



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

# Decision

**Matter of:** Wamore, Inc.

**File:** B-417450; B-417450.2

**Date:** July 9, 2019

Dennis C. Ehlers, Esq., David A. Edelstein, Esq., and Caitlin E. Trevillyan, Esq., Asmar Schor & McKenna PLLC, for the protester.

Jonathan D. Shaffer, Esq., Armani R. Vadiee, Esq., Mary Pat Buckenmeyer, Esq., and Todd M. Garland, Esq., Smith Pachter McWhorter PLC, for Airborne Systems North America, the intervenor.

Jonathan A. Hardage, Esq., and Misty L. Caldwell-Colen, Esq., Department of the Army, for the agency.

Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protest of proposed award of a sole-source contract for highly specialized equipment for foreign military sales purposes is denied where the record shows the agency reasonably concluded that only one firm possessed the necessary data rights to produce the item and was capable of meeting the agency's needs, and award to any other source would cause unacceptable delay in fulfilling the agency's requirements.

## DECISION

Wamore, Inc., of Phoenix, Arizona, protests the intended sole-source award of a contract to Airborne Systems North America (Airborne Systems), of Pennsauken, New Jersey, under request for proposals (RFP) No. W56HZV-18-R-0077, issued by the Department of the Army, Army Contracting Command – Warren, for the supply of joint precision aerial delivery systems (JPADS) for foreign military sales (FMS) to the countries of Norway and Jordan. Wamore argues the intended sole-source contract award to Airborne Systems is improper, insofar as the Army's belief that only Airborne Systems possesses the necessary data rights for the procurement here is in error.

We deny the protest.

## BACKGROUND

The JPADS is a guided, high-altitude capable, precision airdrop system used to accurately deliver payloads by aircraft to soldiers on the ground. Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 4; Agency Report (AR), Tab 41, Justification and Approval (J&A) at 3. The JPADS essentially uses a global positioning system (GPS), steerable parachutes, and an onboard computer to guide loads of varying weights (e.g., 2,000 pounds, or "2K") to a designated landing point. The JPADS is comprised of two primary subsystems: (1) a decelerator (i.e., parachute with steering lines); and (2) autonomous guidance unit (AGU) consisting of GPS, battery pack, "guidance, navigation and control" software, and hardware required to operate the steering lines.<sup>1</sup> COS/MOL at 4; AR, Tab 41, J&A at 3. The AGU creates drag on either side of the decelerator, which thereby provides JPADS with system directional control throughout its descent.

The JPADS 2K procurement history is a long and contentious one. On March 12, 2007, the Army competitively awarded contract No. W911QY-07-D-0010 (hereinafter, D-0010 contract) to Airborne Systems for the design, development, manufacture, and testing of the JPADS 2K system.<sup>2</sup> COS/MOL at 4; AR, Tab 14, D-0010 Contract. Wamore was a subcontractor to Airborne Systems under this original development contract. Wamore Comments at 12.

On April 16, 2009, as part of the administration of the D-0010 contract, the Army offered to purchase data rights in the JPADS 2K system from Airborne Systems. AR, Tab 16, Army Letter to Airborne Systems. On June 4, prior to the sale of data rights to the Army, Airborne Systems entered into a "rights purchase agreement" with Wamore. Relevant to this discussion, the agreement provided for the following:

Wamore hereby sells, delivers, transfers, assigns and conveys exclusively to Airborne . . . all of Wamore's worldwide rights, title and interest in and to the Components [i.e., Airborne Guidance Unit WA-2000], including, but not limited to: (i) any and all U.S. or foreign patents, trademarks, copyrights, together with any registrations (issued or pending), associated with, or related to the Components; and (ii) a complete manufacturing and source control information package which will include all material specifications, Level III technical drawings, schematics, guidance, navigation and control source code and any information necessary to manufacture and produce the Components.

---

<sup>1</sup> The autonomous guidance unit is also referred to as the "aerial guidance unit," "airborne guidance unit," or "air guidance unit" in various documents in the record.

