DECISION

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

26249

FILE: B-212579

DATE: September 16, 1983

MATTER OF: Design Pak, Inc.

DIGEST:

1. Protest is sustained where agency justified sole-source award on the bases that only the design of the awardee's product had been adapted to the Government's needs and that alternate products could not be considered given the required delivery dates and the time needed for other firms to design, test and initiate production of a satisfactory alternate product, where the record shows that producers of comparable products could have satisfied the Government's minimum needs equally well if given the opportunity and that they would have had time to meet the Government's required delivery dates if the agency had initiated competition when its needs were first known.

2. Protest is sustained where agency justified non-competitive award on basis of public exigency, but record shows that competition was possible through use of expedited procedures.

3. Agency belief that article to be procured was subject to patent claim does not justify decision to award sole-source contract,since such a claim, standing alone, does not justify sole-source negotiated award to purported patent holder where competition is otherwise possible.

Design Pak, Inc. protests the sole-source award to Unique Packaging Sales Corporation of Treasury Department contract No. TM83-1046 to produce up to 300,000 presentation cases for Olympic coins. Design Pak asserts that a sole-source award was improper because other qualified producers of coin cases could have satisfied Treasury's requirements in a timely manner. We sustain the protest.

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Subsequent to filing this protest, Design Pak brought suit in United States District Court for the District of Columbia (Civil Action No. 83-2628). The court has issued an order restraining Treasury from authorizing production under Unique's contract and has requested that we issue an opinion on the issues raised by Design Pak in order to aid the court in rendering its decision.

Background

The Olympic Commemorative Coin Act, Pub. L. No. 97-220, approved July 22, 1982, 96 Stat. 222, directed the Secretary of the Treasury to issue silver coins of a face value of $1 and gold coins of a face value of $10 to commemorate the 1984 Summer Olympics to be held in Los Angeles. The Act further directed that those coins sold domestically would bear a premium price, with net profits to go to the Olympic committees. Within the United States, the coins are to be sold directly by the U.S. Mint; outside the United States, the coins are to be sold by a private marketer selected in accordance with the criteria of the Act.

In January, 1983 Treasury issued its request for proposals to select an international marketer; proposals were received on February 28. Negotiations were then conducted with several offerors during March and April. During the course of these negotiations, the firm ultimately selected, Maison Lazard et Cie, Paris, proposed packaging the coins in several ways not previously considered by Treasury, including the one at issue in this protest, designated the Prestige Set, consisting of 6 proof coins: an Olympic silver dollar together with the "usual" annual United States half-dollar, quarter, dime, nickel and penny. Lazard indicated that the Royal Canadian Mint had been very successful in offering a similar proof set packaged in a book-type presentation case, consisting of a leather folder and plastic coin holder, manufactured by Unique. Lazard stated that if it won the international marketing rights, it intended to offer the Prestige Set using Unique's case as modified for the United States coins.

On May 3, 1983, the rights to market Olympic coins on the international market were awarded to Lazard. On that same date, Treasury decided that any product made available to consumers on the world market must also be made available to the domestic market, and the Prestige Set was added to the U.S. product line for Olympic coin sales.

The record is not clear as to precisely what occurred between May 3, when Treasury decided to add the Prestige Set to its domestic product line, and July 21, when Treasury entered into a letter contract with Unique for 100 first article cases for testing and approval. Apparently during May or June, Treasury contacted the Royal Canadian Mint in order to obtain its agreement for Treasury to use the presentation case developed by Unique. This agreement was formalized in a letter dated June 27 from the Master of the Royal Canadian Mint to the Director of the Bureau of the Mint, in which he stated that the Royal Canadian Mint would "release [its] restraints on [its supplier] Universal Packaging to use our design * * *." In addition, he advised:

> " * * * Patents and copyrights have been registered on this product both in Canada and the United States for us by our packaging supplier, Universal Packaging in Montreal."

However, this assertion appears to have been incorrect so far as U.S. patents are concerned, although Treasury was not aware of that fact at the time.

It is also apparent from the record that at that time, Treasury understood Unique to be a subsidiary of Universal Packaging. In comments filed with our Office as an interested party to this protest, Unique stated that it "is an autonomous company incorporated in New York State and is not a subsidiary * * *." Whether this means that Treasury's earlier understanding that Unique was a subsidiary of a Canadian corporation was in error, or that Unique's status simply has changed, we cannot tell.

