



Comptroller General
of the United States

Washington, D.C. 20548

145618

Decision

Matter of: Dayton-Granger, Inc.

File: B-245450

Date: January 8, 1992

Richard A. Ciambrone, Esq., Thompson, Hine and Flory, for the protester.

Bill Cosmos Giallourakis, Esq., for Trivec-Avant Corporation, an interested party.

Vera Meza, Esq., and Catherine S. Anderson, Esq., Department of the Army, for the agency.

Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in preparation of the decision.

DIGEST

1. Allegation that agency failed to justify an urgent sole-source determination is denied where agency properly determined that only the proposed awardee could meet its urgent needs for off-the-shelf noise canceling antennas in order to begin retrofitting helicopters to improve tactical communications.

2. Allegation that protester was unfairly denied an opportunity to qualify its antennas for a possible dual-source procurement is denied where agency had tested protester's antennas in developing its requirements and they had failed to meet the government's needs, and where the protester failed to submit additional antennas in a timely manner for testing even though the deadline for their submission was extended twice by the agency.

DECISION

Dayton-Granger, Inc. (DGI) protests the Department of the Army's sole-source award to Trivec Avant Corporation under request for proposals (RFP) No. DAAB07-91-R-P781, for "noise cancelling" dipole antennas to be used on AH-64 Apache attack helicopters. DGI questions whether the agency has an urgent need for the antennas and submits that it was unfairly precluded from competing for the Army's requirements.

We deny the protest.

On July 19, 1991, a Justification and Approval (J&A) was executed to purchase two types of antennas on a sole-source

basis from Trivec; "trailing edge" antennas (which had previously been manufactured by DGI), and "noise cancelling" antennas--both to be installed on the Apache. The J&A relied upon the authority in 10 U.S.C. §§ 2304(c)(1) (1988) (one identified responsible source) and 2304(c)(2) (unusual and compelling urgency).

The J&A was the culmination of a 6-year effort by the Army and McDonnell Douglas Helicopter Corp., the helicopter builder, to improve FM communications in the Apache at tactical flight levels during which Trivec developed an off-the-shelf "noise cancelling" antenna which, after flight testing met the government's revised requirements. The improvement effort was initiated because the Army discovered soon after the deployment of the Apache that its current antennas--one of which was supplied by DGI--could not provide reliable FM communications in a tactical environment, a limitation which the J&A states was further confirmed by field tests and during adverse conditions such as sand storms experienced in the Persian Gulf War. The principal problem identified was that pilots could not, with existing antennas, reliably communicate with friendly forces during tactical operations at distances sufficient to support the Apache's missions. During the 6-year effort, DGI supplied a number of antennas which were tested and found to be unacceptable.

The J&A also contained a finding that the antennas were urgently required so that retrofitting of the helicopters could begin with deliveries to start in January 1992. According to the J&A, failure to begin improving FM communications by that time would mean that flight crews and aircraft would continue to be subject to unacceptable risk levels because of an inability to properly communicate.

On August 22, the Army synopsised its proposed sole-source award for both types of antenna to Trivec in the Commerce Business Daily (CBD), citing "Footnote 22," which directs other potential offerors to submit an expression of interest showing the ability to meet the agency's requirements within 45 days (i.e., by October 6). During this period, DGI submitted an August 26 letter requesting a copy of the solicitation without comment as to which antenna it might propose to supply and an August 28 letter discussing its capabilities with regard to the "trailing edge" antenna.

DGI filed this protest on August 29; on September 17, the Army canceled its requirement for "trailing edge"

antennas.¹ On October 3, the agency invited DGI to submit a prototype "noise cancelling" antenna with supporting test data as a candidate for consideration in a possible dual-source competition with Trivec, and extended the original deadline until October 11. On October 8, DGI admitted that further "enhancements" to its prototype were needed to meet the government's present requirements and raised certain specification questions in requesting a further extension of 1 month to submit its antenna for the Army's consideration; the request was denied. On the scheduled deadline of October 11, DGI raised additional questions in requesting a new deadline of October 31--a date which the firm indicated it would meet; an extension was granted until "close of business" on October 31 for DGI to submit its tested prototype antenna.

After the deadline was extended, DGI states that it scheduled required vibration testing of its prototype for October 30, but that on October 28 and 29 its two testing laboratories found the testing specification to be defective, a fact that was communicated to the Army on October 29. It took the agency until October 30 to clarify the specification and testing was conducted thereafter on that date.

According to the protester, the prototype was ready for shipment on the morning of October 31. DGI also states that it called the contracting officer at 10:39 a.m., on October 31, to advise him that severe weather conditions in the Northeast might impede timely delivery of the antenna and to request unspecified clarification of delivery instructions. After an intermediate phone conversation at 11:06 a.m. in which DGI states that the contracting officer indicated he was still checking into the matter of delivery, and despite the fact that the protester had scheduled a 1 p.m. flight to insure delivery of the antenna, the firm waited until the contracting officer called at 3:35 p.m., at which time the protester was advised not to bother shipping the prototype because it could not be timely delivered. The antenna was tendered the next day but rejected as late.

