DECISION

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

60994

FILE: B-184927 DATE: April 23, 1976

99027

MATTER OF: Control Data Corporation

DIGEST:

1. When court expresses interest in GAO decision, merits of protest will be considered even though protest might have been untimely filed.

2. Agency's decision to procure design and development of improved system from sole-source supplier without breaking out one component of system for competitive procurement is not subject to objection where record shows agency had reasonable basis for decision.

3. Agency's refusal to break out key component of improved sonar system for separate procurement is justified in view of agency's judgment that such breakout would involve unacceptable technical (due in part to increased concurrency of development and production efforts) and delivery risks as well as increased costs.

4. Protester's fear that militarized disk being developed under contract for development of improved sonar system will become standard disk for use throughout agency without meaningful competition is without merit since agency indicates that it will finance development of "second source" contractor and conduct competitive procurement for standard disk.

5. No organizational conflict of interest is shown where contractor who performed both contract definition including development of specifications, and actual system development is awarded contract for initial production that only it can provide.

6. Fact that contractor engaged in development tasks prior to award of development and that agency intends to pay for costs incurred in those efforts does not indicate illegal action. Payment under such circumstances appears to be authorized by regulatory provision.

PUBLISHED DECISION
55 Comp. Gen. .....

Introduction

This case involves the propriety of the Navy's award of sole-source contracts to International Business Machines Corporation (IBM) for an improved AN/BOQ-5 sonar system without breaking out for competitive development and procurement a key component of the improved system. The improved sonar system is to be installed in three classes of nuclear submarines, including several submarines which are currently under construction.

The AN/BOQ-5 sonar system was developed and produced by IBM under a contract awarded by the Navy in 1970 pursuant to competitive negotiation procedures. In 1974 the Department of Defense approved a proposed Increased Computer Capacity and Towed Array Broadband Processing (ICC/TABP) improvement to the sonar system. After conducting a system definition effort, the Navy, through the Naval Sea Systems Command (NAVSEA), awarded a sole-source contract (No. N00024-75-C-6223) to IBM on June 30, 1975, for the contract definition of the ICC/TABP improvement. This contract was synopsized in the July 11, 1975 issue of the Commerce Business Daily (CBD).

On September 15, 1975, Control Data Corporation (CDC) protested the award. The protest, as supplemented and refined, essentially is directed against (1) the award of that contract and against any subsequent award to IBM for development or production of the complete ICC/TABP improvement. Notwithstanding this protest, NAVSEA on March 31, 1976, awarded a sole-source contract to IBM for the development of the sonar system improvement.

CDC's position is based on NAVSEA's failure to break out and procure competitively a key component of the ICC/TABP improvement, a militarized computer disk system known as an Advanced Disk File (ADF). CDC claims that it has the capacity to timely furnish the required ADP and that NAVSEA's refusal to permit competition for this militarized disk system is contrary to procurement statutes and regulations requiring competition in the award of Government contracts and permitting the breakout of components from end items. CDC also asserts that the inclusion of the ADF in the ICC/TABP improvement development contract awarded to IBM is inconsistent with the efforts of the Navy Electronic Systems Command (NAVELEX) to competitively develop the Navy Standard Disk and would give IBM an insurmountable advantage in the Standard Disk competition. In

addition, CDC suggests that since IBM prepared the specifications for the ICC/TABP improvement, any award of a development and/or production contract to IBM would violate the rules for the Avoidance of Organizational Conflicts of Interest found in Appendix G of the Armed Services Procurement Regulation (ASPR).

Subsequent to filing its protest here, CDC, on March 1, 1976, brought an action in the United States District Court for the District of Columbia for declaratory relief and a preliminary injunction pending resolution of the protest. On March 22, 1976, CDC's motion for preliminary injunction was denied. Ordinarily this Office will not decide any protest where the matter involved is the subject of litigation before a court of competent jurisdiction unless the court "requests, expects, or otherwise expresses interest in the Comptroller General's decision." Section 20.10 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975); Nartron Corp. et. al., 53 Comp. Gen. 730 (1974), 74-1 CPD 154. Although the court's order denying the preliminary injunction is silent on this point, we understand that the court is interested in and does expect a decision in this case. We will therefore consider this matter on the merits. Descomp, Inc., 53 Comp. Gen. 522 (1974), 74-1 CPD 44.

