DOCUMENT RESUME

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[Proposed Award of Contract under Sole Source Procurement]. B-187902. May 24, 1977. 22 pp.

Decision re: Applied Devices Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Department of the Air Force; Sperry Rand Corp.: Sperry Marine Systems Div.
Authority: (P.L. 87-653; 10 U.S.C. 2310, as amended). 10 U.S.C. 137. 10 U.S.C. 2304(a)(10). A.S.P.R. 3-210.2(xiii). A.S.P.R. 7-104.9(a). A.S.P.R. 4-101(a). A.S.P.R. 1-304.2(b). A.S.P.R. 1-313. A.S.P.R. 1-1206.2 to 1-1206.4. A.S.P.R. 2-202.4. A.S.P.R. 1-300.1. 45 Comp. Gen. 642. 51 Comp. Gen. 658. 54 Comp. Gen. 231. 54 Comp. Gen. 29. 55 Comp. Gen. 972. 55 Comp. Gen. 1362. 55 Comp. Gen. 1479. 55 Comp. Gen. 1485-1491. 55 Comp. Gen. 358. 55 Comp. Gen. 1019. 52 Comp. Gen. 801. 53 Comp. Gen. 670. 52 Comp. Gen. 312. B-182536 (1975). B-180577 (1974). B-179730 (1974). B-174082 (1972). B-173063 (1971). B-180211 (1974). B-181448 (1974). B-182248 (1975). B-187624 (1977). B-185592 (1976). B-187051 (1977). B-178740 (1975). H.R. 5532 (97th Cong.). S. Rept. 87-1884. 4 C.F.R. 20.3(e).

The protester objected to the proposed award of a contract on a sole-source basis. Justification for sole-source procurement premised on the lack of data adequate for competitive procurement was not clearly shown to lack a reasonable basis. Justification for the proposed sole-source award for the total quantity of the modified radar requirements was of doubtful propriety. The Air Force should reconsider the practicality of severing the current and urgent requirements from the total requirements, and of limiting the scope of the sole source award to the current and urgent requirements and the purchase of reprocurement data. (Author/SC)

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Mallaghan
Proc. I

DECISION

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

FILE: B-187902 DATE: May 24, 1977

MATTER OF: Applied Devices Corporation

DIGEST:

1. In regard to Air Force determination and findings to negotiate sole-source contract pursuant to authority of 10 U.S.C. § 2304(a)(10) (1970), language of 10 U.S.C. § 2310 plainly indicates that findings are final but that propriety of decision to negotiate, based on those findings, is subject to review.

2. No sufficient basis is seen to object to Air Force's position that since Government merely financed improvements to item which had been privately developed, Government lacks unlimited rights in data relating to basic item itself. Also, even if GAO concluded Air Force should assert unlimited rights, it appears doubtful data could be obtained within reasonable time frame. Therefore, justification for sole-source procurement premised on lack of data adequate for competitive procurement is not clearly shown to lack reasonable basis.

3. Protester's suggestion that Air Force should purchase modified radar systems on reverse engineering basis instead of making sole-source award is not persuasive, since suggested procedure depends in part on protester being furnished with data which is unavailable, and record does not show lack of reasonable basis for Air Force's judgment concerning unacceptable risk of substantial delivery delays inherent in reverse engineering approach.

4. Justification for proposed sole-source award for total quantity of Air Force's modified radar requirements—with deliveries extending over 4-year period—is of doubtful propriety. Accumulation of total requirements into single procurement represents continuing sole-source situation, and agency's justification--primarily based on expected delays and increases in logistics costs if procurement is divided into sole-source and competitive segments--appears questionable in several respects. GAO recommends that Air Force reconsider practicability of severing

current and urgent requirements from total requirements, and limiting scope of sole-source award to current, urgent requirements and purchase of reprocurement data.

5. Since 1974 contract for engineering, development, fabrication and testing of modified radar systems did not include provisions concerning conflict of interest restrictions applicable to follow-on contracts, no reason is seen why contractor would be excluded from consideration for proposed award of production contract. Considering all circumstances of case, alleged unfair treatment by Air Force in failing to advise protester that modification program was being contemplated is not established on record.

6. Air Force's justification for sole-source procurement, based primarily on difficulties in formulating adequate data package, does not constitute improper predetermination of protester's capacity and credit to perform contract work.

7. Need for prompt resolution of before-award protest overrides need to definitively resolve procedural issues as to whether interested party's letter commenting on agency report was untimely, and whether protester is entitled to copy of document in agency's report which was not released to protester by agency.

