

C. Melody



The Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

**Matter of:** Brunswick Corporation, Defense Division  
**File:** B-231996  
**Date:** October 13, 1988

## DIGEST

1. Protest challenging basis for contracting agency's decision to restrict competition to two sources is timely where filed prior to closing date for initial proposals since it concerns alleged solicitation impropriety. Although protester had expressed its concern earlier in letter to agency based on synopsis in Commerce Business Daily announcing decision to restrict competition, protest to General Accounting Office did not have to be filed within 10 days after agency's response to letter, since specific grounds for objecting to restriction were not apparent until the solicitation was issued.
2. Where item being procured is technically complex, critical component is being produced for the first time, and contracting agency requires delivery at earliest practicable date, agency reasonably may restrict competition to firms experienced with prior versions of the item based on determination that only such firms can be expected to produce the item without undue risk of unacceptable performance.

## DECISION

Brunswick Corporation, Defense Division, protests the Army's decision to restrict competition to two sources other than Brunswick under request for proposals (RFP) No. DAAH01-88-R-0372 for forward-looking infrared night sight devices and retrofit kits. The Army limited the competition to the two firms, Texas Instruments, Inc. (TI) and Kollsman Instrument Company, based on its determination that only firms which have produced prior versions of the night sights could be expected to produce the current version without undue technical risk in the time necessary to meet the Army's needs. We deny the protest.

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The RFP calls for 593 AN/UAS-12C night sights, 1,021 operator selectable filter (OSF) kits, and 727 AN/TAS-4C/D modification kits. The AN/UAS-12C night sight is a component of the TOW 2 weapon system, a crew-portable, heavy anti-tank assault weapon. The sight allows the TOW 2 system to operate at night and during other limited visibility conditions. The principal component of the device is the optical/electronic sight/tracking component, designated the AN/TAS-4C.

Contracts to produce earlier versions of the sight (the AN/UAS-12, -12A, and -12B) were awarded to TI and Kollsman beginning in fiscal year 1977. The Army subsequently decided to upgrade the device to incorporate a laser threat countermeasure known as optical improvement. Contracts for the upgraded device, designated the AN/UAS-12C, were awarded to TI and Kollsman in 1984 and 1985. Neither firm was able to fully meet the new optical improvement requirement, however; instead, the AN/UAS-12C devices produced by TI and Kollsman were accepted based on a waiver of the full requirement, although, according to the Army, the devices nevertheless were significantly more advanced than the prior versions. TI then was awarded a contract for further research and development of the optical improvement requirement. The result of TI's contract was the OSF, a filter component which, when added to the AN/UAS-12C produced by TI and Kollsman, would fully satisfy the Army's need for optical improvement. TI has produced an experimental model of the OSF.

With regard to the current procurement, the Army has devised what it calls a "hybrid" technical data package (TDP) incorporating the results of the initial production contracts for the AN/UAS-12C without full optical improvement, and the results of TI's development contract for the OSF component needed to completely satisfy the optical improvement requirement. According to the Army, this hybrid TDP is not adequate for a fully competitive procurement. Instead, in reliance on the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(1) (Supp. IV 1986), the Army limited competition under the RFP to TI and Kollsman, because only those firms have the experience necessary to produce the devices with full optical improvement, including OSF, to the current TDP in time to meet the Army's needs. According to the Army, the battlefield threat which the improved device is intended to address requires deployment of the devices in the field as quickly as possible. Thus, the Army's schedule call for award under the contract in September 1988, initial delivery in September 1989, and

deployment beginning in April 1990.<sup>1/</sup> In the Army's view, because the devices are complex and the current TDP has not been validated, only TI and Kollsman can be expected to produce the devices in time to meet the delivery schedule, due to their experience with prior versions of the device. The Army states, however, that it expects to have a complete TDP by December 1988, and plans to procure any additional devices beyond the basic quantities called for under the current RFP through a fully competitive procurement.