Timeliness

At the outset, we are faced with the Navy's claim that CDC's protest against the contract definition award is untimely. Section 20.2(b)(2) of our Bid Protest Procedures requires protests to be filed not later than 10 days after the basis for protest is known or should have been known. The Navy asserts that CDC was placed on notice of the award by the synopsis published in the CBD on July 11, 1975, and was again informed of the award at a meeting with NAVSEA personnel on July 21, 1975. CDC's position is that it was not made aware of the inclusion of the ADF in the ITT/TABP improvement by the CBD synopsis, that it first learned of the sole-source selection of IBM at the July 21, 1975 meeting, and that, in accordance with section 20.2(a) of our Bid Protest Procedures urging "resolution of * * * complaints initially with the contracting agency," it then sought to resolve the matter directly with the Navy.

We need not resolve this question. We have often indicated that when there is judicial interest in our decision, we would deem it appropriate to consider the matter on the merits notwithstanding the fact that the protest was not timely filed. See,

Dynalectron Corporation et. al., 54 Comp. Gen. 1009 (1975), 75-1 CPD 341; 52 Comp. Gen. 161 (1972). Accordingly, since the District Court is interested in our decision in this case, we will consider the merits of the protest regardless of whether it was filed timely.

Propriety of Awards

The contract definition and development awards followed the Navy's determination that the ICC/TABP improvement required a new disk system and that only IBM could provide it. This is explained by NAVSEA as follows:

> "The SSN 594, 637 and 688 class submarines include a Fire Control System (FCS) designated the MK 117 FCS which is used to program and launch weapons, i.e. torpedoes. The MK 117 FCS presently includes a militarized IBM computer disk file designated the RD-281. The initial ICC/TABP definition studies indicated that it would be necessary to modify and add a second RD-281 disk file specifically for the ICC/TABP. However, this approach to achieving the desired improvement was not feasible since it would have required substantial modifications and combinations of other equipment cabinets to meet the space constraints in the submarine. Following a survey of the commerical disk market (described below), a decision was reached to militarize the IBM 3340 commercial disk which was designated the Advanced Disk File (ADF). Accordingly, the disk designated for use in the ICC/TABP was changed from the initially planned modified RD-281 to AN/BQQ-5 [improved] Sonar systems in lieu of the RD-281 which served only the FCS. The ADF would occupy the space of a single RD-281.
>
> "The system definition effort was completed in March 1975 and plans were initiated to proceed to the contract definition phase of the ICC/TABP. Generally it had been determined that the ICC/TABP could be effected by replacing the IBM built Classification Post Processer with a second Univac AN/UYK-7 Computer. In addition, other equipments in

> the AN/BOQ-5 would be modified to permit incorporation of the second Univac AN/UYK-7 computer, additional hardware modifications would be required to accomplish the broadband processing of towed array signals, and the ADF would be added to provide memory for the AN/UYK-7 computer performing the data storage and retrieval. * * *
>
> "During the first quarter of 1975 a survey of the commercial disk market by NAVSEA and the Naval Electronic Systems Command (NAVELEX) did not reveal a disk that could meet the Navy's schedule requirements without unreasonable technical risk and excessive cost. * * * Generally, the survey indicated that no contractor had a commercial disk equivalent to the IBM 3340 type of disk. Further, no contractor other than IBM had ever militarized a disk of comparable size and capacity as the RD-281, or the 3340. The ADF is a militarization of the IBM commercial 3340 disk. Militarization requires modification of the disk to meet submarine environmental constraints in such areas as shock, vibration, temperature, humidity, electromagnetic interference, salt spray and electric power variations. In 1974 IBM at private expense started militarization of its commercial 3340 disk. IBM has had three years of commercial experience in perfecting its commercial 3340 disk. For all these reasons and the fact that IBM is the developer and sole producer of the AN/BOQ-5 Sonar, IBM was uniquely qualified to develop the ICC/TABP improvement to the Sonar including the ADF. * * *"

CDC, while not disputing that an improved AN/BQQ-5 sonar system would require an ADF, claims that the items are not "inseparable for design and procurement purposes" and that the ADF should be "competitively procured and furnished as GFP [Government Furnished Property] to the BQQ-5 program." CDC states that there are no technical difficulties associated with breaking out the ADF from the ICC/TABP improvement effort because the nature of the required interface is well described in

an existing MIL STD and in the specification developed by IBM. CDC also challenges the adequacy of the Navy's 1975 market survey as a basis for concluding that only IBM could meet the Navy's needs, particularly in view of the fact that the Navy never contacted CDC about what it had in the way of computer disk systems. Had it been contacted, CDC asserts, it would have informed the Navy of CDC's planned imminent announcement of the availability of a disk system which could have been militarized.

