The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Univox California, Inc.; Univox International, Inc.; Cosmodyne, Inc.

File: B-225449.2; B-225449.3; B-225449.4

Date: December 9, 1987

DIGEST

1. When a large-volume water purifier, for which no adequate verified technical data package has been developed, is technologically complex, stems from a contract to design, develop and test a prototype and is needed for the national defense, the prototype development contractors' familiarity with work to be performed justifies a limited competition to those contractors for the initial production contract, since an award to another firm may result in an unacceptable delay in fulfilling the agency's military requirements. However, General Accounting Office recommends that procuring agency verify its requirements to assure that the stated needed date for these units is firm and the agency cannot permit a later delivery date in order to achieve full and open competition.

2. When, due to a long development period, an agency has not obtained a technical data package suitable for competitive procurement, but expects to receive the package concurrent with the first production run, agency should take all practical steps to promptly obtain package, so the option quantity can be competed.

DECISION

Univox California, Inc., Univox International, Inc., (together referred to as Univox) and Cosmodyne, Inc., protest the alleged improper restriction in request for proposals (RFP) No. DAAK70-87-R-0102, issued by the United States Army Troop Support Command, Fort Belvoir, Virginia, that limited competition to Aqua-Chem, Inc., and Brunswick Defense Corporation. The RFP is for 98 each 3,000 gallons per hour "reverse osmosis" water purification units (3,000 GPH ROWPU's) with an option for a quantity of 49 each ROWPU units and a complete technical data package (TDP) for the units adequate to assure full and open competition on future 3,000 GPH ROWPU procurements. Aqua-Chem and Brunswick both

designed, developed and tested prototype 3,000 GPH ROWPU's for the Army.

We deny the protests.

The 3,000 GPH ROWPU is a multi-purpose water purification system designed for use by the field Army and is capable of producing potable water from fresh, brackish, and sea water sources as well as water contaminated with nuclear, biological, and chemical (NBC) agents. Under the RFP, the first article unit is to be delivered by the awardee 390 days after contract award and the first production quantities delivered 25 months after contract award with deliveries continuing for the next year.

The Army justifies the limited competition under 10 U.S.C. § 2304(c)(1), as amended by section 923(a) of the Department of Defense (DOD) Authorization Act of 1987, Pub. L. No. 99-661, 100 Stat. 3932 (1986), which provides that an agency may use other than competitive procedures when the property or services are available from only one responsible source or only from a limited number of responsible sources.1/

The Army found that the competition should be limited to the two contractors (Aqua-Chem and Brunswick) who had designed, developed, fabricated, delivered and tested two different prototypes of the 3,000 GPH ROWPU. These contractors were competitively selected in April 1984. The protesters submitted proposals for the prototype contracts but were unsuccessful in the competition. The solicitation for those contracts advised all potential offerors that "it is the Army's intent to acquire . . . prototype units from two or more independently competing contractors and that the Army plans to restrict the competition for the first year's production contract to the sources found acceptable."

According to the Army, each prototype contractor "performed acceptably" and timely delivered the required number of prototypes and TDP's (drawings and publications). The prototypes were tested and "deficiencies/problems" were identified. The contracts were modified to require the contractors to make certain changes in the prototypes to modify the hardware to alleviate or resolve the problems. Subsequently, a Reliability Growth Test (RGT) was conducted,

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1/ Before the 1987 DOD Authorization Act was enacted, 10 U.S.C. § 2304(c)(1) only authorized other than competitive procedures when the property or services were available from one responsible source; this section provided no authority for limited competition where more than one source existed. This amendment was effective in May 1987.

and completed in February 1987, which the Army insists demonstrated the prototypes' compliance with the government's performance requirements. Consequently, the Army considers the prototypes ready for production.2/ However, because of the changes made to the prototypes as a result of the testing, the prototypes do not match the TDP's that the Army received earlier. No validated TDP's suitable for competitive procurement have been purchased from the prototype contractors.

