12364 PL-1 Ms. Rogers

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

FILE: B-195679 **DATE:** December 19, 1979

MATTER OF: National Presto Industries, Inc. D3513

DIGEST:

1. Decision to make sole-source negotiated award to operator of Government-owned plant under mobilization base authority will not be questioned where contracting officer certified Secretarial class Determination and Findings (under 10 U.S.C. § 2304(a)(16) (1976)) applied to requirement in order to maintain only active line capable of producing item. Under these circumstances, formal advertising was not feasible and practicable.

2. Protester's alleged capability to perform contract negotiated on sole-source basis with another firm is irrelevant where award was justified in order to maintain industrial mobilization base under 10 U.S.C. § 2304(a)(16) (1976).

National Presto Industries, Inc. (NPI), protests the award to Chamberlain Manufacturing Corporation of a contract to manufacture 8" M106 projectiles. The U.S. Army Armament Materiel Readiness Command (ARRCOM) negotiated the procurement with Chamberlain under the authority of 10 U.S.C. § 2304(a)(16) (1976). For the reasons that follow, NPI's protest is denied. D3514 840

1. Factual summary

ARRCOM issued a request for proposals for 64,499 8" M106 projectiles on August 21, 1978, to NPI and two other mobilization base producers. Two proposals were received, but both exceeded available funding. On February 12, 1979, the Army informed NPI that it was canceling the solicitation because "the quantity

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identified in the solicitation is currently underfunded and no time frame for the receipt of additional funding is available."

The contracting officer received a new requirement for 94,275 M106 projectiles later in February 1979, although funding was ultimately limited to a quantity of 65,117. At that time, the Army decided to place the M106 procurement with the Scranton Army Ammunition Plant (SAAP), a Government-owned plant operated by Chamberlain Manufacturing Corporation (Chamberlain). The Army considered it essential to place the procurement with SAAP because cancellation of the M509 program had resulted in a shortage of work there, and the Army felt that industrial mobilization goals would best be served by maintaining SAAP as an active plant. The contract was awarded to Chamberlain on July 13, 1979.

The Army justifies award of the contract to Chamberlain on the basis of 10 U.S.C. § 2304(a)(16) (1976). Procurement by negotiation rather than by formal advertising is authorized by this section when the head of an agency determines that it is in the interest of the national defense that a facility or a supplier be made or kept available to furnish services in a national emergency. Under the authority of 10 U.S.C. § 2304(a)(16) (1976), a Secretarial Determination and Findings (D&F), issued October 27, 1978, authorized procurement by negotiation of certain ammunition components which included the M106 projectile. The contracting officer certified that the D&F applied to the proposed award to Chamberlain when he executed a Statement of Applicability on June 21, 1979.

2. Should the procurement have been formally advertised?

NPI's first contention is that this procurement should have been advertised rather than negotiated. NPI points out that 10 U.S.C. § 2304(a) (1976) requires formal advertising whenever it is "feasible and practicable under the existing conditions and circumstances." NPI contends that the statute sets up a two-part test for authority to negotiate: if it is not feasible or practicable to advertise, and if the Secretary makes

a determination that one of the 17 exceptions to advertising listed in section 2304(a) is applicable, then a procurement may be negotiated. NPI asserts that it was practicable to advertise this procurement, and, therefore, that advertising was required. In this connection, NPI refers to a statement made by the ARRCOM legal office after award to the effect that formal advertising was feasible and practicable.

Our decisions confirm NPI's opinion that the statute imposes a two-part test. Telectro-Mek, Inc., B-190653, April 13, 1979, 79-1 CPD 263; 51 Comp. Gen. 637, 639 (1972). However, we cannot agree that advertising was practicable, and thus required in this case.

The D&F authorizing this award contains the following finding:

> "Use of formal advertising for procurement of the above described property and services is impracticable because such method would not assure the placement of contracts with existing or selected mobilization base producers to insure their continued availability to furnish essential ammunition supplies to meet current and mobilization requirements, as well as to assure the reliability of the product and production within required delivery dates."

