



The Comptroller General
of the United States

Washington, D.C. 20548

Spongberg - PL

Decision

Matter of: Ultraviolet Purification Systems Inc.
File: B-226941
Date: September 10, 1987

DIGEST

1. Where an agency determined that an item should be procured under small purchase procedures on a sole-source basis and the protester shows that there were models of the item that might also have met the agency's needs that were not, but should have been, considered, the sole-source determination was not reasonably based.
2. A successful protester of a sole-source purchase order where the items have been delivered and installed is entitled to the costs of pursuing its protest.

DECISION

Ultraviolet Purification Systems, Inc. (UPS), protests the award of a sole-source purchase order No. 05-1733 to Trojan Technologies, Inc., by the Department of Justice, Federal Correctional Institution, Otisville, New York (FCI-Otisville), for an ultraviolet disinfection system for the prison's sewage disposal system. The award in the amount of \$24,900 was made under small purchase procedures. During the pendency of the protest, FCI-Otisville purchased a second ultraviolet system from Trojan, which UPS also protests.

UPS alleges that since it could have provided a system that would satisfy FCI-Otisville's requirements, the sole-source awards were not justified. UPS further alleges that the award violated a Buy American provision, since Trojan is a Canadian manufacturer.

We sustain the protests on the basis that FCI-Otisville has not properly justified these sole-source awards. We do not find it necessary to decide the Buy American issue.

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The justification of the initial sole-source award on April 30, 1987, references an emergency situation caused by a pending lawsuit by the State of New York, Department of Environmental Conservation (NYSDEC) against FCI-Otisville for violations of State sewage effluent parameters, the "recent" destruction of the primary and back-up ultraviolet units at FCI-Otisville, and the NYSDEC requirement that the replacement ultraviolet system be installed by May 15, 1987. Specifically, the record shows that on September 15, 1986, one of the two existing ultraviolet units at FCI-Otisville burned out. Shortly after this first unit burned out, NYSDEC advised FCI-Otisville that its approval of the removal and replacement of the ultraviolet unit was required. There is no indication at that time or subsequently that the NYSDEC specified or favored any particular manufacturer's unit. The second existing ultraviolet unit was destroyed in November 1986.

Meanwhile, in September 1986 FCI-Otisville had hired a consulting engineer to design and provide a remedy for FCI-Otisville's sewage plant problems. The engineering firm in October 1986 evaluated three possible units (including a UPS model and the Trojan model) and advised that only the Trojan model had the "open channel feature" which made it "best suited for the conditions" at FCI-Otisville.

After the engineer in October 1986, recommended purchase of the Trojan open channel unit, it sought NYSDEC's approval of that unit. On December 15, 1986, NYSDEC required the replacement unit be installed by May 15, 1987, and found the submitted information about Trojan's unit "was very helpful to illustrate how the system will be installed and is supposed to operate." However, the NYSDEC indicated that it would not approve the unit until it passed a bioassay test "to demonstrate that the equipment will consistently achieve bacteria kill in an effective and reliable manner." NYSDEC had already advised FCI-Otisville and the engineer in September 1986, that a bioassay meeting certain specific requirements would be required before the replacement would be approved.

On January 20, 1987, FCI-Otisville's facilities manager first advised the contracting officer of the need for a sole-source purchase of the Trojan unit based on the alleged emergency situation and that the "Trojan unit is the only one recommended by our engineering firm . . . that will both satisfactorily handle the installation flow and also be compatible with the other sewage equipment and controls in place." The record indicates that this recommendation was made because the engineer found that the Trojan unit was "best suited" because it was an open channel unit.

On January 20, 1987, FCI-Otisville issued a purchase order to another consultant to perform a bioassay on the Trojan unit. The bioassay of the Trojan unit was successfully completed on April 7, 1987, and NYSDEC approved the unit on April 28, 1987. The purchase order for the ultraviolet unit was placed with Trojan on April 30, 1987, for \$24,900. On May 4, 1987, UPS protested the sole-source award.

On June 10, 1987, during the pendency of the protest, FCI-Otisville issued another sole-source purchase order to Trojan for a second unit. The contracting officer explains that both units were not combined into a single procurement, because there were not sufficient funds to buy both units at an earlier date and there was an immediate need for at least one ultraviolet unit.

The small purchase procedures of the Federal Acquisition Regulation (FAR) set forth abbreviated requirements designed to minimize administrative costs. BWC Technologies, Inc., 65 Comp. Gen. 500 (1986), 86-1 C.P.D. ¶ 366. Notwithstanding the streamlined nature of small purchase procedures, FAR, 48 C.F.R. § 13.106(b) (1986), requires contracting officers to solicit quotations from a reasonable number of sources to promote competition to the maximum extent practicable. Solicitations may only be limited to one source if the contracting officer determines and justifies that only one source is reasonably available. FAR, 48 C.F.R. §§ 13.106 (b)(1) and 13.106(c)(2). Unless the sole-source justification is reasonably based, we will sustain protests of the sole-source award. BWC Technologies, Inc., 65 Comp. Gen. 500, supra.

UPS asserts that both it and a third manufacturer offered an ultraviolet disinfection system with an open channel feature in October 1986 that could meet FCI-Otisville's requirements as shown by published literature. UPS has furnished the literature dated 1986 of its open channel system and literature dated October 1986 of the third manufacturer's open channel system to substantiate this assertion. Based on the record, we find the consulting engineer should have known other manufacturers offered open channel units.

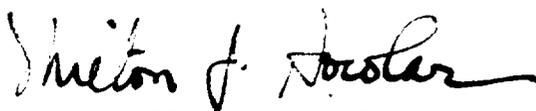
The engineer points out that the UPS model that it evaluated in October 1986 was proposed by UPS as a solution to the problem at hand--a burnt up unit that needed to be replaced. As UPS points out, however, it proposed the particular model (not an open channel model) because it was reasonably led to believe that immediate installation was necessary and that, therefore, the model proposed had to have been previously approved by NYSDEC for installation. UPS was not advised that it could offer an open channel unit that had not previously been qualified.

The engineer now claims that the UPS published literature is not sufficient to evaluate and speculates that the UPS open channel unit may not be suitable for use within the constraints of the existing plant. UPS disagrees and argues that its unit could meet FCI-Otisville's requirements. Both the engineer's and UPS's claims here suffer from a lack of substantiating data and UPS does not claim that its price would be lower than the award price. Nevertheless, the fact remains that FCI-Otisville and its engineer did not evaluate UPS's open channel unit and they should have known that there were potential additional sources for the open channel units. See Fairchild Weston Systems, Inc., B-225649, May 6, 1987, 87-1 C.P.D. ¶ 470.

Consequently, on this record, we find no convincing reason why this procurement action could not have been competitively procured. As stated above, even though the small purchase process is relatively informal, CICA requires that sole-source procurements be properly justified. Since we conclude that the agency has not justified its competitive award of the initial Trojan unit, we also conclude that the follow-up award to Trojan on June 10 of a second unit is unjustified as well.

The protests are sustained.

We do not recommend any remedial action in this case, inasmuch as the Trojan units have been installed. However, under the circumstances we award UPS the costs of pursuing its protest. 4 C.F.R. § 21.6(d)(1) (1987); Fairchild Weston Systems, Inc., B-225649, supra, at 7.

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