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DECISION



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

FILE: B-202904

DATE: August 18, 1981

MATTER OF: McDonnell Douglas Corporation

DIGEST:

1. [Protest against sole-source procurement] is timely and will be considered on merits where protest is filed with GAO within 10 working days after RFP is issued.
2. Protester has not carried burden of proof where evidence presented against agency's determination that sole-source award is required because of time constraints does not clearly show that agency had no rational basis for determination.

McDonnell Douglas Corporation (MDC) protests the award of a contract on a sole-source basis to General Dynamics Corporation (GDC) under request for proposals (RFP) No. 3-361915, issued by the National Aeronautics and Space Administration (NASA).

The procurement is for a modified GDC Centaur upper stage vehicle which will be used with the Space Shuttle to launch space probes. The missions currently planned include the Galileo mission to the planet Jupiter, the International Solar Polar mission, and the Venus Orbiting Imaging Radar mission.

The record indicates that NASA has been studying the suitability of upper stage vehicles for Space Shuttle use since the early 1970's. Originally, NASA intended to use the "Interior Upper Stage" (a solid fuel vehicle) for the Galileo mission; but, after encountering development, schedule, and cost problems, NASA decided to find a substitute. The agency settled on a cryogenic upper stage (a vehicle that uses high-energy gaseous fuels

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which are cooled to a liquid state) since this type of upper stage can provide sufficient power to perform the various missions.

The GDC Centaur is presently in the Government's inventory and has been used with the Atlas and Titan rockets for numerous space shots. To make it suitable for launch from the Space Shuttle, the Centaur will have to be modified.

MDC's S-IVC has evolved from the Saturn family of rockets which have not been in production for about 10 years. Since the S-IVC is a new concept growing out of the original Saturn vehicle, it will require development and testing before it will be ready for use with the Space Shuttle.

NASA decided to award a sole-source contract to GDC rather than conduct a competitive procurement because the modified Centaur is the only upper stage vehicle that can be developed with a minimum of technical and cost risks by the 1985 launch date for the Galileo mission. MDC, however, argues that its S-IVC upper stage vehicle can meet NASA's needs and be ready within the necessary time range (1985-87) required for a successful launch to Jupiter. Thus, in MDC's opinion, NASA has not justified a sole-source procurement.

We find no basis to question this sole-source award.

The threshold question we face is whether MDC's protest is timely. NASA and GDC argue that it is untimely because MDC was on notice no later than March 25, 1981, of NASA's intention to award a sole-source contract to GDC, when the Acting Administrator, NASA, so testified before a congressional committee. According to NASA, this and prior events constituted notification of NASA's final decision (MDC had been corresponding with NASA since December 1980 in an attempt to convince the agency to consider the S-IVC); thus, under our Bid Protest Procedures, 4 C.F.R. § 21.2 (b)(2) (1981), MDC had 10 working days from that date to file its protest here. Since MDC's protest was received in our Office on April 14, 1981, NASA concludes that it was late and should be dismissed. We do not agree.

As a general rule, our Bid Protest Procedures are reserved only for considering whether an award or a proposed award of a contract complies with statutory, regulatory, or other legal requirements. Therefore, we will not consider a protest challenging some aspect of a future procurement, but will dismiss such a protest as premature. See Koolshade Corporation, B-197897, September 2, 1980, 80-2 CPD 164.

In this case, we believe that a protest prior to NASA's issuance of the RFP would have been premature since, up until that time, NASA could have decided to conduct a competitive procurement. Once NASA issued the RFP on April 9, 1981, MDC had a clear basis for protest and was required to file any protest within 10 working days. Since MDC did file a protest with our Office on April 14, 1981, the protest is timely and will be considered on the merits.

However, even if we did not consider April 9, 1981, the critical date in establishing MDC's basis for protest, we would nevertheless conclude that MDC's protest is timely since we do not agree, for the following reasons, with NASA and GDC that MDC was aware of the basis of its protest on March 25, 1981.

