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DECISION

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

FILE: B-208504 **DATE:** April 14, 1983

MATTER OF: Stryker Corporation

DIGEST:

1. Where protester alleges that solicitation's specifications for recovery bed stretchers are unduly restrictive of competition, contracting agency is required to make prima facie case that specifications are related to its minimum needs. However, once contracting agency has made such a case, protester must bear burden of affirmatively proving its case. Protester fails to carry this burden when its arguments do not clearly show that agency's determination of its actual minimum needs has no reasonable basis.

2. Agency decisions to procure sole source must be adequately justified and are subject to close scrutiny by GAO. Agency did not justify protested sole-source procurement of transport, pediatric and X-ray stretchers based on need for compatibility and interchangeability of stretcher parts. Other reasons for sole-source procurement, such as ease of training hospital staff and ease of handling the stretchers, provides no basis by itself for restricting competition where "training" is no more than simple, routine demonstration of the equipment.

Stryker Corporation (Stryker) protests the Army's issuance of request for proposals (RFP) DAKF23-82-R-0066 and award of a contract on a sole-source basis to Hausted Gulf & Western Healthcare, Inc. (GW).

The RFP called for the supply of 71 hospital stretchers to be used at the newly constructed hospital at Fort Campbell, Kentucky. An award pending the protest was made on October 14, 1982, because the Army determined that the stretchers were essential patient care equipment that the new hospital needed in order to be fully equipped when it opened.

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Stryker contends that there was no reasonable basis for the Army's decision to use GW as the sole source for the stretchers because such a decision resulted merely from the personal preference of a few members of the hospital staff at Fort Campbell. Stryker also charges that the Army misled Stryker about proceeding on a sole-source basis in a deliberate attempt to eliminate competition for the required stretchers.

For the reasons set forth below, we deny the protest in part and sustain it in part.

Background

Four types of stretchers were needed for the newly constructed hospital at Fort Campbell: (1) pediatric, (2) recovery bed, (3) transport and (4) X-ray. The stretcher requirements submitted to Fort Campbell's contracting division by the using activity included the requirement that recovery bed stretchers have dual side-mounted controls for rapid elevation in emergency situations. The using activity also requested that all four types of stretchers be manufactured by the same company.

After searching the Federal Supply Schedule (FSS) for vendors meeting the above-described requirements and after telephonic contact with known manufacturers of hospital equipment, the contracting officer concluded that no manufacturer other than GW could provide the required stretchers. A sole-source justification for the procurement was prepared on May 7, 1982, and the RFP was issued to GW on July 20, 1982.

By letter dated July 29, 1982, and received by this Office on August 3, 1982, Stryker protested the restricting of the RFP to GW and its dealers.

Recovery Bed Stretchers

Stryker admits that it does not manufacture recovery bed stretchers having dual side-mounted controls. However, Stryker asserts that side-mounted controls do not improve the functioning of recovery bed stretchers and, in emergency situations, interfere with the stretcher's use. More specifically, Stryker alleges that during an emergency, there will be a doctor at the patient's side in addition to the nurse who operates the stretcher's controls. According to

Stryker, the physician would have to step away from the patient in order for the nurse to operate the side-mounted controls. Such placement of the controls, in Stryker's opinion, presents a "severe and potentially life-threatening disadvantage" in emergency situations. Stryker argues that the advantage of speedy and easy access to stretcher controls in an emergency situation is gained when the controls are located at the head and foot of the stretcher, as is the case with those made by Stryker.

Stryker also points out that the requirement for side-mounted controls does not involve emergency room stretchers, but instead involves stretchers that are to be used in recovery rooms where, according to Stryker, emergency situations ordinarily do not arise.

The Army states that the largest part of the protested procurement in numbers and dollar amount consisted of the 41 dual side-mounted recovery bed stretchers which only GW manufactured. The Army further states the stretchers are for a new hospital and that the Army's medical personnel determined that the "latest" in recovery bed stretchers was essential to improved patient care. In this regard, the Army argues that, if new, improved items cannot be purchased because some contractors are unable to furnish them, the Government is reduced to purchasing what has been used before, regardless of the Government's needs. The Army disputes Stryker's contention that the dual side-mounted controls do not improve the stretcher's function. The Army states, instead, that it is "easier and quicker" for an attending doctor or nurse to treat a patient and operate a stretcher with side-mounted controls than with end-mounted controls. Consequently, the Army contends that dual side-mounted controls are a critical feature in emergency situations and improve patient care.