As a preliminary matter, the Army argues that the protest is untimely. A synopsis of the RFP was published in the Commerce Business Daily (CBD) on May 6, 1988, indicating that the competition would be limited to TI and Kollsman. In a letter dated May 10 to the Army, Brunswick expressed its objection to the restriction. The Army replied by letter dated May 19, explaining that the decision to restrict the procurement to TI and Kollsman was based on the lack of a TDP adequate to enable other sources to produce the device. The Army then issued the RFP, with the restriction, on June 29, calling for submission of initial proposals by July 22. Brunswick filed its protest with our Office on July 15.

The Army argues that Brunswick's May 10 letter to the Army constituted an agency-level protest of the restriction in the RFP and thus that Brunswick's protest to our Office is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1988), because it was filed more than 10 working days after Brunswick received the Army's May 19 letter stating that the RFP would remain restricted to TI and Kollsman. We disagree. Brunswick's May 10 letter to the Army expressed its general concern with the Army's decision as revealed in the CBD synopsis not to delay the current procurement until a TDP was available which would permit a fully competitive procurement. In response, the Army stated that the decision to restrict the procurement was based on lack of a complete TDP. The specific grounds for objecting to the Army's decision which Brunswick raised in its subsequent protest to our Office, however, were not apparent until the RFP was issued, since only then did it

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<sup>1/</sup> According to the Army, the devices can be deployed only from April to August due to scheduling of annual troop exercises in Europe. The Army states that the April 1990 deployment can be achieved by deliveries as late as November 1988; any delay beyond that time would preclude field deployment of the devices during the April to August "window" and thus would delay deployment until the following year.

become evident that, despite the availability of the current "hybrid" TDP which was incorporated in the RFP, the competition nevertheless would be restricted to TI and Kollsman. Accordingly, Brunswick's protest is timely since it was filed before the closing date for initial proposals under the RFP. 4 C.F.R. § 21.2(a)(1).

Brunswick's principal objections to the Army's decision to limit the competition to TI and Kollsman are that 1) the current TDP is adequate for a fully competitive procurement, and 2) even assuming the TDP is adequate only for firms with experience in producing the device, there is no reasonable basis for excluding Brunswick since its production experience with a similar device, the AN/KAS-1, is as good or better than TI's and Kollsman's experience with the AN/UAS-12C. The Army's position is that the TDP is not an adequate basis for competition by firms other than TI and Kollsman, and that Brunswick's experience with the AN/KAS-1, a less sophisticated device than the AN/UAS-12C, is not equivalent to TI's and Kollsman's experience. At a minimum, the Army argues, allowing Brunswick to compete would unacceptably delay delivery because Brunswick would be subject to first article testing, which the Army has decided to waive for TI and Kollsman based on their experience.

Under CICA, a restricted competition is justified where the contracting agency reasonably concludes that only one or a limited number of sources can meet its needs in the required time. In reviewing such a determination, we examine whether the agency's determination is reasonable. Univox California, Inc., et al., B-225449.2, et al., Dec. 9, 1987, 87-2 CPD ¶ 569, aff'd on reconsideration, B-225449.5, et al., Feb. 23, 1988, 88-1 CPD ¶ 183. Here, in our view the Army reasonably concluded that only experienced firms, which qualified for waivers of first article testing, could be expected to produce the devices based on the current TDP without undue risk of delay in the required delivery schedule. Further, we see no basis to challenge the Army's position that Brunswick lacks experience comparable to TI's and Kollsman's experience and therefore was properly excluded from the competition.

