PERRY

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Honeywell, Inc.

File: B-244555

Date: October 29, 1991

William L. Walsh, Esq., Wm. Craig Dubishar, Esq., and J. Scott Hommer III, Esq., Venable, Baetjer and Howard, for the protester.
Paul G. Dembling, Esq., and Dennis A. Adelson, Esq., Schnader, Harrison, Segal & Lewis, for Litton Systems, Inc., an interested party.
Gregory H. Petkoff, Esq., and Francis J. Lamir, Esq., Department of the Air Force, for the agency.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly exercised contract option with the firm selected by a foreign government under foreign military sales program where the designated source was changed as the result of a limited competitive selection process which did not involve any improper agency action.

DECISION

Honeywell, Inc. protests the Department of the Air Force's exercise of an option under Litton Systems, Inc.'s contract No. F33657-85-C-2157, for inertial navigation units (INUs) for the Royal Netherlands Air Force (RNLAF). The protester alleges that after the RNLAF had formally directed the Air Force to exercise an option for these INUs under Honeywell's contract, the Air Force illegally requested Litton and Honeywell to submit best and final offers, under which only Litton was permitted to reduce its price, which resulted in Litton's having its option exercised. The protester contends that once the Air Force received written direction from the RNLAF to exercise the option under Honeywell's contract, the Air Force had no authority to reopen negotiations and deny Honeywell the option.

We deny the protest.

Litton and Honeywell were both awarded contracts in August 1985 which contained four options, each option giving the government the right to acquire up to 1,000 units of standardized INUs that can be used on a variety of aircraft. The basic contracts were for the identical quantities of INUs; the exercise of options for additional INU quantities was to be based on each contractor's overall performance.

In December of 1990, both Honeywell's and Litton's contracts were renegotiated to include foreign military sales (FMS) requirements with associated price adjustments, referred to as FMS deltas. Apparently, both contractors then actively marketed their INUs to foreign purchasers, including the Netherlands. On February 12, 1991, Litton submitted a unilateral price reduction, in the form of a waiver of the FMS deltas and of rate and tooling and test equipment charges which apply to certain options, for all future FMS requirements. By a letter dated March 15, Honeywell similarly submitted a reduction in price, but restricted its reduction to an anticipated RNLAF purchase.

At a March 19 meeting, the RNLAF informed the Air Force that it considered the INUs of each offeror to be technically equal, and would base its selection for its current requirement on lowest price. The RNLAF submitted written instructions to the Air Force, dated March 27, to order the INUs from Honeywell at its March 15 reduced unit price. Honeywell was contacted by the contracting officer who congratulated it on being selected. On April 2, Litton submitted a further price reduction to a level below Honeywell's offer. On April 3, Honeywell met with RNLAF officials to discuss contract implementation.

On April 5, the Air Force issued a request for what it termed a "best and final offer" (BAFO) to Litton and Honeywell, in an effort to "regain control" of the contract, to curb what the Air Force viewed as a contractor-initiated bidding war, and establish a fair market price for the INU for both its own needs and for FMS requirements. This request informed offerors that they were not required to reduce their contract prices, but that "[a]ny reduction in price must apply to all units regardless of whether they are . . . [Air Force] or FMS requirements." BAFOs were due by the amended date of May 10.

The Air Force informed the RNLAF that it had issued a request for BAFOs, but in an April 11 letter the RNLAF confirmed its selection of Honeywell, essentially stating

that notwithstanding the Air Force's current BAFO request, the RNLAF designation of Honeywell "is still a valid one tak[ing] the desired delivery schedule into account."

Additional clarification information was distributed to Honeywell and Litton in an April 18 letter, in which the contractors were informed that they would have yearly opportunities to adjust their prices, and that an FMS delta, which cannot be below 0, should be proposed on a per country basis. The letter also provided that Honeywell and Litton should propose prices equal to or lower than their current contract rate, otherwise the adjustments would not be accepted. The letter contained the following statement: "It should be reiterated that it is your prerogative to adjust the current contract INU unit prices at this time or you may choose to make no changes to the present contract unit prices."

A "pre-proposal meeting" was conducted on April 19 with each of the contractors. Honeywell submitted an agency-level protest at its meeting, objecting to the "post-award" request for BAFOs. Honeywell was informed that the BAFOs were being used as a "contract-vehicle" to get both Litton's and its own price reductions "on contract" with the Air Force so that the RNLAF's award direction could be implemented and future options exercised at the reduced price. The protester was also informed that the Air Force intended to comply with the RNLAF award direction.[1] Based on these assurances, Honeywell withdrew its agency-level protest on April 30.

BAFOs were received on May 30 and contract modifications incorporating the new prices were executed. While Honeywell submitted the identical price it had offered to the RNLAF, Litton further reduced its price significantly below Honeywell's.

The contracting officer began preparation of the RNLAF contract documents for Honeywell and requested a subcontracting plan from Honeywell. However, on June 3, RNLAF officials contacted the contracting officer and requested the opportunity to revisit their designation given

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[1]Honeywell alleges that the Air Force officials went one step further and stated that Honeywell would receive the award so long as it submitted a BAFO price equal to the quoted price to the RNLAF. While the Air Force does not specifically deny this allegation, it alleges that Honeywell was also informed that the RNLAF could change its selection after the BAFOs were received. Honeywell denies that this statement was made.

the significant price reduction offered by Litton in its BAFO. By a letter dated June 14, the RNLAF directed the Air Force to purchase the INUs from Litton. On June 21, Honeywell protested the Air Force's failure to implement the March 27 and April 11 RNLAF award directions, alleging that the agency's failure to do so violated Federal Acquisition Regulation (FAR) § 6.302-4 and Defense Federal Acquisition Regulation Supplement (DFARS) § 225.7307(a)[2].

TIMELINESS

The Air Force initially contends that Honeywell's protest is untimely since the essence of the protest is that the agency improperly issued a request for BAFOs and, after withdrawing its agency-level protest, the protester did not protest this action to our Office within 10 working days of the issuance. Honeywell disputes this analysis, arguing that it is not challenging the BAFO request per se; rather, it objects to the agency's failure to implement the RNLAF's directions. Further, the protester argues that after timely protesting the request for BAFOs in its agency-level protest, it withdrew its protest only because of the Air Force contracting officials' representations and assurances that the BAFO process would not upset Honeywell's RNLAF award.

We find that Honeywell's protest concerning the selection implementation is timely. Taken as a whole, the record supports Honeywell's allegation that the issuance of the BAFO request did not provide the basis for protest because Air Force contracting officials caused Honeywell to believe that the BAFO process would not interfere with its RNLAF award. Moreover, to the extent there is a question as to exactly what Honeywell was told by Air Force officials, it is our practice to resolve doubts over the timeliness of a protest in the protester's favor. See Apex Micrographics, Inc., B-235811, Aug. 31, 1989, 89-2 CPD ¶ 205. Therefore, we consider Honeywell's objection to Litton's option exercise to be timely raised.

JURISDICTION

The Air Force next argues that its actions in this matter constitute the exercise of a contract option and, therefore, the protest should be dismissed as a matter of contract

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[2]Honeywell raises a series of objections to certain terms of the BAFO request itself, including an allegation that it was not properly justified, and that Honeywell was not permitted to further reduce its price. However, the record clearly establishes the factual inaccuracy of these allegations.

administration under our Bid Protest Regulations. 4 C.F.R. § 21.3(m)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). We disagree.

Here, the Air Force issued what it termed a BAFO request which permitted both Litton and Honeywell to offer revised pricing, for the RNLAF requirement and all future delivery orders, and both Honeywell and Litton were made aware that low price would be substantially determinative with respect to future option exercises. In effect, the Air Force conducted a limited competition between Honeywell and Litton, even though it was able to implement the award determination through the exercise of a contract option with one of the two competitors. We have recognized that in this situation, where the agency conducts a competition resulting in the exercise of an option under one competitor's contract, our rule against reviewing an agency's exercise of a contract option is inapplicable. See Mine Safety Appliances Co., 69 Comp. Gen. 562 (1990), 90-2 CPD ¶ 11.

SELECTION

Honeywell objects to the selection of Litton on two grounds: (1) the Air Force unreasonably failed to implement the RNLAF's selection of to Honeywell; and (2) the Air Force's inclusion of the RNLAF component in the BAFO prices after its selection of Honeywell was "improper, inequitable and in contravention to the representations made by [Air Force] personnel." The protester argues that in effect the Air Force improperly interfered with the implementation of the RNLAF selection, and in so doing violated FAR § 6.302-4 and DFARS § 225.7307(a). The protester's position is that the Air Force was required to implement the RNLAF's written directions upon receipt, and that the Air Force's failure to directly and immediately implement the March 27 and April 11 RNLAF official written direction to exercise the option under Honeywell's contract is a clear regulatory violation.

FAR § 6.302-4(a)(2) provides:

> "Full and open competition need not be provided for when precluded by the terms of . . . the written directions of a foreign government reimbursing the agency for the cost of the acquisition of the supplies or services for such government."

DFARS § 225.7307 provides that FMS purchases should be implemented under normal acquisition procedures, unless the FMS customer designates a particular source. These regulations do not require an agency to award a contract when a foreign government designates a particular source; rather, they provide that when such official written

direction is received, the resulting contract awards are exempt from the full and open competition requirements of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(4) (1988). Thus, while the Air Force was not required to pursue full and open competition, neither was it required by the regulations cited by the protester or by any other regulation of which we are aware to immediately implement the RNLAF's instructions.

Moreover, we think the Air Force acted reasonably here. The contracts at issue primarily provided for the Air Force's own needs. It was apparent, however, that the two contractors, in vying for FMS orders, were willing to offer lower prices than those contained in the contracts. Under the circumstances, the Air Force could legitimately seek to obtain for itself the better prices that the contractors were willing to give to FMS customers. Thus, we see nothing improper with the Air Force's seeking price revisions to the contracts so that reduced prices would be available for future government requirements under the contracts. The fact that the RNLAF decided, after the Air Force obtained the revised pricing, to specify Litton as the supplier of the INUs rather than Honeywell does not mean that the Air Force acted improperly.

In short, we find no violation of law or regulations in this case. We therefore deny the protest.

Robert P. Murphy

for James F. Hinchman
General Counsel