The Army also disputes Stryker's contention that the selection of GW as the only supplier was based on the personal preference of some of the Army's medical personnel. The Army emphasizes that the contracting officer questioned the using activity's request to purchase solely from GW. The Army states that only after conducting his own investigation did the contracting officer conclude that GW was the sole manufacturer of recovery bed stretchers with dual side-mounted controls. Thus, the Army asserts that the determination to purchase these stretchers from GW was reasonable.

In response, Stryker claims that the Army's efforts have from the beginning been directed to eliminating competition rather than fostering it. First, Stryker alleges that, despite knowing in early May 1982 that the procurement would be on a sole-source basis, the Army concealed this from Stryker until the end of July 1982. Second, Stryker asserts that the Army has said nothing to contradict the alleged fact that the RFP's specifications were specifically drafted around a single company's product and that the company was selected exclusively on the basis of a personal preference rather than upon performance criteria. Finally, Stryker notes that the Army's sole-source justification related to just one of the four types of stretchers required by the RFP, but that the Army proceeded to award the entire procurement on a sole-source basis to GW.

GAO Analysis

In determining the propriety of a sole-source award, the standard this Office applies is one of reasonableness; unless it is shown that the contracting agency's justification for a sole-source award is unreasonable, we will not question the procurement. Diesel Parts of Columbus, B-200595, July 20, 1981, 81-2 CPD 50.

Here, the protester is challenging the agency's sole-source procurement of recovery bed stretchers on the basis that one of the technical requirements for the stretchers was unduly restrictive of competition. In this regard, we note that the determination of the Government's minimum needs and the best method of accommodating those needs are primarily the responsibility of the contracting agency. Walter Kidde, Division of Kidde, Inc., B-204734, June 7, 1982, 82-1 CPD 539. More specifically, we have recognized that the Government procurement officials are generally in the best position to know the Government's actual needs, since they are the ones most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future. Consequently, we will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. Frequency Electronics, Inc., B-204483, April 5, 1982, 82-1 CPD 303.

However, when a protester challenges a specification as unduly restrictive of competition, the burden is on the procuring agency to establish prima facie support for its contention that the restrictions it imposes are needed to

meet its minimum needs. But, once the agency establishes this prima facie support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. Mid-Atlantic Industries, Inc., B-202682, August 26, 1981, 81-2 CPD 181. Also, we have consistently held that in technical disputes, a protester's disagreement with the agency's opinion does not invalidate that opinion. Carolina Concrete Pipe Company, B-192361, March 4, 1981, 81-1 CPD 162; Tyco, B-194763, B-195072, August 16, 1979, 79-2 CPD 126.

As indicated above, the Army has defended its decision to restrict this procurement to GW by presenting evidence showing that having a stretcher with dual side-mounted controls facilitates both patient treatment and the operation of the stretcher itself. The Army's evidence reveals that a recovery bed stretcher having dual side-mounted controls permits the nurse to remain at the patient's side along with the physician to provide medical care in any critical, life-threatening situation that might occur following surgery. We find that this is the prima facie support that the contracting agency is required to provide when a protester challenges a specification as unduly restrictive of competition. In view of this, we conclude that the burden is on Stryker to prove that the Army's requirement for dual side-mounted controls was clearly unreasonable.

Stryker has offered a sworn statement from its president in rebuttal to the Army's position regarding the need for recovery stretchers having dual side-mounted controls. Stryker's president avers that "stretchers in and of themselves do not constitute a life-saving device and do not thereby create a medical emergency." Stryker also asserts, as stated above, that the placement of the stretcher controls at the side presents a life-threatening disadvantage in crucial situations. Stryker's basic position, though, is simply that the stretchers are not for emergency room use, but are instead to be used in hospital recovery rooms. However, Stryker does not rule out entirely that emergencies will occur during postoperative recovery. In view of the possibility of a medical emergency occurring during recovery, we are not prepared to find unreasonable the Army's need for stretchers having dual side-mounted controls.