The July 21 letter contract was replaced on August 30 by an indefinite quantity contract which permits the Government to order up to 300,000 cases with delivery scheduled between September 12 and December 10, if ordered by designated dates. Treasury also issued an initial production order for 59,500 cases on August 30, but we understand that Unique was not authorized to produce those units pending first article approval. During the period September 2 through 9, Treasury mailed some 1,700,000 illustrated brochures depicting the Prestige Set and three other coin sets, offering delivery by Christmas for orders received by November 1.

Prior to executing the letter contract with Unique on July 21, the contracting officer prepared a Justification for a Non-Competitive Procurement, dated July 19, and Findings and Determination authorizing negotiation, dated

July 21. In these documents, he concludes that because of public exigency a sole-source award to Unique is necessary, in that only Unique can meet Treasury's requirements for the requisite high quality presentation cases in the quantities needed to satisfy anticipated Christmas sales. This is so, these documents state, because (1) the Unique case, previously developed for the Royal Canadian Mint, could be readily modified, while other producers would require an estimated 6 months to develop a similar high quality case; (2) because of Unique's patent rights; and (3) because the competitive selection of a new contractor would require time for solicitation, review and award. These documents also state that any other firm would have to develop new molds, at an additional cost to the Treasury, and that a specification adequate for competitive procurement will be developed to permit solicitation for future requirements after this initial urgent purchase for the 1983 Christmas marketing period.

The Protest

In its initial letter of protest, Design Pak raised 6 objections to the award to Unique: (1) there in fact was no exigency justifying the sole-source award to Unique and the procurement should have been competitive; (2) Unique's "patent" does not seem to exist; (3) award to Unique violated the Buy American Act, 41 U.S.C. §§10a-d; (4) under Unique's contract, the Treasury will pay the cost of making new molds when those from the 1972 Carson City Silver Dollar program may be used and are still available; (5) the cost of Unique's packaging is excessive and will discourage sales and (6) Unique's book-style case has a "major disadvantage" in that one side of the coins will be displayed upside down.

Subsequent to its initial protest, the last three of these arguments either were not pursued before our Office and the District Court or were shown to be in error--probably attributable to the limited factual information available to Design Pak when it filed its protest. We therefore see no need to discuss them. The most significant issue is whether there was an adequate justification for negotiating this contract on a sole-source basis. The resolution of this issue necessarily includes consideration of whether Treasury properly concluded that patent rights militated against a competitive procurement. We also consider the protester's Buy American Act argument, although for the reasons stated below, we do not think that statute prohibits an award to Unique.

Design Pak contends that the circumstances of this procurement do not constitute a public exigency, pointing out that Treasury frequently delivers coins after the year they are minted and that Treasury had an ample number of alternative coin sets available for marketing during the 1983 Christmas season, so that sole-source award of a contract of an entirely new case for the Prestige Set was not warranted.

Design Pak argues further that there are other producers of the time-critical portion of the case--the plastic coin holder--fully qualified to manufacture a case of the quality desired if given the opportunity, and furnishes statements from two such firms asserting their interest.

Treasury counters that an exigency does indeed exist, in that it expects sales for Christmas 1983 to be a significant portion of the total sale of the Olympic coins and that the Prestige Set is considered particularly appropriate for such sales. Consequently, Treasury says that, in order to assure a supply of coin cases for this purpose, it was necessary to begin receiving cases by mid-September. According to Treasury, only Unique was in a position to make initial deliveries within the time required. All parts of the Unique case, other than the plastic coin holder, were in production for the Royal Canadian Mint and, for them, only minor changes (such as color and emblem) were needed. As for the coin holder, molds for it were made or in production for the international marketer, Lazard. Therefore, based on the estimate of U.S. Mint and Royal Canadian Mint officials that up to 6 months would be required for a new manufacturer to develop and produce a display case of the type and quality sought, it was determined to negotiate a contract with Unique as the sole-source of supply and that a public exigency existed that did not permit the time for formal advertising.