The Army found that since no validated TDP's exist for these units, the competition must be limited to the prototype contractors in order to meet the Army's mission requirements in a timely manner. The Army found there was an unacceptable "high risk" that a company which had not gone through the prototype design, development and testing process could not timely deliver 3,000 GPH ROWPU's that are technically acceptable under the initial production contract. In this regard, the Army states that it has no existing systems that treat NBC contaminated water or sea water at the corps level or echelons above that level and that the 3,000 GPH ROWPU must be delivered in 1989 in order to meet critical military requirements.3/ The Army concludes that this work is a "follow on" contract for the production of highly specialized equipment and an award to any other source would result in an unacceptable delay in fulfilling the Army's military requirements.

Prior to the issuance of the RFP in question here, we issued a report on this proposed procurement (NSIAD 87-129, B-226511, Apr. 28, 1986, letter report to Representative Dymally), which found that the decision to limit competition for the first production quantity of 3,000 GPH ROWPU's was questionable. That report recommended that the Army solicit full and open competition for the first production contract "unless an analysis shows that the risk of doing so

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2/ Although Univox contends that numerous errors and violations of Army policy occurred in making the decision that the units were ready for production, this does not adversely impact on the reasonableness of the Army decision to limit competition, even assuming any such violations occurred. In any case, our Office does not consider protests that agency actions violate internal agency policies; these matters are for resolution within the Army, rather than through the bid protest process. True Machine Company, B-215885, Jan. 4, 1985, 85-1 C.P.D. ¶ 18.

3/ The Army is acquiring under separate contract 600 GPH ROWPU's to support the Army at the division level.

outweighs the benefits envisioned by" the Competition in Contracting Act of 1984 (CICA). We also found that the Army's plan at that time to buy, in this procurement, 250 of the 417 units needed by the Army over the next 5 years might not leave potential new suppliers with a sufficient quantity to enable them to effectively compete with the firm which received the award of the initial production quantity.

In response to our report, the Army, which now identifies a need for 453 units, only provides in this RFP for the acquisition of an initial production quantity of 98 units with an option for 49 units. The Army also states that it has weighed the risks, as recommended in the letter report, and determined that the risk of making award for the initial production run in the circumstances extant here to a firm which has not designed, developed and tested the prototypes is an unacceptable one.

The protesters contend that the Army's restriction of competition to the prototype contractors is not reasonably based. The protesters allege that the prototype contracts, which did not produce acceptable prototypes or TDP's, have been ongoing for more than 3 years. Consequently, the protesters contend that since the issuance of the RFP was delayed until July 2, 1987--almost 5 months after the prototypes were determined acceptable--and since the first deliveries under this RFP will not occur until more than 2 years after award, the agency's needs cannot be considered urgent and the Army has sufficient time to allow other companies to compete for the initial production quantity.

The protesters also contend that since the first article test provided for in the RFP allegedly offers adequate assurance of the usability of the offered units and because the offerors have 390 days to deliver a first article unit, Univox and Cosmodyne, who are experienced producers of other ROWPU's, have the ability to satisfy the government's concerns about the acceptability of their units, particularly if the Army makes available to the competitors the TDP's that were delivered by the prototype contractors and the test results on the prototypes. The protesters contend that the Army's failure to require delivery of acceptable TDP's under the prototype contracts represents a failure by the Army to properly advance plan for this procurement.

Finally, the protesters contend that the prototype contractors' lack of success in developing and testing the prototypes and Univox's and Cosmodyne's demonstrated experience in producing smaller ROWPU's (300 GPH, 600 GPH, and 1,200 GPH) indicates the Army has no reasonable basis for restricting competition, since the protesters could better meet the Army's requirements if given the chance.

