



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Magnavox Electronic Systems Company
File: B-230297
Date: June 30, 1988

DIGEST

Where an agency is required by language in an appropriations act to obligate funds for light field artillery technical data systems (LFATDS) by a date approximately 3 months after passage of the act, a sole-source award is justified where there is only one source to which a contract for LFATDS can be awarded by the date specified for obligation of the funds.

DECISION

Magnavox Electronic Systems Company protests the sole-source award by the U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey, of letter contract No. DAAB07-88-C-E224 to Litton Data Systems. The contract is for seven light division field artillery technical data systems (LFATDS).

We conclude that, faced with a directive in an appropriations act to obligate funds for seven LFATDS by April 1, 1988, the Army acted reasonably in awarding a contract to Litton, which appeared to be the only firm to which a contract for LFATDS could be awarded by April 1. We therefore deny the protest.

LFATDS is a computer-based artillery fire direction system. Essentially, the system is a lightweight version of an earlier tactical fire direction system known as TACFIRE. Litton developed both TACFIRE and LFATDS (which sometimes is referred to as LTACFIRE). Magnavox is under contract with the Army to develop the next generation fire control system, the Advanced Field Artillery Tactical Data System (AFATDS), which is scheduled to be available in the early 1990s.

The Army has equipped most of its heavy divisions with TACFIRE; it has not done so for most of its light divisions because of the size and weight of that system. The Army's 9th Mechanized Infantry Division has LFATDS, but the agency decided not to procure LFATDS for its other light divisions, preferring instead to wait until AFATDS could be fielded.

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The appropriations act for fiscal year 1988, H.R.J. Res. 395, Pub. L. No. 100-202, dated December 22, 1987, contains three line items under the heading "Other Procurement, Army." The appropriation under that heading concludes as follows:

"In all: \$5,093,549,000, to remain available for obligation until September 30, 1990: Provided, That \$24,300,000 available from the fiscal year 1986 Other Procurement, Army appropriation for light division field artillery tactical data systems shall be obligated for procurement of seven LFATDS sets for seven light divisions by April 1, 1988."

The Army determined that the only way to comply with the language requiring an obligation of funds by April 1 was to award a sole-source contract to Litton. By letter of February 9, Magnavox submitted to the Army an unsolicited proposal to supply a light division fire support system, which it called LFATDS, and which the firm said was based on its in-production Fire Support Team Digital Message Device (FIST/DMD). When Magnavox learned that the Army intended to proceed with the sole-source award to Litton, the firm filed its protest with this Office, on February 24. Notwithstanding the protest, on March 8 the Army awarded a letter contract to Litton after notifying this Office.^{1/} The contract was to be definitized later. By letter of March 11, the Army informed Magnavox that its unsolicited proposal did not contain sufficient information to permit a meaningful evaluation. The letter specifically mentioned the proposal's failure to describe in detail the hardware and software upgrades to its FIST/DMD that would be required.

Under the Competition in Contracting Act of 1984 (CICA), agencies are required to procure goods and services through the use of competitive procedures, unless an exception to that requirement applies. 10 U.S.C. § 2304 (Supp. IV 1986).

^{1/} Magnavox then filed an action in federal court seeking to prevent the Army from continuing with performance of the contract. The court denied the firm's request for a temporary restraining order and a preliminary injunction. Magnavox Electronic Systems Company v. United States, Civil No. 88-0672-SS (D.D.C. March 16, 1988). Magnavox appealed the court's order, Magnavox Electronic Systems Company v. United States, No. 88-5084 (D.C. Cir. 1988), and that matter is still pending.

In this case, the Army relied on two exceptions, which permit an agency to use procedures other than competitive procedures when:

"(2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; [or]

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"(5) a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale"

10 U.S.C. § 2304(c)(2) and (5). The Army justifies its use of the exception in clause (2) on the basis that failure to award the LFATDS contract by April 1 would constitute a violation of an express directive contained in the appropriations act. The record shows that the agency also was concerned that failure to obligate the funds would result in the Army's losing the \$24.3 million in fiscal year 1986 funds and in a curtailment of its ability to spend other money appropriated for AFATDS research and development.^{2/} There was also concern that failure to meet the April 1 deadline would affect the entire \$5 billion appropriation under the Other Procurement, Army category.

The Army justifies use of the exception in clause (5) based on the legislative history of the appropriations act. The conference report on the measure, H. R. Rep. No. 100-498, 100th Cong., 1st Sess. 570 (1987), provides:

^{2/} The same appropriations act at issue here also provides under the section entitled "Research, Development, Test, and Evaluation, Army" that none of the funds provided for fiscal year 1988 support of the AFATDS program office would be available for obligation beyond April 1, 1988, unless the LFATDS contract had been executed.

"LIGHT FIELD ARTILLERY TACTICAL DATA SYSTEM

"The Conferees include bill language directing the Army to procure the Light Field Artillery Tactical Data System (LFATDS), also referred to as LTACFIRE, for the seven Army Light Divisions. The amount of \$24,300,000 authorized and appropriated in fiscal year 1986 for this purpose is available and may only be obligated for this program. Any additional funding for necessary support or procurement of peripheral equipment for the seven division sets will be funded from appropriate accounts. The Army shall identify and report to the Committee on Appropriations on the necessary support or peripheral equipment provided. As reported by the General Accounting Office (GAO), LFATDS has met all of its design requirements and is ready for fielding to the Light Divisions."3/

3/ In a report to the Chairman of the Subcommittee on Defense, House Committee on Appropriations, we advised of the status of LFATDS as follows:

"LFATDS was accepted as a 'go to war' system by the 9th Infantry Division. The initial operational test and evaluation in April 1987 demonstrated that LFATDS met all its design requirements as specified in the light divisions' quick reaction program. However, LFATDS did not meet some of the recently identified critical light division requirements.