<sup>2</sup> The D-0010 contract was awarded to Para-Flight, Inc., which subsequently changed its name to Airborne Systems. AR, Tab 14, D-0010 Contract; Tab 15, Certificate of Amendment for Name Change.

AR, Tab 17, Rights Purchase Agreement at 1.

Thereafter, on August 27, the Army entered into a special license agreement (SLA) with Airborne Systems for government purpose rights in the JPADS 2K technical data, which included the following restriction:

For purposes of this agreement, including without limitation paragraph (2) above, "Government Purpose" shall not include FMS, FMF [foreign military funding], or any other U.S. Government sales or transfer of the JPADS 2K Hardware Technical Data or any products manufactured using or in accordance with the JPADS 2K Hardware Technical Data to foreign governments, international organizations, or multi-national defense organizations until April 1, 2029.

AR, Tab 19, Modification P0022; Tab 20, SLA with Airborne Systems.

On June 19, 2011, as part of the continuing performance of the D-0010 contract, Airborne Systems submitted an engineering change proposal (ECP) to the Army for a configuration change to the JPADS 2K AGU component.<sup>3</sup> AR, Tab 21, JPADS 2K ECP Request. The ECP proposed the AGU be reconfigured to be "lighter and modular which will allow the users to remove high cost components if [re-use] of the entire AGU is not possible."<sup>4</sup> Id. at 1. The Army approved Airborne Systems' ECP request on December 2. AR, Tab 22, Delivery Order 23, Dec. 2, 2011.

The MAGU ECP included the cost of engineering data revision and required Airborne Systems to deliver the technical data package (TDP) (i.e., drawings and specifications) for the revised item to the Army. Supp. COS/MOL at 2; AR, Tab 21, JPADS 2K ECP Request at 11-12. Airborne Systems did, in fact, subsequently deliver MAGU drawings to the Army. Supp. COS/MOL at 2; see AR, Tab 88, Army Email to Airborne Systems, June 1, 2012. Additionally, the MAGU drawings which Airborne Systems' provided to the Army contained Airborne Systems' special license rights legend. See AR, Tab 23, MAGU TDP, Dec. 28, 2012 ("Airborne Systems . . . conveyed specially negotiated rights . . . to the U.S. Government in the technical data associated with the JPADS 2K Hardware . . . but only specifically set forth below . . .").

As with the underlying D-0010 contract, Airborne Systems employed Wamore as a subcontractor for the ECP effort, including the development of the MAGU TDP. AR, Tab 7, Protest, exh. 6, Airborne Systems Purchase Order to Wamore, Jan. 17, 2012,

---

<sup>3</sup> An ECP is a management tool used to propose a change to a configuration-controlled item and its government-baselined performance requirements during an acquisition program. "The Government Contracts Reference Book" (4th ed. 2108) at 227.

<sup>4</sup> The parties refer to this reconfigured variant of the AGU as the modular AGU, or MAGU.

at 1. At no time, however, was there privity of contract between the Army and Wamore regarding the MAGU ECP nor did the Army ever pay Wamore directly for any work it performed on the MAGU ECP. Supp. COS/MOL at 2.

While ECP approval was pending, an Army engineer for the JPADS 2K program communicated with the subcontractor Wamore--with Airborne Systems' knowledge--regarding the MAGU TDP. Specifically, on September 22, 2011, the Army engineer encouraged Wamore to submit MAGU drawings ahead of ECP approval "in an effort to maintain schedule on the required logistics events that are required to support the Re-Type Classification and Full Materiel Release." AR, Tab 7, Protest, exh. 6, Army Email to Wamore, Sept. 22, 2011. Wamore thereafter made MAGU drawings available to the Army, which Wamore states contained its standard restrictive legend.<sup>5</sup> *Id.*, Wamore Email to Army, Sept. 29, 2011; Wamore Supp. Comments at 1. At no time, however, did the Army contracting officer ever conduct negotiations with Wamore regarding data rights in the MAGU TDP. COS/MOL at 3-10.

