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DECISION

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

FILE: B-198864

DATE: October 22, 1980

MATTER OF: Communications Company, A Division
of E.F. Johnson Company

DIGEST:

[Protest of Army

1. GAO will not review contracting agency's decision to terminate contract for convenience of Government since decision was not based on bad faith, constituting breach of contract claim, or on agency determination that initial contract award was improper; any claim regarding supplies shipped to agency after contract was terminated must be pursued under contract.
2. Contracting agency's decision, after terminating protester's delivery order for convenience, to make sole-source award to company that was able to deliver needed equipment in short timeframe was not unreasonable.

Communications Company (Comco), a division of E.F. Johnson Company, [protests the decision by the Department of the Army (Army), Fort Devens, Massachusetts, to terminate delivery order No. DAKF31-80-F-1434 for the convenience of the Government.]

[The delivery order was issued as a result of request for quotations (RFQ) No. DAKF31-80-Q-0068 which solicited radios, antennas, and battery chargers to be used by the Fort Devens Military Police.] Three companies responded to the RFQ as follows:

| <u>Comco</u> | <u>Motorola, Inc.</u> | <u>General Electric</u> |
|--------------|-----------------------|-------------------------|
| \$9,381.67 | \$11,691.58 | \$13,084.20 |

[After evaluating the quotations, the Army made the award to Comco as the low offeror. The delivery order, dated November 28, 1979, was not signed

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until December 1, 1979, provided for delivery by December 21, 1979, and referred to General Services Administration (GSA) contract No. GS-00S-92053. However, the delivery order failed to specify the applicable radio frequencies. Upon receipt of the delivery order, Comco telephoned the Army to inquire about this omission. The frequencies were furnished to Comco by telephone and were later confirmed in a written amendment issued on January 4, 1980. In the meantime, Comco had acknowledged receipt of the delivery order and, according to the Army, had indicated that shipment would be made by February 1, 1980.]

However, [by the first week of March, the equipment had not been delivered. On March 7, 1980, the Army terminated the delivery order for the convenience of the Government and notified Comco.] According to the Army, it took this step because, despite a number of telephone calls, it had not been able to obtain a status report from Comco about the order; Comco's Miami office insisted that it had no order from Fort Devens. The Army also based the decision to terminate on the fact that [the Military Police now claimed that Comco's equipment would not be compatible with the existing on-base battery chargers previously purchased from Motorola, Inc.] (Motorola). [After terminating Comco's order] on March 20, 1980, the Army placed an order with Motorola for the same equipment on a sole-source basis because only Motorola's equipment is compatible with the battery chargers on hand and the Military Police's urgent need for the equipment was aggravated by Comco's failure to deliver timely.]

On April 29, 1980, [after Motorola had delivered its equipment, the Fort Devens Property Control Office received a shipment from Comco.] Telephone calls were then made to Comco to obtain an explanation. The record indicates that [Comco was either unaware of the Army's decision to terminate or ignored it.] According to Comco's initial protest letter, the Fort Devens order was completed on approximately April 11, 1980, and after final testing, was shipped on April 24, 1980.

When told that its equipment was no longer needed, Comco at first indicated that it would require a 15-percent return/restocking charge before it would take the order back; but, after filing the protest with our Office, Comco refused to accept the return of the equipment until we rendered our decision.

Comco requests "that the cancellation be denied and that COMCO receive full payment in exchange for the radio products which are now located at Fort Devens." It argues that under the terms of the GSA contract referenced in the delivery order, it had 30 to 120 days to deliver the equipment and that the delivery of April 29, 1980, met this requirement. Moreover, regarding the Army's sole-source award to Motorola and the reasons given to justify this decision, Comco argues that the delivery order provided no specifications whatsoever or anything to indicate that the equipment had to be compatible with Motorola battery chargers. In this connection, Comco argues that it could have provided the required equipment, including its battery chargers, and still have been less expensive than Motorola.

As a general rule, our Office will not review an agency's decision to terminate a contract for the convenience of the Government since such a decision is a matter of contract administration. However, we will review a termination for convenience when it appears that the termination resulted from bad faith or a clear abuse of agency discretion since a "bad faith" termination constitutes a breach of contract and, therefore, entitles the contractor to breach of contract damages. In addition, we review terminations for convenience when based on agency determinations that the initial contract awards were improper. See Bradford National Corporation, B-194789, March 10, 1980, 80-1 CPD 183; Antilles Produce, Inc., B-193159, December 15, 1978, 78-2 CPD 418.

We cannot conclude that either exception is applicable here. The decision to terminate was not based on any impropriety in the award process, but rather on factors that arose after the award had been made. Moreover, although Comco implies that the Army abused its discretion in this matter, we do not agree in light of the Army's several attempts to learn the status of its order only to be finally told that Comco had no record of an order from Fort Devens.

Therefore, we will not review the Army's decision to terminate Comco's delivery order. Any claim that Comco has regarding the equipment it sent to Fort Devens should be pursued with the contracting officer under the contract.)

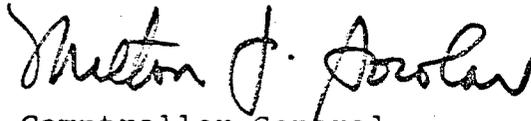
As to the Army's decision to make a sole-source award to Motorola, the general rule is that sole-source awards are authorized in circumstances when needed supplies or services can be obtained from only one person or firm. However, because of the general requirement in Federal procurements that competition be obtained to the maximum extent practical, the determination to sole source is subject to close scrutiny by this Office. The standard to be applied in determining the propriety of a sole-source procurement is one of reasonableness; that is, unless it can be shown that the contracting agency acted without a reasonable basis, our Office will not question the decision to procure on a sole-source basis. } Federal Data Corporation, B-196221, March 3, 1980, 80-1 CPD 167.

We have recognized the propriety of sole-source awards where--as the Army argues here--only a single source can provide an item that is compatible and interchangeable with existing equipment or where time is of the essence and only one known source can meet the Government's needs within the required timeframe. } Precision Dynamic Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402.

On the record, we cannot definitely decide the merits of the respective positions concerning compatibility and interchangeability.) On the other hand, we believe that the record demonstrates the Military Police's urgent need for the equipment and justified the sole-source award because expedited delivery of the equipment was essential. At the time the sole-source award was made, the Army believed that Comco had made no progress and had no intention of performing.) At that point, the Army reasonably looked to another source of supply since more than 30 days had passed since Comco's promised delivery date. The record indicates, moreover, that Motorola did deliver the equipment.

The order was placed with Motorola on March 20, 1980, and the equipment was expeditiously delivered before Comco's shipment arrived on April 29, 1980, or almost 3 months after Comco was to deliver. In light of this, we cannot conclude that the contracting officer's decision to make the sole-source award on the basis that only Motorola could deliver the equipment in a short timeframe was unreasonable.

The protest is dismissed in part and denied in part.)



For the Comptroller General
of the United States