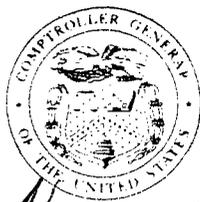


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DECISION



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

[Protest of Navy Contract Award]

FILE: B-199705

DATE: February 18, 1981

MATTER OF: The Willard Company Incorporated

DIGEST:

Protester contends that sole source procurement of special warfare craft should have been opened to competition because it is capable of manufacturing craft from existing drawings, because contractor is receiving unfair competitive advantage for future procurements, and because it is unwise to centralize all production in one company. (Navy asserts that data suitable for competitive procurement is lacking, that only sole source can satisfy critical military need for item within required time frame, and that no unfair competitive advantage is involved. In circumstances, GAO concludes that protester has not met heavy burden of clearly showing that agency's determination was unreasonable.)

This is our decision on a protest by the Willard Company Incorporated (Willard) concerning the award of a contract to Uniflite, Inc., under request for proposals No. N00024-80-R-2114, issued by the Naval Sea Systems Command.

The contract calls for the furnishing of eight "Seafox" special warfare craft (small boats made of reinforced plastic, about 36 feet in length) along with ancillary equipment and a technical data package suitable for use in future competitive procurements of approximately 28 additional craft. It was awarded to Uniflite on a sole source basis under the negotiation authority provided in 10 U.S.C. § 2304(a)(10)(1976), which permits negotiation where it is impracticable to obtain competition. The determination to negotiate the contract was based upon the following findings by the contracting officer:

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"1. Naval Sea Systems Command proposes to acquire by negotiation * * * Special Warfare Craft Light (SEAFOX) including cradles and trailers, as well as a verified technical data package that will be suitable for the competitive acquisition of future production quantities.

"2. Acquisition by negotiation of the above described craft and technical data package is necessary because only a prototype craft not wholly representative of the craft that is eventually to be acquired, and an unvalidated specification package are available. Additional design, production engineering, and testing effort by the contractor, including the preparation of verified construction drawings will be necessary. The specifications and drawings are not adequate to permit advertised bidding. The prototype craft was constructed by Uniflite, Inc., on the basis of Government designs and drawings and preliminarily tested. Based on testing of the prototype, Uniflite developed and implemented modifications to the prototype design. The available design data is incomplete and not production engineered and validated for use in competitive acquisitions.

"3. Use of formal advertising for acquisition of the above described equipment is impracticable because it is impossible to draft, for a solicitation of bids, adequate specifications or any other adequately detailed description of the equipment."

PROTESTER'S POSITION

While the protester has presented several objections to the award, we believe its protest essentially involves three

major points. (First, Willard maintains that a sole source award for the first eight craft will give Uniflite an unfair competitive advantage in future competitive procurements because of the "learning curve" involved in producing this type of craft.) Specifically, the protester contends that after the first three or four craft are constructed, the cost of producing additional units drops off sharply. Also, Willard calls attention to Defense Acquisition Regulation (DAR) § 3-108(d) (1976 ed.), which states in part that one of the factors to be considered in deciding the number of units to be procured in an initial production contract is the practical minimum quantity suitable to permit the development of the production design and a data package adequate to establish competitive procurement at the earliest practicable date.

(Second, the protester argues that competition is possible because there are many companies capable of building small fiberglass boats.) Willard points out that the basic policy of the procurement statutes and regulations is that procurements are to be conducted on a competitive basis, and believes that the present sole source award is particularly unfortunate in light of the depressed state of the small boat construction industry. The protester maintains the Navy has overestimated or exaggerated the complexity of the Seafax program.

(Third, the protester contends that a sole source award is not in the Government's best interest because it centralizes all program activity in one company, and makes the Government vulnerable should a major catastrophe occur destroying all or a major portion of that company.)

The protester believes that the sole source contract should have been limited to the production of a data package for use in competitive procurements, that the contract for the initial production should have been competitively negotiated, or that the initial production quantity should have been split between two companies.

AGENCY'S POSITION

The Naval Sea Systems Command has pointed out that the Seafox is an extremely complex and dense craft for its size, having a length of only 36 feet and a displacement of 13 tons. Its canopies, roof, windshield, masts and antenna must be readily collapsible, telescoping, or folding, in order to meet stringent transportability requirements. According to the contracting agency, 36 craft are critically needed as soon as possible to replace aging and obsolete craft, most of which are between nine and 20 years old, have seen combat duty in Vietnam and other actions, and are not suited to fulfill the Seafox special warfare mission for which they have been utilized.