On September 24, 2014, after completion of the D-0010 contract, the Army awarded indefinite-delivery, indefinite-quantity (IDIQ) contracts to both Wamore and Airborne for additional JPADS 2K units. COS/MOL at 6; AR, Tab 27, Airborne Systems' IDIQ Contract; Tab 28, Wamore IDIQ Contract. The contracts, which had a 5-year ordering period, involved JPADS 2K units for the Army's own use and contained MAGU components. To date both Airborne Systems and Wamore have been issued eight delivery orders each for non-FMS JPADS 2K units. COS/MOL at 6.

On August 11, 2016, the Army received a "letter of offer and acceptance" (LOA) from the Jordanian Armed Forces for JPADS 2K units, spare parts, and related training; a second LOA was subsequently received from Norway for additional JPADS 2K units. AR, Tab 29, LOA from Jordan, at 1-20; Tab 39, LOA from Norway, at 1-24.

On December 1, 2016, the Army posted a notice on the Federal Business Opportunities (FBO) portal seeking to identify sources that could produce JPADS 2K units for FMS purposes.<sup>6</sup> AR, Tab 30, JPADS 2K FBO Posting. By January 10, 2017, the Army received responses from both Airborne Systems and Wamore. Specifically, Airborne Systems asserted it owned full data rights to all JPADS 2K systems, and that limited use data rights had been sold to the Army for U.S. government, but not FMS, purposes. AR, Tab 31, Airborne Systems Request for Information (RFI) Response at 15. Wamore, in its response, declared that it was the original equipment manufacturer of the JPADS

---

<sup>5</sup> Although the Army requested information from Wamore when trying to resolve the JPADS 2K (and MAGU) data rights issue prior to executing the J&A, Wamore did not provide this email exchange to the agency prior to filing its protest with our Office. Wamore Supp. Comments at 6.

<sup>6</sup> This notice sought information regarding the availability of both military and commercial systems that may meet the stated requirements.

2K MAGU and holder of all non-government use data rights. AR, Tab 33, Wamore RFI Response at 10. Wamore also stated it had granted the government use data rights to the MAGU under the D-0010 contract, and that Airborne Systems held no legal rights or title to the MAGU intellectual property. Id.

The Army, because of the conflicting responses received here, then began a lengthy process of obtaining additional information from both Airborne Systems and Wamore in order to clarify the issues of ownership and data rights to the JPADS 2K. COS/MOL at 7-10. For example, on March 22, 2017, in response to the Army's inquiry, the Army received a letter from Airborne Systems' parent company (TransDigm Group) asserting that: (1) Wamore had sold all of its rights in the AGU (including any part thereof) to Airborne Systems; (2) Airborne Systems had contracted with Wamore to modify some of the AGU components as part of the MAGU ECP; (3) Airborne Systems owned the "commissioned work, the MAGU;" and (4) the MAGU contained both modified and original AGU components, and therefore Wamore was prohibited from producing or selling the MAGU. AR, Tab 34, TransDigm Group Letter to Army, Mar. 22, 2017, at 1. Similarly, the Army received a letter from Wamore asserting that it had developed the JPADS 2K MAGU using "[government and [i]nternal Wamore funds," and had granted government use rights to the component item to the Army.<sup>7</sup> AR, Tab, 35, Wamore Letter to Army, Apr. 26, 2017, at 1. The contracting officer thereafter concluded that Wamore had not provided sufficient information to support its assertion that the company was able to compete for the FMS JPADS 2K requirements. COS/MOL at 8; AR, Tab 38, Army Legal Review of FMS JPADS 2K Data Rights Issue.

On June 26, 2018, the Army prepared a Justification and Approval (J&A) for the proposed sole-source award to Airborne Systems. AR, Tab 41, J&A. The J&A presented the agency's conclusion that there is only one responsible source and no other supplies or services will satisfy the agency's requirements. Id. at 2 (citing 10 U.S.C. § 2304(c)(1); Federal Acquisition Regulation (FAR) § 6.302-1). The Army determined that, pursuant to the SLA with Airborne Systems, the Army's data rights in the JPADS 2K TDP did not extend to FMS requirements. Id. at 3. The Army also determined that awarding a contract to a source other than Airborne Systems would result in substantial delays to fill the FMS requirements. Id. Specifically, the Army concluded that testing, validating, and type classifying a new JPADS 2K system--including the decelerator and AGU components--would take an estimated 5 years and cost approximately \$17 million.<sup>8</sup> AR, Tab 41, J&A at 3. Additionally, after this procurement, the Army did not anticipate a further need for FMS JAPDS 2K units. Id. at 1.