With regard to the adequacy of the TDP, Brunswick contends that the TDP includes all the essential drawings and specifications needed to produce the device and that there is no reason to anticipate more difficulties with production than in any other procurement of a similarly complex device. The Army in essence argues that the TDP must be validated by being used successfully by experienced firms before the Army can warrant to other potential offerors in a fully competitive procurement that the TDP is adequate. Even

accepting Brunswick's conclusion that the TDP is complete, we believe it was reasonable for the Army to conclude that only firms qualifying for waiver of first article testing are equipped to produce the device within an acceptable level of risk, given the technical complexity of the device and the fact that the OSF component critical to full satisfaction of the optical improvement requirement has not been produced before. See Univox California, Inc., et al., B-225449.2, supra. As discussed above, the Army states that initial delivery in September 1989 is required to allow deployment of the devices beginning in 1990. To accommodate that schedule, the competition must be restricted to firms qualifying for waiver of first article testing. We will not object to the agency's required delivery schedule. Honeycomb Co. of America, B-225685, June 8, 1987, 87-1 CPD ¶ 579, aff'd on reconsideration, B-225685.2, Sept. 29, 1987, 87-2 CPD ¶ 313.

Brunswick challenges the Army's determination that deployment is needed by 1990, arguing that until the decision was made in April to restrict the competition, the Army planned to hold a full and open competition in fiscal year 1988 despite the delays which would result from first article testing requirements on the successful offeror. Even assuming that the Army in fact changed its position as to the urgency of its need for the devices, that does not demonstrate that the Army's current position is unreasonable. In this regard, we have recognized that a military agency's assertion that there is a critical need for certain items carries considerable weight and the protester's burden to show unreasonableness is particularly heavy. Id. Here, we see no basis in the current record to conclude that the Army's assessment of the laser threat addressed by the new version of the device, or its resulting need for deployment as quickly as possible, was unreasonable. In view of the complexity of the device and the Army's need for deployment, we do not believe the Army was required to assume the risk of unacceptable delays in delivery by considering proposals from firms without adequate experience in the work called for by the RFP.

The crucial question in our view thus is whether Brunswick's experience is sufficiently similar to TI's and Kollsman's experience that it is in as good a position as those firms to produce the device without first article testing and without an unacceptable risk of unsuccessful performance within the required schedule. Brunswick contends that it

has experience equivalent to TI's and Kollsman's since it currently is under contract to produce a device, the AN/KAS-1, which is substantially similar to the AN/UAS-12C. According to Brunswick, the only significant difference between the devices is the new OSF component of the AN/UAS-12C; however, Brunswick contends that since Kollsman has no more experience with producing the OSF than it does, there is no reasonable basis for allowing Kollsman to compete while excluding Brunswick. In response, the Army contends that the AN/KAS-1 and the AN/UAS-12C have such significant differences that Brunswick's experience with the AN/KAS-1 does not equate to the expertise necessary to produce the AN/UAS-12C within an acceptable level of risk. In addition, the Army states that Brunswick lacks the institutional knowledge developed by TI and Kollsman as a result of their prior contracts for earlier versions of the device, which in the Army's view is necessary to successfully produce the current version, including the newly developed OSF.

Brunswick in essence argues that, like TI and Kollsman, it qualifies for waiver of any first article testing requirements based on its experience and, as a result, there is no basis for excluding it from the competition. Because first article testing is for the protection of the government and offerors do not have any right to waiver of first article requirements, we will question an agency's denial of a waiver for a particular offeror only if it is the result of bad faith or fraud, or there is a clear showing of abuse of discretion by the agency. Honeycomb Co. of America, B-225685, supra. Here, we find that Brunswick has not shown that it was clearly unreasonable for the Army to conclude that Brunswick lacks experience equivalent to TI's and Kollsman's, and therefore does not qualify for the waiver of first article test requirements necessary to meet the Army's delivery schedule.

The record contains a detailed discussion by the parties of numerous components of the AN/KAS-1 and the AN/UAS-12C. Although the parties disagree as to the differences among the various components and precisely which components are critical, it is clear that many components of the AN/UAS-12C, including some which are critical to its operation, are different from those in the AN/KAS-1. For example, according to the Army, one significant difference between the AN/UAS-12C and the AN/KAS-1 is the missile tracking and guidance capability of the AN/UAS-12C. Specifically, the AN/KAS-1 is a viewing device only, used to

detect the presence of chemical agents; the AN/UAS-12C is a more sophisticated device with the capability to track a missile in flight and if necessary correct the missile's flight path.

