



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

Decision

Matter of: Motorola, Inc.
File: B-247913.2
Date: October 13, 1992

Bruce S. Ramo, Esq., and Aaron C. Horowitz, Esq., for the protester.
Frank D. Kramer, Esq., and Elizabeth M. Brown, Esq., Shea and Gardner, and John F. McNett, Esq., for Rockwell International Corporation, Randy Hoffmann and Sharon Jones for Magellan Systems Corp., E. Dean Tanner for Texas Instruments, and Alfred Verdi, Esq., for Magnavox Electronic Systems Corporation, interested parties.
Maj. Wyckliffe S.G. Furcron, Capt. Vanessa Summerfield, and John Petit, Esq., Department of the Air Force, for the agency.
Mary G. Curcio, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency may initiate a procurement for a nondevelopmental item (NDI) at a time when no NDI is available in the marketplace, where agency expects such NDI to be available by the time of award.
2. Where procuring agency properly required offerors to supply a nondevelopmental item and protester cannot meet that requirement, protester is not an interested party to challenge solicitation's bid sample requirement.

DECISION

Motorola, Inc. protests the decision by the Department of the Air Force Joint Program Office to procure Precise Lightweight Global Positioning System Receivers (PLGR)¹ on a nondevelopmental item (NDI) basis under letter request for technical proposals No. F04701-91-B-0007, a two-step sealed bidding procurement. Motorola also protests the requirement that bidders under the first-step solicitation submit bid

¹The PLGR is a hand-held device used to determine precise positioning and to navigate reliably worldwide during day and night, in all climatic conditions.

samples of the receivers they will be providing under the contract for testing.

We deny the protest in part and dismiss it in part.

BACKGROUND

The PLGR is a global positioning system (GPS)² receiver which has anti-spoofing³ and selective availability⁴ capabilities. The PLGR combines technology currently available in the small, lightweight GPS receiver (SLGR) with that of the user equipment manpack. The SLGR, which evolved from commercial GPS initiatives, provides the basic GPS capabilities, but does not comply with Department of Defense (DOD) directives relative to precise positioning service (PPS)⁵ capable systems. Specifically, hand-held GPS receivers developed commercially for civilian users are designed for the GPS Standard Positioning Service (SPS),⁶ and cannot meet DOD performance requirements for precise positioning service with selective availability and anti-spoofing capabilities implemented. The user equipment manpack does have

²The GPS is a three dimensional position, time and velocity navigational system consisting of three segments: the space segment, a constellation of satellites that provide the navigational data; the control segment, a ground-based operational system for controlling the satellites; and a user equipment segment, consisting of a wide variety of equipment for collecting and interpreting the data in such a way that it provides latitude, longitude, altitude, time and velocity to users around the globe.

³Anti-spoofing is a process of encrypting one of the codes broadcast by the satellites. This prevents an enemy from predicting the code sequence and using that prediction to generate a code that could be used to deceive a GPS set. The set would believe the deception code to be real and could falsely calculate its position.

⁴Selective availability is a method of intentionally degrading GPS satellite signals so that positioning accuracy is degraded unless the GPS satellite set is authorized with cryptographic key access so that it can remove the intentionally introduced corruptive effects.

⁵PPS is the military positioning accuracy obtained by using GPS satellite signals with the corruptive effects of selective availability removed.

⁶SPS is for civilian users who have not been authorized by DOD to possess cryptographic keys to read the encrypted signals of the GPS. It is available to anyone in the world.

PPS capabilities; however, it is too large to meet the agency's physical requirements as stated in the solicitation.

In November 1990, the Air Force published a sources-sought synopsis in the Commerce Business Daily (CBD) to alert the business community to the planned acquisition and subsequently forwarded market surveys and draft specifications to all firms that indicated an interest in the program. The purpose of the market survey was to define the range of commercial development underway since, if at all possible, the Air Force desired to procure the PLGR on an NDI basis. In this regard, the transmittal letter, which accompanied the documents, stressed the importance of industry comments and noted that the government did not wish to procure a receiver that required extensive research and development. The survey results indicated to the Air Force that several potential offerors would have units that met the draft specifications available by January 1992.