By letters of December 17, 1980, and February 13, 1981, MDC urged NASA to consider the use of a competitive procurement for the upper stage vehicle. Included with the February 13 letter were two technical volumes through which MDC attempted to show the value of its approach and the feasibility of competition. NASA reviewed MDC's submission, but concluded that the MDC concept was "not sufficiently mature to support a development program without further study" and that the 1985 launch date for the Galileo mission made further study impractical in view of NASA's past experience with the time required for a competitive procurement cycle. By letters dated March 9, 1981, NASA, as required by law, notified the Speaker of the House and other Members of Congress of its intention to use a modified Centaur with the Space Shuttle. Upon learning of this development, MDC sent a letter to NASA dated March 18, 1981, acknowledging the March 9 letters as NASA's decision to proceed with a sole-source procurement of the modified Centaur, but requesting that this decision be changed and that a competitive procurement be conducted.

We believe that MDC's letter of March 18 was an initial protest to the contracting agency. Even though MDC was aware of NASA's views on the use of a modified Centaur months before its March 18 letter, we do not believe that MDC had a clear basis for protest until it learned that NASA had notified Congress of its intent to procure the modified Centaur. NASA responded to this protest in a letter dated March 24, 1981, explaining for the first time directly to MDC why it would not consider a competitive procurement and, in effect, denying MDC's protest. This, rather than the NASA testimony of March 25, apparently a continuation of NASA's reporting responsibilities to Congress, constituted initial adverse agency action on the protest. MDC received this letter on March 31, 1981. The protester then had 10 working days from that date to file a protest with our Office. See 4 C.F.R. § 21.2(a) (1981). Since we received the protest letter from MDC on April 14, 1981, the tenth working day from MDC's receipt of NASA's March 24 letter, MDC's protest was timely filed and will be considered on the merits.

NASA based the sole-source decision on the following grounds:

- (1) The low technical and cost risks involved in modifying the Centaur in view of its current production;
- (2) Only a modified Centaur could be developed in time to meet the scheduled 1985 launch date for the Galileo mission;
- (3) The risk of increased costs (estimated by NASA at \$50 million per year) if another upper stage was permitted and development fell behind schedule;
- (4) The risk of the project's technical team of scientists, engineers, and technicians being lost to other projects if development of the upper stage fell behind schedule and caused launch delays;
- (5) The existence of facilities at the launch site that can easily be adapted for the handling and checkout of the modified Centaur; and

(6) The general technical superiority of the modified Centaur in view of the S-IVC's use of older technology as well as in view of the greater technical, schedule, and costs risks that would be run because of the extensive development the S-IVC requires.

MDC denies NASA's implication that the modified Centaur is an "off-the-shelf" design which involves few technical or costs risks. In MDC's opinion, the modified Centaur is "every bit as much a new vehicle as is the proposed S-IVC" and involves the same technical, schedule, and cost risks in development.

MDC also points out that the Galileo mission can be launched successfully in either 1985, 1986, or 1987. Thus, it believes that NASA's 1985 deadline for the Galileo launch is misleading since a delay in the launch would not be as serious as NASA implies. As to NASA's claim that a postponement of the Galileo launch would result in an increase in annual costs of \$50 million, MDC questions the validity of such an assertion in view of the lack of supporting data. MDC finds no merit in NASA's concern

over the possible breakup of the NASA technical team if the upper stage development is delayed. In MDC's opinion, this inaccurately implies that this technical team is only working on the Galileo mission so that a delay in developing the upper stage will force NASA to either maintain the team at an increased cost (part of the \$50 million mentioned above) or lose the personnel to other projects. MDC indicates that this scenario is unlikely and, further, is no justification for a sole-source procurement.

In sum, MDC believes that NASA has failed to present any justification for a sole-source award and, since in MDC's opinion both the modified Centaur and the S-IVC are new vehicles requiring considerable development, no real urgency exists which should prevent a competitive procurement.