¹DGI withdrew its protest relating to trailing edge antennas upon learning that the agency canceled its requirements for this type of antenna because they were no longer urgently required. DGI claims that it is entitled to recover its bid protest costs because the cancellation was taken in response to its protest. While it is not clear whether the cancellation resulted from DGI's protest, it was in any event promptly effected within 3 weeks of the filing of the protest. We therefore deny the claim. See CV Assocs.--Recon., B-243460.2, Aug. 20, 1991, 91-2 CPD ¶ 171.

The contracting officer's account² of the events of October 31 is markedly different from DGI's. He states that in the first morning conversation, DGI indicated that it had already shipped the antenna and had arranged for its marketing representative to pick it up and directly deliver it to the agency but that weather might delay the representative. The contracting officer further states that he recommended delivery from the airport by private messenger and that he provided a specific name and address for delivery purposes. As to the afternoon conversation, the contracting officer states that DGI indicated that it had not, in fact, shipped the antenna but that it was making arrangements for a later air shipment which would mean that the prototype would not arrive until about 11 p.m. According to the contracting officer, these conditions warranted his advice not to ship. The Army has since determined that it is necessary to proceed with an award to Trivec notwithstanding the pendency of this protest.

DGI principally objects to the Army's determination that the antennas are urgently needed. In this regard, the protester argues that the government knew as early as 1985 that the Apache was experiencing FM communications problems and, in DGI's view, did little more than help Trivec to develop an antenna which could later be sold to the government on a sole-source basis. In contrast, DGI asserts that the agency gave it only about 1 month to qualify its product--a time frame in which the protester asserts that agency officials deliberately frustrated its efforts to timely submit a prototype for consideration.

An agency may use other than competitive procedures to procure goods where its needs are of such an unusual or compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2). When citing an unusual and compelling urgency, the agency is required to request offers from "as many potential sources as is practicable under the circumstances." 10 U.S.C. § 2304(e). An agency, however, has the authority under 10 U.S.C. § 2304(c)(2) to limit the procurement to the only firm it reasonably believes can properly meet its needs within the time available. Abbott Prods., Inc., B-231131, Aug. 8, 1988, 88-2 CPD ¶ 119. We will not object to the agency's determination to use other than competitive procedures unless we find that the agency's decision lacks a reasonable basis. Id.

²This account was sent to DGI on November 27 and, in its final submission to this Office on December 16, the protester did not mention it.

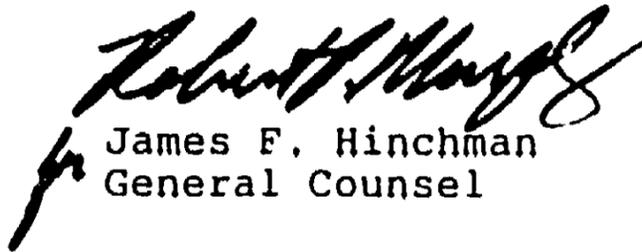
There is nothing in the protester's arguments which contradicts the reasonableness of the J&A findings that improved "noise cancelling" antennas are needed by January 1992 to avoid loss of life and aircraft should there be a need to use the Apache in combat. There also is nothing in the record which contradicts the other essential finding in the J&A--i.e., that, at present, only Trivec manufactures an acceptable antenna. By DGI's own admission in mid-October its prototype still required modification to meet the agency's requirements. We also note that, in making its assertion that no urgent need for new antennas exists, DGI fails to mention that its own antennas had been tested during the 6-year study and that they had been determined to be unacceptable. Further, the record shows that during the study period Trivec chose to undertake at its own expense a development program to produce improved antennas. There is nothing in the record to indicate that DGI undertook such an effort or that it was prevented from doing so. Thus, we have no basis to disturb the agency's conclusion that only antennas manufactured by Trivec could meet the agency's needs within the required critical delivery schedule. Abbott Prods., Inc., supra.

We also are unpersuaded by DGI's suggestions that it was unfairly treated after the sole-source CBD announcement was issued. By the first deadline, the firm had sent nothing to the Army evidencing its ability to supply the required noise cancelling antennas. The Army twice extended the deadline for the submission of a prototype and supporting testing data. On the first extended deadline, DGI requested and received a further extension to October 31.

As early as October 11, the firm knew, by the agency's response to its request, that it had to deliver a tested prototype by close of business on October 31, yet it waited to schedule final testing until October 30. In our view, the protester operated at its own peril in this regard and, despite the weather conditions which existed on the day the prototype was due and any other last-minute need for further delivery instructions, we cannot conclude that the Army acted unreasonably in refusing to grant a further extension.

when it became apparent that the unit would not be delivered on time. The record indicates that DGI was given an opportunity to meet the Army's requirements during its 6-year study and again after the CBD announcement was issued; nothing more was required.

The protest is denied.



James F. Hinchman
General Counsel