



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** S-TRON  
**File:** B-248176.3  
**Date:** May 2, 1994

Brett A. Alcala, Esq., Mousalam, Katzman & Alcala, for the protester.

Garry S. Grossman, Esq., Fenwick & West, for Conax Florida Corporation, an interested party.

Ronald M. Pettit, Esq., Defense Logistics Agency, for the agency.

David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that termination of protester's contract, under which protester was to satisfy 40 percent of agency requirement, and direction of all remaining orders to second, 60-percent requirements contractor, amounted to a modification improperly exceeding the scope of the second contract and which therefore should have been competed, is denied where contracts contemplated that second contractor would satisfy entire requirement in the event that, as here, the protester failed to supply inflator assemblies for automatic life preservers which were fit for the life-saving purpose for which they were procured.

### DECISION

S-TRON protests the Defense Logistics Agency's (DLA) termination for convenience of the firm's contract, No. DLA750-92-D-1048, for inflator assemblies for use in automatic life preservers, and the agency's determination to instead procure its entire requirement for inflator assemblies under contract No. DLA750-92-D-1047 with Conax Florida Corporation. S-TRON argues that DLA's actions improperly deprived it of an opportunity to furnish the inflator assemblies and constituted an unjustified sole source procurement from Conax.

We deny the protest.

Both S-TRON's contract (No.-1048) and Conax's contract (No.-1047) resulted from a solicitation (request for proposals (RFP) No. DLA750-91-R-0278) issued by the agency

in 1991 to satisfy its estimated annual requirement for 20,000 inflator assemblies for use in automatic life preservers. After evaluating proposals received in response to that solicitation, the agency determined that Conax's proposal offered the best value to the government. Since, however, the agency desired to maintain a second source for the inflator assemblies, it split the award between Conax and S-TRON, which had been supplying inflator assemblies under a prior 1991 contract (No. DLA700-91-C-0208). The requirements contract awarded to Conax on March 23, 1992, provided for that firm to furnish 60 percent of the agency's 20,000-unit estimated requirement, while S-TRON's requirements contract awarded on the same date called for it to furnish the remaining 40 percent. However, the solicitation and the resulting contracts provided that:

"At the time delivery orders are written, the quantities will be divided as practicably as possible between the awardees according to the percentage of award received. In the event that a contractor fails to meet the requirement of the contract, i.e., first article test, delivery, or quality requirements, the government reserves the right to award the full quantity of the delivery order to the contractor who is performing most advantageously to the terms of the contract until such time that the contractor is able to comply with the contract requirements."

The 1991 solicitation and the resulting 1992 contracts included a performance specification under which contractors were responsible for developing their own inflator assembly designs. While S-TRON's inflator assembly was made of plastic, Conax's was made of metal. The agency reports that on July 27, 1993, a sailor on the aircraft carrier U.S.S. Abraham Lincoln fell overboard while wearing a life preserver equipped with a plastic inflator assembly supplied by S-TRON under its prior 1991 contract. The agency's investigation found "extremely serious deficiencies with the S-TRON inflator assembly which present a serious hazard for fleet sailors." Specifically, the investigation showed that the S-TRON inflator assembly failed to inflate the life preserver because of a crack that had developed in the neck of the inflator assembly housing into which CO<sub>2</sub> cartridges are screwed. According to the agency, subsequent testing of the S-TRON inflator assemblies supplied under the 1991 contract indicated that they were prone to cracking at the neck, thus rendering them unreliable, and all assemblies were destroyed. In addition, although the assemblies furnished by S-TRON under the 1992 contract (No. -1048) at issue here included a reinforced neck, the agency reports that they nevertheless had a fatigue life of approximately only 6 months and therefore were also unsatisfactory. In

contrast, tests conducted on Conax's metal inflator assembly indicated that it was very durable and could indefinitely withstand repeated removal and reinsertion of CO<sub>2</sub> cartridges.