On the other hand, NAVSEA states that breaking out the ADF "is not feasible in the contract definition phase or in the development phase * * * because of the interface between the computer/computer program of the ICC/TABP and the ADF." According to NAVSEA:

> "Operation of the computer and the ADF is one integrated function. The computer program software must be developed to function with the ADF. The ADF design must be completed early in the ICC/TABP Program to minimize the impact on the program software. Accordingly, the configuration of the ADF must be defined at an early stage of the ICC/TABP design or a program impact resulting in delays and significantly increased costs will result."

Furthermore, says NAVSEA, its 1975 market survey cannot be regarded as inadequate because it was used only to determine if the required ADF technology existed and not to determine what companies might be able to develop that technology.

Initially, we point out that while CDC has couched many of its submissions in language which suggests that the protest is against allegedly improper sole-source awards, in essence the protest is actually directed against the Navy's refusal to break out one component of the system being developed for separate, competitive procurement. In other words, CDC's concern is not that it should have been given an opportunity to compete for the design and development of the entire ICC/TABP improvement, but that the Navy should have provided it with an opportunity to compete for the ADF component of the improved sonar system. Thus, what is at issue here is not the sole-source nature of the awards to IBM, but rather the Navy's decision to procure the entire ICC/TABP improvement from IBM instead of breaking out the ADF for a separate competitive procurement.

The issue of component breakout is directly related to the statutory requirement of 10 U.S.C. 2304(g)(1970) that proposals shall be solicited "from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured." See also ASPR § 3-101 (b). Although this requirement for maximum competition has been recognized as the "cornerstone of the competitive system", 53 Comp. Gen. 209, 211 (1973); Hoffman Electronics Corporation, 54 Comp. Gen. 1107 (1975), 75-1 CPD 395, procuring activities may place sole-source or other restrictions on competition when the legitimate needs of agencies so require. See cases and examples cited in Hoffman Electronics Corporation, supra, at 1112-13. Sole-source awards are generally justified in situations where time is of the essence and award to other than the sole-source contractor would introduce the possibility of unacceptable technical risk, North Electric Company, B-182248, March 12, 1975, 75-1 CPD 150; Hughes Aircraft Company, 53 Comp. Gen. 670 (1974), 74-1 CPD 137, and where only a single source can meet compatability and interchangeability requirements. B-174968, December 7, 1972.

However, because sole-source awards are exceptions to the general rule requiring maximum competition, contracting officers are charged with the responsibility for assuring that a proposed noncompetitive award is necessary and for taking steps to "avoid the need for subsequent noncompetitive procurements. This action should include * * * possible breakout of components for competitive procurement." ASPR § 3-101(d). Guidelines for determining whether components should be broken out are provided in ASPR § 1-326. Essentially, these guidelines involve considerations of technical risk, delayed delivery, and net cost savings if breakout were to occur.

Decisions based on those guidelines, of course, are primarily matters within the sound discretion of the procuring activities, which are in the best position to assess the technical risk and potential cost savings involved in component breakout, and will be upheld so long as some reasonable basis for the decisions exist. They will be subject to question only where it appears that a failure to break out one or more components from an end-item procurement unnecessarily restricted competition in contravention of 10 U.S.C. 2304(g). For example, in B-169924, B-170426, November 24, 1970 and February 10, 1971, we objected to the Air Force's inclusion of one particular item in a procurement of modification kits when that would result in a noncompetitive procurement even though

"there was competition available with respect to the great majority of the items being procured." We pointed out that "[c]ompetition could have been assured if the [item not competitively available] had been procured on a separate solicitation." On the other hand, where the Navy decided, primarily for reasons relating to integration and other technical risk problems, to procure strobe lights for the P-3 aircraft then being manufactured directly from the airframe manufacturer through issuance of a contract change order instead of obtaining competitive proposals, we held that the decision "involves a matter of contract administration" and was not subject to objection since the change order was within the scope of the original contract. Symbolic Displays Incorporated, B-182847, May 6, 1975, 75-1 CPD 278.

