discuss ways in which AAI ACL's equipment might satisfy the agency's integration requirements. As a result of these discussions, AAI ACL offered to withdraw its protest if the Army would evaluate its proposed alternate equipment items. Consequently, on February 13, 1995, this Office dismissed AAI ACL's protest as academic, in accordance with the express agreement of all parties.

On February 28, the Army sent several CCAD technical engineers to AAI ACL's California facility to evaluate the firm's proposed "equivalent" equipment, and to conduct a site survey. The CCAD technical engineers also traveled to McClellan Air Force Base in California where they surveyed older AAI ACL equipment models. After completing their technical evaluation, the CCAD technicians advised the contracting officer that AAI ACL's proposed equipment would not meet the agency's needs since it was not compatible with the existing DTB UH-60 test stand.

By letter dated March 7, the contracting officer advised DTB to continue with contract performance. On March 28, the contracting officer advised AAI ACL that the firm's proposed equipment did not meet the Army's requirements for a variety of technical reasons, including noncompatibility with the existing DTB test stand. On March 31, AAI ACL filed this protest at our Office.³ On October 5, we conducted a hearing to explore the Army's technical evaluation of AAI ACL's equipment. On October 19, AAI ACL amended its protest based on information first learned at the hearing.

³The contracting officer and CCAD technical engineers testified that they delayed informing AAI ACL at the same time DTB was ordered to continue contract performance because they needed to prepare a detailed, technical statement for the protester. (Tr. at 151 - 154.)

PROTESTER'S CONTENTIONS

AAI ACL contends that the current sole source award to DTB is improper because CCAD improperly split a large requirement into smaller pieces in order to avoid the requirement for full and open competition. That is, AAI ACL maintains that the initial sole source award for the first DTB test stand was conducted by CCAD in order to ensure that DTB would receive the current award for the remaining four test stands and centralized computer system. Alternatively, AAI ACL contends that the current sole source to DTB is improper because it is the result of a lack of advance planning.

The Army responds that at the time it procured the first UH-60 DTB test stand in 1993, it did so because that was the maximum amount of equipment for which it had funds available, and because it had a near-urgent priority for a test stand for the UH-60 hydraulic helicopter components. The Army reports that while it knew that it ultimately sought to upgrade the entire CCAD facility to an integrated automated facility, it did not have the budget or authority to proceed with such a procurement at that time. (Tr. at 109.) The Army readily admits that if it had had the funding for a total package upgrade, it would have solicited competitive proposals for a seven-test stand upgrade from a number of companies, including AAI ACL. (Tr. at 108; 246.) However, the Army maintains that it has been forced to upgrade its facility on an essentially piecemeal basis because its requirements are increasing faster than it "can buy equipment for and get funded for." (Tr. at 240.)

ANALYSIS

When an agency uses noncompetitive procedures, it must execute a written justification and approval (J&A) with sufficient facts and rationale to support the use of the specific statutory authority cited, in this case, 10 U.S.C. § 2304(c)(1). See FAR §§ 6.302-1(c); 6.303; 6.304. When the J&A sets forth reasonable justifications for the agency's actions, we will not object to the award. See Sperry Marine, Inc., B-245654, Jan. 27, 1992, 92-1 CPD ¶ 111.

Here, the J&A—dated March 10, 1994—states, in relevant part:

"AUTHORITY CITED - 10 U.S.C. [§] 2304(c)(1), FAR [§] 6.302-1. Only one responsible source and no other supplies or services will satisfy agency requirements.

"REASONS FOR AUTHORITY CITED - The proposed acquisition requires use of the cited statutory authority because the data required to produce this Depot Maintenance Plant Equipment (DPME) is not available within the Government. This data exists only at [DTB]. Procurement of this data by the Government in order to allow

competition would exceed Government cost limitations and would not be feasible within the required time for scheduled Army Force Modernization pilot programs mandated by Deputy Chief of Staff for Logistics (DCSLOG) and Joint Depot Maintenance Advisory Group (JDMAG) decisions.

"[A Market Survey] resulted in a determination that the units produced by [DTB] are the only units compatible with Army requirements, particularly with regard to interfacing with existing equipment at CCAD (i.e. [the DTB UH-60 test stand])."

We recognize that the explanation in the J&A is somewhat general. For example, the J&A describes the basis for the sole source award in terms of the lack of "data required to produce" the equipment, instead of more precisely describing the need for software compatibility. Nevertheless, as explained below, we think the J&A adequately conveyed the rationale for the sole source award, and that this rationale is reasonable.