---

<sup>7</sup> Wamore also characterized Airborne Systems' involvement in the MAGU development as nothing "other than a pass-through contract vehicle to fund the effort [by] Wamore." AR, Tab, 35, Wamore Letter to Army, Apr. 26, 2017, at 1.

<sup>8</sup> In contrast, the FMS JPADS 2K procurement here has an estimated cost of \$1.2 million. COS/MOL at 1.

On June 29, 2018, the Army posted a sole-source synopsis on the FBO portal, indicating its intent to award a contract for the FMS JPADS 2K requirement on a sole-source basis to Airborne Systems. AR, Tab 42, FBO Synopsis Posting. What followed, then, was a series of exchanges between the Army and Wamore, during which time Wamore alleged unauthorized release of Wamore's intellectual property (*i.e.*, the MAGU TDP to Airborne Systems) and the Army's request for additional information in support of Wamore's claims. AR, Tab 43, Wamore Letter to Army, Oct. 12, 2018; Tab 44, Army Letter to Wamore, Dec. 4, 2018. Additionally, on October 26, 2018, Airborne Systems filed a "Demand for Arbitration" against Wamore regarding the parties' data rights dispute in the JPADS 2K and/or MAGU. AR, Tab 50, Wamore Letter to Army, Mar. 19, 2019, at 2; Tab 12, Protest exh. 11, Airborne Systems Demand for Arbitration, Oct. 26, 2018.

Finally, on March 5, 2019, the Army issued the subject RFP. AR, Tab 47, RFP. The solicitation stated that the Army planned to award a contract on a sole-source basis to Airborne Systems for FMS JPADS 2K units. *Id.* at 3-6. On April 5, prior to the RFP's closing date and time, Wamore filed its protest challenging the Army's planned sole-source contract award to Airborne Systems.

## DISCUSSION

Wamore's central assertion is that the Army is acting improperly by soliciting its requirement here (*i.e.*, FMS JPADS 2K units) on a sole-source basis from Airborne Systems despite the fact that Wamore is allegedly in a position to meet the agency's requirements.<sup>9</sup> Protest at 9-18. The Army responds that its sole-source award to Airborne Systems is proper because the agency conducted a reasonable inquiry and concluded that it did not possess data rights to competitively procure the JPADS 2K units for FMS purposes. COS/MOL at 14-21. As discussed below, we deny the protest because the agency reasonably determined that only Airborne Systems possessed the data rights to provide the JPADS 2K items here, thereby making it the one responsible source. We also find the agency's conclusions regarding unacceptable delay were reasonable. Although the protester raises several additional arguments that are not discussed below, we have reviewed them all and find that none provides a basis on which to sustain the protest.

The Competition in Contracting Act (CICA) requires agencies to obtain full and open competition in their procurements through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A). However, CICA offers an exception to the use of competitive procedures where the supplies or services required by an agency are available from only one responsible source, and no other type of supplies or services will satisfy

---

<sup>9</sup> In this regard, Wamore contends that it (and not Airborne Systems) is the rightful owner to the data rights in the MAGU, and that Wamore provided the Army with government purpose rights in the MAGU, which permits the Army to conduct the procurement here on a competitive basis. Protest at 6-7.

agency requirements. 10 U.S.C. § 2304(c)(1); see also FAR § 6.302-1(a)(2). Where the agency intends to award “a follow-on contract for the continued development or production of a major system or highly specialized equipment,”<sup>10</sup> CICA provides that:

[S]uch property or services may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures when it is likely that award to a source other than the original source would result in--

- (i) substantial duplication of cost to the United States which is not expected to be recovered through competition; or
- (ii) unacceptable delays in fulfilling the agency’s needs.<sup>11</sup>