Sole-source procurements are authorized under 10 U.S.C. § 2304(a)(10) (1976) and NASA Procurement Regulation § 3-210. Because of the requirement for maximum practical competition in the conduct of Government procurements, agency decisions to procure sole-source

must be adequately justified and are subject to close scrutiny. Precision Dynamics Corporation, 54 Comp. Gen. 114 (1975), 75-1 CPD 402.

However, we will not substitute our judgment for that of the contracting agency when reviewing the justification for a sole-source procurement, but will only determine whether the agency decision has a reasonable

basis. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14. The burden is on the protester to make a clear showing that the agency's decision is unreasonable. The Willard Company Incorporated, B-199705, February 18, 1981, 81-1 CPD 102.

One of NASA's arguments is that time is of the essence and that only one known source (GDC) can meet the required timeframe--a 1985 launch for the Galileo mission. We have recognized that this circumstance alone can justify a sole-source award. Design and Evaluation, Inc. B-193128, June 28, 1979, 79-1 CPD 466.

MDC has argued that the Galileo mission does not have to be launched in 1985, but can be successfully undertaken in either 1986 or 1987. NASA, however, maintains that delaying the launch beyond 1985 will increase the time required for the mission due to a change in trajectory and that this will affect mission reliability (the longer the mission, the greater the opportunity for malfunction) and mission cost (a longer mission will increase costs because the program team will have to be held together for an additional 2 years).

We believe that the timing for the launch of a space mission is clearly within NASA's discretion. We have held that mere disagreement with a contracting agency's discretionary decision is not grounds to disturb it. See, e.g., James G. Biddle Company, B-196394, February 13, 1980, 80-1 CPD 129. Thus, while MDC clearly disagrees with the importance of a 1985 launch, it has not shown that NASA's decision to make that date its goal is unreasonable. Under the circumstances, we find no basis to question NASA's 1985 deadline.

With the first launch fixed for 1985, NASA then concluded that only GDC could furnish an upper stage vehicle within the required timeframe. MDC, however, argues that if NASA used an expedited procurement cycle then, if successful, MDC could have its S-IVC ready for a 1985 launch. MDC concludes, therefore, that GDC is not the only source capable of meeting NASA's timeframe.

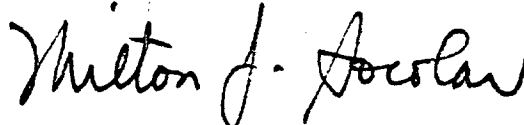
In response, NASA states that an expedited procurement cycle is not feasible. According to NASA, a competitive procurement, even MDC's expedited version, would make it impossible for an upper stage vehicle to be ready in time for the 1985 launch date because an acceptable upper stage would not be available until 1987. It reaches this conclusion because MDC's approach is not mature enough to permit development to begin immediately, but requires further in-depth design study. According to NASA, such studies have already been completed for the modified Centaur. Therefore, NASA argues that under the particular

circumstances of this case, a competitive procurement would take 18 to 24 months to complete, thus delaying the first launch until 1987; in contrast, the modified Centaur can be put into development immediately and the 1985 launch date met.

MDC questions NASA's conclusions on both the amount of further study required for its S-IVC and the ease of modifying GDC's basic Centaur vehicle. However, MDC has not shown that NASA has acted unreasonably, but only that it can be argued that NASA's various assumptions are incorrect. As noted above, MDC must make a clear showing that NASA's sole-source determination is unreasonable. In our opinion, this burden is not met where, as here, the protester presents evidence which, although raising questions regarding the wisdom of the agency's technical and discretionary judgment, does not prove that the agency's decision is without a rational basis. See, e.g., EMI Medical, Inc.; Picker Corporation, B-195487, February 6, 1980, 80-1 CPD 96.

We conclude, therefore, that MDC has not shown that NASA has no rational basis for making a sole-source award to GDC on the grounds that only GDC's modified Centaur can be ready by the 1985 launch date for the Galileo mission.

Protest denied.

A handwritten signature in cursive script that reads "Milton J. Socolar".

Acting Comptroller General
of the United States