Thus, the Army's acknowledgment that advertising would have been practicable if mobilization base concerns had not been a factor means that advertising was not practicable under the existing conditions and circumstances. The ARRCOM legal office has explained that this was the effect of the statement referred to by NPI. In any event, although this Office may examine the propriety of a Secretarial determination, i.e., whether the facts legally support it, we are precluded from disturbing the findings made by the Secretary. Braswell Shipyards, Inc., B-188286, June 24, 1977, 77-1 CPD 454.

3. Should the procurement have been competitively negotiated?

NPI's second contention is that even if the Army was justified in not advertising this procurement, the award should have been made through competitive negotiation rather than on a sole-source basis. We cannot agree with NPI since ample legal authority exists to support a sole-source award in this situation. We have often upheld sole-source awards under the authority of 10 U.S.C. § 2304(a)(16). Braswell Shipyards, Inc., supra; Etamco Industries, B-187532, February 25, 1977, 77-1 CPD 141; B-169470, June 18, 1970. In fact, we have recognized that--

> "the usual case justifying negotiation under 10 U.S.C. § 2304(a)(16) may well require contracting with a predetermined contractor or contractors." 48 Comp. Gen. 199, 201 (1968).

The justification which supports the D&F authorizing this procurement specifically permits a sole-source award "to satisfy urgent delivery schedules, to prevent loss of certain manufacturing expertise; or, to prevent a break in production with consequent adverse impact."

In a procurement negotiated under 10 U.S.C. § 2304(a)(16) (1976), the normal concern with insuring maximum competition is secondary to the needs of industrial mobilization. The award of a contract for current needs becomes not only an end in itself, but a means to another goal--the creation and/or maintenance of mobilization capacity. Contracts are awarded to particular plants or producers to create or maintain their readiness to produce essential military supplies in the future.

NPI's argument that its projectile price is cheaper than Chamberlain's is essentially irrelevant. Our decisions have recognized that the Government may assume any additional costs resulting from the use of 10 U.S.C. § 2304(a)(16) negotiation authority without regard to prices available from

other sources. Etamco Industries, supra; 49 Comp. Gen. 840 (1970). In fact, the legislative history of this authority clearly indicates that the price to the Government need not be controlling since Congress expected that the Government would be required to pay more for contracts awarded under 10 U.S.C. § 2304(a)(16) (1976). Etamco Industries, supra.

4. Was the Army justified in selecting SAAP to produce the M106 projectile?

The Army based its decision to award the M106 contract to SAAP on the fact that SAAP was the only active producer who had the technical capability to produce the M106. NPI disputes the Army's justification for its selection of SAAP.

NPI, SAAP, and two other suppliers are all potential producers of the M106 projectile. At the present time, however, there are not enough requirements to maintain all of these facilities in full production. Thus, as long as SAAP remained on active status to produce the M509 projectile, the Army decided to put NPI, and, apparently, the other two suppliers as well, on inactive status. However, suspension of that program made it necessary in the interest of industrial mobilization to retain the only "active line capable of producing the M106 Projectile to the exclusion of the inactive lines which presently cannot produce the M106 Projectile because they lack ultrasonic testing capability." Moreover, the Army points out that to have reactivated NPI would have resulted in SAAP being curtailed or closed even though it had the only quality assurance equipment available to produce the M106 projectile.

NPI disputes the technical basis for the award to SAAP. It argues that: (1) SAAP will have to retool its lines in order to produce the M106; (2) the Army could transfer the test equipment to NPI; (3) the Army could keep SAAP in production by slowing down work on other projects; and (4) the Army could simply pay Chamberlain's work force to keep it available.

In effect, much of NPI's argument amounts to a quarrel with the Army's decision to keep NPI on inactive status, while workloading SAAP to keep it active. NPI contends that its inactivation flies in the face of Defense Department policy because the premise of the mobilization base concept is to retain experienced producers whenever possible. However, the point of the concept is not necessarily to maintain as many current producers as possible.

The Department of Defense is responsible for developing an industrial preparedness program which will insure the nation's ability to respond to a military emergency. In implementing this goal, the Defense Department must continually reassess the nation's current and future weaponry needs. It must decide which producers are in the best position to rapidly expand production to meet emergency needs. The decision as to which producers of a particular item must be kept in active production in order to insure emergency preparedness is a complex judgment which must be left to the discretion of the military agencies. We would only overturn such a decision if the evidence convincingly demonstrated that the agency had abused its discretion. Saft America, Inc., B-193759, July 12, 1979, 79-2 CPD 28; 53 Comp. Gen. 348 (1973). We cannot say that the Army has abused its discretion in the present case.