Throughout the ensuing months, the Air Force continued to meet with industry officials collectively and individually and to accept comments on the specifications. As a result of industry input, the Air Force issued a number of modifications to its internal draft specification which were designed to enhance the probability that the PLGR could be procured on an NDI basis and, as a result of the industry input and the changes, the agency concluded that the PLGR would be available on an NDI basis. The Air Force further concluded that two-step sealed bidding with bid sample testing was the best acquisition strategy.

The first-step solicitation, with the final specification, was issued on May 6, 1992. The solicitation requested an NDI receiver and required bidders to submit preliminary information on June 8, with additional information on July 17 and the bulk of the technical proposal and bid samples due on September 1. Contract award is anticipated for January 1993.

STATUTORY FRAMEWORK

10 U.S.C. § 2325 (1988 and Supp. III 1991) establishes a preference for the procurement of NDIs. This statute provides:

"(a) Preference-The Secretary of Defense shall ensure that, to the maximum extent practicable-

"1) requirements of the [DOD] with respect to a procurement of supplies are stated in terms of-

- (A) functions to be performed;
- (B) performance required; or
- (C) essential physical characteristics;

"(2) such requirements are defined so that [NDI] may be procured to fulfill such requirements;

"(3) such requirements are fulfilled through the procurement of [NDIs]; and

"(4) prior to developing new specifications, the Department conducts market research to determine whether [NDIs] are available or could be modified to meet agency needs."

Under 10 U.S.C. § 2325(d), an NDI is defined as:

"(1) any item of supply that is available in the commercial marketplace;

"(2) any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

"(3) any item of supply described in paragraph (1) or (2) that requires only minor modification in order to meet the requirements of the procuring agency; or

"(4) any item of supply that is currently being produced that does not meet the requirements of paragraph (1), (2), or (3) solely because the item-

- (A) is not yet in use; or
- (B) is not yet available in the commercial marketplace."

PROTESTER'S CONTENTIONS

According to Motorola, a procuring agency may restrict an acquisition to an NDI only if the item to be acquired is in production or will result from only minor modifications to an existing product. Motorola argues that the PLGR the Air Force is attempting to procure is not an NDI because, on July 25, 1991, the date the agency announced the procurement in the CBD, there was no PLGR that was currently being produced that met the specifications and none that would meet the specifications by undergoing only minor modification. Motorola argues that an NDI must exist in the marketplace at the time the agency decides to procure the item on an NDI basis (i.e., at the time of CBD synopsis).

Motorola argues that even if an item is being developed and will be in production at the time the item is evaluated for award it does not meet the definition of an NDI because at the time the agency makes the decision to procure on an NDI basis, the item is not currently being produced and will have to undergo extensive testing. Thus, Motorola asserts that even if industry was in the process of developing the PLGR or was willing to develop the PLGR on its own, the agency here had no authority to procure the PLGR on an NDI basis.

According to Motorola, existing military receivers are too large to meet the portability requirements of the Air Force, and that the commercial receivers do not contain anti-spoofing and selective availability, as required by the specifications. According to Motorola, to adapt either of these receivers to the current specification would require numerous modifications. Motorola asserts that the market survey shows that on the date the CBD announcement was issued, the earliest that any company could provide a GPS receiver that could satisfy the PLGR specification was June 1992, approximately 1 year away.

AGENCY RESPONSE

The Air Force acknowledges that it desired to procure the PLGR on an NDI basis if at all possible. The Air Force notes that in fact under 10 U.S.C. § 2325 it was required to procure the PLGR on an NDI basis to the maximum extent practicable. To this end, the agency reports that in order to determine if the PLGR could be procured on an NDI basis, it used market surveys, meetings with the industry, and draft specifications. According to the Air Force, through this process it sought to ensure the availability of equipment that would meet the minimum requirements of the users with only minor, if any, modifications to existing receivers.

The Air Force further asserts that it made a reasonable and proper determination to procure the PLGR on an NDI basis. In this regard, the Air Force does not argue that there was a receiver in production at the time it initiated contact with industry or at the time it issued the CBD notice announcing the procurement. The Air Force argues, however, that, based on the market surveys it conducted and the meetings it held with industry, it reasonably concluded that there were receivers available that would meet the PLGR specification with only minor modifications or that they were being developed and would be available by the time the agency awarded the contract for the PLGR.