Table of Contents

	Page
Introduction	4
Determination and Findings	4
Air Force Rights to Sperry Technical Data	6
Reverse Engineering	12
Propriety of Sole-Source Award for Total Quantity	15
Alleged Conflict of Interest	20
Alleged Predetermination of Protester's Capacity and Credit	21
Procedural Issues	21
Conclusion	22

Introduction

Applied Devices Corporation (ADC) has protested against the proposed award of a contract on a sole-source basis to Sperry Marine Systems Division, Sperry Rand Corporation (Sperry), under request for proposals (RFP) No. F09603-77-R-3300, issued by the Department of the Air Force. The contemplated contract is for production of hardware, ground equipment, data and spare parts for modification of the APN59B radar to the APN59X configuration for use on various aircraft.

The Air Force believes the procurement is unobjectionable because it represents a situation where only one firm is capable of producing an acceptable item, and adequate data is not available to the agency which would enable it to conduct a competitive procurement within the necessary time frame, such as in Stewart-Warner Corporation, B-182536, February 26, 1975, 75-1 CPD 115, and Electro Impulse, Inc., B-180577, May 7, 1974, 74-1 CPD 232.

ADC contends that under a 1974 contract with Sperry, the Air Force obtained unlimited rights to sufficient technical data to enable it to conduct a competitive procurement; that regardless of whether the Air Force obtained such rights, a competitive procurement is possible because ADC could reverse engineer existing APN59X units; that the Air Force should procure only a small quantity of the required supplies and services on a sole-source basis, obtain reprocurement data, and purchase the remainder of its requirements competitively; that the sole-source procurement violates the spirit of the conflict of interest provisions in Armed Services Procurement Regulation (ASPR) Appendix G (1976); and that the refusal to allow ADC to compete is an improper predetermination by the Air Force of ADC's capacity and credit as a small business concern, a determination which is reserved by law to the Small Business Administration.

Determination and Findings

The Air Force's determination to negotiate this contract (pursuant to the authority of 10 U.S.C. § 2304(a)(10) (1970), implemented by ASPR § 3-210.2(xiii) (1976)) is based upon the following pertinent findings:

"2. PROCUREMENT BY NEGOTIATION OF THE ABOVE DESCRIBED EQUIPMENTS AND/OR DATA IS NECESSARY BECAUSE DETAILED ENGINEERING DATA IS NOT AVAILABLE. SOME ADDITIONAL DESIGN AND ENGINEERING EFFORT BY THE CONTRACTOR, INCLUDING THE PREPARATION OF DESIGN DATA AND QUALITY ASSURANCE PROCEDURES, WILL BE NECESSARY. THE PERFORMANCE SPECIFICATION IS NOT SUFFICIENTLY DETAILED TO PERMIT ADVERTISED BIDDING. THE DESIGN DATA AVAILABLE ARE INCOMPLETE, NOT SUFFICIENTLY DETAILED AND ARE LARGELY UNCOORDINATED. Sperry Marine Systems IS THE PRIME DESIGNER AND MANUFACTURER OF THE AN/APN59 Solid State Weather Radar TO WHICH THE EQUIPMENT/DATA CONTEMPLATED FOR PROCUREMENT HEREUNDER IS APPLICABLE. SAID FIRM IS THE ONLY SOURCE KNOWN WHICH MAINTAINS THE CURRENT DESIGN INFORMATION, TECHNIQUES, DRAWINGS, AND OTHER FACTUAL DATA NECESSARY TO PROVIDE THE REQUIRED EQUIPMENT AND/OR DATA.

"3. USE OF FORMAL ADVERTISING FOR PROCUREMENT OF THE ABOVE DESCRIBED EQUIPMENT IS IMPRACTICABLE BECAUSE IT IS IMPOSSIBLE TO DRAFT, FOR A SOLICITATION OF BIDS, ADEQUATE SPECIFICATIONS OR ANY OTHER ADEQUATELY DETAILED DESCRIPTION OF THE EQUIPMENT."

Sperry contends that the Air Force's finding that only Sperry has the necessary procurement data is final and not subject to review by virtue of 10 U.S.C. § 2310 (1970). In this regard, 10 U.S.C. § 2310(a) provides for the finality of determinations and decisions which are required to be made by the head of an agency under chapter 137 of title 10, U.S.C. (which deals with procurement, generally, by agencies subject to the chapter). 10 U.S.C. § 2310(b) addresses, among other things, determinations and findings (D&F's) to negotiate certain contracts.

Sperry's contention in this regard is based on the legislative history of Public Law 87-653, September 10, 1962, which amended 10 U.S.C. § 2310. One version of the bill ultimately enacted (H.R. 5532, 87th Cong., 2d Sess.) would have amended 10 U.S.C. § 2310(a) to provide that the determinations and decisions required to be made by the agency head were to be final unless clearly erroneous or not supported by substantial evidence, and would have eliminated the provisions for the finality of findings in 10 U.S.C. § 2310(b). This version of the bill was not adopted,

and Sperry believes this shows that the congressional intent was that findings are not reviewable. See S. Rept. No. 1884, August 17, 1962, 2 U.S. Code Cong. & Admin. News, 87th Cong., 2d Sess. p. 2478ff.