With regard to Stryker's contention that placement of stretcher controls at the side creates a life-threatening disadvantage during emergency situations, we fail to understand the basis of Stryker's allegation that the attending physician will have to step away from the patient

in order for the nurse to have access to the stretcher controls. We presume that the reason the Army wanted dual controls on the recovery stretchers was because in emergency situations the nurse can operate the stretcher without interferring with what the physician is doing.

As to Stryker's argument that the Army misled Stryker about proceeding on a sole-source basis, the record shows that the Army did not complete its sole-source justification for this procurement until May 11, 1982. As noted above, the RFP itself was not issued until July 20, 1982, and Stryker was furnished a copy of the solicitation at approximately the same time. While the Army could possibly have notified Stryker of its position much earlier in the procurement process, we do not find that Stryker was in any way prejudiced by the Army's failure to inform the company of its sole-source intentions until July 1982. Upon learning of the Army's proposed sole-source award to GW, Stryker immediately filed a protest with our Office. No award had been made at the time. Rather, the Army's decision to award pending resolution of Stryker's protest was based on urgency, that is, the Army determined that the stretchers were essential patient care equipment that had to be on hand when the new hospital at Fort Campbell opened.

In this regard, Stryker also contends that the Army's failure to timely inform it that the procurement would be conducted on a sole-source basis deprived Stryker of the opportunity to participate in the evaluation of the relative technical merits of GW's recovery stretcher in comparison to Stryker's recovery stretcher. Citing our decision in Maremont Corporation, 55 Comp. Gen. 1365 (1976), 76-2 CPD 181, Stryker argues that it should have been given the opportunity to observe the Army's "testing" of its stretcher with GW's stretcher. According to Stryker, Maremont, in part, stands for the proposition that, if a procurement is to stand on the basis of the testing of competing companies' products, the testing must be conducted in the "open" following full disclosure to all interested parties. Consequently, Stryker asserts that the contract award to GW must be nullified because of the Army's failure to fairly and openly test the stretchers.

Stryker's arguments are based on the assumption that its stretcher and GW's stretcher were subjected to testing by the Army. This assumption is, in turn, based on the

following language in a memorandum dated December 9, 1981, from the hospital staff at Fort Campbell to the contracting division at Fort Campbell:

> "The Department of Nursing Standardization and Equipment Committee was charged with the responsibility for developing criteria for wheeled stretchers for the new hospital. These criteria should address such factors, as the intended uses of the equipment, the required features of the equipment, and the flexibility of the equipment. The mechanism for accomplishing this objective was to have a committee member coordinate with appropriate using services to determine requirements, data on use and to review the product literature. On 24 July 1981, the criteria were approved. Both the Hausted [GW] and Stryker wheeled stretchers were evaluated using the predetermined criteria. Based upon this objective evaluation, Hausted was found to meet more of the criteria and was ordered as the standard wheeled stretcher."

We find nothing in the foregoing language to indicate that either Stryker's stretcher or GW's stretcher was subjected to any testing. Rather, the commercial product literature of the two companies was compared with already determined stretcher criteria. Further, the memorandum language clearly shows that the stretcher criteria were developed based on the actual needs of the hospital activities that would be using the stretchers. Consequently, we do not find anything inappropriate in the way the Army's minimum needs for the recovery bed stretchers were developed.

Finally, Stryker contends the Army could have taken positive steps designed to promote competition by either procuring off the FSS or by entering into negotiations with interested stretcher manufacturers. With regard to the FSS, the record shows that the Army contracting officer did research all schedule contracts for all potential sources of recovery bed stretchers, but found no manufacturers other than GW that could provide a recovery bed stretcher with side-mounted controls on both sides of the stretcher. As to entering into negotiations with all interested stretcher manufacturers, there first must be more than one manufacturer who can meet the agency's minimum needs before there can be negotiations.

This portion of the protest is denied.