The Air Force disagrees with Motorola that an item is not an NDI if it is only in the process of being developed by the industry at the time a procurement is first contemplated. Rather, asserts the agency, an item should be considered an NDI if it is in production at the time the product is evaluated for award. To support this position, the agency argues that under 10 U.S.C. § 2325(a)(4), the Secretary of Defense must conduct market research to determine whether NDIs are available or could be modified to meet the agency's needs. The Air Force asserts that as part of this survey, as a practical matter, the agency must include questions to determine what products are anticipated to be available in the near future since a product in development at the time of the survey could be available at the time that the government actually evaluates the needed item. The Air Force asserts that this is especially true where, as here, the industry has told the government that it is independently conducting an effort to complete a product that meets the agency's needs and would be available shortly. Thus, according to the Air Force, since the market survey and other information showed that several potential bidders would have products available by the anticipated award date,⁷ the Air Force properly concluded that an NDI PLGR would be appropriate.

In support of its position, the agency asserts that the results of the initial market survey showed that there were three companies currently producing hand-held receivers. Two of those companies indicated that their current receivers could be upgraded with anti-spoofing and had PPS capability. In addition, these two companies stated that their current receivers satisfied 90 to 99 percent of the PLGR specification, while two others stated that their current receivers met more than 60 percent of the requirement. Thus, the Air Force states that after the initial market survey it determined that at least three offerors would be able to provide a receiver that met the PLGR specification with only minor modifications to one of their existing products. The Air Force further reports that throughout its contact with industry in connection with the PLGR procurement, at all times it was led to believe that there would be three offerors that could provide the PLGR on an NDI basis. Thus, at various times, Rockwell International Corporation, Motorola, and E-Systems, Inc., in addition to Trimble Instruments, Magellan, and Texas Instruments, stated that they could provide a compliant product. The agency further asserts that the chips which are at the heart of the system

⁷This need date was changed from January 1992 to January 1993 to reflect changing quantity requirements, funding requirements and specification requirements.

had already been developed and were available in the marketplace. Thus, according to the Air Force, the only necessary technical modification was the integration of the chips into appropriate existing receivers.

ANALYSIS

As noted, under 10 U.S.C. § 2325, DOD, to the maximum extent practicable, is required to procure supplies on an NDI basis and to define its requirements so that those requirements can be satisfied by NDIs. To this end, 10 U.S.C. § 2325(a)(4) requires DOD to conduct market research to determine whether NDIs are available that will meet its needs before developing new and unique military specifications. Thus, while the law does not require any particular procurement to be for NDIs, see Harris Corp., B-235126, Aug. 8, 1989, 89-2 CPD ¶ 113, it does envision that DOD will buy NDIs whenever possible.

In furtherance of its statutory goal, DOD frequently conducts procurements with preferences for NDIs. See, e.g., Stewart-Warner Elecs. Corp., B-247308.2, July 15, 1992, 92-2 CPD ¶ 25; Eyring Corp., B-245549.7, Mar. 31, 1992, 92-1 CPD ¶ 320; Wylie Laboratories, B-239671, Sept. 19, 1990, 90-2 CPD ¶ 231; Harris Corp., supra. It has also limited procurements to NDIs only. See Astron, B-236922.2, May 2, 1990, 90-1 CPD ¶ 441. The statutory preference for an NDI is just that--a preference. See Harris Corp., supra. Decisions to procure on an NDI-only basis must be consistent with the broader statutory and regulatory scheme concerning the selection of specifications for a particular procurement--they must, in most cases, permit full and open competition, reflect market research, and be consistent with agency needs and the market availability to satisfy these needs. 10 U.S.C. § 2305(a)(1); Federal Acquisition Regulation § 10.002.

When an agency's choice of specifications is challenged, we review the matter to determine if the agency has a reasonable basis for imposing or using the challenged specifications. Barrier-Wear, B-240563, Nov. 23, 1990, 90-2 CPD ¶ 421; Janke & Co., Inc., B-225710, B-226897, June 12, 1987, 87-1 CPD ¶ 589. Thus, the question presented by Motorola's protest is whether the Air Force had a reasonable basis for its selection of NDI-only specifications. We conclude that it did.