Here we think the record clearly establishes that the Navy had a reasonable basis for including the ADF in the overall ICC/TABP improvement contract. Unlike the situation in B-169924 and B-170426, supra, most of what is being procured is not, insofar as the record indicates, competitively available, and the Navy has presented substantial reasons why it would not be feasible to break out the one component for which CDC desires to compete. These reasons involve both technical risk and time of delivery, as well as likelihood of increased costs. Although CDC does not agree with those reasons, CDC has not established on this record that the Navy's position is unreasonable.

First of all, with regard to the market survey conducted in early 1975, it appears that the Navy was not at that time looking for potential developers of the militarized computer disk system. Rather, the purpose of the survey was to uncover existing militarized disk technology which would meet program needs and thus be suitable for use as Government Furnished Equipment in the improved sonar system. In other words the Navy wanted to separately acquire the ADF if it existed (and apparently have the rest of the ICC/TABP improvement designed around that ADF), but was not looking for possible competitors for designing or developing the ADF if it did not exist since, as explained below, the Navy believed that it was not feasible to have an ADF designed separately from the design effort needed for the rest of the improved system. For this reason, NAVSEA limited the survey to a review of the literature of militarized disk sources and to a review of earlier (involving responses to a CBD notice) conducted by NAVELEX. According to the Navy, CDC did not have any literature at that time indicating that it had developed

a militarized disk technology. The Navy further states that even a direct contact with CDC would not have indicated anything to the contrary since CDC, although it apparently had developed and was about to announce a new disk capability, did not have a developed militarized disk technology. Thus, the Navy's failure to contact CDC directly had no bearing on the sole-source awards to IBM.

Secondly, the contract definition award was predicated primarily on the Navy's belief that it is important, in the design phase, to have the configuration of the ADF component defined in the early stages of the overall design effort for the ICC/TABP improvement and that breakout would not be feasible for this reason. There is nothing in the record which would warrant our disagreeing with that belief. We think it is obvious that a separately designed ADP would necessary involve some degree of noncompatability of the ADF design with the design of the ICC/TABP improvement. Although CDC asserts that breakout was feasible because of the availability of both a military standard (MIL STD) and a specification, the specification referred to by CDC is the very one developed by IBM under the design contract. Obviously, the specification could not support ADF breakout for the design contract itself. Furthermore, the most that can be said with respect to the feasibility of ADF breakout for the design contract is that CDC's technical experts and the Navy's technical experts disagree. In such situations, where the technical judgment of the agency has a reasonable basis, "we do not believe it is appropriate for this Office to question the [agency's] judgment * * * merely because there may be divergent technical opinions * * *." Honeywell, Inc., B-181170, 74-2 CPD 87; METIS Corporation, 54 Comp. Gen. 612 (1975), 75-1 CPD 44. Here we think the record reflects a reasonable basis for the Navy's judgment that it was not technically feasible to break out the ADF, and we therefore cannot conclude that the failure to break out the ADF for the contract definition procurement was improper.

With respect to the development contract, the Navy does not rely solely on the lack of technical feasibility for ADF breakout, since it admits that, if certain changes were made to the IBM-developed specification, the ADF could be developed separately from the ICC/TABP improvement and that CDC is capable of developing it. Instead the Navy asserts that while there are still technical risk problems associated with separate development of the ADF, it is the time constraints imposed on

the AN/BQQ-5 sonar system improvement program by the delivery schedule of submarines now under construction which preclude breaking out the ADF for separate development and production. According to the Navy, separate ADF development would result in either (1) an unacceptable delivery date of 14 production units, thereby costing the Navy some $4.2 million to purchase the existing RD-281 disk and later retrofitting the affected submarines with the ADF (plus an additional $3.9 million in integration and support maintenance costs if the ADF is developed separately), or (2) an unacceptable technical risk stemming from a significant overlapping of development and production efforts.

The delivery problem is explained by the Navy as follows:

> "Using the parallel development plan required by the CDC approach, it would be necessary for IBM to develop the ICC/TABP without an ADF in order to meet the first required ICC/TABP delivery date of January 1978 for the SSN 700. In parallel with this effort it would be necessary to award a separate contract for the ADF development. Assuming a separate ADF development contract, the earliest award date for such a contract would have been 1 April 1976 (this date was constrained by a 1 October 1975 availability of the ADF specification) and the first delivery of the ADF would not be made until July 1978 (15 month development effort followed by a 12 month production lead time). Six additional months would be required to integrate the ADF into the ICC/TABP production systems thereby resulting in a January 1979 initial total system delivery. This would result in apparently 14 ICC/TABP systems being delivered and installed in submarines without the ADF."

CDC points out, and the record establishes, that in fact the Navy envisions some overlap of the development and production phases in lieu of consecutive phases assumed in the above quoted statement. In this connection, however, the Navy states:

> "Ideally, in any program to develop, produce and deploy a major new military system, development should be completed prior to the initiation of production. The

obvious reason is that changes which become necessary as a result of development program are most expeditiously, and economically incorporated into production before materials are ordered and before production begins. Otherwise, expensive rework retrofit and waste occur as a result of incorporating changes during the production cycle which are required by the development program. Further, even where development is 'completed' prior to production in a complex defense system, unforeseen problems and delays generally arise in getting systems integrated and working properly.

"In the ICC/TABP program, because of the need to deliver a working production system to the SSN 700 by 1 March 1978, development and production must exist concurrently to a great extent. This fact significantly increases the technical risk. The greater the concurrency of development with production, the greater the technical risk. Breaking out the ADF for separate development will delay the program and thereby increase the technical risk. Further, it will dilute the total systems responsibility for the Sonar system which IBM presently has."

NAVSEA's position essentially is that while development and production overlapping would occur regardless of whether the ADF were broken out for separate development, separate ADF development by a company other than IBM would involve significantly greater overlap with the attendant greater technical risks. IBM can meet the Navy's time schedule with less overlapping because that company, prior to award of the development contract, had engaged in ADF development efforts on its own and was the only firm in a position to meet the initial delivery requirements of the development phase. The time schedule, as reported by the Navy, is as follows:

(1) delivery of a Functional Development Model of the ADF in April 1076 for support of the ICC/TABP software development;

(2) delivery of an Engineering Model ICC/TABP system (including an ADF) in July 1976, to support system development testing;

(3) delivery of a fully militarized pre-production model of the ADF in October 1976, for the start environmental and reliability testing;

(4) delivery of a production unit of the ADF in July 1977 for the start of the system integration of the production AN/BQQ-5 ICC/TABP for delivery of a total system in January 1978.

The January 1978 date is based on the stated requirement of the Navy's submarine shipbuilder, the Electric Boat Division of General Dynamics, for receipt of the first ICC/TABP improvement by March 1, 1978, for installation into the SSN-700, the first of several submarines under construction which have been designated to receive the improved sonar system.

CDC asserts that although it could not have met some of the intermediate delivery requirements, it could have met the Navy's "early 1978" requirement, had an award to it been made expeditiously, by overlapping development, production, and integration. CDC also states that there would be no serious technical risk involved in the separate development of the ADF, and that the 6 months established by the Navy for integration of the ADF into the ICC/TABP is much too long. Furthermore, CDC claims that the early 1978 delivery date for the ICC/TABP improvement is no longer realistic because of scheduled slippages at Electric Boat.

The record does not support CDC's position. Although there is an overlap of development and production in the Navy-IBM contract, the Navy reports that production cannot begin until a functional development model of the ADF is delivered and tested. The ICC/TABP improvement delivery schedule calls for 1 year of production plus 6 months of integration. Since the total system delivery date is January 1978, production would have to start in July 1976, thereby necessitating delivery of the functional development model in April 1976 to allow time for testing. CDC has indicated that it could reasonably expect to furnish a functional development model 7 months after contract award. Thus, even if the Navy was prepared to award a contract to CDC at the same time it awarded the development contract to IBM, CDC would have had to make up at least 7 months in order to meet the Navy's delivery requirements. Although CDC apparently believes it could have made up some of that delay with a short integration period, we note that in the Navy's technical judgment a 6-month integration period, including an 8 to 10-week acceptance period,

is necessary. The record indicates that this 6-month period, which is being required for IBM, "is based on experience on programs of very similar complexity and design." Thus it would appear that CDC either could not reasonably be expected to meet the Navy's delivery requirements, or could possibly do so only through significantly greater overlapping of development and production effort than will be required under the IBM contracts.

In this regard, despite CDC's assertion to the contrary, we think the Navy has reasonably established the likelihood of substantially increased technical risk under a CDC contract because of that more extensive overlapping. It has long been recognized that "concurrency" of development and production necessarily entails certain risks which, if realized, can lead to significant delay and increased costs. See, e.g., Hoffman Electronics Corporation, supra; 51 Comp. Gen. 743, 748 (1972); 2 Report of the Commission on Government Procurement 85, 158; GAO Report to the Congress, "Adverse Effects of Large-Scale Production of Major Weapons Before Completion of Development and Testing", B-163058, November 19, 1970. We think it is obvious that "[t]he greater the concurrency of development with production, the greater the technical risk." Here, the record contains an affidavit from a NAVSEA senior engineer which sets forth some indication of why and how those risks would arise and why the schedule which only IBM can meet would minimize those risks:

> "The prevalent method of developing Navy software programs is from the top down with many incremental deliveries which are tested as a complete system. Both DOD and commercial developments have been plagued with bottom up developments and delivery of large amounts of software for purposes of integration and test. These types of development require perfect specifications, perfect two way interpretation and perfect implementation. This has not been shown to be a real world probability and has led to many disastrous development programs. As previously stated the heart of the system is the software and hardware elements dealing with total system processing and control. For software these elements are the executive services, bulk memory management, display/system concurrency management, and man/machine interface. For the hardware these elements are the computer, mass memory, and man/machine

> interface. In top down approach these elements will be first delivered and debugged. A July 1976 delivery date of these elements is required in order to assure a reasonable chance of delivering a successful production system by January 1978. To proceed into production prior to the accomplishment of these events would result in significantly increased technical risk, i.e. a likelihood that production systems would require extensive rework and retrofit prior to delivery thereby delaying delivery and increasing costs. The schedule from July 1976 until January 1978 is derived from some of the most successful development schedules for similar efforts. Some of the factors used in determining the schedule were code generation rates, debug and test rates, available hardware assets, size of program, complexity, and the experience of programmers."

We find no basis in the record to disagree with the Navy's technical judgment.

CDC's contention that the January - March 1978 delivery date for the improved sonar system is not realistic is based on schedule slippages for delivery of the SSN-700. CDC argues that the January - March 1978 date for delivery of the improvement was established on the basis of a scheduled delivery of the SSN-700 in August 1978. Because of labor and other difficulties, the SSN-700 is now scheduled for completion in June 1979. CDC therefore asserts that the required delivery date for the improved sonar should have slipped a corresponding number of months, thereby providing CDC with significant time to develop and produce the ADF.

The record shows that the January - March 1978 delivery date for the improved sonar system was established at a time when the Navy's official expected delivery date for the SSN-700 was August 1978. However, the technical director of NAVSEA's Sonar Division has stated that:

> "The schedule for the ICC/TABP was developed utilizing the best estimates available within NAVSEA of the actual delivery for the SSN 700, recognizing that schedule slippage was anticipated. The SSN 700 was assumed to be May 1979 for the purpose of the ICC/TABP development schedule."

Although CDC questions that statement, the record does indicate that in fact the current SSN-700 delivery date of July 1979 necessitates delivery of the ICC/TABP improvement in the January - March 1978 period. The record shows that Electric Boat, on February 20, 1976, notified the Navy that it would require a March 1, 1978 delivery of the improved sonar system to be installed in the SSN-700. It is our understanding that this 15-month lead time is needed because installation of the sonar system takes place prior to launch, which in turn is approximately 1 year prior to delivery of the vessel to the Navy.

In light of this record, we find no basis for questioning the propriety of either the sole source nature of the awards to IBM or the Navy's decision not to breakout the ADF from those awards. The Navy has shown compliance with all applicable statutory and regulatory requirements for awarding sole source contracts, has justified the noncompetitive basis of the awards and the inclusion of the ADF in the awards, and has executed the necessary Determination and Findings (signed by the Assistant Secretary of the Navy) required by 10 U.S.C. 2310. Furthermore, we find no substantial evidence in the record indicating that the award of either contract was the result, as CDC alleges, of illegal "favoritism" toward IBM on the part of the Navy. Rather, the awards appear to be the logical result of IBM's winning a competition for a sonar system in 1970 and the Navy's current needs for delivery of an acceptable improved version of that sonar system within rigidly prescribed time frames.

Other Issues

There remains for consideration certain other issues raised by CDC in connection with these procurements. These issues involve (1) future award of a production contract to IBM; (2) the Navy Standard Disk program; (3) organizational conflict of interest; and (4) reimbursement of IBM for costs incurred while not under contract. Each is considered below.