Other Stretchers

Stryker argues that, even if we do conclude that a sole-source procurement was justified for the 41 recovery bed stretchers, the justification would not apply to the remainder of the Army's stretcher procurement because side-mounted controls were not required for the other 30 stretchers. In Stryker's opinion, the Army should have at least broken out these other stretchers from its sole-source procurement for the recovery bed stretchers. According to Stryker, the Army's award to GW violated applicable procurement regulations requiring the maximization of competition since the purported sole-source justification extended to only a portion of the entire procurement.

The Army states that the procurement of the other 30 stretchers on a sole-source basis was consistent with the requirement of the new hospital at Fort Campbell to have a full line of stretchers from a single contractor. In this regard, the Army emphasizes that this fulfilled the hospital's need for equipment "standardization and interchangeability." The Army goes on to state that there is no better time to achieve the goal of "standardization" of equipment within one facility than the time when that facility is being opened. Finally, the Army states that, with regard to the nine pediatric stretchers required by the RFP, Stryker had informed the Army that it did not manufacture pediatric stretchers.

In response, Stryker claims that it is ready, willing and able to supply pediatric stretchers conforming to the Army's requirements. Stryker has submitted an affidavit to this effect from its vice president, Medical Products Division.

GAO Analysis

Because of the requirement in Federal procurements for maximum practical competition, agency decisions to procure sole source must be adequately justified and are subject to close scrutiny. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402.

Here, the Army justifies the additional procurement of the pediatric, transport and X-ray stretchers from GW on the grounds that all the stretchers for the new hospital at Fort Campbell had to be manufactured by the same company to facilitate training of hospital staff, to assure easier

handling of the stretcher controls, particularly during emergencies, and to achieve interchangeability of component parts. Specifically, the Army states that the GW stretchers have the controls located in similar locations, have the same braking and locking mechanisms, have similar operating features, and have interchangeable component parts and standardization.

We have recognized that a sole-source procurement is justified where it is necessary that the desired item manufactured by one source be compatible and interchangeable with existing equipment. See Environmental Protection Agency sole source procurements, 54 Comp. Gen. 58 (1974), 74-2 CPD 59. While the Army has shown compatibility of parts in the various types of stretchers manufactured by GW, it has not shown why such compatibility is necessary for the continued functioning of the stretchers. Moreover, standardization is inappropriate unless there has been a prior competitive procurement for the equipment. Cf. Julie Research Laboratories, Inc., B-199416, June 16, 1981, 81-1 CPD 493. Further, the record shows that the contracting officer found that two other companies could provide transport and X-ray stretchers that had "similar" mechanical features to GW's. These two companies were rejected by the contracting officer as sources of supply because they did not make a "full line of stretchers."

With regard to the Army's justification that having all the new hospital stretchers manufacturered by the same company will facilitate training of the hospital staff and also assure easier handling of the stretchers, we find nothing in the record to support this conclusion. The record does indicate that the stretchers have few operating devices other than some type of lift controls for the backrest and some type of braking and locking mechanism. It appears to us, that the "training" contemplated by the Army for the staff at the hospital is not much more than a routine, simple demonstration of the above-described operation devices and therefore is no basis by itself for restricting competition.

This portion of the protest is sustained.

However, notwithstanding the foregoing, we are unable to recommend that the portion of GW's award for transport, pediatric and X-ray stretchers be terminated for the convenience of the Government. The record shows that the awarded contract provided for the delivery of all stretchers

within 30 days and that all the required stretchers were delivered by GW to the Army on November 13, 1982. Stryker urges that the appropriate remedy should be the cancellation of GW's contract. Cancellation is reserved for contracts illegally awarded and an illegal award results only if it was made contrary to statutory or regulatory requirements because of some action or statement by the contractor or if the contractor was on direct notice that the procedure being followed was violative of the requirements. 52 Comp. Gen. 215, 218 (1972). Since there is no indication in the record that GW was aware that the Army's rationale for the sole-source award was, in part, not legally sound, the award must be considered improper rather than illegal. Consequently, the only theoretically available remedy here is termination for convenience. See System Development Corporation, 58 Comp. Gen. 475 (1979), 79-1 CPD 303. But, even if cancellation is the remedy, no corrective action is possible at this time since the contract has been performed. See 40 Comp. Gen. 447 (1961).

for Harry R. Van Cleve
Comptroller General
of the United States