10 U.S.C. § 2304(d)(1)(B); see also FAR § 6.302-1(a)(ii).

As a general matter, when an agency uses noncompetitive procedures, it must execute a J&A with sufficient facts and explanation to support the use of the specific authority. Raytheon Co.-Integrated Def. Sys., supra; see 10 U.S.C. § 2304(f). Our review of an agency’s decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth reasonable justifications for the agency’s actions, we will not object to the award.<sup>12</sup> FN Am., LLC, B-415261, B-415261.2, Dec. 12, 2017, 2017 CPD ¶ 380 at 5; Raytheon Co. and Kongsberg Def. & Aerospace AS, B-409615, B-409615.2, June 24, 2014, 2019 CPD ¶ 228 at 6. A protester’s disagreement with the agency’s rationale does not provide a

---

<sup>10</sup> Wamore does not challenge the Army’s determination that the JPADS 2K unit is a type of highly specialized equipment under 10 U.S.C. § 2304(d)(1)(B).

<sup>11</sup> Because unacceptable delay is itself sufficient justification for a sole-source acquisition, and because we find reasonable the Army’s conclusion that testing and validating an alternate JPADS 2K decelerator, AGU, or both would result in unacceptable delay, we need not consider whether a competitive acquisition here would also result in substantial duplication of costs that are not expected to be recovered through competition. See 10 U.S.C. § 2304(d)(1)(B); Raytheon Co.-Integrated Def. Sys., B-400610 et al., Dec. 22, 2008, 2008 CPD ¶ 8 at 6. Moreover, while Wamore “disputes” the Army’s assertion that testing and validating an alternate JPADS 2K unit would take 5 years, see Wamore Comments at 4 n.3, the only evidence presented by the protester in support thereof involves the use of an alternate, commercial product.

<sup>12</sup> Once the agency establishes support for the sole-source procurement, the burden shifts to the protester to show that it is unreasonable. See, e.g., Humanetics Innovative Solutions, B-416979.3, May 15, 2019, 2019 CPD ¶ 183 at 9; GlobaFone Inc., B-405238, Sept. 12, 2011, 2011 CPD ¶ 178 at 3; EA Eng’g, Sci. & Tech., Inc., B-411967.2 et al., Apr. 5, 2016, 2016 CPD ¶ 106 at 8 n.2 (“it is the protester’s burden to prove its allegations”); Chicago Dryer Co., B-401888, Dec. 8, 2009, 2009 CPD ¶ 253 at 3.

basis to sustain the protest; rather, the protester must show that the agency's position is unreasonable. Raytheon Co. and Kongsberg Def. & Aerospace AS, *supra*; Allied-Signal Inc., B-247272, May 21, 1992, 92-1 CPD ¶ 461 at 10.

Additionally, where an agency does not possess adequate data--or data rights--to conduct a competitive procurement, we have recognized that a proper basis for a sole-source award exists. See, e.g., Coastal Seal Servs., LLC, B-406219, Mar. 12, 2012, 2012 CPD ¶ 111 at 5 (sole source for replacement stern tube shaft seal repair kits justified where the agency did not acquire technical data rights to allow for a competitive procurement); Raytheon Co.-Integrated Def. Sys., *supra* (sole source for Navy's Aegis modernization program justified where agency did not possess a TDP adequate for competition without undue risk); MFVega & Assocs., LLC, B-291605.3, Mar. 25, 2003, 2003 CPD ¶ 65 at 4 ("An agency may properly take into account the existence of software data rights and licenses when determining whether only one responsible source exists."); Aerospace Eng'g & Support, Inc., B-258546, Jan. 13, 1995, 95-1 CPD ¶ 18 at 4 (sole source justified where original equipment manufacturer, not government, has right to engineering data for aircraft part); Masbe Corp. Ltd., B-260253.2, May 22, 1995, 95-1 CPD ¶ 253 at 3-4 (sole source for aircraft engine part justified where adequate data is not available to permit conducting a competitive procurement); see also FAR § 6.302-1(b)(2).