CICA generally requires full and open competition, which can be limited only if justified in accordance with that statute.4/ 10 U.S.C. §§ 2301(a)(1), 2304(a)(1) and 2304(c) (Supp. III 1985); C&S Antennas, Inc., B-224549, Feb. 13, 1987, 66 Comp. Gen. ____, 87-1 C.P.D. ¶ 161. Under CICA, a sole-source or limited-source award is justified where the contracting agency reasonably concludes that only the known source or sources can meet its needs within the required time. Data Transformation Corp., B-220581, Jan. 16, 1986, 86-1 C.P.D. ¶ 55. In determining the propriety of a

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4/ Cosmodyne's protest focuses on its contention that the Army did not comply with the requirements contained in 10 U.S.C. § 2304(d)(1)(B), as amended by section 923(b) the DOD Authorization Act of 1987, 100 Stat. 3932 (1986), which provides:

> "In the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment or the continued provision of highly specialized services, such property or services may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures when it is likely that award to a source other than the original source would result in--(i) substantial duplication of cost to the United States which is not expected to be recovered through competition; or (ii) unacceptable delays in fulfilling the agency's needs."

Although the Army concedes that this provision is applicable to this RFP (because it is for a follow-on contract for highly specialized equipment), Aqua-Chem argues that the provision is applicable only to sole-source procurements and not to limited-source procurements. Aqua-Chem points out that although the Authorization Act amended both 10 U.S.C. § 2304(c)(1) to make it applicable to limited-source procurements (see footnote 1, supra) and 10 U.S.C. § 2304(d)(1)(B), the latter provision was not amended to make the word "source" plural, which implies that the provision is only applicable to sole-source follow-on contracts. On the other hand, there seems to be no cogent policy reason why this provision should not be as applicable to follow-on limited-source procurements as it is to sole-source procurements. Since we decide below the Army has satisfied the standards of both 10 U.S.C. § 2304(c)(1) and 10 U.S.C. § 2304(d)(1)(B), we need not decide whether the latter authority applies to limited-source procurements.

sole-source or limited-source award, the standard we apply is one of reasonableness; unless it is shown that the agency's justification for the award is unreasonable, we will not question it. Dynamic Instruments, Inc., B-220092 et al., Nov. 25, 1985, 85-2 C.P.D. ¶ 596.

The protesters argue that the Army cannot rely upon the absence of verified TDP's to justify this limited competition, inasmuch as it is the Army's responsibility that no adequate TDP's suitable as a specification for a competitive procurement exists. The protesters insist that with a "minimal effort" the Army could have updated the existing TDP to a level permitting competitive contracting. On this point, the protesters cite NSIAD 87-129, supra, where we reported that one Army official said it would take "at least 6 months for the development contractors to update the TDP to include changes made during testing." The protesters argue, therefore, that had the Army undertaken this updating effort promptly after the RGT testing, which purported to show the acceptability of the prototype units and was completed in February 1987, an adequate TDP would now be available. Cosmodyne argues that the Army's failure in this regard constitutes inadequate advance procurement planning.

The Army explains that in the December 1986 to February 1987 time frame it gave consideration to having both prototype contractors' TDP's validated and seeking a production contract on a fully competitive basis. The Army says that this option was dismissed for three reasons.

First, the Army states that a minimum of 90 days, more probably 150 days, would be required to contract for the effort to update the TDP's. An additional 180 days would be required for the contractor to update the TDP's to correspond to the units successfully completing the prototype testing and to validate the updated TDP's to meet the Army's requirement for production units by 1989.

Second, the Army found that since both prototype contractors had successfully completed all testing and there were two distinct configurations, the TDP from each of the two contractors would have had to have been updated and validated. This would result in a substantial duplication of costs for the TDP's, as compared to the alternate plan to validate the TDP for the selected unit under the initial production contract.

Finally, the Army found that the technical risk of first acquiring the TDP's and then conducting a competitive procurement for production of the 3,000 GPH ROWPU's was too high. Although the prototype units had successfully completed all required testing, it was recognized that

certain changes would be necessary to render the units ready for production prior to first article testing because the units had been built in a "model shop environment." The Army found that validation of production-built first article units would be needed to minimize technical risk under any follow-on production buy and that only the prototype contractors possessed the requisite learning and experience, not transferable to drawings and written documentation, which substantially reduces the technical risk in successful performance of the production contract.