"[The Army's Operational Test and Evaluation Agency (OTEA)] compared the light divisions' critical requirements formulated on March 30, 1987, with the LFATDS' April 1987 test results. OTEA judged LFATDS to have met 5 of 11 critical effectiveness and 1 of 3 critical suitability requirements. As a result, OTEA concluded that LFATDS is neither operationally effective nor suitable as an interim light division system."

Battlefield Automation: Field Artillery Data Systems Acquisition Problems and Budget Impacts, GAO/NSIAD-87-198 BR (July 1987), p.15.

The Army reasons that since the report referenced by the conferees concerned the LFATDS in use by the 9th Division, and Litton was the source for that system, the conferees must have intended that the procurement of the seven additional LFATDS be from Litton.

The exception in 10 U.S.C. § 2304(c)(2) specifically provides that the agency must have an urgent need for the goods and services. Here, while the appropriations act created a need for the Army to act expeditiously, the record is clear that the agency believed it had no urgent need for delivery of the LFATDS. With regard to the Army's funding concerns, CICA provides that in no case may an agency enter into a contract using other than competitive procedures on the basis of concerns related to the amount of funds available to the agency for procurement functions. 10 U.S.C. § 2304(f)(5). We think the (c)(2) exception did not apply here.

Under 10 U.S.C. § 2304(c)(5), the use of other than competitive procedures is permitted when a statute expressly authorizes or requires that the procurement be from a specified source. While the appropriations act required the obligation of funds for LFATDS, and only Litton had produced that system, the act does not contain an express direction to procure LFATDS from Litton. The act did not preclude the Army from considering sources other than Litton if other sources were available. The Army made award to Litton not because a statute directed the Army to do so; rather, the award was made to Litton because the Army determined that Litton was the only acceptable source to which an award for LFATDS could be made by April 1, 1988. We therefore question whether clause (c)(5) was the proper exception to be used in this case.

In our view, the Army's action in response to the directive to obligate funds for LFATDS by April 1 more properly should be viewed as a procurement under 10 U.S.C. § 2304(c)(1). That section permits an award based on other than competitive procedures when the property or services are available from only one responsible source, or a limited number of sources, and no other type of property or services will satisfy the agency's need. While the agency did not specifically rely on (c)(1) to justify its award to Litton, the justification approved by the Army clearly indicated that the Army was convinced that Litton was the only source to which an award for LFATDS could be made by April 1. Cf. NI Industries, Inc., Vernon Division, B-223941, Dec. 15, 1986, 86-2 CPD ¶ 674 (protest sustained where the agency's justification was too general to support the use of an exception to the competition requirement in that specific procurement).

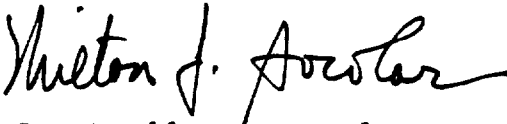
The appropriations act required the obligation of funds for LFATDS, as opposed to any other type of fire support system, and only Litton had produced that system. The government does not own the technical data package for LFATDS, nor does it have a performance specification. Since the contract for the 9th Division's LFATDS was awarded, the system has undergone extensive testing and software maturation, and no other contractor reasonably could have been considered a source for the system given the short time that was available for making an award. This is particularly so in light of Magnavox's advice to the Army that the system it offered to supply would need unspecified revisions in order to perform the functions of LFATDS.

We recognize that when an agency relies on 10 U.S.C. § 2304(c)(1) to justify the use of other than competitive procedures, the agency must publish in the Commerce Business Daily a notice of the proposed procurement. 10 U.S.C. § 2304(f)(1)(C); 41 U.S.C. § 416(a)(1)(A) (Supp. IV 1986). The agency did not do so here because it concluded that the sole-source award was justified based on 10 U.S.C. § 2304(c)(2) and (5). While normally an agency's failure to comply with mandatory notice requirements would require corrective action, see World-Wide Security Service, Inc., et al., B-224277 et al., Jan. 8, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 35, aff'd, B-224277.3, Apr. 22, 1987, 87-1 CPD ¶ 430, we think the Army's failure to do so here was not fatal to the procurement. The record shows that Magnavox had actual notice of the proposed award to Litton, and that a third firm, Norden, which had submitted an offer in the LFATDS procurement in 1983, knew of the Army's need to obligate funds for LFATDS by April 1. To our knowledge, Norden has not complained about the award to Litton. More importantly, however, the record shows that both the Magnavox and Norden products consisted of hardware that was part of systems other than LFATDS; based on Magnavox's unsolicited proposal of February 9 and a letter from Norden to the agency of the same date, neither firm realistically could be expected to provide a proposal that could be the basis for awarding a contract by April 1.

Thus, it is clear from the record that there was only one source to which a contract for LFATDS could be awarded by April 1. That source was Litton. While other sources such as Magnavox--given time and access to the technical data

package--may have been able to produce the LFATDS, there was simply not enough time to qualify other potential sources for the system prior to April 1, when the award was required to be made.

The protest is denied.

for 
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