The present case involves findings in support of a decision to negotiate a contract under 10 U.S.C. § 2304(a)(10). Our Office's view is that while the findings are final, the language of 10 U.S.C. § 2310(b) plainly indicates that our Office is not thereby precluded from questioning whether the decision to negotiate, based on those findings, is proper. See Winslow Associates, B-178740, May 8, 1975, 75-1 CPD 283; Cf. 51 Comp. Gen. 658 (1972).

Thus, our Office has, for example, objected to a decision to procure by negotiation under 10 U.S.C. § 2304(a)(10), in lieu of formal advertising, where reasonable grounds to support the determination were lacking (Cincinnati Electronics Corporation et al., 55 Comp. Gen. 1479, 1485-1491 (1976), 76-2 CPD 286) and to a proposed contract negotiated under 10 U.S.C. § 2304(a)(10) where the findings reasonably supported the determination to negotiate sole-source, but other facts revealed as a result of a protest indicated that the sole-source restriction was not valid (Non-Linear Systems, Inc., et al., 55 Comp. Gen. 358 (1975), 75-2 CPD 219).

Therefore, while Sperry correctly maintains that the Air Force's findings are final, this in itself is not dispositive of ADC's protest. Also, we think it is unnecessary to consider Sperry's arguments by analogy that other statutes providing for the finality of certain administrative determinations and decisions have been interpreted by the courts as precluding review of such determinations and decisions. Sperry has cited no authorities which so construe the statutory language involved here.

Air Force Rights to Sperry Technical Data

The background to this issue begins with the APN59B radar, described in the record as a tube-type device, dating back to the 1950's, with known reliability problems. The Air Force reports that in 1967 Sperry began, at its own expense, to study changes in this system. In 1970, modified radars developed by Sperry were flight tested, and Sperry then submitted an engineering change proposal (ECP SPE-70[illegible]-102) to the Air Force. The ECP contained restrictive legends to the effect that the data therein were not to be disclosed outside the Government.

The Air Force approved the ECP. In 1974, contract No. F09603-75-C-3575 was awarded to Sperry (estimated total price: $1,830,000). Item 0001 of the contract provided for performance of the following work at a price of $1,021,727:

> "Supplies and services to provide engineering, development and fabrication of eight each AN/APN 59 modified configuration (hereinafter designated AN/APN 59X) Weather Navigation Radar Systems in accordance with Sperry ECP-SPE-701-102."

Nine other contract line items essentially dealt with the testing of APN59X systems. Also, item 0003 called for data as specified in an attached DD Form 1423, Contract Data Requirements List, i.e., a Reliability/Maintainability Demonstration Plan; Reliability/Maintainability Data Reporting and Feedback; an Equipment Test Plan; and Test Reports-General.

The General Provisions of the contract, sections L-1, L-3, incorporated by reference a clause entitled "RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (1974 Nov)" (ASPR § 7-104.9(a) (1975)). The clause provided in pertinent part:

> "(b) Government Rights.
>
> "(1) Unlimited Rights. The Government shall have unlimited rights in:
>
> "(i) technical data and computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;
>
> * * * * *
>
> "(iv) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which

experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components, processes, or computer software developed at private expense (but see (2)(ii) below);

"(2) Limited Rights. The Government shall have limited rights in:

"(i) technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights; and

"(ii) technical data pertaining to items, components or processes developed at private expense, and computer software documentation related to computer software that is acquired with restricted rights, other than such data as may be included in the data referred to in (b)(1)(i), (v), (vi), (vii), and (viii);

* * * * *

"(d) Removal of Unauthorized Markings. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract on any technical data or computer software furnished hereunder, if:

"(i) the Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings, or

"(ii) the Contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of limited rights markings by clear and convincing evidence, or of restricted rights markings by identification of the restrictions set forth in the contract.

In either case the Government shall give written notice to the Contractor of the action taken."

ADC maintains that because the 1974 contract clearly called for "development" of the APN59X, under the contract's technical data clause the Government obtained unlimited rights to all data necessary to enable manufacture of the end item. ADC relies on 52 Comp. Gen. 312, 315 (1972), where our Office quoted the following statement as representing the Department of Defense position in such matters:

> "'Where there is a mix of private and government funds, the developed item cannot be said to have been developed at private expense. The rights will not be allocated on an investment percentage basis. The government will get 100 percent unlimited rights, except for individual components which were developed completely at private expense. Thus, if a firm has partially developed an item, it must decide whether it wants to sell all the rights to the government in return for government funds for completion or whether it wants to complete the item at its own expense and protect its proprietary data. On the other hand, if the government finances merely an improvement to a privately developed item, the government would get unlimited rights in the improvement or modification but only limited rights in the basic item. Hinricks, Proprietary Data and Trade Secrets under Department of Defense Contracts, 36 Mil. L. R. 61, 76.'"

