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**DECISION**

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

*[Protest of Navy Procurement Procedures]*

FILE: B-198681

DATE: October 14, 1980

MATTER OF: RAM Enterprises, Inc. *DLGO 5333*

**DIGEST:**

Navy used basic ordering agreement to make sole-source award notwithstanding availability of potentially acceptable supplier, thereby improperly restricting competition for requirement in question.

RAM Enterprises, Inc. (RAM), protests the procurement procedures used by the Naval Supply Center, Norfolk, Virginia, (NSC), in awarding an order for certain mechanical seal conversion kits to Worthington Pump Corporation (Worthington), under Basic Ordering Agreement (BOA) No. N00104-77-A-0024. RAM asserts that the Navy improperly failed to allow it to compete for these items. Based on our review of the record, we agree with RAM's assertion.

*CNO 01266  
Acc 00017*

The Norfolk Naval Shipyard (NNS), the requiring activity, had requested authorization in November 1979, to make a sole-source award for the kits under its BOA with Worthington. In February 1980, the Navy determined to make a noncompetitive (sole-source) procurement from Worthington under Defense Acquisition Regulation (DAR) § 3-101(d) (1976 ed.) on the basis that the equipment had to be compatible with existing Worthington equipment. The Navy recited that prior purchases from other vendors had necessitated modifications to this equipment in order to be installed and found that only Worthington was known to produce the compatible and interchangeable kits which were needed.

*DLGO 3093*

Placement of the order was delayed, apparently because Worthington had increased its prices and was putting together a proposal based on its new prices. In April 1980, Worthington provided a proposal which contained a 36-week delivery period. This was unacceptable to NNS, which had previously requested a 20-week delivery period. Therefore, the Navy began

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to make informal inquiries in an effort to obtain other possible suppliers. As a result of these inquiries, on April 8 or 9, 1980, RAM became aware of the requirement and called NNS. RAM states that it was requested to submit a proposal at this time, while the Navy indicates that RAM volunteered to submit a proposal. No date for submission of the proposal was provided or discussed.

On April 14, 1980, NSC awarded the order to Worthington, which had advised the Navy that it could provide delivery in 22 weeks for \$82,970, with certain changes in the inspection and acceptance procedure which had been provided under the BOA. On April 18, 1980, NNS received RAM's proposal, dated April 14, and advised RAM that award had already been made to Worthington. RAM's proposed price was considerably less than Worthington's price; RAM also proposed delivery 16 weeks from the date of award.

{RAM asserts that its proposal was specifically requested by the NNS contracting officer on April 9, 1980.} It also contends that it has previously supplied the identical items to the Navy for use on three similar vessels, and that in each instance no modifications were required and the kits performed properly..

DAR § 3-410.2 (1976 ed.) describes a BOA as an instrument of understanding between a procuring activity and a contractor which: (1) applies to future procurements between the two during its term; (2) includes a description of the supplies to be furnished, the negotiated contract clauses which shall be applicable to future procurements, and a method for determining the prices to be paid; and (3) specifies the circumstances under which an order becomes a binding contract, but it is not itself a contract. {While a BOA may be used to expedite procurement, it may not be used in any manner to restrict competition.} DAR § 3-410.2(c)(1) (1976 ed.). Thus, an order under a BOA is proper if a sole-source procurement would have been justified. T M Systems, Inc., B-196170, April 8, 1980, 80-1 CPD 261.

The Navy contends that Worthington was the only known supplier of kits which met its requirements at the time that the sole-source determination was made. RAM takes issue with this contention, as noted above. However, assuming that Worthington was a genuine sole-source when the original determination was made, the

Navy's course of conduct thereafter suggests that it felt an additional supplier had become available. Specifically, after the Navy found Worthington's original proposed delivery schedule unacceptable, the Navy felt it could locate other suppliers and made inquiries as well as entertained conversations to that end, thus indicating its belief that other potentially acceptable suppliers were available.

In its response to these inquiries, RAM indicated to NNS that it could provide the requisite kits with delivery to take place within 16 weeks from award. This proposed delivery schedule apparently was not transmitted to NSC. The Navy asserts that NSC's decision to award to Worthington on the basis of its revised 22-week delivery schedule reflected a determination "impliedly that RAM's product, even if arguendo was technically acceptable, could not have been produced and delivered in a timely manner." However, there is evidence to the contrary, and there is no ascertainable basis in the record before us to support this inferential determination.

With particular reference to use of a BOA, our Office has held that:

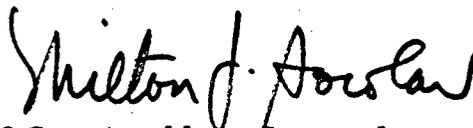
"\* \* \* If an alternate source offers the same item being procured under a BOA, free and open competition requires the Government to include the source \* \* \* [since] the procurement statutes and regulations generally contemplate obtaining maximum competition consistent with the Government's actual needs." D. Moody & Company, Inc., 56 Comp. Gen. 1005, 1008 (1977), 77-2 CPD 233.

Here, the Navy apparently conducted some form of informal negotiations with RAM, but did not give RAM any closing date for its proposal, and proceeded to award an order to Worthington under the authority of its initial sole-source justification, after it had attempted to find other offerors, and, in fact, had apparently located at least one such offeror in RAM. This type of informal competition is at variance with fundamental principles of Federal negotiated procurement since it denies offerors

the opportunity to be fully informed of the Government's requirements in order to compete on a common basis. Tymshare, Inc., 57 Comp. Gen. 434, 437 (1978), 78-1 CPD 322.

In essence, [the BOA was improperly used here in a manner which restricted competition.] Regardless of the validity of the initial sole-source determination, [we are unable to conclude, in view of the subsequent course of conduct by the Navy, that a determination warranting the issuance of an order under the BOA was valid at the time the order was actually issued.] See, Rotair Industries, et al., 58 Comp. Gen. 149 (1978); 78-2 CPD 410.

[Accordingly, the protest is sustained. However, since the order under the BOA has been completed, no remedial action is possible.] By separate letter of today, we are informing the Secretary of the Navy of the defects in this procurement and requesting that action be taken to assure that these defects do not arise another time. We note that the Navy has advised our Office of its intention to explore the possibility of an alternative source of supply for future requirements.



For the Comptroller General  
of the United States