

DOCUMENT RESUME

03882 - [A2773989]

[Protest to Procurement before Resolution of Previous Protest].
B-186947. September 30, 1977. 11 pp.

Decision re: Herley Industries, Inc.; by Robert F. Keller,
Acting 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: Defense Logistics Agency: Defense
Electronics Supply Center; Microwave Development Labs., Inc.

Authority: A.S.P.R. 2-407.8(b)(3). 4 C.F.R. 20.2(b)(1). 4 C.F.R.
20.4. B-179028 (1973). B-187243 (1976). B-188277 (1977).
B-185582 (1977). B-184416 (1976). B-186756 (1976). B-180893
(1974). B-187497 (1977). 56 Comp. Gen. 454.

The protester to a contract award contended that there was no urgent need for procurement before resolution of a protest to rejection of its low offer. In view of demand, leadtime, and inventory requirements, the determination of urgency was reasonable. Rejection of the protester's proposal was proper because of record of past failure. The protest to inadequate specifications was untimely and the contention that competition was restricted was without merit. (HTW)

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DECISION



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

M. Boyle
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FILE: B-186947

DATE: September 30, 1977

MATTER OF: Herley Industries, Inc.

DIGEST:

1. Protester contends that no urgent need existed to procure waveguide switches--used in forward radar of Air Force F-4 airplane--before resolution of protest and issuance of new military specification. In view of (1) current rate of monthly demand for switches by Air Force, (2) leadtime required to procure switches under new specification, (3) annual demand for switches by foreign government, and (4) Air Force's inventory requirements, contracting officer's determination of urgency was reasonable and in compliance with applicable regulations.
2. Protester's proposal--offering lowest unit price, sole evaluation criterion--was rejected because offered switch did not meet RFP's requirement of "current [Government] approval as result of * * * previously supplying [acceptable switch] to Government." Rejection was proper since record shows that past use of protester's switch resulted in unacceptable failure rate as compared to switches of approved offerors due to differences in design and manufacture of switches.
3. Protester's contention, first made after closing date for receipt of initial proposals, that award to other offerors would be improper because RFP contained inadequate and ambiguous testing requirements and standards is untimely under CAO Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977), which require protests involving apparent improprieties in solicitations to be filed prior to closing date for receipt of initial proposals.
4. Protester contends that RFP requirement of current Government approval of item to be supplied excluded protester and unduly restricted competition. Contention is without merit since RFP contains only known acceptable specification currently available to meet Government's legitimate minimum needs.

5. Protest against procuring agency's substitution of warrant in lieu of RFP's testing requirements at request of all acceptable offerors is not subject to objection since all offerors were treated equally, and there is no showing that needs cannot be satisfied by warrant.

Herley Industries, Inc. (Herley), protests the award of a contract to Microwave Development Labs, Inc. (Microwave), under request for proposal (RFP) No. DSA900-77-R-0823 issued by the Defense Electronics Supply Center (DESC) for certain waveguide switches used in the forward radar of Navy and Air Force F-4 airplanes.

For the period 1970 through 1976, Herley was effectively the Navy and Air Force's sole source of supply for the waveguide switches. In 1970, the switches were procured in accord with Westinghouse Electric Corporation (Westinghouse) drawing P/N 579R958H02, revision H, and first article testing in accord with military specification MIL-S-55041A, with testing and acceptance performed by the Air Force not Westinghouse. In 1973, the Air Force issued its own drawing No. 7334765, revision A, modifying the switch, and in November 1974, the Air Force again modified the switch by issuing revision B to its drawing, which governed the switch's specifications supplied by Herley until February 1976. Sometime in 1975, reports of switch malfunctions began to cause great concern to the Air Force, the Navy, and Herley. After a thorough investigation by military personnel, Herley and RCA Service Company, an independent consultant, suggestions were made to remedy the problem on Navy planes. Concerning Air Force planes, Herley concluded that switch failures were the fault of the air pressurization system of the airplane but the Air Force concluded that the failures were caused by Herley's deviation from design specifications, errors in manufacturing and assembly, and inadequate quality control. In late 1975, switches (which conformed to the Air Force's design specifications) also failed. That resulted in the Air Force's determination, in February 1976, that the Air Force's specifications were inadequate. Consequently, Herley's then current contract was terminated for the convenience of the Government.

At that time, the only known acceptable switch specifications were contained on revision K of the Westinghouse drawing. Although Microwave and Waveline, Inc., manufactured switches approved by Westinghouse as meeting the specifications of revision K, Herley's switch was not so approved. Based on revisions K's switch specifications, DESC issued a solicitation on May 18, 1976, limiting potential

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suppliers to those with then current approval of Westinghouse or previous suppliers of that item. Under that solicitation, Herley submitted the lowest unit price, which was the sole basis of proposal evaluation, but DESC rejected Herley's offer since Herley was not, in DESC's judgment, a qualified supplier under that solicitation's current approval requirement. Herley filed a timely protest here against rejection of its proposal.