ADC thus contends it is immaterial that Sperry may have expended its own funds prior to 1974, because the development effort in the 1974 contract shows that the APN59X was not developed solely at private expense. In this regard, ADC maintains that most of the 1974 contract price was for "development," and also that the Air Force's rights are not limited to data specified for delivery under the contract--since the rights in data clause refers to data necessary to manufacture the end items where the end items have been developed under any Government contract where development work was specified as an element of contract performance. ADC concludes that since the sole-source justification is based on the erroneous assumption that the Government does not have rights to necessary technical data, it is a nullity.

The Air Force's position can be summarized as follows. Development of the APN59X was complete prior to the 1974 contract. The design concept was fully developed in the 1970 ECP, and item 0001

of the 1974 contract called for performance in accordance with the ECP. The only "development" under the 1974 contract was the updating of parts, because many parts described in the ECP had become obsolete due to improvements in the state-of-the-art from 1970 to 1974. The 1974 contract essentially called for services, i.e., converting the "breadboard" ECP design into a manufactured end item. Therefore, "development" other than updating the ECP was not specified as an element of performance in the 1974 contract. Under the rationale of 52 Comp. Gen. 312, the Government merely financed an improvement to a privately developed item, and did not obtain unlimited rights in data concerning the APN59X.

In response to this, ADC cites several technical reference works which define "breadboarding" or "breadboard model" as involving assembly of an electronic item in rough, experimental form. ADC further points out that ASPR § 4-101(a) cites 5 categories of research and development: (1) research; (2) exploratory development; (3) advanced development; (4) engineering development; and (5) operational system development. The regulation states that exploratory development may vary from fairly fundamental applied research to quite sophisticated breadboard hardware, and that advanced development includes all effort directed towards projects which have moved into the development of hardware for test. ADC believes it is clear that Sperry's ECP involved exploratory development, and that the 1974 contract involved "advanced development."

We note initially that 52 Comp. Gen. 312, supra, is one of a number of cases where our Office has considered whether to recommend cancellation of a solicitation prior to the award of a contract due to the alleged wrongful disclosure in the solicitation of a protester's proprietary data or trade secrets. For a cancellation to be recommended, a protester must present clear and convincing evidence that the procurement will violate its proprietary rights. See, generally, Chromalloy Division - Oklahoma of Chromalloy American Corporation, B-187051, April 15, 1977, 56 Comp. Gen. ____.

The present case represents the reverse situation. ADC does not complain that its proprietary rights are being violated; rather, it contends that the Air Force should be asserting rights in another party's data for the purpose of using the data in a competitive procurement. The proposed sole-source procurement is premised on the finding that only Sperry possesses the necessary procurement data. We believe the issue to be resolved is whether ADC, like protesters

in other sole-source situations, has clearly shown that the agency's sole-source justification lacks a reasonable basis. North Electric Company, B-182248, March 12, 1975, 75-1 CPD 150. In other words, the issue here is not whether the Air Force actually has unlimited rights in data produced by Sperry, but whether the Air Force's position that it does not have such rights is clearly shown to be without a reasonable basis.

We do not believe that ADC has satisfied this standard of review. First, the 1974 contract cannot, in our view, be accurately characterized as a development contract. As the Air Force points out, the sole reference to development is the appearance of that word in contract line item 0001, supra. In this light, ADC's citation of the ASPR § 4-101 definitions is not directly in point, because the regulation clearly relates to research and development contracts. The 1974 contract does not contain any references to research and development, nor was it negotiated under the authority of 10 U.S.C. § 2304(a)(11)—i.e., for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research.

The Air Force does appear to concede that the 1974 contract work was not without its developmental aspects—i.e., the updating of parts. In this regard, the record does not substantiate what portion of the 1974 contract price could be allocable to updating of parts. The Air Force asserts that all of the monies expended were for "fabrication" and "testing" of 8 APN59X units, and Sperry maintains that only a de minimus portion of the 1974 contract price was expended to update parts.

It may be useful to contrast the present situation with that in 52 Comp. Gen. 312, supra, where our Office did not object to the Air Force's assertion of unlimited rights in certain end formulas. In reaching that conclusion, we noted the Air Force's technical assessment that massive Government-financed development efforts had resulted in wholly new and independent end formulas which were not merely routine extensions of earlier formulas, and regarded these expert technical opinions as offering substantial support for the agency's position.