In regard to the protester's contention that an unfair competitive advantage is being conferred on Uniflite, the Navy points to decisions of our Office stating that the test is whether the competitive advantage was secured because of some unfair action by the Government, and asserts that no such unfair action exists here. As for Willard's contentions that competition is possible and that a sole source award conflicts with the requirement for maximum practical competition, the Navy submits that its action was entirely reasonable, given what it terms a critical time factor and the lack of a technical data package sufficient for either advertised or competitive negotiated procurement. The agency's view is that under these circumstances, its original plans for a two step formally advertised procurement became impracticable and that it was necessary to contract for an initial production quantity and a data package suitable for use in competitive procurements with the contractor which produced the prototype boat, namely, Uniflite. In regard to the protester's argument that it is unwise to centralize all production in one company, the Navy maintains that splitting the requirements between two contractors would be the least economical method of procurement and would limit instead of maximize competition in future procurements. Further, the agency rejects the protester's suggestion that the procurement from Uniflite be limited to development of a data package, as this would exacerbate an already critical need, and repeats that the competitive procurement of Seafox craft themselves is impossible at this time due to lack of an adequate production data package.

PROTESTER'S REBUTTAL

In response to the contracting agency's report, the protester has commented that the Navy is magnifying the complexity of producing the Seafox craft. Willard states that while the Uniflite may be the only contractor who can complete the data package, it is not the only company capable of building the Seafox. The protester also asserts that contrary to statements in the Navy's report, design of the craft was accomplished by Navy personnel, not by Uniflite. Willard believes that existing drawings it has examined are detailed enough to form the basis for a competitive procurement. In regard to the Navy's assertions of urgency, the protester states that it has been monitoring this program for the past several years and this is the first time any military urgency has been mentioned. Finally, Willard again maintains that splitting the contract between two shipyards would be in the Government's interest because it would protect against any major catastrophe which could totally destroy a single contractor's production capability, and would also help to meet the alleged urgent need for the craft.

DISCUSSION

The protester correctly points out that the applicable procurement statutes and regulations call for competition. DAR §§ 1-300.1 and 3-101(d) (1976 ed.) require maximum practicable competition in negotiated procurement. It has been said, accordingly, that any determination to make a sole source award must be closely scrutinized. See Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402. On the other hand, contracting agencies enjoy a reasonable range of discretion in making such determinations, and our Office has pointed out that the burden is on the protester to clearly show that the agency's determination lacks any reasonable basis. See, for example, Applied Devices Corporation, B-187902, May 24, 1977, 77-1 CPD 362.

In the present case, the protester's contention that a number of companies are capable of making small fiberglass

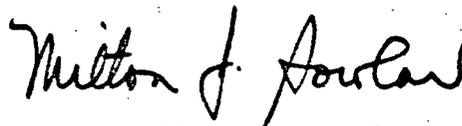
boats like the Seafox has not been contested by the Navy. The Navy's position, rather, appears to be that given a combination of prevailing circumstances--principally, the Navy's conclusion that a data package adequate for a competitive procurement is lacking, along with what the contracting agency sees as a military urgency calling for delivery of an initial quantity of production units as soon as possible--a sole source award is justified. Our Office has declined to disturb sole source awards premised on an agency's reasonably-based conclusion that a data package adequate for a competitive procurement is lacking. See generally Applied Devices Corporation, supra. While Willard argues that it could compete based upon existing data, we do not believe this difference of opinion with the contracting officer's judgment is enough to show that the agency's position has no reasonable basis to support it. Further, a military agency's assertion that there is a critically urgent need for certain supplies carries considerable weight in this type of case, and the burden on the protester to show the unreasonableness of the agency's position can be a particularly heavy one in such circumstances. See in this regard Vega Precision Laboratories, Inc., B-191432, June 30, 1978, 78-1 CPD 467. In the present case, we do not believe the protester has met this heavy burden.

As for the protester's argument that the award should have been split between two companies to protect the Government against any catastrophe which might destroy a sole supplier's production capability, we note that under 10 U.S.C. § 2304(a)(16)(1976) contracts may be negotiated if the Secretary of the agency concerned determines that it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency. The present case, however, does not involve any Secretarial determination to use such authority to make awards to several companies in order to assure an adequate mobilization base for this type of craft. Rather, the contract was negotiated under a determination by the contracting officer that it was impracticable to obtain competition by formal advertising (10 U.S.C. § 2304(a)(10)). In addition, as the Navy points out, it is generally within the discretion of the contracting agency whether to procure its needs in one "package" as opposed to undertaking separate procurements for

divisible portions of its total requirement. In the present case, the Navy has stated that procuring a quantity of fewer than eight craft on the initial production run would leave the Navy in a very critical situation regarding Seafox craft at the time of its first follow-on procurement, a shortfall which would seriously affect the Navy's ability to perform small-scale military actions. In the circumstances, we do not see a basis on the record to say that the Navy's decision to procure all eight of the initial production units from Uniflite clearly lacked any reasonable basis.

Finally, in regard to Willard's argument that the current sole source contract will give Uniflite an unfair competitive advantage in future procurements, we agree with the Navy's view that unless some type of unfair Government action can be shown, the fact that an award may result in a company gaining competitive advantage in future procurements is not in itself objectionable. See generally Telos Computing, Inc., 57 Comp. Gen. 370 (1978), 78-1 CPD 235 and decisions cited therein.

The protest is denied.



Acting Comptroller General
of the United States