**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Datacom, Inc.--Protests and Request for Costs

File: B-274175; B-274246.2; B-274287

Date: November 25, 1996

Joseph A. Camardo, Jr., Esq., and Robert D. Somerset, for the protester.
Sophia L. Rafatjah, Esq., for Tracor, Inc., an intervenor.
Nike Nihiser, Esq., Bradley S. Adams, Esq., Gregory H. Petkoff, Esq., and Marian E. Sullivan, Esq., Department of the Air Force, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that two sole source awards--one via a contract, one via a modification to an existing contract--are improper and result from poor planning on the part of the agency is denied where the record shows that the agency: (1) properly justified its use of sole source authority; (2) was not responsible for the delay that occurred due to high-level political intervention in the procurement; and (3) limited the amount of the purchases to a quantity reasonably calculated to extend to the beginning of deliveries under a new contract to be awarded using full and open competition.

2. Request for recommendation that protester be permitted to recover reasonable costs associated with pursuing an earlier protest is denied where the record shows that the protest in that case was rendered academic by a change in statute, not by agency corrective action.

DECISION

Datacom, Inc. protests the Department of the Air Force's decision both to award a contract (F09603-96-C-52442), and to issue a contract modification (modification P00156 to F33657-88-C-0026), on a sole-source basis to Tracor, Inc. for the purchase of the AN/ALE-47 Countermeasures Dispenser System. The contract award involves quantities of spare parts related to this system for use on F-16 aircraft for the National Guard and the Air Force Reserve; the modification involves 22 AN/ALE-47 shipsets to be split between already-deployed C-17 aircraft earmarked for use in the Bosnia pullout scheduled to begin December 1996 (12 shipsets), and new C-17 aircraft where the items are needed as government-furnished equipment by January 31, 1997 (10 shipsets). Datacom argues that the stated bases for these two sole source decisions do not withstand scrutiny and constitute an improper use of sole

source procedures because the Air Force engaged in poor planning. Datacom also requests that our Office recommend that it recover the reasonable costs of filing and pursuing an earlier protest related to those at issue here.

We deny the protests and deny Datacom's request for its earlier protest costs.

BACKGROUND

The AN/ALE-47 Countermeasures Dispenser System (CMDS) is an electronic warfare system used by the Army, Navy, and Air Force to protect aircraft from hostile missile attacks.[1] The system discharges chaff cartridges and decoy flares that distract ground-launched missiles aimed at aircraft. Five distinct line replaceable units (LEU) comprise the system in varying numbers and configurations depending on the aircraft involved.

The original manufacturer of this equipment, Tracor, was awarded a contract for lots I to III of this system in 1988. The record shows that the Air Force anticipated to "breaking out" the remaining need for these parts (lots IV to VII) and procuring the parts competitively. However, before the Air Force could hold a competition for the parts included in lots IV to VII, various forces intervened and derailed the procurement. A chronology of these events is set forth below.

On March 17, 1994, the Air Force published in the Commerce Business Daily (CAD) a notice seeking potential new sources for production lots IV to VII of the CMDS. After receiving several expressions of interest, the Air Force, on January 30, 1995, released a draft RFP for the remaining production quantities of the system. Prior to finalization of the RFP, the procuring center's small business representative recommended that the acquisition be set aside for small business competition. After the contracting officer rejected the set-aside recommendation, and the decision was appealed to the head of the contracting activity--who also rejected the set-aside recommendation--the Secretary of the Air Force decided, on September 12, 1995, that the procurement was appropriate for a total small business set-aside. The Secretary's decision was based, in part, on a conclusion that there were at least six small businesses capable of producing this system.

The Secretary's decision calling for a total small business set-aside resulted in extensive congressional interest. First, by letter dated November 21, 1995, a U.S. senator requested that the procurement be held in abeyance until the Air Force evaluated the impact of the decision to proceed with a small business set-aside on cost, risk, and industrial mobilization preparedness. On January 22, 1996, report

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[1]The following aircraft use this system: F-16, HH-60, C-130, C-141, C-17, C-4, F/A-18, MH-47, VH-60 VH-3, V-22 and the E-8.

language in the National Defense Authorization Act for Fiscal Year 1996 Conference Report, H.R. Conf. Rep. No. 104-450, 104th Congress, 2d Sess. 617 (1996), directed the Air Force "to delay any procurement action regarding lots IV through VII of the AN/ALE-47 until 14 days after the date on which the Air Force has provided the congressional defense committees with a report that assesses the cost and acquisition strategy related to the introduction of new suppliers for the system."