1. Future production award to IBM

The Navy has stated its intention to award a contract to IBM in July 1976 for a production quantity of 14 ADF units. CDC's protest, while aimed primarily at the award of the development contract, also encompasses any future award to IBM. It is not clear, however, in light of our conclusion that the development contract was awarded properly, to what extent, if any, CDC is

interested in pursuing a protest solely against the intended limited production award since it would appear that CDC would not be in a position to compete for a production quantity when it has not developed a militarized disk. In any event, the record provides no basis for our objecting, at this point, to an ADF production award to IBM.

2. The Standard Disk program

NAVELEX has for some time been seeking to obtain a standard computer disk system for the Navy. In this regard, it was planned to have qualified companies interested in competing for the standard computer disk system bear the cost associated with militarizing their existing commercial hardware. CDC complains that the ICC/TABP development contract award to IBM without breakout of the ADF has resulted in NAVSEA's funding of IBM's militarization efforts, thereby giving IBM an advantage in any subsequent competitive procurement. CDC is also concerned that the ADF itself might become the Standard Disk for use throughout the Navy and that IBM would be the sole source for the item.

We do not believe that the existence of the Standard Disk program in any way precluded NAVSEA from funding IBM's development of the ADF. It is clear that NAVSEA was interested only in its immediate needs, which required development of the ADF as an essential part of the ICC/TABP improvement, and not the overall Navy Standard Disk program. Furthermore, the Navy has reported that the Standard Disk itself will be procured competitively, and that if the ADF is selected as the Navy Standard Disk, the Navy will fund development of a second source prior to conducting a competitive procurement. Accordingly, this aspect of the protest is without merit.

3. Organizational conflict of interest

CDC argues that organizational conflict of interest questions arise if IBM is permitted to compete for production quantities of the ADF after it prepared the specification for the development of the ADF. ASPR Appendix G sets forth various rules for avoidance of conflicts of interest that would give rise to biased contractor judgment of unfair competitive advantage. These rules provide that where a contractor furnishes specifications for nondevelopmental items to be used in a competitive procurement, the contractor should be eliminated for a reasonable period of time for competing for the production award. However, when development work is required, Appendix G states:

> "In development work it is normal to select firms which have done the most advanced work in the field. It is to be expected that these firms will design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms which did not participate in the development, and this affects the time and quality of production, both of which are important to the Department of Defense. In many instances the Government may have financed such development. Thus, the development contractor may have an unavoidable, competitive advantage which is not considered unfair and no prohibition should be imposed."

We think the quoted provision is clearly applicable to this situation. Furthermore, as indicated above, it appears that the Navy is planning to award a production contract for only a limited number of ADFs and that only IBM will be able to provide those items. Thus, we see nothing in the Appendix G rules which would preclude award of the limited production contract to IBM.

4. Reimbursement of IBM

The record indicates that IBM engaged in development work on the ADF for several months prior to the March 31, 1976 award of the development contract, and that the Navy intends to reimburse IBM for the allowable costs it incurred during that period. CDC suggests that this situation indicates that the Navy may have "promised, illegally" to reimburse IBM prior to execution of the authorizations required for award of a contract.

The record does not support this contention. The affidavit of the technical director of the Sonar Division indicates that the contracting officer advised IBM that the Navy was not encouraging that firm to work on the ICC/TABP development and that IBM was doing so at its own risk. The affidavit further states that at no time did the Navy authorize IBM to engage in development activities beyond the scope of contract N0024-75-C-6223 for contract definition. There is nothing else in the record to indicate that the Navy in any way did encourage or authorize IBM to continue its development work.

Furthermore, with regard to the intended reimbursement, the Navy reports that it desires to obtain unlimited rights in data developed by IBM for the ICC/TABP improvement for

possible future competitive procurements and that "it must recognize and pay for the allowable cost incurred" in order to do so. Such reimbursement would appear to be authorized by ASPR §15-205.30, which states:

> "Precontract costs are those incurred prior to the effective date of the contract directly pursuant to the negotiation and in anticipation of the award of the contract where such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract."

We find no merit to this aspect of CDC's protest.

Conclusion

We have carefully considered the various contentions advanced by CDC both in papers filed directly with this Office and in documents filed directly with the District Court. As indicated, we believe the Navy's actions are consistent with applicable statutory and rgulatory provisions, and have not been shown by CDC to have been otherwise improper. Accordingly, the protest is denied.

Comptroller General
of the United States