According to Treasury, it now appears that Unique does not hold a U.S. patent, but that Treasury's concerns, based on the best information available to it at the time, were legitimate. Moreover, a special agreement with the Royal Canadian Mint was contemplated to permit Treasury to market the Prestige Set in Canada, which, if another firm produced the case, would have violated Canadian patents. Further, as a matter of comity with the Royal Canadian Mint, its understanding as to ownership of the rights to the design should be honored.

As to the Buy American Act, Treasury argues that Unique is furnishing a domestic end product, but that even if the Act were to apply, under existing trade agreements with Canada the provisions of the Act are waived.

Discussion

When a procurement is negotiated, proposals must be competitively solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services being procured. Federal Procurement Regulations § 1-3.101(d). For this reason, our Office closely scrutinizes sole-source procurements. We will, however, uphold such procurements if there is a reasonable or rational basis for them. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402.

Presumably, no contracting activity will make a sole-source award without believing such action is in the Government's best interests. However, such an award may not be justified merely on the belief that the potential awardee is best qualified. Aero Corporation, 59 Comp. Gen. 146 (1979), 79-2 CPD 430. Further, administrative expediency or convenience by itself provides no basis for restricting competition, and an agency must reasonably attempt to ascertain the existence of alternative sources. Las Vegas Communications, Inc.--Reconsideration, B-195966.2, October 28, 1980, 80-2 CPD 323. Consequently, while we have recognized that procuring agencies should have flexibility in defining their needs, their discretion has never extended to approval of sole-source procurements when the facts show that the company selected was not the only company qualified to perform the contract. Aero Corporation v. Department of the Navy, 540 F. Supp. 180, 208 (D.D.C. 1982). Implicit in that firm principle is an assumption that a procuring officer has not discharged his obligation to pursue competition if, before competition could have begun, he preemptorily selects the "best" company. Id.

Here, the procuring agency's decision to award on a sole-source basis is premised, in part, upon the conclusion that only one manufacturer, Unique, is capable of producing a case that satisfies its minimum needs in the time available. Such determinations of the Government's minimum needs and the best methods 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 procuring 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 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. For the reasons stated below, we believe such a showing has been made in this case.

We recognize that Unique had previously designed and developed a very similar, suitable coin case for the Royal Canadian Mint; that the international marketer of Olympic coins, Lazard, had already arranged to have that case adapted by Unique for the Olympic Prestige Set; and that the case in question undoubtedly would satisfy Treasury's requirements. However, despite the apparent administrative convenience of procuring from Unique in those circumstances, we are not persuaded that it was reasonable for Treasury to believe that only Unique's case met Treasury's minimum needs, which are described in the sole-source justification as a "high quality, physically attractive presentation case * * * precisely molded to assure desirable coin orientation," assembled in an exacting manner so that "the completed case maintains the dignity of U.S. coinage." Instead, we believe that Treasury confused its minimum need for a presentation case that satisfied its performance requirements with the characteristics and measurements of Unique's particular case which happened to satisfy those requirements. In fact, Treasury's insistence that only Unique can satisfy its requirements is called into question by its statement that future procurements of this case will be competed.

The record shows that Treasury first became aware of Lazard's proposal to market the Prestige Set during negotiations in March and April for the international marketing rights and that, as indicated in the sole-source justification, by the time of award to Lazard on May 3, Treasury had decided to also market the same set domestically. Consequently, Treasury was in a position to commence initial planning for procuring the cases some time in the early spring of 1983, and in a position to actually solicit in early May of 1983. The record is not clear in this regard, but it appears that the time between early May and mid-July was used instead to discuss with the Royal Canadian Mint and Unique the purchase of Unique's case.

First deliveries under Unique's contract are scheduled for mid-September, but the bulk of the deliveries occur in October, November and early December. Moreover, at least one potential supplier of the plastic coin holders has stated in connection with this protest that it has produced as many as 190,000 plastic coin holders per week, which would permit even later initial deliveries, towards the end of November. Thus, Treasury had available 5 to 6 months between the time it first determined to market the Prestige Set and the date deliveries of the coin cases were required.