The agency found the performance specification to be inadequate because it did not ensure that the inflator assemblies would be durable enough to meet its minimum needs. As a result, the agency modified the specification to require more stringent testing and to add certain design requirements. In response to a request for an estimate of the cost of incorporating the modified specification into its contract, Conax quoted a price of \$8,917. In contrast, S-TRON quoted a price of \$76,617.49 and specifically cautioned that the government would bear any technical risks associated with the design changes. The agency reports that given the higher cost of modifying S-TRON's contract, and since even with modifications it was not certain that S-TRON's inflator assembly would satisfy the agency's operational requirements, it determined to terminate for convenience S-TRON's 1992 contract (No.-1048) and instead procure the remainder of its requirement under Conax's requirements contract.

In its protest, S-TRON challenges the transfer to Conax of S-TRON's 40-percent share of the agency's overall requirement for inflator assemblies. S-TRON maintains that its inflator assembly complied with the contract specification and therefore was not deficient. S-TRON argues that the assignment of its share of the inflator assembly requirement to Conax amounted to an improper sole source award.

Any challenge to the termination of S-TRON's contract would involve matters of contract administration beyond the scope of our bid protest function. Under the Competition in Contracting Act of 1984, our Office considers challenges to the award or proposed award of contracts. 31 U.S.C. § 3552 (1988). Consequently, we generally do not review matters of contract administration, as they are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the U.S. Court of Federal Claims. 4 C.F.R. § 21.3(m)(1) (1994). The few exceptions to this rule include situations where it is alleged that a contract modification improperly exceeds the scope of the contract and therefore should have been the subject of a new procurement, CAD Language Sys., Inc., 68 Comp. Gen. 376 (1989), 89-1 CPD ¶ 364; where the protest alleges that the exercise of a contractor's option is contrary to applicable regulations, Bristol Elecs., Inc., B-193591, June 7, 1979, 79-1 CPD ¶ 403; or where an agency's basis for contract

termination is that the contract was improperly awarded. ADC Ltd., B-255457, Oct. 25, 1993, 93-2 CPD ¶ 258; ASR Mgmt. & Technical Servs., B-244862.3; B-247422, Apr. 23, 1992, 92-1 CPD ¶ 383. None of these exceptions permit our Office to review a termination based upon an agency determination that, as here, the contractor's design cannot assure satisfactory performance.

However, S-TRON's challenge to the agency's determination to satisfy its entire requirement for inflator assemblies under Conax's contract amounts to an argument that the agency executed a modification of Conax's contract which exceeded the scope of that contract and therefore should have been the subject of a new procurement. As noted above, our Office does review protests of alleged improper sole source procurement actions. Nevertheless, it is clear from the record that S-TRON's position is without merit.

Although the solicitation contemplated that the quantity of inflator assemblies ordered by the agency would be divided as practicably as possible between the awardees according to the percentage of award received, it reserved the right to the government to award the full quantity to the contractor performing most advantageously in the event that the other contractor failed to meet contract requirements, including quality requirements. In this regard, the specification for inflator assemblies for automatic life preservers which was included in the solicitation generally required that the "inflation assembly shall automatically activate within 3 seconds when fully immersed in lake or seawater. . . ." Further, the specification required that the inflation assembly shall be "of uniform quality and free from other defects which could adversely affect performance, reliability, or durability." In addition, while the specification apparently did not establish an overall useful life for the inflator assembly, it did provide that the "power supply shall have a minimum shelf life of 3 years and be delivered with a remaining/functional shelf life of two (2) years, and be easily replaceable by the user." Thus, while the specification may not have specifically addressed the construction of the neck into which the CO<sub>2</sub> cartridges were to be screwed, we believe that it clearly contemplated that the design and manufacture of the overall inflator assembly, including the neck, would be sufficiently durable such that it would not fail in normal use within 6 months, as did S-TRON's assemblies.

In these circumstances, where one contractor failed to supply inflator assemblies of reasonable durability and fit for the life-saving purpose for which they were procured, the solicitation reserved to the agency the right to direct any remaining orders to the other contractor supplying inflator assemblies fit for the purpose for which they were

procured. Accordingly, DLA's decision to satisfy its entire requirement for inflator assemblies under Conax's contract did not amount to a modification of that contract which exceeded the scope of the contract. The requirement thus did not have to be satisfied by conducting a new procurement.

The protest is denied.



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