Finally, NPI argues that its process for producing the M106 is superior to that which will be used at SAAP. However, it is not the function of this Office to make these kinds of determinations in the absence of evidence that the agency's determination was unreasonable. Saft America, Inc., supra. We have previously noted the rationale for selecting only one source--Chamberlain--and the lack of sufficient requirements for activating other sources. In addition, the Army reports that it would cost about 1 million dollars and take approximately 24 months to acquire and place in production the ultrasonic testing equipment needed by sources other than Chamberlain. While NPI has vigorously disputed

the rationale for the sole-source award to Chamberlain and the decision to keep NPI inactive, it has provided no evidence to show the agency acted unreasonably.

5. Did the Army act improperly in its conduct of this procurement?

NPI makes the following allegations concerning the propriety of the way this procurement was conducted.

Allegation 1: The Army orally informed NPI that it was the low offeror on the original solicitation and would receive the award.

Discussion: The Army denies this allegation. The protester has the burden of affirmatively proving its case. We do not believe that burden has been met when conflicting statements of the parties constitute the only evidence. Nationwide Building Maintenance, Inc., B-186602, December 9, 1976, 76-2 CPD 141; Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Allegation 2: The real reason the Army canceled the original solicitation was in order to award the contract to Chamberlain, not because of a lack of funds.

Discussion: We have consistently held that the decision to cancel an RFP and resolicit is a matter for the discretion of the procuring agency. We will question that decision only if it is clearly shown to be without a reasonable basis. Telectro-Mek, Inc., supra; Semiconductor Equipment Corporation, B-187159, February 18, 1977, 77-1 CPD 120. Even if NPI is correct in its hypothesis as to the reason for the cancellation, although the Army denies the contention, we will not object because it was within the Army's discretion to cancel a competitive solicitation and make a sole-source award in the interest of industrial mobilization.

Allegation 3: The Director of the Procurement Directorate failed to act on his oral assurance to NPI that no award would be made until the matter had been discussed with NPI.

Discussion: The Director's affidavit states that he made no commitment to NPI to review the M106 requirement with them as a contingency pertaining to award of the contract. As noted above, the protester has the burden of affirmatively proving its case, and we do not believe that burden has been met when conflicting statements of the parties constitute the only evidence. Nationwide Building Maintenance, Inc., supra; Reliable Maintenance Services, Inc.,--request for reconsideration, supra.

Allegation 4: The Army made misrepresentations to NPI to prevent it from learning about the proposed award to Chamberlain and thus made a preaward protest impossible.

Discussion: While we do not think the evidence establishes that the Army made deliberate misrepresentations to NPI, we do believe the Army should have been more forthright in informing NPI that a decision had been made to award the contract to Chamberlain.

A February 6, 1979, memo from the Director of the Production Directorate states that the M106 projectile requirement was being transferred from the commercial division to the GOCO division in order to place the program with SAAP. NPI's letter of March 22, 1979, informed the Army that it had heard about the proposed award to SAAP, that it wished to be considered for any procurement of 8" M106 projectiles, and that it believed that no award should be made without a competitive solicitation.

The Army's response to NPI did not admit that a decision had been made to award the contract to SAAP. Instead, its letter of April 4, 1979, stated:

> "Prior to award of any contract for subject projectiles, consideration will be given and a determination made as to whether or not competitive procurement is feasible or whether a noncompetitive solicitation would be necessary under the existing circumstances. * * * Please rest assured

> that if a competitive solicitation is warranted, National Presto Industries will be afforded the opportunity to participate."

While the above statements were not false, they were not responsive to NPI and would naturally lead to the assumption by NPI that no decision had yet been made to award the contract to SAAP. If the Army had responded frankly to NPI's letter, NPI would have been in a position to make its protest almost 3 months before award was eventually made.

While the protest in this case is denied on the merits and, therefore, the lack of a frank response was not prejudicial to NPI, the Army should be more forthright with potential protesters in the future.

Milton J. Socolar

For The Comptroller General
of the United States