Treasury's technical experts estimate that 6 months would be required for the design, manufacture and testing of new molds and for initial production. This appears to be based upon the Royal Canadian Mint's advice that, based on its experience, it will take a new producer 14 weeks to fabricate a suitable mold and 24 weeks to initiate production, a period closer to 5 months.

Given the approximately 5 to 6 months available from the date Treasury decided it would market the Prestige Set until the dates deliveries of the cases were required, we do not believe that the fact that an estimated 5 to 6 months would be required for a new producer to make deliveries can be said to reasonably justify a sole-source procurement. Of course, if the other producers were to offer an alternate high quality case, based on their own products or a modification to Treasury's commemorative coin case molds, that time would be markedly reduced, just as it was for Unique.

In these circumstances, we believe that Treasury was required to solicit for alternative proposals that might also have satisfied its need for an appropriate case for the Prestige Set. See Viereck Company, B-209215, March 22, 1983, 83-1 CPD 287. Had this been done, the forces of competition might well have encouraged offerors to use their ingenuity and inventiveness in proposing designs and approaches that could also have satisfied Treasury's actual needs. See Auto-Trol Corporation, B-192025, September 5, 1978, 78-2 CPD 171. Such alternative designs could have been based upon Treasury's existing commemorative coin molds; privately produced items not known to Treasury; or completely new designs with accelerated production schedules.

As to Treasury's contention that it did not have adequate time to conduct a competitive procurement in these circumstances, urgency can only be used as a justification for sole-source procurement where the agency finds that only one known source can meet the Government's needs in the time required. See Amdahl Corporation, B-191133, October 18, 1978, 78-2 CPD 284. A decision to make a sole-source award based on urgency is unreasonable if the agency had adequate time to assess its needs and conduct a more competitive procurement, Las Vegas Communications, Inc.--Reconsideration, supra, but failed to do so or otherwise took improper action which created the urgency.

International Business Machines Corporation, B-198094.3, September 29, 1981, 81-2 CPD 258. In this connection, we recognize that the usual competitive procedures must be subordinated if necessary in order to obtain competition through shortened response times, telegraphic or oral offers and negotiations and other short-cuts. See e.g., Las Vegas Communiations, Inc.--Reconsideration, supra. See also U.S. Financial Services, Inc., B-197082, August 7, 1981, 81-2 CPD 104.

We cannot disagree with Treasury's position, presumably based on its coin marketing exerience over the years, that increased sales of Olympic coins could be anticipated if they were available for gift giving in the 1983 Christmas season. Further, we see no basis to question Treasury's judgment that it would be highly desirable to market the Prestige Set in this period. To this extent, we agree that Treasury was faced with an urgent procurement, if not an actual public exigency.

However, we cannot agree that the need to have the Prestige Sets available for Christmas sales justified sole-source award to Unique for reasons of public exigency, since Treasury has not shown that the time available was inadequate to conduct a competitive procurement. While the time necessary for such an abbreviated procurement cannot be estimated with certainty, it could be a matter of a few weeks, since it took Treasury slightly more than 2 months after date of solicitation to award other coin case contracts for the Olympic coin program under its formalized procedures. In summary, we do not believe the record reasonably supports Treasury's contention that sole-source award to Unique was necessary in order to meet its objective of marketing the Prestige Set during the 1983 Christmas season.

As to Treasury's earlier reliance upon Unique's patent rights, as vested in the Royal Canadian Mint, to justify sole-source award, it appears that this reliance was misplaced. Treasury now advises that it knows of no U.S. patents that relate to Unique's coin case design.

Treasury also asserts that the Canadian patents would have interfered with a contemplated plan for Treasury to market the Prestige Set directly to the customers of the Royal Canadian Mint, but does not explain how this was to be accomplished consistent with its agreement to give international marketing rights to Lazard. Treasury states further that, while not legally determinative, and as a matter of comity, Treasury would not wish to endanger its working agreements with the Royal Canadian Mint, but does not explain how such interest in cooperation can overcome the statutory mandate for competition.

Further, had competition been conducted, it is far from certain that Unique's precise design would necessarily have been adopted by its competitors, since Treasury's actual needs, as discussed above, may have been satisfied through alternative designs. In any event, the possibility of patent infringement is not an adequate basis for sole-source award because contractors are relieved of liability for infringing patents under Government contracts. 28 U.S.C. § 1498. Consequently, all potential sources should be permitted to compete for Government contracts regardless of possible patent infringement. American Sealcut Corporation, B-201573, April 28, 1981, 81-1 CPD 327.