After some discussion with the Air Force and DESC, Herley withdrew its protest since, on the basis of urgency, award under that solicitation had already been made to Waveline and Herley believed no further procurements of switches would be made until a new military specification, including first article testing, could be issued. Under the new specification all these current suppliers as well as other potential suppliers would be competing without prequalification requirements.

Before the new specification could be issued, however, the Air Force reports that its urgent needs required the procurement of 211 more switches to be designed and manufactured in accord with revision K. Thus, the Air Force issued the RFP involved; again Herley's offer, containing the lowest unit price, was rejected and thereafter Herley protested here again. The basis for Herley's protest is that: (1) the Air Force had no urgent need for additional waveguide switches and should have waited until the new specification could be issued to procure additional switches; (2) Herley is a qualified supplier within the meaning of the RFP because Herley previously supplied the specified switches; and (3) the award to Microwave was improper because the specifications were restrictive of competition, ambiguous, included incomplete testing requirements, and certain power and environmental tests were waived.

URGENT NEED FOR WAVEGUIDE SWITCHES

Herley contends that DESC had no urgent need to procure any waveguide switches before resolution of the protest and Herley believes that no urgent requirement for switches exists because approximately 500 aircraft in use each require one of these waveguide switches and since June 1976, 800 switches have been supplied under three separate contracts with Waveline and Microwave. Herley concludes, based on an Air Force statement that Waveline and Microwave switches last an average of about 6 years, that the Air Force had no urgent need for the additional 211 switches.

The Defense Logistics Agency (DLA) reports that while DESC intends to procure switches in accord with the new specification when it becomes available, present needs cannot wait. DLA reports that the award to Microwave was necessary to cover the Air Force's anticipated requirements until switches conforming to the new specification can be procured and to insure an uninterrupted supply during the interim. The contracting officer reports that there are currently 830 aircraft, simulators, and trainers which use the waveguide switches and 281 additional units are required in the supply inventory. Thus, the Air Force concludes that a total of 1,111 switches are required to replace the switches previously supplied by Herley based on inadequate Air Force specifications. Therefore, the 800 units already provided by Waveline and Microwave were insufficient to meet current needs and the additional 211 units were deemed urgently necessary based on a current monthly demand of 30 units and the leadtime required to procure switches under the new specification when issued. In addition, about 15 switches per year are provided to foreign Governments.

Section 20.4 of our Bid Protest Procedures provides that when a protest is filed here before award, as here, the agency will not make an award prior to resolution of the protest except as provided in the applicable procurement regulation. Section 2-407.8(b)(3) of the Armed Services Procurement Regulation (1976 ed.) provides that when a protest is filed before award, award shall not be made until the protest is resolved unless the items to be procured are urgently required. Since Government procurement officials are familiar with the past, present and projected needs for supplies or equipment, they are generally in the best position to know the Government's current actual minimum needs. Therefore, determinations regarding the urgency of the Government's present need for supplies or equipment will not be questioned by our Office unless there is a clear showing that the determination has no reasonable basis. See B-179028, October 12, 1973. Compare Inflated Products Co., Inc., B-187243, December 14, 1976, 76-2 CPD 485. Cf. Drexel Dynamics Corporation, B-188277, June 2, 1977, 77-1 CPD 385. After considering: (1) the current rate of monthly demand for switches by the Air Force; (2) the leadtime required to procure switches under the new specification, including time for first article testing; (3) the annual demand for switches by foreign governments, and (4) the Air Force's inventory requirements, we conclude that the contracting officer's determination of urgency was reasonable.

ALLEGED IMPROPER REJECTION OF HERLEY'S OFFER

The RFP provided that offers on the solicited item must be limited to sources whose product has current Government approval as a result of (1) previously supplying the subject item to the Government, (2) furnishing the item to the original equipment radar manufacturer, Westinghouse, or (3) specifying that the item will be supplied by firms identified in (1) and/or (2) above. After evaluation of the three offers received, Herley's offer--offering the lowest unit price, which was the RFP's sole evaluation criterion--was rejected by the contracting officer because the Herley switch offered was neither previously supplied to the Government, nor approved by Westinghouse, and the offered item did not have current approval: thus, the item was unacceptable under the terms of the RFP. This determination was based in part on the contracting officer's contact with Westinghouse personnel who reported that the required switch was significantly different than other switches previously supplied by Herley, specifically:

"The difference lies in the requirement for the protested item to perform in a tactical operation environment with switching functions subject to stress and a greater power force. The other Herley waveguide switches furnished to Westinghouse are not subject to the tactical environmental operation and are used for ground testing only. Thus, the comparisons drawn by Herley are inappropriate to the problems of this switch and other systems' switches."

Herley in essence contends that switches manufactured in accordance with revision H satisfy the RFP's item approval requirement because the differences between revision K and revision H drawings are negligible. Our examination of the drawings and the following passage from DLA's report support Herley's position that the differences in the drawings are negligible:

"As regards comparison of the two Westinghouse drawings, the Air Force has submitted an evaluation of the two drawings * * * which supports the inadequacy of the drawings for competitive purposes * * *. The actual drawing differences are largely dimensional, which differences are admittedly not that significant. However, in comparing the current Herley items with

other Westinghouse approved sources' items [Microwave/Waveline], the Air Force reveals numerous important technical differences in the items such as size and weight of components, design of rotor interface, coatings and air pressurization factors which are not referenced or specified in the Westinghouse Revision K drawing. The Air Force regards these differences as significant * * *. The previous and current Westinghouse specifications as well as previous Air Force requirements have been shown to lack certain data and Herley's own admission of inadequacies with the previous drawings and specifications further supports the inadequacies cited. These factors fully justify the action of the Contracting Officer in not accepting Herley's item for consideration for award and are regarded as providing a sufficient basis for rejecting Herley's assertion of entitlement of its switch to an approved item status under the Westinghouse Revision K drawing. " (Emphasis added.)

As clearly stated above, the difference between drawings was not significant; thus, the remaining basis for rejection of the Herley offer is that revision H switches supplied to the Government did not have current approval because the Herley revision H switches furnished after 1974 were totally unacceptable due to frequent switch failures. An Air Force Logistics Command memorandum dated June 1, 1976, contained the following findings concerning the Herley switch failures:

"(8) * * * [O]ut of 501 units produced in 1975, 48 failed exhibits or 9.6% of the total were analyzed. The failures were caused by a) drive motor underpowered, b) clutch torque higher than the motor, c) lubricants used breakdown into an explosive compound, d) bearing contamination primarily at fabrication, and e) microswitch positioning and sequencing. The primary mode of failure was established as 'failure of the motor to turn the rotor due to dynamic load or seizure of the rotor'.

"(9) The contractor Herley Industries had made numerous changes in his configuration since 18 June 1974 without Air Force approval. The significant changes include the following:

- "(a) rotor design
- "(b) drive mechanism
- "(c) changing of the microswitch activation devices
- "(d) bearing size

"(10) In addition, it was determined that the contractor had used relays in the 1975 production switches ranging in age from 10 to 18 years. The manufacturer, Elgin Advance, formerly Elgir Watch, has been out of business for approximately 10 years.

"(11) The contractor's Quality Assurance is extremely inadequate without incoming inspection and his admitted failure to properly insure the quality of his products."

Herley's response to those findings is as follows:

"(a) a drive motor underpowered', but does not know the torque specification of the motor used by Herley Industries and has not specified torque as a requirement on the new Air Force specification MIL S-55041/10.

"(b) clutch torque higher than the motor' - Again no parameters shown and no specification requirement in the newly prepared MIL S-5541/10.

"(c) lubrications used break down into an explosive compound' - the wildest allegation yet made by PRAM with absolutely nothing to substantiate this statement and a refusal by PRAM to support this allegation when requested
* * *

"(d) bearing contamination primarily at fabrication' - another totally unsupported statement which must be contrasted with the

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U.S. Navy's findings and the [RCA] findings that the contamination occurred as a result of an inadequate system performance.

"(c) Micro-switch positioning and sequencing' - a problem that was caused by the Air Force decision to permit untrained field personnel, without adequate instruction, to disassemble our waveguide switches and reassemble them in the field without drawings, without tools and without knowledge of the original assembly procedures used to manufacture these switches."

Herley also states that the report's statement (11) above is incorrect and unsupported. Herley concludes that the cause of the switch failures is the aircraft's faulty air pressurization system and not defects in the manufacture or design of the Herley switch. In reply, DLA reports that the utilization of Microwave and Waveline switches has resulted in a significant reduction of supply requirements because the failure rate of those switches is much lower than the failure rate of the Herley switch.

Herley requests that our Office make the determination concerning the cause of the switch failures. It is not the function of this Office in rendering this decision to determine the cause of past switch failures. Rather, the only issue with which we are concerned is whether the protester has established that the rejection of its proposal was unreasonable under the circumstances.

Our Office has recognized that Government procurement officials, who are familiar with the conditions under which supplies, equipment, or services have been used in the past, and how they are to be used in the future, are generally in the best position to know the Government's actual needs. Consequently, we will not question an agency's determination of what its actual minimum needs are or what products or equipment will satisfy those needs unless there is a clear showing that the determination has no reasonable basis. Jarrell-Ash Division of the Fisher Scientific Company, B-185582, January 12, 1977, 77-1 CPD 19; Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4; Newton Private Security Guard and Patrol Service, Inc., B-186756, November 30, 1976, 76-2 CPD 457; Drexel Dynamics Corporation, supra.

The record shows that the use of Herley switches resulted in an unacceptable failure rate as compared to the failure rate of Waveline or Microwave switches and that differences in design and

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manufacturing of the switches not specified in the drawings seem to account for the lower failure rate of Herley's competitors; we conclude that the protester has failed to show that the rejection of its proposal was unreasonable in the circumstances of this procurement.

ALLEGED IMPROPER AWARD TO WAVELINE AND MICROWAVE

Herley contends that the contracts awarded to Waveline and Microwave are improper because the RFP contained inadequate and ambiguous testing requirements and standards. Our Bid Protest Procedures provide that protests based upon alleged improprieties in any type of solicitation which are apparent prior to the initial closing date for receipt of initial proposals shall be filed prior to the initial closing date. 4 C.F.R. § 20.2(b)(1) (1977). Since this aspect of Herley's protest concerns alleged RFP improprieties, which were apparent prior to the initial closing date for receipt of proposals, and Herley did not protest until after such date, this aspect of the protest is untimely and will not be considered.

Herley also contends that the latest revision of the Air Force drawing is a perfectly adequate specification and that the Air Force and DESC retreated behind the Westinghouse drawing, revision K, in order to restrict competition to Waveline and Microwave as "Westinghouse qualified suppliers." DLA in response argues, citing our decision in Engineering Research, Inc., B-180893, September 12, 1974, 74-2 CPD 161, that the Westinghouse drawing with limited sources is the only known specification and source currently available to satisfy the Government's requirements for the item.

The Engineering Research, Inc. decision held that the contracting officer's decision to make a sole-source award was justified because only one source could supply the part known to meet the Government's needs and the Government did not have data or drawings adequate to permit other suppliers to manufacture the required part. In the present situation, the Westinghouse drawings were not meant to provide every detail of manufacture but merely certain minimum requirements. Therefore, it is not unreasonable that a supplier may meet all the drawings specification and still be unable to obtain approval because unspecified details make its switch different from another acceptable supplier's switch. Moreover, here, we are not concerned with a sole-source award since at least two suppliers were able to meet the Government's needs. In this regard, we have often stated that the preclusion of one or more potential offerors from a particular competition does not render

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a specification or product qualification unduly restrictive if, in fact, the specification represents the legitimate needs of the Government. See, e.g., Memorex Corporation, B-187497, March 14, 1977, 77-1 CPD 187. Since the record shows that the Herley switch has resulted in an unacceptable number of failures, it appears that the RFP product approval restriction is reasonably related to the Government's minimum needs and not improper.

Finally, Herley objects to the awards to Microwave and Waveline because DESC waived the RFP's critical power and environmental testing requirements and accepted a warrant in lieu thereof. Herley contends that waiver of these tests permits unnecessary risk to the pilot and aircraft. DLA states that since both approved sources requested such a waiver both were treated equally.

DLA also reports that:

"* * * Environmental testing is also a qualification requirement and not a continual acceptance test requirement. As an approved source, Waveline need not requalify.

* * * * *

"* * * 'Unknown' power testing requirements complained of by Herley are clearly identified by Herley as Paragraph 3.2.4 of the Westinghouse drawing. Westinghouse indicates that this requirement is also for qualification, that Waveline and [Microwave] have met it, and that it is not an acceptance testing requirement. Westinghouse further assures DESC that this test is not required for acceptance of approved source items and that, although this test does occur in the test of the next higher assembly, there is, and can be, no assurance or determination that the switch itself has been subjected to the full power testing requirement of the drawing in that subsequent test.

* * * * *

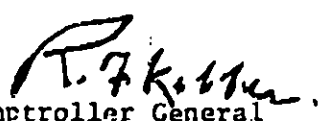
"* * * The warranty provisions assailed by Herley do provide contractual rights for replacement, correction, etc. of switches that fail to meet drawing specifications. The warranty coupled

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with a reliable OEM controlled drawing certainly assures the Government of more rights and remedies than previously prevailed under the defective drawing and the receipt of questionable Herley items manufactured to that drawing. It is also noted that the successful performance of [Microwave] and Waveline items in the system is an additional assurance of adequate performance of [Microwave] and Waveline items."

We have no basis to object to changes in RFP requirements when, as here, all acceptable offerors have been permitted to compete on an equal basis and there is no showing that the agency's needs cannot be satisfied by the warrant. See, e.g., Standard Conveyor Company, 56 Comp. Gen. 454 (1977), 77-1 CPD 220.

Protest denied.


Acting Comptroller General
of the United States