It may be that the Army could have acquired a verified TDP in less time than it has estimated. Nevertheless, we do not find that the Army's judgment to procure a verified TDP along with the production quantities shows a lack of advance planning. Rather, we find that the Army took a rational approach to obtaining these purification units given its stated need date.

The central question for decision, therefore, is whether the Army is correct that only the two prototype development contractors can reasonably satisfy the Army's urgent requirements by the needed date and that obtaining full and open competition will result in unacceptable delays in fulfilling the Army's needs. It is the protesters' views that they also could satisfy the Army's requirements.

The protesters claim that they may be in a better position to satisfy government requirements, since the prototype contractors have shown their inability to timely deliver an acceptable unit. In support of this contention, Univox has submitted a test report on the prototypes showing numerous deficiencies. The Army responds that this test was not conducted on the finally approved prototype and lists six other tests of the prototypes, some subsequent to the test report referenced by Univox. Although the Army admits that "deficiencies/problems" were found in the prototypes, it states that the contractors were not responsible for all noted problems. In any case, the Army states that both contractors' prototypes passed the RGT and were modified to meet all government requirements and approved for production. Based on this record, we cannot disagree with the Army's assessment that the prototype 3,000 GPH ROWPU's could meet the government requirements and that the developers have the capability to successfully produce the unit.

Because no TDP's for the finally revised prototypes have been written or verified, the Army has found that no firms, other than the prototype contractors, could meet the Army's requirements of placing at least the initial quantity of units in the field in 1989. The protesters contend that if

they were given the TDP's and test results they could compete.5/

The Army insists that it is its judgment that only the two prototype developers can meet the required delivery schedule for hardware and supporting documentation, and provide timely delivery of a complete TDP and other data items required under the RFP. The Army states that the 3,000 GPH ROWPU is an integrated system which includes complete integrated logistics support, operational and maintenance manuals, and provisioning parts lists, which were all completed as a part of the original design effort. Each developer had to work out various procedures for handling problem waters, such as high algae, high turbidity cold water, and waters with various degrees of salinity and contamination. A multitude of technical problems had to be faced and overcome during testing. A new contractor would not only have to expend significant effort to review all of the documents to discover problems reported (but not corrected in the TDP's), but would have to create solutions of its own. In this regard, the Army states that the problems in the prototype testing were subtle, related to each contractor's specific design, but were very crucial to the operational readiness of the system. According to the Army, without the benefits of experience and knowledge gained from "hands-on" tests, it is highly improbable that a third party could use the existing TDP to provide a design which meets all of the requirements of the 3,000 GPH ROWPU program within schedule, since it has taken the two developmental contractors more than 3 years to develop the units. The Army has found that the protesters' experience with much smaller scale ROWPU's cannot serve as a substitute for the experience and knowledge achieved by the successful prototype developers, since there are no validated TDP's.

Given the Army's statement that it needs the units in 1989, we think the Army has a reasonable basis for finding that unacceptable delays in fulfulling this needs could result if other sources, who have not developed 3,000 GPH ROWPU's and do not possess adequate TDP's for the ROWPU's, are awarded

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5/ To the extent the protesters complain about the agency's refusal to release these documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1982), the authority to determine what information must be disclosed is vested in the contracting agency, not our Office; a protester's recourse after an agency's denial of its request for documents is to pursue the remedies provided in FOIA. Troglodyte Society, Inc., B-227407 et al., June 25, 1987, 87-1 C.P.D. ¶ 632.

the first production contract,6/ and therefore for limiting competition to the two contractors who have designed, developed and tested the 3,000 GPH ROWPU's. Specifically, we do not agree that the Army should be required to consider proposals from sources external to the lengthy contract development phase in the absence of technical information which is reasonably obtainable only from the prototype contractors and which has been validated.7/ Contrary to the protesters' suggestion, we do not agree that first article testing requirements, in and of themselves, are an adequate substitute for a validated TDP and the assurance to the Army stemming from the prototype contractors' experience. The first article is not to be delivered until 390 days have passed; if the first article is unacceptable, the Army's critical requirements will suffer.