The rationale set forth in the J&A, although brief, is consistent with the detailed technical testimony provided by the Army at the hearing in this case. As explained by the Army, the "data" referenced in the J&A is the software which runs the DTB equipment. This software is unique to DTB and, because DTB owns the exclusive rights to the software, it cannot be reproduced by AAI ACL or any other hydraulic test stand manufacturer without a complete reverse engineering effort.⁴ (Tr. at 84.)

Further, the Army states that given the current CCAD backlog of hydraulic components requiring testing and repair, a reverse engineering effort is not feasible in this case because of the time required to reverse engineer the software--and the resulting interruption to the current production line, the greater expense to the government of purchasing a software developed by means of a research and development effort, and finally, the potential risk that even if reverse-engineered, the resulting software solution might not be completely interchangeable with or equivalent to the DTB software which is currently used to run the UH-60 test stand. (Tr. at 83; 86-89.)

As explained by the CCAD officials, the unification of automated hydraulic test stands through a centralized computer system will improve the efficiency of testing and repairs, and will enable the government to "save hundreds of thousands of dollars" because of the speed of testing production and the ability to share

⁴Each hydraulic test stand manufacturer uses a unique proprietary equipment configuration and software; there is no universal software which will operate all equipment systems.

software, and track repairs and test results through the depot system. (Tr. at 83.) The manual stand-alone testing stations do not offer this capability. There is no dispute by any of the parties that the Army's desire for an integrated automated hydraulic testing station system is improper. Nor does the protester disagree that, absent a reverse-engineering effort, only DTB software will run DTB equipment.

Under these circumstances, given the risk and cost associated with a reverse-engineering effort, and the Army's uncontested need for a centralized automated testing system, we find the current sole source award to DTB to be reasonably based and unobjectionable.⁵ See Midwest Dynamometer & Eng'g Co., B-257323, Sept. 2, 1994, 94-2 CPD ¶ 91 (sole source award for engine test system is unobjectionable where agency reasonably determined that only one source could provide a test system compatible with existing software); Sperry Marine, Inc., *supra*, (sole source award for navigational radar systems to be used for instructional purposes is not objectionable where agency needed a particular radar system that was the same as the system already in place at the school).

At the hearing, and in its comments on the hearing, AAI ACL stated that if it were given the opportunity to compete for this requirement, it would offer its own UH-60 test stand--to replace the existing DTB test stand--at no extra cost to the Army. Under this scenario, the Army would have a completely integrated five-stand AAI ACL system, plus an extra DTB stand which could be used on a stand-alone basis. Based on this offer, AAI-ACL contends that the Army should have realized that

⁵AAI ACL argues that the J&A is defective because it states that "no follow-on procurement is anticipated." Because the record shows that the Air Force is currently in the process of procuring two additional test stands needed by CCAD to complete its seven-test stand upgrade goal established in 1992, AAI ACL argues that this portion of the J&A is incorrect, and therefore merits sustaining its protest on the ground that the J&A is defective. The CCAD technical engineer testified that his purpose in using the J&A statement referenced above was to convey that this equipment would not need to be replaced. (Tr. at 238-240.) The CCAD technical engineer further acknowledged that at the time of this procurement, he recognized that it was possible that the Army might be "adding" more test stands to the system procured under the current DTB sole source award--as it ultimately did through the Air Force procurement. Given that the J&A otherwise adequately conveyed the basis for this sole source award--the need for software compatibility--we do not think that the inclusion of the "no follow-on buy" phrase presents a basis to conclude that the J&A is fatally defective so as to justify sustaining the challenge to the award to DTB.

competition is feasible, and therefore competitively procured the additional four test stands and integrating computer system.

As noted above, the price of the UH-60 test stand under the 1994 sole source procurement to DTB was \$955,944. The price of the equipment under the current sole source contract at issue in this protest is \$1,875,167; the price of the pending Air Force buy is \$1,719,107. We do not think that the Army was required to speculate that for equipment worth in total less than \$5 million, potential competitors might offer approximately \$1 million dollars in replacement equipment at no cost in exchange for the opportunity to compete.

AAI ACL next argues that the sole source award to DTB is improper since the noncompetitive basis for the procurement arose from a lack of advance planning. As noted above, the record shows that in 1990, the Army conducted an engineering survey to study what upgrades were necessary to improve its production and testing/repair mission. Because the agency knew by 1992 that it ultimately needed to upgrade the entire facility, AAI ACL argues that the agency was required to procure all its equipment needs at the same time, under a total package procurement. In making this argument, AAI ACL relies on FAR § 6.301(c)—which provides that the expiration of appropriated funds does not constitute a basis for procuring under a sole source award to save time—and contends that the Army's apparent lack of funding does not provide a reasonable justification for the current sole source.