As an initial matter, we note that the dispute--now in arbitration--between Airborne Systems and Wamore regarding data rights in the MAGU is a dispute between private parties that we will not consider. Piedmont Propulsion Sys., LLC, B-410026.2, Mar. 30, 2015, 2015 CPD ¶ 140 at 6; Athena Scis. Corp., B-409486, B-409486.2, May 14, 2014, 2014 CPD ¶ 154 at 9; see also York Indus., Inc., B-186958, Nov. 29, 1976, 76-2 CPD ¶ 453 at 2 ("We are not in a position to adjudicate the rights of private parties each of whom apparently claims rights in contested data."). Although Wamore has previously alleged that Airborne Systems "could only have obtained the MAGU drawings from the [government]" and then improperly marked them as its own, AR, Tab 50, Wamore Letter to Army, Mar. 19, 2019, at 2, there is no evidence that Airborne Systems' special license rights markings on the MAGU TDP involved government personnel or improper agency action of any sort.<sup>13</sup>

Wamore asserts that it is not "asking the GAO to adjudicate the parties' intellectual property rights . . ." Wamore Comments at 3. Nevertheless, Wamore contends that the agency's sole-source award is improper because the Army "could not and cannot conclude that only [Airborne Systems] has the data rights for the MAGU" absent adjudication of the parties' private dispute. Protest at 13. We disagree. Here, as detailed below, the Army conducted a reasonable inquiry and determined that only

---

<sup>13</sup> Moreover, any allegation that the government improperly disclosed proprietary information to a private party is a matter for the courts, and not our Office, to remedy. Olin Corp., B-252154, Mar. 9, 1993, 93-1 CPD ¶ 217 at 2; Ultraviolet Purification Sys., Inc., B-185178, July 15, 1976, 76-2 CPD ¶ 46 at 6.

Airborne Systems held the data rights to the JPADS 2K TDP (including the MAGU) for FMS procurements. As we are not in a position to adjudicate the rights of private parties, neither would we be justified in disturbing an ongoing procurement or an award because of an allegation that data rights are being violated incident to a procurement. York Indus., Inc., *supra*. Based on the record before us, we find the Army's position to be unobjectionable. Therefore, we are of the opinion that Wamore's protest essentially relates to a dispute between two private parties as to which court action, rather than a protest to our Office, is the appropriate remedy. Olin Corp.--Recon., B-252154.2, June 3, 1993, 93-1 CPD ¶ 428 at 2-3; York Indus.--Request for Recon., B-186958, Jan. 10, 1977, 77-1 CPD ¶ 17 at 3.

We also find the adequacy of the rationale and conclusions of the Army's sole-source award determination to be reasonable, insofar as the Army's inquiry into the JPADS 2K data rights issue was also reasonable.<sup>14</sup> The record reflects that the contracting officer considered that, pursuant to the D-0010 contract SLA, the Army acquired government purpose rights in the JPADS 2K units--including all components thereof--for domestic purposes, but not for FMS purposes. AR, Tab 41, J&A at 3; COS/MOL at 5. The contracting officer also considered that, in advance of the SLA, Airborne Systems had purchased Wamore's "worldwide rights, title and interest" to the AGU.<sup>15</sup> COS/MOL at 4 (citing AR, Tab 17, Rights Purchase Agreement at 1). The contracting officer also concluded that because the MAGU represented an updated (modular) version of the AGU, obtained by ECP change order to the D-0010 contract, "any data rights in the MAGU . . . would also be governed by the SLA." AR, Tab 90, Contracting Officer's Statement, June 12, 2019, at 2; COS/MOL at 5. Lastly, the contracting officer considered that the Army "maintained privity of contract with only Airborne [Systems]" for the MAGU, and did not fund Wamore's work on the MAGU as the protester alleged. AR, Tab 90, Contracting Officer's Statement, June 12, 2019, at 2; COS/MOL at 5. Thus, we find reasonable the Army's justification for determining that Airborne Systems was the only responsible source for the FMS JPADS 2K procurement here. See The Boeing Co.; Bombardier, Inc., B-414706, B-414380.2, Aug. 25, 2017, 2017 CPD ¶ 274 at 5; Eclypse Int'l Corp., B-408795, Nov. 25, 2013, 2013 CPD ¶ 271 at 2.