In the present case, after examining the 1970 ECP and the 1974 contract, we do not find a sufficient basis to object to the Air Force's position that the Government merely financed improvements

to an item which had already been privately developed. Further, the Air Force's resulting judgment--that without unlimited rights in data relating to the basic item itself (the APN59X concept), the data to which the Government has unlimited rights (the APN59X update development data) is insufficient for the purpose of conducting a competitive procurement--cannot, in our view, be considered clearly without a reasonable basis.

Related to this point is a further practical difficulty. ADC contends that the Air Force should exercise its rights to cancel restrictive markings on Sperry data pursuant to paragraph (d) of the ASPR § 7-104.9(a) clause, supra. In this regard, the Air Force has stated that it has in its possession the 1970 ECP and the test procedures and reports furnished under the 1974 contract, and does not know exactly what other data is in Sperry's possession. There is no indication in the record that the Air Force has physical possession of the type of data appropriate for a competitive procurement, such as detailed engineering drawings of the APN59X modification techniques.

In this light, even if our Office concluded that the Air Force should assert unlimited rights in all AN/APN59X data generated by Sperry, it is by no means clear how the agency could physically obtain the necessary data within a reasonable time frame. Sperry strenuously maintains that the AN/APN59X was completely developed prior to the 1974 contract and that the Air Force has no rights whatsoever in the system or its components. Also, we note that the agency's right to cancel restrictive markings under paragraph (d) of the ASPR § 7-104.9(a) clause applies, by its terms, to data furnished under the contract containing the clause. In the present case, therefore, it appears that this right would apply only to the test data furnished under the 1974 contract.

In view of the foregoing, we have no objection to the Air Force's position on this issue.

Reverse Engineering

ADC next contends that it could commence deliveries within 15 months after award if provided with one of the APN59X models and copies of Sperry's ECP and the 1974 contract test data. ADC points out that it has in the past produced APN59B units within 9 months after receiving poor quality drawings.

The Air Force reports that since the records concerning the previous APN59B procurement have been destroyed, it can neither confirm nor deny ADC's allegations in this respect. In the present case, the agency suggests that there is an unacceptable risk of substantial delay if ADC's suggestion is followed. Specifically, the Air Force believes that if adequate data was available to conduct a competitive procurement, a contractor other than Sperry would need about 21 months after award to begin production deliveries, and that more time would be needed in a reverse engineering procurement. The Air Force points out that Sperry, under the proposed sole-source contract, is scheduled to begin deliveries within 13 months after award. Further, the Air Force points out that under the provisions of ASPR § 1-304.2(b) (1976), reverse engineering is the least favored approach when procuring privately developed items. ASPR § 1-304.2(b) provides:

> "(b) When the Government desires to purchase privately developed items but does not have necessary data with unlimited rights for use in a specification for competitive procurement, the contracting officer shall use one of the following alternative procedures with preference in the order of this listing (see also 1-313).
>
> "(1) When practical, procurement shall be competitive using performance or other specifications, including purchase descriptions, which do not contain data developed at private expense to which the Government does not have unlimited rights. Procurement on this basis will normally not provide items of identical design. However, it frequently is not necessary that items of identical design be purchased. There are two methods of competitive procurement which may provide items of the same or of similar design and suitable performance. One of these is purchase by two-step formal advertising. The other is by the use of 'brand name or equal' purchase descriptions. To encourage participation by technically oriented firms that are desirous of offering their privately developed products in competition with similar articles, procuring activities should consider incorporating a requirement in the IFB or RFP for a bid sample to be used for evaluation purposes only (see 1-1206.2 through 1-1206.4 and 2-202.4).

"(2) When items of design or composition similar or identical to a privately developed item are required and it is determined that competitive procurement is not practicable, procurement should be on a noncompetitive basis from the firm which developed or designed the item or process or its licensees, provided productive capacity and quality are adequate and price is fair and reasonable.

"(3) When additional sources are required for items of design or composition similar or identical to a privately developed item in order to meet total current or mobilization requirements, and the procedures in (1) above cannot practicably be used to create additional sources, the developer should be encouraged to license others to manufacture such items. Procuring activities should also consider the specific acquisition by the Government of the necessary rights in data. When complex technical equipment is involved and the establishment of satisfactory additional sources will require, in addition to data, technical assistance from the primary source, consideration should be given to the use of the leader company procurement technique (see Section IV, Part 7).

"(4) As a last alternative, a design specification may be developed by the Government through inspection and analysis of the product (i.e., reverse engineering) and used for competitive procurement. Reverse engineering shall not be used unless significant cost savings can be reasonably demonstrated and the action is authorized by the Head of the Procuring Activity. In the case of the Air Force this authority may be delegated to the Commanders of the Air Force Systems Command Divisions and Centers and the Air Force Logistics Command Air Material Areas."

