The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Magnavox Electronic Systems Company

File: B-231795

Date: November 2, 1988

DIGEST

Protest that an agency's modification of a contract for sonobuoys to require delivery of additional units constituted an improper sole-source award is sustained where it appears from the record that competition for the additional units was possible and likely would have resulted in the government paying a lower unit price for those units.

DECISION

Magnavox Electronic Systems Company protests the purported exercise by the Naval Avionics Center, Indianapolis, Indiana, of an option for a quantity of AN/SSQ-53B sonobuoys under contract No. N00163-88-C-0001 with Sparton Electronics Florida, Inc. Magnavox alleges that the Navy's action was not in conformance with either the regulatory requirements governing the exercise of an option or the terms of Sparton's contract and therefore constituted an improper sole-source award. We sustain the protest.

BACKGROUND

The Navy awarded the basic contract to Sparton on April 15, 1988, following a competition under request for proposals (RFP) No. N00163-87-R-0974, which was restricted to firms that qualified as "emergency planned producers." The RFP required offerors to submit unit prices for various "stepladder" quantities of sonobuoys ranging from 28,320 to 260,304 units and advised that the Navy would award up to three contracts, with quantities to be fixed based on the prices offered and the government's mobilization base requirements. The Navy determined that Sparton was the low offeror under an "average price differential" formula described in the RFP and made award to that firm for 107,827 units at $237.85 each. Magnavox and a third firm, Hermes

Electronics Limited, received awards for lesser quantities at higher unit prices. The propriety of the basic awards is not at issue.

The solicitation also stated that an option quantity representing 50 percent of the "buy" quantity would be included in each award and that offers should contain separately stated option unit prices no higher than the prices for the basic quantities. Prices for the option quantities were not evaluated in determining the relative standings of the offerors for purposes of awarding the basic contracts. Sparton's contract1/ provided for an option, exercisable by the government within 120 days of award, for an additional 53,914 sonobuoys at a unit price of $237.85. On June 15, the Navy modified Sparton's contract to increase the number of sonobuoys to be procured from that firm by 34,223 at a price of $214.30 for each additional unit.2/ Because of this protest, the Navy has ordered Sparton to stop work on the additional quantity.

Magnavox contends that the Navy's action was improper in part because the unit price paid to Sparton for the additional 34,223 sonobuoys was higher than the price Magnavox claims it would have charged for these units. In connection with the protest, we held a factfinding conference under our Bid Protest Regulations, 4 C.F.R. § 21.5(b) (1988), to resolve the question of how the Navy calculated and compared unit prices for both Magnavox and Sparton to determine the best price for the exercise of the option. The contracting officer was the sole witness.

FINDINGS OF FACT

We find that the Navy arrived at a unit price for Sparton for the additional 34,223 sonobuoys as follows. First, the Navy took the amount obligated under the basic contract with Sparton for 107,827 units, which was $25,646,651, and added to that figure the amount available for the procurement of additional units, which was $7,334,000. The Navy then used

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1/ The contracts awarded to Magnavox and Hermes did not provide for option quantities, but neither firm has objected. The agency explains that it included an option provision only in the contract of the offeror with the lowest unit price for the option quantity associated with that offeror's "buy" quantity.

2/ At the same time, the number of units that remained subject to the government's option was reduced by 34,223.

the stepladder pricing chart submitted by Sparton in response to the RFP to determine both the number of units it could have purchased initially with the total of $32,980,651 and what the unit price would have been for that number of units.3/ The Navy calculated that it could have purchased a total of 153,899 units from Sparton at $214.30 each. (Transcript, pp. 8-10.)

For purposes of comparison, the Navy took the amount obligated under the contract with Magnavox, $22,495,690, and added the $7,334,000 available for additional units. The agency then referred to the stepladder pricing chart submitted earlier by Magnavox and determined that for the total amount of $29,829,690, it could have purchased 129,004 sonobuoys at a unit price of $231.23. The Navy decided that obtaining additional sonobuoys from Sparton would be more advantageous to the government because the unit price at which Sparton had agreed to deliver additional units ($214.30) was lower than the comparable unit price the Navy calculated for Magnavox ($231.23). (Exhibit No. 3.)