First, we see no reason why NDIs should not be viewed as items that will be available by the date of award rather than some earlier date. The fundamental purpose of the statutory NDI preference is to preclude the unnecessary development of unique military specifications and the anticipated higher cost of acquiring from private industry items

manufactured to those specifications rather than items the private sector otherwise could provide. In other words, if DOD can satisfy its needs with commercially available items or with such items with only minor modification to them, DOD is to acquire such products instead of products manufactured to its unique requirements. Obviously, that purpose is satisfied not only when items defined as NDIs are available when a procurement is initiated, but also when they will be available by the time of award. Therefore, so long as the private sector is developing items for commercial use, there is no reason why, if those items are either available in the commercial marketplace or being produced by the time of award, they should not be considered as NDIs.

Second, we find, based on our review of the protest record, including the submissions of the protester, the agency, and interested parties and the testimony that was given at the hearing held in connection with this protest, that the Air Force, at the time it issued the solicitation, had a reasonable basis to conclude that there would be NDI PLGRs available by the time of contract award. From the time the first sources-sought synopsis was issued in the CBD in November 1990 until May 6, 1992, when the solicitation was issued, the Air Force was in close contact with industry representatives concerning the possibility of obtaining the PLGR items on an NDI basis. The Air Force learned that there were offerors who would have an NDI available either by making minor modifications to existing items or by developing an item that would meet the agency's specifications and would be available by the time the agency would award the PLGR contract. While the agency's conclusion as to which contractors would be available to compete on an NDI basis changed during this period, at all times the agency believed that three different offerors would be able to offer an NDI. Moreover, during March 1992, Rockwell demonstrated a working model of its PLGR to the government. We also note that at the hearing both Rockwell and Magellan testified that they have reached the point where they are now producing compliant PLGRs on a production line. Thus, we think the Air Force had a sufficient basis to conclude that an NDI procurement was feasible.

Nonetheless, Motorola asserts that the Air Force's actions are improper here because the Air Force should not be able to rely on anticipated product development in response to the agency's own prodding to support its decision to procure the item on an NDI basis. Motorola asserts that no development on the PLGR was undertaken by any company in earnest until after the PLGR procurement was announced. Motorola also points to the agency's statement that it revised its specification to drive industry to the maximum of the current state of the art in GPS technology.

The record does not support Motorola's factual premise--it shows that the development was underway at the time the agency started planning the PLGR procurement. Rockwell is the producer of the manpack--which meets the DOD required capabilities but is too large for combat use--which the Air Force was attempting to replace with this procurement. Rockwell testified at the hearing that based on its observations of manpack users and market research in 1989, it independently concluded that there was a market for a small hand-held receiver with manpack capabilities. As a result of this conclusion, Rockwell began designing and developing its version of the PLGR in 1989, before that Air Force even issued the sources-sought announcement in the CBD. Similarly, Magellan also testified that it began development of its PLGR, which is a modification of an existing Magellan product based on an independent determination that the item would be required and that its development began before the agency initiated the PLGR procurement or began to research the PLGR procurement. Thus, we find no support for the assertion that the agency initially induced contractors to develop the PLGR for its needs by holding out the possibility that the successful contractor would receive an award.

BID SAMPLES

Motorola also protests the requirement in the solicitation for bid samples because, according to Motorola, the agency can adequately describe all its requirements in the specifications. See FAR § 14.202-4. Under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1992), a protester must be an interested party before we will consider its protest. A protester is not an interested party if it would not be in line for award if its protest were sustained. See Textiles, Inc., B-243912, July 24, 1991, 91-2 CPD ¶ 89. Here, since we have concluded that the Air Force properly limited the procurement to NDIs, and since Motorola acknowledges that it cannot provide an NDI PLGR, and in fact did not participate in the procurement, Motorola would not be in line for award even if its protest on this issue were sustained. Accordingly, Motorola is not an interested party to challenge the bid sample requirement, and we will not consider its protest on this issue. See Co. Am. Comms., Inc., B-248575 et al., Sept. 4, 1992, 92-2 CPD ¶ ____.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel