

DECISION



11210 Proc II
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-193188

DATE: August 23, 1979

MATTER OF: Consolidated Aeronautics Corporation

[Protest of Sole-Source Contract Award]

DIGEST:

Sole-source award based on erroneous belief that insufficient data existed to evaluate offer from another firm was improper. However, corrective action is not possible since contract has been fully performed.

ACW 159
Consolidated Aeronautics Corporation (CAC) protests the rejection by the Department of the Navy, Aviation Supply Office (ASO), Philadelphia, of its offer to supply nine linear valves, Hydro-Aire P/N 50389, for use in Naval aircraft. ASO awarded the contract on a sole-source basis to the Hydro-Aire Division of the Crane Company (Hydro-Aire). *DLB 02622*

The record indicates ASO made a "Determination and Findings" pursuant to 10 U.S.C. § 2304(a)(10) (1976) and Defense Acquisition Regulation (DAR) § 3-210.2(xv) (1976 ed.) to negotiate a contract with Hydro-Aire. This statement indicated that data and quality assurance procedures adequate to assure that valves bought from any source other than Hydro-Aire would perform satisfactorily were not available and could not reasonably be made available.

CAC learned of the proposed procurement through a notice published in the Commerce Business Daily. CAC submitted an unsolicited proposal to supply the valves in unused surplus condition at a total price of \$4,230. Hydro-Aire's proposal offered newly manufactured units at \$15,909.03. The protester's offer was rejected after ASO determined it did not have adequate data for a competitive procurement, and without the data the Government would be unable to assure that CAC's valves were acceptable.

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CAC contends that ASO's rejection of its offer was arbitrary, capricious and without a reasonable basis. CAC initially requested that the contract be awarded to it. However, since Hydro-Aire's contract has been fully performed, CAC now requests that our Office advise the procuring activity to fulfill its "obligations" to surplus property dealers like itself in future procurements.

CAC's position is that the rejection of its offer was gross negligence on the part of ASO. The protester, referring to Technical Order NAVAER 03-30CL-596, states that acceptance test procedures satisfactory for evaluation of the valves have been available for over twenty years. The technical order, according to CAC, provides detailed instructions for the breakdown, inspection, and assembly of the valve. Any doubt about acceptance criteria, the protester alleges, should have been discussed with it.

ASO states that while there are no available specifications suitable for a competitive solicitation, the agency does have some specifications which together with a "form and fit" test on the aircraft would be adequate to test surplus parts. This fact, the agency states, was not recognized at the time its "Determination and Findings" was executed.

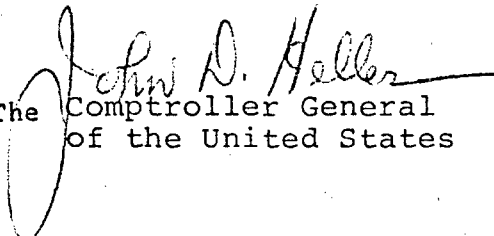
The agency also states:

"This matter has been discussed with cognizant technical personnel to assure that, in all instances such as this, consideration be given to the question of whether the data inadequacy is such as would necessarily preclude contracting for surplus material. It is submitted, however, that corrective action is not required in this case. The Contracting Officer's determination that data adequate for the procurement of surplus property was not available was made in good faith and was, it is submitted, a proper exercise by the Contracting Officer of his discretionary authority."

In this case, the contracting officer's decision to reject CAC's unsolicited proposal and enter into a sole-source contract with Hydro-Aire was based upon misinformation furnished by a technical advisor, who informed the contracting officer that the agency did not have data to evaluate CAC's offer. While the contracting officer obviously did not act in bad faith, it is clear from ASO's subsequent statements that the determination to reject the CAC offer for the reason stated was erroneous. As CAC recognizes, however, Hydro-Aire's contract has been fully performed and corrective action is not practical.

Nevertheless, CAC insists that we "make a clear and explicit declaration of the obligation of a procuring agency upon the receipt of an offer of surplus property." It appears to us from the report submitted by the agency that it is aware of its obligation to set up procedures for effectively qualifying alternate suppliers, including surplus dealers. See Rotair Industries; D. Moody & Co., Inc., 58 Comp. Gen. 149 (1978), 78-2 CPD 410. The agency also appears to realize that it is obliged under these procedures to make a good faith evaluation of offers from surplus dealers and of the methods and data available for assuring that the parts offered by such dealers meet the agency's needs. We see no need to make a further "declaration".

The protest is sustained.


For The Comptroller General
of the United States