The Air Force provided its report to Congress on May 3, 1996, and advised that it would continue with a total small business set-aside for the remaining portion of the production quantities of the system. The record shows that the Air Force report generated letters of opposition from at least four additional senators, and one representative. The record also shows that several members of Congress expressed support for the decision to set aside this procurement for small business.

In addition to expressions of interest by letter, on June 11, 1996, the Fiscal Year 1997 House Appropriations Committee Report, H.R. Rep. No. 104-617, 104th Cong., 2d Sess. 214 (1996), directed the Air Force not to introduce any new supplier for this system. In conference with the Senate, the House position was modified to require instead that the Air Force drop its plans for a small business set-aside. Specifically, on September 30, 1996, the President signed the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, ___ Stat. ___ (1996), which provides at section 8107 that:

> "Notwithstanding any other provision of law, the Air Force shall not introduce any new supplier for the remaining production units for the AN/ALE-47 Countermeasures Dispenser System without conducting a full and open competition that will include, but not be limited to, small businesses."

Meanwhile, the Secretary of the Air Force reversed her earlier decision, and decided on July 17, 1996, to pursue a full and open competition in lieu of a small business set-aside. By memorandum dated July 26, Air Force acquisition personnel were authorized to proceed with the competition for the procurement of lots IV to VII, but were advised that:

> "In the event urgent requirements exist for the AN/ALE-47 (such as C-17 or National Guard [line replacement units] requirements), you are authorized to develop an alternate strategy (using either new or existing contractual vehicles) to meet these requirements, subject to any statutory or regulatory approvals."

Memorandum from Maj. Gen. John W. Hawley to Warner Robins Air Logistics Center acquisition personnel, July 26, 1996.

Datacom's protests challenge the use of sole source procedures to meet the two requirements identified in the July 26 memorandum.[2]

The National Guard and Air Force Reserve Procurements

The record here shows that as early as March 1994, the Air Force F-16 program office identified a need for AN/ALE-47 parts for the National Guard and Air Force Reserve above the anticipated levels covered by the lots III and IV procurements. At that time, the F-16 program office asked that steps be taken to increase the purchase levels in those lots. As set forth above, no progress was made in the overall procurement for subsequent production parts because of the controversy over how the parts would be procured.

In December 1995, amidst the debate over the appropriate method for procuring these parts, agency acquisition personnel received a request to procure 133 of 1 of the LRUs for the AN/ALE-47 system, the dispenser, for the National Guard and Air Force Reserve. After issuing a solicitation, the Air Force received 11 proposals (including one from Datacom) prior to the January 19, 1996, deadline for proposal submission. On January 24, the Air Force buyer was directed to cancel the solicitation, and was advised that the program office had decreased its need substantially, and would fill any remaining need from existing stock. The solicitation was formally canceled on February 23.

On August 2, one week after the July 26 direction to proceed with procurements of AN/ALE-47 parts, the Air Force buyer received a new purchase request from the F-16 program office for three AN/ALE-47 LRUs--i.e., spare parts--for the National Guard and Air Force Reserve. This request sought 274 dispensers, 191 safety switches, and 21 Flight Line Payload Simulators (FLPS). According to the request, these items are to be provided as government-furnished material for the Electronic Warfare Management System modification for the F-16 National Guard/Air Force Reserve Theater Airborne Reconnaissance System pod.

On August 7, the Air Force published a CBD notice indicating the agency would award a sole source contract to Tracor for these items. A justification and approval (J&A) document was prepared citing the authority set forth at 10 U.S.C. § 2304(c)(1) (1994), permitting the use of other than competitive procedures when

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[2]Datacom also protested the July 17 decision by the Secretary of the Air Force to rescind her earlier decision to procure lots IV to VII of the AN/ALE-47 using a small business set-aside. This protest, B-274246, was dismissed on October 16, 1996, as academic after the President signed the Fiscal Year 1997 Department of Defense Appropriations Act on September 30, which directed the Air Force not to use a small business set-aside for this procurement.

the supplies or services needed by the agency are available from only one responsible source, and no other product will satisfy the agency's needs. Datacom's first protest followed.

