

DOCUMENT RESUME

02641 - [A1652629]

[Protest against Sole Source Negotiation of Contract for Sale of Defense Articles]. B-188332. June 2, 1977. 3 pp.

Decision re: Verne Corp.; by Paul G. Dembling, General Counsel.

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 Army: Army Tank-Automotive Materiel Readiness Command, Warren, MI.

Authority: Foreign Military Sales Act (22 U.S.C. 2751 et seq.).

10 U.S.C. 2304(a)(10). A.S.P.R. F-1307. A.S.P.R.

3-210.2(xviii). 55 Comp. Gen. 674. 55 Comp. Gen. 1479.

B-177450 (1977). B-188784 (1977). B-188514 (1977). B-187699 (1977).

Company protested sole source negotiations for foreign military sales, contending that it could supply an equal commercial vehicle to that of the awardee. The protest was dismissed since the U.S. Government is only the nominal contractor, and payment will be reimbursed by a foreign government. (RRS)

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George Ruppert
Proc. I

DECISION



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

FILE: B-188332

DATE: June 2, 1977

MATTER OF: Verne Corporation

DIGEST:

Protest against sole-source negotiation of contract for credit sale of defense articles pursuant to section 2763 of Foreign Military Sales Act is dismissed since U.S. Government is only nominal contractor and payment for articles will be reimbursed by foreign government.

Verne Corporation (Verne) protests the award of sole-source negotiated contract No. DAAE07-77-C-0132 for six Commando V-150 vehicles to Cadillac Gage Company (Cadillac) under request for proposals (RFP) No. DAAE07-77-C-0132, issued by the Army Tank-Automotive Command, Warren, Michigan. Verne objects to negotiations being conducted on a sole-source basis and contends that its firm can supply an "equal" commercial vehicle to that of Cadillac and therefore requests that the award be canceled and the procurement resolicited on a competitive basis.

The procurement involved is a Foreign Military Sale (FMS) to the Government of Gabon, under the Foreign Military Sales Act, 22 U.S.C. § 2751, et seq. (1970). The RFP was issued only to Cadillac Gage because it is the sole source of the V-150 Commando Armored Cars which the purchasing country, Gabon, specified in its order to the Department of Defense (DOD). Sole-source negotiation is authorized under 10 U.S.C. § 2304(a)(10) (1970), as implemented by Armed Services Procurement Regulation (ASPR) § 6-1307 (DPC #76-6, January 31, 1977) and ASPR § 3-210.2 (xviii) (1976 ed.) where, as in this case, the contemplated procurement is to be reimbursed by a foreign country, which has required that the product be obtained from a particular firm. The record discloses that the Government of Gabon negotiated with the United States for the purchase of six Cadillac Gage Armored Cars, V-150.

The procurement in question represents a sale of defense articles pursuant to section 2763 of the Foreign Military Sales Act, as amended, 22 U.S.C. § 2763 (Supp. IV, 1974). This section authorizes the President of the United States to finance procurements of defense articles and

defense services by friendly foreign countries and international organizations on terms requiring the payment to the United States Government in United States dollars of the value of such articles or services within a period not to exceed 10 years.

The record discloses that the instant transaction was based upon a credit agreement between the Government of the United States and the Government of Gabon. Although appropriations available to the Department of Defense will be used to meet the payment required by the contract, any such payments are required to be reimbursed by the Government of Gabon. Thus, the articles are ultimately paid for by the Government of Gabon and not by the United States from appropriated funds.

In Tele-Dynamics, Division of AMBAC Industries, 55 Comp. Gen. 674 (1976), 76-1 CPD 60, and subsequent cases, our Office has declined to render a decision in circumstances where the protest involved a question as to the proper recipient of an award of a Foreign Military Sale procurement based upon a cash sale. See, in this regard, Cincinnati Electronics Corporation, Inc. et al., 55 Comp. Gen. 1479 (1976), 76-2 CPD 286. These decisions are based upon the principle that this Office's jurisdiction depends upon the expenditure of appropriated funds and the procurements do not involve the expenditures of appropriated funds since the foreign country or international organization is required to make funds available in such amounts and at such times as may be required to meet the payments called for by the contract. In addition, we have held that the incidental and temporary use of Air Force appropriated funds pending reimbursement does not change the essential character of the transaction as one financed by the particular foreign country or international organization involved. Consolidated Diesel Electric Company, B-177450, January 6, 1977, 77-1 CPD 7.

Further, in situations where the funds involved in the procurement were obtained through a loan from the United States Government and repayable thereto, we have declined jurisdiction since the protested award involved neither a procurement by or for an agency of the United States Government, nor a procurement by a grantee of the United States. See New England Insulation Co., B-188784, April 21, 1977; Allis-Chalmers Corporation, B-188514, April 5, 1977; Central Construction, Inc., B-187699, February 23, 1977, 77-1 CPD 130. While in the instant case the United States Government is the nominal contractor, unlike the situation in the cited cases, the funds for this procurement are borrowed by the Government of Gabon and will be repaid to the United States Government. In view thereof, we believe that the two situations are so similar that our Office should decline jurisdiction.

B-188332

Accordingly, the protest is dismissed.

Paul G. Dembling
Paul G. Dembling
General Counsel