Finally, to the extent that Treasury's sole-source justification relies upon the cost savings thought possible because Unique's coin holder mold had already been fabricated at no cost to Treasury, such reliance was also misplaced. Whatever the contracting agency's conclusions as to the potential for price competition, it may not be the grounds for the sole-source award of a contract. Olivetti Corporation of America, B-187369, February 28, 1977, 77-1 CPD 146. We note that the cost of a mold, perhaps as much as fifty thousand dollars, would be only a minute fraction of Unique's total contract price of $1,632,000 if all quantities are ordered.

With respect to the protester's contention that the award of the contract to Unique violated the Buy American Act, 41 U.S.C. §§ 10a-d, there are conflicts in the record both as to where the coin case is manufactured and as to the applicability of the Act to this procurement. Although Treasury maintains in its report to our Office that Unique's product is "substantially manufactured in the United States," as the protester points out, the definitized contract indicates that the leather case is to be manufactured in Canada, which is identified as the "principal place of performance." According to the protester, the leather case accounts for approximately 85 percent of the total cost of the item. Treasury also maintains that in any event, as a matter of law the Buy American Act is inapplicable to this procurement, having being waived pursuant to the Trade Agreements Act of 1979, Pub. L. 96-39, 19 U.S.C. §§ 2511-2518 and Executive Order No. 12260, December 31, 1980. The protester contends that Treasury is in error because the International Agreement on Government Procurement, implemented pursuant to the authority of the Trade Agreements Act, excludes "purchase for resale purposes." 41 C.F.R. App. FPR Temp. Reg. 57, § 1-6.1603(e)(6)(1982).

We need not decide these issues because we have sustained the protest for other reasons. Moreover, it should be noted that the Buy American Act does not provide a basis for challenging a sole-source procurement since it does not impose an absolute prohibition on the purchase of foreign-made products, but posits a price comparison between competing offers, domestic and foreign, which is not possible when only one offer is present.

In sum, we find that Treasury has not justified a sole-source procurement. Meaningful competition could have been conducted using expedited procedures. We recognize that even after such a competition, Unique might have been the only firm to have submitted an acceptable proposal or it might have submitted the most acceptable proposal of several, but that fact would have been established only after all firms interested in satisfying Treasury's needs had been given the opportunity to offer to meet those needs. Because Treasury negotiated with only one source, we sustain the protest. Nevertheless, a remedy is not now feasible.

More than 4 months have elapsed since the May 3 date Treasury decided to market the Prestige Set during the 1983 Christmas season. If Treasury's marketing objective is to be accomplished, deliveries of the case must commence within approximately a month and be completed within less than 3 months. Consequently, the judgment Treasury made much earlier now appears to be true; not enough time remains for other producers to design and manufacture competing cases for the Prestige Set. Therefore, we do not believe it is now feasible to initiate a new procurement for the entire case.

Design Pak appears to have anticipated that competition for the entire case would not now be feasible, since in its comments on Treasury's report to our Office, it no longer recommends adaptation of Treasury's existing molds for the Prestige Set. Further, upon learning that Treasury did not acquire the modified mold that Unique fabricated for the Prestige Set, Design Pak dropped the suggestion that competition be conducted on the basis of that mold and, instead, now requests that production of only the leather folders be competed among qualified producers of coin cases.

Due to time constraints, Treasury has not been given an opportunity to respond to Design Pak's latest suggestion that Treasury now procure the leather folders and plastic coin holders separately. Even if Treasury were able to complete a competitive procurement for the leather folders within a matter of weeks, however, it appears highly unlikely that a new producer would be able to meet Treasury's marketing objectives. Moreover, it is not clear that Unique would be willing to manufacture only the plastic coin holder portion of the case since, as Design Pak argues, it is by far the less costly portion to produce. Further, Treasury's contract with Unique does not give it the right to order only a portion of the case in this manner. In these circumstances, we do not believe that corrective action is feasible.

Milton J. Socolar
for Comptroller General
of the United States