The C-17 Procurement

The Air Force's inability to move forward on its competitive procurement also impacted its ability to outfit C-17 aircraft with AN/ALE-47 systems. In the agency report, the contracting officer explained that the initial C-17 requirement was for 44 shipsets, but only 22 had been funded at the time the agency negotiated its lot III+ procurement from Tracor in December 1995.[3] The Air Force explains that the negotiations for the lot III+ procurement had to be complete by the end of December 1995 to avoid a break in production. Thus, the 22 shipsets sought here were not purchased as part of the lot III+ buy and the contracting officer hoped that the items might be addressed through the upcoming competitive procurement.

The contracting officer further explained that in April or May 1996, it became apparent that the competitive procurement would not occur in time to meet the remaining requirements for shipsets for the C-17. In June, Air Force procurement personnel concluded that an additional purchase for these items would be required. This need became even more acute because of a decision to use the C-17 to support the Bosnia pullout (originally ordered by the President to start in December 1996). Thus, the Air Force determined that it needed 12 shipsets by November 30 to retrofit the previously-delivered C-17 aircraft slated for use in the pullout but lacking the CMDS. Agency officials also included an additional 10 shipsets needed for delivery by January 31, 1997, to assure that C-17 aircraft in production would be combat-ready when delivered.

To meet these needs the Air Force prepared a J&A to support its decision to procure the 22 shipsets via a modification, if possible, to Tracor's existing contract. The J&A cited the authority set forth at 10 U.S.C. § 2304(c)(2), permitting other than competitive procedures when the agency's need is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources. Here, the J&A set forth the urgent need to support missions in Bosnia and, potentially, the Far East. In addition, the J&A limited the buy to Tracor on the basis that only Tracor could meet the accelerated delivery schedule, and then only by using existing materials to

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[3]In addition to the purchase lots originally anticipated, the Air Force procured an interim lot, lot III+, directly from Tracor in early 1996, to cover the gap between Tracor's deliveries and deliveries from whichever source received award from either the small business competition or the full and open competition.

build the items. The Air Force awarded the contract modification on August 30, and Datacom's second protest followed.

DISCUSSION

In both of these protests, Datacom essentially argues that the Air Force is barred from using sole source procedures because it has not performed the proper planning to ensure that its needs will be met using competitive procedures. For the reasons set forth below, we disagree with Datacom's general challenge, as well as with its specific challenges to each procurement.

In general, the overriding mandate of the Competition in Contracting Act (CICA) is for "full and open competition" in government procurements, which is obtained through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A). With respect to the spare parts needed for the National Guard and the Air Force Reserve, the Air Force used the exception to full and open competition authorized by 10 U.S.C. § 2304(c)(1)--i.e., that there is only one source capable of meeting the agency's needs. Marconi Dynamics, Inc., B-252318, June 21, 1993, 93-1 CPD ¶ 475; Sperry Marine, Inc., B-245654, Jan. 27, 1992, 92-1 CPD ¶ 111. To use noncompetitive procedures under 10 U.S.C. § 2304(c)(1), the agency must execute a written J&A with sufficient facts and rationale to support the use of the specific authority, 10 U.S.C. § 2304(f)(1)(A),(B); Federal Acquisition Regulation (FAR) §§ 6.302-1(d)(1); 6.303; 6.304, and publish a notice in the CBD to permit potential competitors to challenge the agency's intent to procure without full and open competition. 10 U.S.C. § 2304(f)(1)(C). Our review of an agency's decision to conduct a sole source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth reasonable justifications for the agency's actions, we will not object to the award. Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299.