The Army states that the critical component of the AN/UAS-12C for this purpose is the postamplifier assembly, which converts a video picture to electronic signals and enables the device to track and guide the missile in relation to its target. Brunswick acknowledges that the postamplifier assembly is not a feature of the AN/KAS-1. Since it is a critical component of the AN/UAS-12C and Brunswick has not produced it before, the Army argues that first article testing would be required. Brunswick disagrees, arguing that the component has been procured in the past under a small business set-aside, so that it could obtain the item from one of the sources which has provided it before. (Brunswick adds, however, that it would retain the option of producing the postamplifier assembly itself, if it were more economical to do so.) Brunswick also contends that lack of experience with the postamplifier assembly is not a reasonable basis on which to restrict the competition, since that item also is a feature of the AN/UAS-12A, a prior version of the AN/UAS-12C, which currently is being procured on a fully competitive basis.

With regard to prior purchases of the postamplifier assembly, the Army refutes Brunswick's contention that the item has been procured under a small business set-aside. Further, the Army states that while postamplifier kits have been the subject of contracts with two small businesses, neither one has yet successfully delivered the item. Under these circumstances, Brunswick's position that it could acquire the item from an existing supplier, taken together with its reservation of the right to produce the item itself, does not show that a first article requirement is unreasonable. Further, while, as Brunswick argues, the postamplifier assembly is a feature of the AN/UAS-12A currently being procured competitively, the Army has retained the right to require first article testing of the successful offeror in that procurement. Accordingly, we do not agree that the Army's decision to fully compete the AN/UAS-12A procurement represents a determination by the Army that first article testing is not required for those features common to the AN/UAS-12A and AN/UAS-12C.

In addition to the critical differences between the components of the AN/KAS-1 and AN/UAS-12C, the Army raises a more general concern with waiving first article testing requirements for Brunswick. The Army asserts that, even assuming that Brunswick had the capability to obtain or

produce the individual components of the AN/UAS-12C, there is no assurance that it could then successfully integrate the components as required to produce a properly functioning device. This aspect is of particular concern to the Army because the problems experienced with producing prior versions of the device generally have concerned integration of components. In view of the technical complexity of the device, we have no basis to question the Army's determination in this regard.

Under these circumstances, we find that Brunswick has failed to show that it was clearly unreasonable for the Army to conclude that Brunswick's experience with the AN/KAS-1 is not equivalent to TI's and Kollsman's experience with the AN/UAS-12C. As a result, we see no basis in the current record to disturb the Army's determination that Brunswick does not qualify for the waiver of first article testing requirements essential to fulfilling the delivery schedule, and therefore was properly excluded from the competition.<sup>2/</sup>

Brunswick also argues that even if first article testing were required, it could still meet the Army's delivery schedule by beginning preproduction procurement of long lead-time items simultaneously with first article testing production. Brunswick maintains that this approach would delay delivery by only 1 or 2 months, due to the additional time required for first article tests. We find this argument unpersuasive. Even accepting Brunswick's position that it would be proper for the Army to assign to the contractor the financial risk involved in preproduction procurement before first article approval, Brunswick's approach poses a more fundamental risk; in essence, it would require the Army to assume the risk that Brunswick would successfully complete first article testing in time to comply with the required delivery and deployment schedule. Given the technical complexity of the item and the need for the item as soon as possible to meet an existing battlefield threat, we do not believe the Army is required to risk compromising its needs in that manner.

While we see no basis to challenge the Army's decision to allow only TI and Kollsman to compete, our conclusion pertains only to the current procurement. With regard to

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<sup>2/</sup> Since our conclusion is based on a comparison of the AN/KAS-1 with the basic features of the AN/UAS-12C, excluding the OSF component, we need not consider Brunswick's further argument that it was unreasonable to differentiate between Brunswick and Kollsman in view of Kollsman's lack of production experience with the OSF.

future procurements, we expect the Army to abide by its stated intention to procure any additional devices beyond the basic quantities under the current RFP using fully competitive procedures.

The protest is denied.

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