

DOCUMENT RESUME

02709 - [A1872894]

[Contract Negotiations]. B-188286. June 24, 1977. 3 pp.

Decision re: Braswell Shipyards, Inc., Charleston, SC; by Robert P. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Navy; Bethlehem Steel Corp.

Authority: 10 U.S.C. 2304(a)(16). 10 U.S.C. 2310(b). A.S.P.R. 2-407.8(b)(3)(iii). A.S.P.R. 3-216.2. A.S.P.R. 3-302(vi). 51 Comp. Gen. 658. B-187532 (1977).

The protester objected to the decision by the Department of the Navy to negotiate a request for proposals with only one firm. The protest that the agency acted improperly in making this decision was denied, since the agency head's determination that the contract should be negotiated pursuant to the authority of 10 U.S.C. sec. 2304(a)(16) was properly based on findings which GAC is required to treat as final. (Author/SC)

C2709
DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

*Piney Sherry
Rec'd 5*

FILE: # 188286

DATE: June 24, 1977

MATTER OF: Braswell Shipyards, Inc.

DIGEST:

Protest that agency acted improperly in negotiating contract with only one firm is denied since agency head's determination that contract should be negotiated pursuant to authority of 10 U.S.C. § 2304(a)(16) was properly based on findings which GAO is required to treat as final.

Braswell Shipyards, Inc. (Braswell), has protested the decision by the Department of the Navy (Navy) to negotiate request for proposals (RFP) N62665-77-R-0001, for repairs and overhaul work on the USS Damato with only one firm, Bethlehem Steel Corporation (Bethlehem). Specifically, the protester has asserted that its business position is similar to that of Bethlehem and that the actions of the Secretary of the Navy in determining that negotiations should be conducted only with Bethlehem was arbitrary and capricious. Subsequent to Braswell's protest to our Office the Navy determined, pursuant to Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3)(iii) (1976 ed.), that because of the urgency of the situation an immediate award would be in the best interest of the Government. Award was made to Bethlehem on March 16, 1977.

The RFP was issued pursuant to 10 U.S.C. § 2304(a)(16) (1970), which states that a contract may be negotiated if the head of the agency determines that (A) it is in the interest of national defense to have a plant, mine or other facility, or a producer, manufacturer, or other supplier available for furnishing property or services in case of national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved. This authority is implemented by ASPR § 3-216.2 (1976 ed.) which provides in part as follows:

"* * * The authority of this paragraph 3-216 may be used to implement plans developed under the direction of the Secretary to provide an industrial mobilization base which can meet production requirements for essential military supplies and services. The following are examples of situations when use of this authority should be considered:

"(i) when procurement by negotiation is necessary to keep vital facilities or suppliers in business; or to make them available in the event of a national emergency;

"(ii) when procurement by negotiation with selected suppliers is necessary to train them in the furnishing of critical supplies or services, to prevent the loss of their ability and employee skills, or to maintain active engineering, research, and development work;
* * *"

Moreover, the use of this authority must be supported by a determination and finding signed by the head of an agency. 10 U.S.C. § 2310(b); ASPR 3-302(vi) (1976 ed.).

In the instant case the Secretary of the Navy, prior to issuance of the subject RFP, determined that it was in the interest of national defense to have Bethlehem available for the specialized skills required by Navy ship repair and overhaul work in the event of a national emergency and that negotiation of the repair work with Bethlehem was necessary to that end. The findings accompanying this determination pointed out that Bethlehem had developed a skill in the technical and specialized field of repairing and overhauling Navy vessels due to its recent work on two Navy ships and that without additional naval ship overhaul or repair work this skilled work force would be dispersed and unavailable for later Navy programs. Additionally, it was noted that only by negotiations with Bethlehem could the Navy assure the continued availability of that firm as a valuable source for the repair and overhaul of Navy vessels and that in order to assist Bethlehem to retain this work force for future programs, it was in the interest of national defense to make an award to Bethlehem.

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We note that we are precluded from disturbing the findings made by the Secretary but not from examining whether the determination, based on those findings, is proper. 51 Comp. Gen. 658, 659 (1972). Here, however, the Secretarial determination that it was in the interest of national defense to negotiate with Bethlehem to insure their availability in the event of national emergency is supported by the Secretary's findings. Accordingly, the action of the Navy in negotiating only with Bethlehem was proper.

Furthermore, we note that in a recent decision, Etamco Industries, B-187532, February 25, 1977, 77-1 CPD 141, our Office indicated that the language and logic of 10 U.S.C. § 2304(a)(16) permit a sole source award when there is no other way to insure the continued availability of a particular plant.

In view of the foregoing, Braswell's protest is denied.

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Deputy Comptroller General
of the United States