With respect to the 22 shipsets needed for the C-17, the Air Force relies on different authority, and the requirements that flow from that authority are slightly different. Where an agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals, the agency may use noncompetitive procedures pursuant to the authority set forth at 10 U.S.C. § 2304(c)(2). All Points Int'l, Inc., B-260134, May 22, 1995, 95-1 CPD ¶ 252. This authority is limited by 10 U.S.C. § 2304(e), which requires agencies to request offers from as many sources as practicable. An agency may limit a procurement to only one firm if it reasonably determines that only that firm can properly perform the work in the available time. Lundy Technical Center, Inc., 70 Comp. Gen. 588 (1991), 91-1 CPD ¶ 609. Although an agency is required to prepare a J&A to support its claims of unusual and compelling urgency, it may do so after contract award when

preparation and approval would unreasonably delay the acquisition. FAR §§ 6.302-2(c)(1); 6.303-1(e). We will object to the agency's determination only where the decision lacks a reasonable basis. All Points Int'l, Inc., supra.

We first consider Datacom's contention that the Air Force's failure to complete a competitive procurement of these items is due to poor planning by agency personnel. In this regard, 10 U.S.C. § 2304(f)(5)(A) prohibits award of a contract using other than competitive procedures as a result of a lack of advance planning by contracting officials. Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579, aff'd, B-225685.2, Sept. 29, 1987, 87-2 CPD ¶ 313. On both of these procurements, the protester correctly points out that the Air Force was aware of its needs at least as early as 1994.

As an initial matter, there is no dispute with the protester's contention that the Air Force could have avoided these two sole source purchases if it had proceeded as originally planned in late 1994 and early 1995. However, we do not agree that the circumstances here support a conclusion that the Air Force has failed to plan sufficiently to meet its needs. Rather, it appears that the Air Force would have completed this procurement but for concerns about the utilization of small business which led to intervention from outside the agency.

The record shows, for example, that nearly 2 years ago, Air Force personnel appropriately identified the possibility that the AN/ALE-47 system could be set aside for a small business competition, and set out to compete the procurement. The record also shows, however, that this procurement has been the subject of two separate decisions by the Secretary of the Air Force regarding its suitability for a small business set-aside; several instances of report language and statutory changes imposed by congressional oversight committees; and significant input from key members of Congress offering their respective views on how the procurement should be handled.[4]

In our view, the Air Force's efforts here are in marked contrast to the situations where we have sustained protests of sole source procurements on the basis that the agency failed to complete advance procurement planning. For example, in TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700, and Freund Precision, Inc., 66 Comp. Gen. 90 (1986), 86-2 CPD ¶ 543, agency officials failed to take steps to allow potential offerors to qualify as competitors when there was sufficient time to do so. Instead, the situation here is analogous to the one discussed in our recent decision in Sprint Communications Co., L.P., B-262003.2, Jan. 25, 1996, 96-1 CPD ¶ 24. In the Sprint decision, the agency made extensive efforts to complete a competitive

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[4]For example, the letters from members of Congress include a letter from the chairman and ranking minority member of one of the defense oversight committees.

procurement, but despite its best efforts, outside events--specifically, tremendous changes in the nature of the telecommunications industry--interrupted and stymied the agency's ability to proceed with a competition, making an interim sole-source purchase necessary. In this case, the Air Force's procurement efforts were made against a backdrop of congressional inquiry and legislative actions. Simply put, we cannot fault the Air Force for failure to complete its procurement in the face of congressional report language directing the agency to go no further in its effort to hold a competition of any kind. Thus, while we understand Datacom's frustration with the course of this procurement, we do not agree that the Air Force has acted improperly.

With respect to Datacom's specific allegations regarding the decision to purchase the F-16 parts for the National Guard and Air Force Reserve, the protester argues that the agency incorrectly concluded that technical data are unavailable for the FLPS; unreasonably stated that only Tracor could produce the items in the time required; failed to conduct a market survey; and failed to negotiate a fair market price for the parts. We have reviewed Datacom's arguments and conclude that they raise issues irrelevant or immaterial to the Air Force's conclusion that a sole source contract is needed.

For example, the Air Force does not base its decision here on the lack of available data. It is based on the conclusion that none of the potential offerors would be able to produce a first article for approval and then production articles within the time by which the Air Force would need these items. The purchase here is for parts needed between March and December 1997. The Air Force J&A estimates that potential offerors would need 180 days to produce a first article for testing, plus 90 days government evaluation time, plus 120 days for delivery of production items.