Unlike the situation addressed by FAR § 6.301(c), CCAD here was not faced with expiring funds—rather, it had insufficient funds available to satisfy its entire long-term needs. That is, while the Army clearly had planned and devised an engineering concept for updating its facility to a centralized automated system of seven hydraulic test stands of varying capabilities, it was simply not in a position to procure these items until it received adequate funding. When it obtained some funding, it chose—we think, properly—to procure its most critical need first, the UH-60 hydraulic component testing stand.⁶

⁶To the extent AAI ACL challenges the 1993 sole source award as improper, its protest is untimely. AAI ACL admittedly saw the 1992 CBD synopsis of the first sole source award, but chose not to respond or challenge the procurement. Consequently, its current attempt in this protest to have our Office invalidate the initial sole source for the UH-60 test stand as improper, more than 2 years later, is untimely. See Navigation Services Corp., B-255241, Feb. 10, 1994, 94-1 CPD ¶ 99. AAI ACL chose to ignore the synopsis which expressly sought responses from interested sources; consequently, it must abide by that decision.

AAI ACL also suggests that the Army was required to include an addendum in the 1992 sole source CBD synopsis advising prospective offerors that any follow-on equipment would be required to be compatible with the DTB equipment. We think this would be an unreasonable burden to impose on the agency in light of the fact that the Army did not know when—or in fact whether—it could obtain funding for any remaining equipment upgrades. In any event, given the integrated capabilities which automated hydraulic testing equipment offers, we think a manufacturer experienced in the field—such as AAI ACL—should have recognized that if the Army were procuring an automated test stand, the compatibility of this test stand with future pieces of equipment would certainly be a consideration in future procurements.⁷

Finally, AAI ACL argues that this procurement is improper because the Army did not obtain a delegation of procurement authority (DPA) from the General Services Administration (GSA) to conduct the acquisition. Since, according to the protester, the requirement here is for the acquisition of automated data processing equipment (ADPE), a DPA was required under the Brooks Act, 40 U.S.C. § 759 (1988).

Even assuming that these test stands and associated computer system are ADPE, we will not consider this contention further as it is untimely.⁸ Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent before the closing time for receipt of initial proposals must be filed before that time. See 4 C.F.R. § 21.2(a)(1) (1995); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. In this case, the Army's failure to obtain a DPA was

⁷In its comments, AAI ACL contends that the Army violated FAR § 7.202(a)(1), which requires agencies to "procure supplies in such quantity as will result in the total cost and unit cost most advantageous to the [g]overnment, where practicable." We find this contention without merit. As discussed above, because the Army did not have sufficient funding available, it was not possible to procure the entire system under one procurement.

⁸AAI ACL first learned that the Army had a total facility upgrade requirement at the October 5 hearing held in this case. Based on this information, AAI ACL argues that the Army was required to obtain a total package DPA from GSA—and since this ground is filed within 10 working days of the October 5 hearing, this particular protest contention is timely. As discussed above, we conclude that the Army properly procured its test stands on an as-needed basis—and that under the financial circumstances present in this case, a total package procurement for an entire facility equipment upgrade was not possible. Since we conclude that a total package procurement was not required, we need not consider AAI ACL's contention that the Army was required to obtain a total package DPA from GSA.

apparent before the closing time for receipt of initial proposals since the RFP did not include a clause describing any type of DPA, as required by the Federal Information Resources Management Regulation, 41 C.F.R. §§ 201-39.106-4; 201-39.5202-3 (1995). Because this clause was not included in the solicitation, the protester knew or should have known that the Army had not obtained a DPA to conduct this procurement. See Source Diversified, Inc., B-259034, Mar. 1, 1995, 95-1 CPD ¶ 119; Ebon Research Sys., B-253833 et al., Nov. 3, 1993, 93-2 CPD ¶ 270.

Despite its untimeliness, AAI ACL contends that we should consider its protest under the significant issue exception to the timeliness rules. See 4 C.F.R. § 21.2(c). Our Office will review an untimely protest under the significant issue exception only if the matter raised is of widespread interest to the procurement community and has not been considered on the merits in a previous decision. DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310. Whether a DPA should have been obtained from GSA under the Brooks Act for a particular procurement has been considered by this Office in a variety of prior decisions, see our discussion in Source Diversified, Inc., supra, and we do not view the issue of whether a delegation should have been obtained for a particular procurement to be of widespread interest to the procurement community.⁹ Id.

The protest is denied.

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⁹GSA reports that on June 19, 1995, it established a "new specific agency [DPA]" for the Army for acquiring ADPE resources. This DPA allows the Army to procure up to \$100 million in ADPE resources from one or several sources without obtaining the prior approval of GSA. GSA also reports that it has granted a \$100 million DPA for ADPE resources to all executive agencies—including the Air Force.