ANALYSIS

An option provision in a contract gives to the government, for a specified time, the unilateral right to purchase additional supplies or services from the contractor. Federal Acquisition Regulation (FAR) § 17.201, 48 C.F.R. § 17.201 (1987).4/ Because the exercise of an option permits an agency to satisfy current needs for goods or services without going through formal competitive procedures, the FAR provides that before an option can be exercised the agency must be satisfied that a better price or more advantageous offer would not be available in the market. FAR § 17.207(c)(3) and (d). The FAR also provides that an agency may exercise an option only if the exercise accords with the terms of the option. FAR § 17.208(f). An agency is not permitted to negotiate with the awardee to

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3/ In conducting this exercise, as well as in awarding the basic contracts, the Navy determined prices for quantities not listed on the stepladder charts by interpolating between quantities that in fact were listed.

4/ Subpart 17.2 of the FAR, which concerns options, was amended effective July 17, 1988. Federal Acquisition Circular (FAC) 84-37, 53 Fed. Reg. 17,858 (1988). The Navy modified Sparton's contract on July 15, prior to the effective date of FAC 84-37; therefore all citations in this decision are to the FAR provisions applicable on July 15.

reduce the option price stated in the contract if price competition for the option quantity is available. Varian Associates, Inc., B-208281, Feb. 16, 1983, 83-1 CPD ¶ 160, aff'd in relevant part sub nom Department of the Army--Reconsideration, B-208281.2, July 12, 1983, 83-2 CPD ¶ 78.

In this case, the agency had a unilateral option to procure up to 53,914 additional sonobuoys from Sparton at a unit price of $237.85. Rather than exercise that option, however, either in whole or in part, the Navy negotiated with Sparton to obtain additional sonobuoys at a lower unit price, and ultimately modified the contract to add 34,223 units at $214.30 each. The Navy did not contact any potential source other than Sparton prior to the modification, but instead negotiated with Sparton on a sole-source basis. In our view, the record indicates that these sole-source negotiations resulted in the Navy paying a higher unit price for the additional units than it likely would have paid had a new competition been conducted.

The Navy obviously determined that the option price in Sparton's contract, $237.85, was not the best price available for additional quantities; otherwise, the Navy would not have attempted to negotiate a lower price. That a better price might be available was also clear from the stepladder pricing charts, which showed that as the quantities ordered increased, unit prices decreased. In this regard, the record shows that it occurred to the Navy that if it added an additional quantity to the quantity ordered under the basic contract, a contractor might be willing to reprice the basic quantity to reflect the unit price on its pricing chart for the combined quantity. (Transcript, p. 22.) The Navy discussed this possibility with Sparton, but the firm would only agree to price the additional quantity at the unit price that would have applied to the combined quantity.

Magnavox contends that had the Navy asked it for a price quote for an additional 34,223 units, the firm would have quoted a price of $203.95 each, because at that price Magnavox would have received an average unit price for the combined quantity of sonobuoys equal to the unit price for the combined quantity indicated on its pricing chart. Had Sparton taken the same approach in the context of a competition, its unit price for the additional units would have been approximately $160. In this connection there is no basis for concluding that the market had changed in the 2 months since award of the basic contracts or that adding additional units after the awards would have resulted in increased costs to contractors. The additional units merely would be added to the production run and would be delivered in lots over the course of 14 months.

It is not known, of course, whether either firm would have priced an additional quantity in this manner; this could be learned only through a competition. What is known, however, is that the average unit price for the combined quantity ordered from Sparton is higher than the unit price for that combined quantity listed on the pricing chart Sparton submitted 2 months prior to the modification.5/ We think it was unreasonable for the Navy to agree to pay a higher aggregate price for the combined quantity of sonobuoys than it could have paid just 2 months earlier.

We do not object, necessarily, to an agency attempting to negotiate for a lower price than that stated in an option. Where, however, the facts indicate that a competition likely would result in the lowest price obtainable, the agency should conduct such a competition rather than negotiate on a sole-source basis. Varian Associates, Inc., B-208281, supra. Here, we think that based on the pricing information available, the Navy should have concluded that a competition for additional sonobuoys likely would have resulted in a lower unit price for the additional units than the $214.30 negotiated with Sparton on a sole-source basis.

The protest is sustained. We recommend that the Navy conduct a competition for any required quantity of sonobuoys beyond the quantities initially ordered under the basic contracts and make appropriate modifications to Sparton's contract depending on the results of that competition. We find that Magnavox is entitled to the costs of filing and pursuing this protest; the firm should submit a statement of these costs directly to the Navy.

Milton J. Socolar

Acting Comptroller General
of the United States

5/ The Navy has ordered a total of 142,050 sonobuoys from Sparton for a total of $32,986,126.99, for an average unit price of $232.21. Sparton's listed unit price for quantities in the range of 142,000 units was approximately $216.00. The parties consider the exact prices of the firms for specific quantities to be proprietary.