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**DECISION**



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

FILE: B-185463  
B-185986

DATE: October 6, 1976

MATTER OF: Nartron Corporation; DC Electronics, Inc.

**DIGEST:**

1. Where record indicates that issues before court in suit filed by protester against successful bidder under subject procurement are same as incorporated in protest and are likely to be disposed of by court, GAO will render no decision on merits of protest.
2. Protest alleging patent infringement as result of contract awards to another company will not be considered since protester has brought suit against Government for money damages in Court of Claims and 28 U.S.C. § 1498 (1970) confers exclusive jurisdiction on that forum to consider claims for unauthorized Government patent infringement.
3. GAO no longer reviews affirmative determinations of responsibility of prospective contractors absent allegation of fraud on part of procuring officials or where solicitation contains definitive responsibility criteria which allegedly were not applied. Thus, award to low bidder determined to be responsible will not be questioned notwithstanding its performance problems incurred in supplying identical item under previous contracts, since there has been no showing of fraud or failure of bidder to meet definitive criteria.
4. Where record supports determination that public exigency did not permit formal advertising, GAO will not question sole-source award of contract negotiated under oral solicitation pursuant to authority of 10 U.S.C. § 2304(a)(2) (1970).

This decision involves protests under invitation for bids (IFB) No. DAAE07-76-B-0952, and request for proposals (RFP) DAAE07-76-R-1346, solicitations for the supply of vehicle turn signal units, which were issued by the United States Army Tank - Automotive Command (TACOM), Warren, Michigan.

The IFB, calling for the production of 55,108 units, was released to 33 potential bidders. Two bids were received by bid opening on November 12, 1975. DC Electronics, Inc. (DCEL), submitted the low bid

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at a unit price of \$5.81. The Nartron Corporation (Nartron) submitted a bid of \$8.78 per unit. TACOM concluded that both bids were completely responsive to the terms and conditions of the IFB. The preaward survey report dated November 26, 1975, recommended "complete award" be made to DCEL notwithstanding the fact that the company was on the "close surveillance contractor list" due to its production record for the identical item under previous contracts. Nartron filed its protest (B-185463) on December 4, 1975, prior to the award to DCEL. Pending resolution of that protest, pursuant to the RFP, supra, on January 30, 1976, the Army awarded a sole-source contract (containing a 300-percent increase option clause) to Nartron for an additional quantity of 8,522 units. DCEL protests (B-185986) the award to Nartron under the RFP.

The primary basis for Nartron's protest is the allegation that the DCEL bid is not responsive to the requirements of the IFB and that it is not a responsible bidder. Nartron argues that DCEL has an unfair advantage over its competitors since the units supplied to TACOM by that firm supposedly incorporate a cheaper plastic connector rather than a metal housing connector required by the specification's qualified product list (QPL) requirements for turn signal units. In this regard, it is alleged that TACOM has accepted thousands of similar units produced by DCEL under prior contracts which did not comply with the stated requirements of the solicitations. Therefore, Nartron contends that DCEL's bid price was lowest because it knew TACOM would accept the cheaper product rather than the approved unit called for under the IFB.

The allegation is also made that the turn signal units supplied by DCEL are being produced illegally with Nartron's tooling and under patents owned by Nartron. Accordingly, when any award is made to DCEL for these units, Nartron asserts that the Government is inducing patent infringement and interfering with Nartron's contractual relationships regarding the licensing of other suppliers.

DCEL protests the award to Nartron under the RFP as being unjustified, and alleges that TACOM's use of a 300-percent option clause was an attempt to achieve its requirements without engaging in competitive bidding. Since Nartron's initial protest delayed supply of the necessary units under the IFB, DCEL maintains that it was unconscionable for Nartron to benefit from that action by receiving a sole-source negotiated award. In this regard, the allegation is

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made that TACOM purposely delayed action on the IFB protest in order to institute a higher cost award with Nartron. Therefore, it is requested that TACOM be directed to cancel the Nartron contract and solicit its remaining requirements through formally advertised procurements.

DCEL and Nartron are apparently the two principal suppliers responding to TACOM solicitations for procurement of the turn signal units. Several solicitations involving an award to one or the other company have been the subject of previous protests to this Office by the unsuccessful firm. See Nartron Corp.; DC Electronics, Inc., 53 Comp. Gen. 730 (1974), 74-1 CPD 154; and B-168810, May 22, 1970. The record in this case indicates that the dispute between Nartron and DCEL over the ownership of tooling and patents used in the production of the unit is still being litigated in the courts. In addition, on June 14, 1976, Nartron filed suit (United States Court of Claims No. 243-76) against the Government to recover reasonable and entire compensation for the unlicensed manufacture and use of units (not purchased from Nartron) under the patents in question.