The Air Force states that the first of these alternatives is precluded because the Government does not have specifications which lend themselves to competition, and that, therefore, under the regulation, a sole-source award is next in order of preference. Further, the agency states that since it has not been determined that any significant cost savings would be realized by reverse engineering procurement, that method is inappropriate in any event.

ADC has repeatedly asserted that the Air Force's time estimates are conclusory and unsupported by factual substantiation. However, we are not persuaded that the Air Force's position is clearly shown to be without a reasonable basis. Initially, ADC's proposed method of procurement is premised in part on its being furnished with a copy of the 1970 Sperry ECP. As already discussed, we do not object to the Air Force's position that the Government does not have unlimited rights in the APN59X design concept covered in the ECP.

Further, we believe the Air Force is in the best position to assess the potential for delay involved in a reverse engineering approach. In this regard, ADC's account of its experience in producing the APN59B, even if assumed to be accurate, is not compelling evidence. This experience apparently occurred during the 1960's. Having examined the Sperry ECP, it appears to us that the changes involved in modifying the APN59B to the APN59X are substantial. For instance, there appear to be large scale changes from vacuum tubes and related circuitry to solid state components and technology. Therefore, we see no reason to believe that ADC's judgment of production times, based on its experience with the APN59B, is better than the Air Force's in this situation. The difference of opinion between ADC and the Air Force does not show the agency's position lacks a reasonable basis.

Propriety of Sole-Source Award for Total Quantity

ADC further contends that a sole-source procurement is not justified for the large quantity of systems called for in the RFP (which involves deliveries over a 4-year period of systems for the Air Force's C-130 and KC-135 aircraft, with an option for the C-141 aircraft). The protester contends that as a matter of sound procurement policy, the sole-source award should be limited to an initial purchase of a small number of units together with reprocurement data, so that the remaining quantities can be procured competitively.

The Air Force's February 24, 1977, supplementary report to our Office responds as follows:

> "The RFP does cover the complete Air Force requirement plus reprocurement data. The reprocurement data will be used in future procurements of

spare parts. The Applied Devices proposal to buy a small quantity and reprocurement data for competition of the remainder is not feasible due to the time required. As stated previously, we are incurring an estimated additional $8.8 million annually in logistics costs because of the low reliability being experienced on the APN59B System. The following represents our considered opinion of a realistic time frame to accomplish the procurement as proposed by Applied Devices:

Award contract to Sperry	7 months
Obtain Delivery of Reprocurement Data	15 months
Award Competitive Contract	5 months
Qualify New Contractor	12 months
Begin Production Deliveries	9 months
	48 months

Production deliveries on the proposed award to Sperry are scheduled to begin 13 months ARO. To follow the course of action proposed by Applied Devices would cause a delay of 35 months. This delay would ultimately cost the Air Force approximately $25 million in 1976 constant dollars (basis for logistics costs computation). Anticipated inflation would further escalate that figure. While we recognize that competition is preferred, sound procurement policy requires that all aspects of a procurement be examined to determine the approach which is most cost-effective for the Government. The additional cost would far outweigh any benefits which might be obtained as a result of competition."

The Air Force further notes that reprocurement data was not previously purchased because evaluation of the test results under the 1974 contract was necessary before deciding whether to purchase the modified system in production quantities. Also, the agency states that its $8.8 million estimate was made by a computer program for life cycle cost, taking into consideration such factors as flying hour programs, mean-time-between demand, cost to repair, and cost to buy; the program was structured using actual cost experience with the APN59B and reliability projections for the APN59X. The agency believes ADC's suggestion for breaking up the total requirements into

several procurements reflects a lack of understanding of the magnitude of the APN59X modification program, since it would involve a major restructuring of requirements, additional time to negotiate and award contracts, review and approve test procedures and reports, and the like.

ADC asserts that the Air Force's assessment is unrealistic. The protester believes that Sperry could deliver a data package within 6 months, and that the total delay in introducing competition for a portion of the requirements would be substantially less than the 35 months estimated by the agency. ADC also contends that the additional logistics costs, if any, must be considered in light of the fact that deliveries are spread over a 4-year period, and that Sperry would be delivering quantities under an initial sole-source award. In other words, the additional logistics cost impact would only involve the gap, if any, between Sperry's initial deliveries and the beginning of deliveries under competitively awarded contracts. Thus, the protester asserts that the Air Force's $25 million estimate is not supported by the facts.

As the Air Force and Sperry point out, our Office has accorded considerable weight to estimates by contracting agencies of technical risks and the potential for resulting delivery delays inherent in introducing competition into sole-source situations. Such risks have been noted, for example, in circumstances where a competitor would have needed to independently design complex electronic components (Hughes Aircraft Company, 53 Comp. Gen. 670 (1974), 74-1 CPD 137; California Microwave, Inc., 54 Comp. Gen. 231 (1974), 74-2 CPD 181) or where development and production of an item were proceeding concurrently (Control Data Corporation, 55 Comp. Gen. 1019 (1976), 76-1 CPD 276).

Technical and delivery risks become particularly compelling where the sole-source procurement is being conducted to satisfy urgent needs. For example, in Bio Marine Industries et al., B-180211, August 5, 1974, 74-2 CPD 78, the urgency related to the Navy's need for life support breathing devices to outfit submarine rescue ships which had already joined the fleet. In Stewart-Warner Corporation, supra, there was a military exigency related to stringent delivery schedules for altimeters which were to be Government-furnished property to aircraft manufacturers producing aircraft for foreign military sales. Urgency may also occur due to a prior contractor's

unsatisfactory performance or default, as in Dero Industries, Inc., B-179730, April 13, 1974, 74-1 CPD 166, and Unique Packaging Sales Corporation, B-187122, March 23, 1977, 77-1 CPD 203. Applied to the present case, we believe the kinds of technical and delivery risks noted in these and similar decisions would reasonably support the award of a sole-source contract to Sperry insofar as current and urgent Air Force requirements are concerned.

However, there are problems in applying such reasoning to the Air Force's actual proposed award. The contemplated contract covers the Air Force's entire requirements, with deliveries extended over a 4-year period. In light of these facts alone, it is difficult to see how all of the requirements could be considered either current or urgent. Further, while Air Force statements in the record refer to the desirability of replacing the old radars with new modified units, there is no claim as we understand it of a bona fide military exigency here. Indeed, the Air Force's reports do not stress the urgency of the procurement except in the sense that it has taken a number of years to arrive at a decision to procure modified systems, the program for doing so will be long and complicated, and that it is best to proceed without delay. While we have no quarrel with this reasoning, and believe that we have some appreciation of the magnitude of the program, we have difficulty seeing how it adequately responds to the protester's contention that it may be possible to introduce competition by dividing the procurement into several parts.

Further, we have several reservations concerning specific justifications offered by the Air Force. Based upon the record, it is unclear to us why it would require 7 months to award a contract to Sperry and 15 additional months for Sperry to furnish a competitive data package. With regard to the $8.8 million annual logistics cost, we have no reason to believe the estimate is not based upon careful consideration of the relevant factors involved. However, what is most advantageous to the Government from a procurement cost standpoint must be judged not only in terms of estimated increased logistics costs, but in terms of the sole-source contract price versus the benefits which might result from competitive procurements for portions of the overall requirements. Such benefits are an unknown factor and can only be tested in actual competition. Maximum practicable competition is the Government's established policy both in procurement generally (ASPR § 1-300.1 (1976)) and in procurements of privately

developed items (ASPR § 1-304.1(i) (1976)). While the Air Force points out the potential for millions of dollars of additional costs if the procurement is delayed, we must note that the proposed award price represents the investment by the Government of a very substantial dollar amount, the reasonableness of which has not been subjected to the test of competition.

To sum up, the problem with the agency's position is that the accumulation of its total requirements into a single procurement results in a continuing sole-source situation. Procurement on this basis is obviously not a favored arrangement. In a number of cases our Office has found that a sole-source award to accommodate current and urgent needs was unobjectionable, but at the same time recommended that steps be taken to introduce competition into future procurements. See 52 Comp. Gen. 801 (1972); B-174482(2), March 24, 1972. In B-173063, September 22, 1971, we did not object to a sole source award premised on a lack of adequate data, but recommended that the Air Force consider initiating efforts to broaden competition in the future. See, also, B-178179, July 27, 1973, where we found that an agency had shown sufficient reasons for not dividing an initial purchase of aircraft sonobuoy receivers into two parts, but recommended that future procurements of the same item be undertaken competitively.

We believe that similar reasoning must be applied here. To attempt to justify the proposed award on the basis that a known sole-source price is most advantageous to the Government because of risks associated with competitive procurement of a portion of the requirements--those risks involving estimated increased logistics costs and speculation that introducing competition will not produce more advantageous prices to the Government, long-term--is, in our view, of doubtful propriety. We do not believe that any of the numerous decisions of our Office cited by the Air Force and Sperry adequately support this proposition as applied to factual circumstances like those prevailing in the present case.

In view of the foregoing, we recommend that before proceeding with the proposed award, the Air Force reconsider the practicability of severing its current and urgent requirements from its total requirements, and limiting the scope of the sole-source award to satisfying current and urgent requirements and the purchase of reprocurement data.

By letter of today, we are advising the Secretary of the Air Force of our recommendation.

Alleged Conflict of Interest

ADC contends that the spirit of the rules for avoidance of organizational conflicts of interest (ASPR Appendix G (1976)) would be violated by a sole-source award to Sperry. Specifically, ADC believes that the Air Force accorded Sperry an unfair competitive advantage by failing to advise other potential suppliers that the Air Force was interested in modifying the APN59B system, and by funding Sperry's development of the APN59X without prohibiting Sperry from participating in follow-on production procurements.

The ASPR Appendix G provisions are not self-executing. They can be applied against a contractor only if a provision relating to possible conflict of interest restrictions had been included in a prior contract. Gould, Inc., Advanced Technology Group, B-181448, October 15, 1974, 74-2 CPD 205. The 1974 Sperry contract did not contain such a provision. Therefore, it is not apparent what basis the Air Force would have for excluding Sperry from consideration for a production contract.

As for the Air Force's failure to advise ADC or other potential suppliers of a possible modification program for the APN59B, we note initially that preprocurement discussions with potential suppliers are an appropriate function and may even be necessary for the agency to determine what its minimum needs are. Maremont Corporation, 55 Comp. Gen. 1362, 1373 (1976), 76-2 CPD 181. Once minimum needs are determined and procurement plans are being made which will lead to an expected sole-source award, an agency should be receptive to inquiries from other potential sources of supply as to the performance standards which only the sole source is believed capable of meeting. Bio Marine Industries, supra. In certain cases, e.g., Consolidated Elevator Company, B-187624, March 24, 1977, 77-1 CPD 210, we have criticized an agency's failure to make its needs publicly known where additional potential suppliers were apparently available.

In the present case, it is worth noting that the genesis of the modification program was Sperry's work in the 1960's. It was not until later that the Air Force became involved. Sometime in 1976, after evaluation of the test results under the 1974 contract, the Air Force's plans became firm and a decision was made to procure the modified system, the APN59X. The Air Force states that it had considered other approaches to satisfying its needs prior to reaching

that decision. There is no indication that ADC had either undertaken any independent study of possible modifications to the APN59B prior to 1976, or had expressed any interest in the Air Force's plans until after the issuance of the RFP in November 1976. As the Air Force points out, ADC was free to undertake a study of modifications to the APN59B system at its own expense, as Sperry did. Also, there is no indication in the record of contacts by other likely potential sources of supply expressing interest to the Air Force in modifying the APN59B. In these circumstances, we are unable to see grounds for finding the unfair treatment which ADC alleges.

Alleged Predetermination of ADC's Capacity and Credit

We see no merit in ADC's argument that the Air Force is improperly predetermining its capacity and credit. It is apparent that the Air Force's sole-source justification is grounded on what the agency believes are difficulties in formulating a data package adequate for competitive procurement as well as time and delivery constraints--not on a judgment that ADC is the only possible competitor, that ADC lacks the capacity and credit to perform, and that but for ADC's lack of capacity and credit, a competitive procurement would be possible. In contrast to the present case, for examples of several factually distinguishable cases where improper predeterminations of responsibility have been found, see 45 Comp. Gen. 642 (1966), and Plattsburgh Laundry and Dry Cleaning Corporation et al., 54 Comp. Gen. 29 (1974), 74-2 CPD 27.

Procedural Issues

ADC raises two procedural issues. First, ADC contends that Sperry's "comments" letter to our Office dated March 14, 1977, should be rejected because it was not submitted within 10 working days after Sperry received the Air Force's February 24, 1977, supplementary report. Second, ADC maintains that it should be furnished with a copy of an Air Force Staff Judge Advocate memorandum which accompanied the Air Force's April 6, 1977, supplementary report but which has not been released to the protester. ADC argues, citing various authorities, that by submitting the memorandum to GAO the Air Force waived any attorney-client privilege, and that fundamental procedural fairness requires that ADC be allowed to respond to the memorandum.

As to the first issue, we note that our Bid Protest Procedures provide that untimely submission of comments on an agency report "may result" in resolution of the protest without consideration of the

comments. 4 C.F.R. § 20.3(e) (1976). On the second issue, we have held that where, as here, a portion of an agency's report to our Office is regarded by the agency as exempt from disclosure under the Freedom of Information Act, our Office will not disclose that portion of the report outside the Government; rather, the protester's recourse is to attempt to obtain the materials under the procedures provided by the Act. See Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972, 990 (1976), 76-1 CPD 240.

However, we do not in any event find it necessary to resolve these issues. In our view, the contents of these submissions are not decisive to the outcome of the protest. The need for a prompt resolution of this before award protest overrides the necessity for a definitive resolution of these procedural issues. See, in this regard, C3, Inc., et al., B-185592, August 5, 1976, 76-2 CPD 128.

Conclusion

The protest is denied as to all issues except the one involving the propriety of making a sole-source award for the total quantity of the Air Force's requirements. To the extent indicated in our discussion of that issue, supra, the protest is sustained.

R. F. Keller

Deputy Comptroller General
of the United States