Although Datacom argues it could produce its first articles in less time than the government estimate, the Air Force defends its estimate on the basis that the estimate was a good faith attempt to quantify the time required to produce the items and that none of the small businesses seeking to produce this system has yet produced it. Under the circumstances here, since the Air Force is proceeding with a full and open competition, and since it seeks to purchase only a limited number of items to meet its needs until completion of its competitive buy, we have no basis to overturn this procurement based solely on Datacom's claim that it can build the items more quickly.

Similarly, with respect to Datacom's specific challenge to the purchase of these parts for installation in C-17 aircraft--more than half of which need to be installed before the C-17s could be used in the Bosnia pullout originally scheduled for December 1996--we conclude the Air Force's justification for this purchase is even more sound. Datacom cannot argue that it can produce the AN/ALE-47 shipsets in

time for their use in the aircraft destined for Bosnia, but instead challenges the Air Force's decision to use the C-17 in this operation, and challenges the inclusion of the 10 shipsets for installation in new aircraft. With respect to the first issue, neither Datacom, nor our Office, can dictate military policy. The bid protest function has no role in a decision about which aircraft will best suit the government's needs in this upcoming operation. With respect to Datacom's argument that the Air Force has unreasonably included in this purchase an additional 10 shipsets to assure that newly manufactured C-17 aircraft arrive combat ready, we again agree with the Air Force. In our view, the inclusion of these additional subsets in this limited purchase to assure the readiness of aircraft to be manufactured between now and the time the agency can procure additional parts via a full and open competition, is a reasonable exercise of the agency's statutory authority to make such purchases.

In sum, given that the record shows that the Air Force issued its RFP to procure its upcoming needs for the AN/ALE-47 on August 30, 1996, and has made a reasonable effort to limit the sole source procurements here to its interim requirements, and given our conclusion that the delay is not the result of poor agency planning, we deny Datacom's challenge to the agency's use of sole source procedures for these two purchases.

Request for Reimbursement of Costs

Datacom requests a ruling from our Office that it be permitted to recover the reasonable costs of filing and pursuing its earlier protest of the July 17 decision by the Secretary of the Air Force to rescind her earlier decision to procure lots IV to VII of the AN/ALE-47 using a small business set-aside. Datacom argues that the passage of section 8107 of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, ___ Stat. ___ (1996)--which made its protest academic and resulted in dismissal of the protest by our Office--was corrective action by the agency.

Under our Bid Protest Regulations, when an agency takes corrective action in response to a clearly meritorious protest, prior to our issuing a decision on the merits, we may declare the protester to be entitled to recover reasonable costs of filing and pursuing its protest, including attorneys' fees. Bid Protest Regulations, section 21.8(e), 61 Fed. Reg. 39,039, 39,047 (1996) (to be codified at 4 C.F.R. § 21.8(e)). We will make such a recommendation only where an agency unduly delays taking such corrective action. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, the agency has taken reasonably prompt action. Dynair Elecs., Inc.--Request for Declaration of Entitlement to Costs, B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260.

In this case, however, the protest became academic for reasons unrelated to the protest allegations. The record shows that the matter here was under consideration by the Congress well before the time Datacom filed its protest, and the Congress, not the Air Force, passed a new law with specific application to this procurement. It was this law that rendered the protest academic, not corrective action by the Air Force. In fact, we fail to understand how Datacom can argue that the statute here was corrective action, when the statute ensured that Datacom could not prevail in its protest. Where a protest is rendered academic by actions outside the control of the agency, we have no basis to conclude that the agency took corrective action in response to the protest, and no basis for awarding costs under section 21.8. Red River Service Corp.--Entitlement to Costs, B-259462.2, Sept. 11, 1995, 95-2 CPD ¶ 106.

Datacom also argues that our Office should assess costs against the Air Force as a sanction because the agency failed to advise both the protester, and our Office, of the pending language in the Appropriations Act that would render this protest academic. We do not interpret our authority to recommend award of protest costs in corrective action cases to extend to assessing protest costs as a sanction against agency behavior unrelated to corrective action. See H. Watt & Scott General Contractors, Inc.--Request for Declaration of Entitlement to Costs, B-257776.3, Apr. 6, 1995, 95-1 CPD ¶ 183 (award of protest costs not available as a sanction against an agency's 2 month delay in providing requested documents).

The protests and the request for costs are denied.

Comptroller General
of the United States