Nartron's protest as it relates to ownership and patent infringement is not for consideration. We previously stated in 53 Comp. Gen. 730, 732, supra, that this Office will not render a decision on a protest where the material issues involved are likely to be disposed of in litigation by a court of competent jurisdiction. See Nartron Corporation B-178224, B-178223, July 17, 1974, 74-2 CPD 35, aff'd November 12, 1974, 74-2 CPD 257. Moreover, pursuant to 28 U.S.C. § 1498 (1970), our Office has held that a patent holder's remedy for infringement with respect to items furnished under a contract with a Federal agency is properly a matter for settlement in the United States Court of Claims in a suit against the Government for money damages. See Nautel Maine, Inc., B-186326, May 4, 1976, 76-1 CPD 301, and cases cited therein.

With regard to the remaining issues in Nartron's protest, previous solicitations issued by TACOM required bids to be submitted on the basis of supplying a turn signal unit that was a QPL item. In this case the IFB called for units described as Control Assembly, Directional Signal NSN: 2590-00-808-6072, to be produced in accordance

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with Technical Data Package List (TDPL) No. 11613632-1, dated January 17, 1975, as amended, rather than under the qualified products specification. The TDPL specifically required metal construction, supra, in the MS-3102R-18-EP receptacle. In addition, bidders were advised that, notwithstanding any statement in the IFB or the materials referenced therein, first article testing was required regardless of the prospective contractor's past or present production experience. The "Quality Conformance Inspection" was to be performed on each unit supplied under the resulting contract.

While TACOM acknowledges that it had some problems receiving acceptable QPL units under previous contracts performed by DCEL, it nevertheless found DCEL responsible. The issue of whether DCEL, in view of its prior record, could provide acceptable units under this solicitation (or similar future procurements) involves the matter of bidder responsibility. In this regard, our Office does not review protests against affirmative determinations of responsibility unless fraud on the part of procuring officials is alleged, or the solicitation contains definitive responsibility criteria which allegedly were not applied. See Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. While Nartron has presented several allegations that DCEL fraudulently offered and supplied a part that it knew did not meet the specification, the record does not show that TACOM officials acted fraudulently or that DCEL (despite its prior record) was incapable of meeting the requirements to be applied under the instant IFB's specifications for the unit. Accordingly, Nartron's protest on this issue is not for consideration and we will take no further action on this matter.

DCEL's protest (B-185986) questions the legality of the contract awarded to Nartron under the RFP. The contract, resulting from an oral solicitation, was initiated as an emergency sole-source procurement with an "02" Issue Priority Designator to alleviate an immediate demand for supplies. When the RFP was issued, the record indicates that the Army had an existing shortage of about 12,478 units. TACOM had predicted the shortage would increase at a rate of 3,010 units per month; therefore, a total of 94,285 units would be needed to reach the number required for Army readiness.

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Consequently, it was determined that the public exigency did not permit the delay incident to processing a written solicitation.

TACOM states that the procurement was limited to Nartron because of the need to receive the combined production output of both companies should DCEL prevail in the resolution of the IFB protest (B-185463). The combined total potential output under the IFB (55,108 units) and the RFP, utilizing the full 300-percent option clause (34,050 units), was only 89,158 units. Thus, it was concluded that a compelling need existed for simultaneous deliveries from both suppliers since complete performance (89,158 units) under both contracts would still leave a shortage of 5,127 units of the total number required (94,285).

Concerning DCEL's objection to the 300-percent option clause, Armed Services Procurement Regulation § 1-1504(d)(1975 ed.) requires that approval by the Chief of the Purchasing Office be obtained if unusual circumstances exist which would require a contract option in excess of 50 percent of the initial quantity specified. In view of the circumstances in this case, we do not object to the 300-percent option included in the RFP since approval was obtained in accordance with the regulation and documented in the record by memorandum dated January 12, 1976.

It was assumed that the denial of Nartron's protest under the IFB, supra, would have committed DCEL to a delivery schedule calling for initial delivery of 7,131 units within 180 days after contract award and, thereafter, 4,000 units per month (upm) until expected completion 540 days after award. TACOM states that no negotiations were undertaken with DCEL because it had experienced quality and delivery problems under a prior contract (DAAE07-74-D-0822) calling for only 4,000 upm. Moreover, the most recent preaward survey provided no information which indicated that DCEL could exceed the 4,000 upm rate. TACOM concluded that DCEL could not perform both procurements concurrently. Thus, Nartron was determined to be the only producer capable of supplying acceptable controls within the accelerated delivery period.

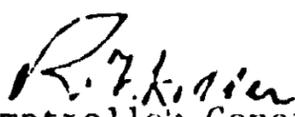
In deciding the propriety of a contract award, all relevant and material factors surrounding the award must be considered in light of the best interests of the United States. The military departments are permitted to make use of noncompetitive awards to assure particular sources of supply when the public exigency will not permit the delay

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incident to the use of advertised procurements (10 U.S.C. § 2304(a)(2) (1970)). The documentation in the record clearly supported the existence of the exigency and that Nartron was the only other source of supply that could immediately satisfy the Government's needs. Therefore, and in view of the procurement history of this unit and BCEL's production record, we find no basis to question the negotiations and award of a contract under the RFP to Nartron for the supply of additional units.

For the reasons cited above, the protests are denied.

Deputy

  
Comptroller General  
of the United States