Wamore argues that the J&A is improper because the Army did not perform "an appropriate inquiry into the [MAGU] matter" and unreasonably accepted Airborne's misrepresentations as fact. Protest at 12. We disagree. The protester essentially argues the Army failed to look at available information in a light most favorable to

---

<sup>14</sup> We recognize that various documents were first provided by Wamore to the Army after the J&A was prepared, but were thereafter considered by the contracting officer as part of his sole-source determination. COS/MOL at 4-11; AR, Tab 90, Contracting Officer's Statement, June 12, 2019, at 1-2.

<sup>15</sup> Importantly, Wamore does not dispute that it sold its ownership of the AGU to Airborne Systems, nor does the protester dispute Airborne Systems' data rights to any part of the JPADS 2K TDP, other than the MAGU.

Wamore--that is, Wamore would have the agency take all of the following assertions from the protester to be true on its face and disregard any evidence to the contrary: that Wamore retained rights in the modular version of the AGU even after selling its ownership and all rights to the underlying AGU to Airborne Systems; that Wamore developed the MAGU for the Army with government funding even though there was never a contract between the Army and Wamore; that Wamore never acquiesced to Airborne Systems' rights in the MAGU even after knowing that the MAGU TDP contained Airborne Systems' markings; and that Wamore provided the Army with government purpose rights in the MAGU even though it never negotiated such with any contracting officer and first alleged such more than 5 years after providing MAGU drawings to the Army. In sum, absent a formal adjudication of the matter, we find the Army's inquiry into the JPADS 2K and MAGU data rights issue and resulting sole-source award justification to be a reasonable one.

Wamore also protests that the J&A is inadequate because it does not reasonably show that only this exact product (i.e., the JPADS 2K unit), and not an alternate commercial variant thereof, would meet the agency's needs. Wamore Comments at 40-41. We find this aspect of Wamore's protest to be untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. CDO Techs., Inc., B-416989, Nov. 1, 2018, 2018 CPD ¶ 370 at 5; Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. As relevant here, our Bid Protest Regulations require that protests of alleged apparent solicitation improprieties must be filed prior to the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1); Allied Tech. Group, Inc., B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 9 n.10. The solicitation here made clear the agency would consider only the militarized JPADS 2K system, and not an alternate commercial product. RFP at 3-6; see also AR, Tab 42, FBO Synopsis Posting at 1. Wamore, however, did not file its protest challenging this perceived solicitation defect until after the RFP's closing date and time. There was simply no need, as the protester suggests, for Wamore to wait for receipt of the J&A before challenging the agency's stated needs.<sup>16</sup>

Lastly, Wamore protests that the RFP is ambiguous (e.g., documents labeled as amendments in the FBO notice were not labeled as such in the solicitation), and that the agency improperly bundled the FMS buys for Norway and Jordan into one procurement.

---

<sup>16</sup> In any event, we find no merit to Wamore's assertions. Contracting agencies have broad discretion in identifying their needs and determining what characteristics will satisfy those needs. Persistent & Determinant Techs. LLC, B-408342, Aug. 22, 2013, 2013 CPD ¶ 198 at 2. Here the Army's needs were those as defined by its FMS customers, Jordan and Norway, both of whom requested JPADS 2K units. As the FMS customers desired a military product, the Army's decision not to consider an alternate commercial product was also reasonable.

Protest at 18-20. We find Wamore is not an interested party to pursue its protest here; even if Wamore were correct that the RFP was ambiguous and/or improperly bundled requirements, the firm is not eligible for award because, as detailed above, the Army reasonably determined that only Airborne Systems, and not Wamore, was a responsible source for the FMS JPADS 2K procurement. Piedmont Propulsion Sys., LLC, supra, at 7; Standard Bent Glass Corp., B-401212, June 23, 2009, 2009 CPD ¶ 143 at 5-6.

The protest is denied.

Thomas H. Armstrong  
General Counsel