The protesters argue that there is no real urgency involved in this requirement. However, the Army has clearly stated that this item is critically needed. As noted above, the Army states that it has virtually no capability to treat brackish or salty water or NBC contaminated water at the corps level or echelons above that level, and that it needs the first 3,000 GPH ROWPU's units in the field in 1989. In addition, the Army states that its current water treatment equipment is old, unsupportable, and approaching obsolescence and that the need to sustain forces in arid

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6/ The case is distinguishable from ILC Dover, Inc., B-227839.2, Nov. 9, 1987, 87-2 C.P.D. ¶ ____, where we sustained a protest of an award of a production contract for protective masks because of failure to follow evaluation criteria. As a remedy, we recommended termination and recompetition of the contract. In recommending that full and open competition, instead of limited competition, be used on the resolicitation, we criticized the Army's determination that it needed to validate TDP's that had been fully completed as a justification for limiting competition to the protective mask developmental contractors. By contrast, in this case, the TDP's are incomplete and the Army reasonably found they can be completed only by the developmental contractors.

7/ Univox complains that no formal market survey was conducted as required by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 6.303-2 (1986). However, the agency, which indicates its familiarity with the protesters' products and capabilities, reasonably found only the prototype developers could meet its requirements. Therefore, no formal market survey was required. See 48 C.F.R. § 6.303-2(a)(8).

environments has made the 3,000 GPH ROWPU a critical concern.

The protesters do not rebut the Army's position. Although the protesters point to the delay in the issuance of the RFP as evidence of the lack of real urgency, the Army points to several factors that led to this delay. First, the Army states that it needed the limited competition authority granted in the DOD Authorization Act of 1987, which only became effective in May 1987. Also, the Army needed time to respond to our report, which was issued on April 12, 1987, and recommended that other than limited competition be considered and that the initial production quantities be reduced. The Army states that it delayed issuance of the RFP to respond to the concerns contained in that report and subsequent congressional inquiries and that it was able to reduce the production quantity being procured, which first required obtaining the requisite approvals within the Army.

Therefore, on this record, we cannot question the Army's statements that it must forego full and open competition in order to meet the "urgent" requirement that 3,000 GPH ROWPU's be delivered in 1989. Accordingly, the protests are denied.8/

In denying the protest, however, we remain concerned as to whether the Army's stated need is based upon a comprehensive analysis of its actual needs. In NSIAD 87-129, we said that we were unaware of any analysis by the Army that demonstrates that existing water purification equipment will not be adequate until units can be obtained using full and open competition. In this connection, we note that the Army has operated without this unit for many years and has 600 GPH ROWPU's which perform the same basic function. We therefore are recommending that the Secretary of the Army verify the Army's requirements to assure that the stated needed date of 1989 for these units is firm and the Army cannot permit a later delivery in order to achieve full and open competition.

Additionally, we are concerned about the option contained in the RFP for 49 additional units if the Army decides to proceed with this procurement. Noncompetitive procurements that involve more than a minimum quantity or that continue

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8/ We understand that only Aqua-Chem submitted a proposal in response to the RFP. However, since the Army adequately justified limiting the competition, this fact does not change our decision in this matter.

for more than a minimum time are inconsistent with CICA requirements for full and open competition. Honeycomb Company of America, B-227070, Aug. 31, 1987, 87-2 C.P.D. ¶ 209. What is justifiable initially may soon cease to be justifiable, particularly in light of the obvious advantages to be gained from competitive pricing and the wisdom, from a managerial point of view, of competition. Id. The Army has stated that "at the present time, if current acquisition schedules are achieved, the option quantity would be awarded as a part of the fully competitive follow-on contract rather than through exercise of the option."

Consequently, in the event that the Army decides to proceed with the procurement, we recommend that the Army, concurrent with the first production run, take all necessary steps to insure that a complete and validated technical data package and other necessary information are promptly obtained, so that noncompetitive procurement will not be extended past this initial production run and the option need not be exercised. See H. Koch & Sons, B-202875, Dec. 14, 1981, 81-2 C.P.D. ¶ 463.

James F. Hinchman
General Counsel