

Proc I

DECISION



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

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FILE: B-193263

DATE: April 9, 1979

MATTER OF: Techniarts CNG 00049

[Protest of EPA Issuance of Sole-Source Solicitation and Resultant Contract]

DIGEST:

1. Although lack of definite specification may justify negotiated, rather than advertised procurement, it does not in itself justify noncompetitive award. Where agency possesses design specifications and record does not indicate that only one firm could submit acceptable proposal based thereon, sole-source award to such firm was improper.
2. Agency admits that protester could fulfill agency's needs but for alleged lack of data adequate for competitive procurement. Award of contract on sole-source basis to another firm essentially to avoid cost and administrative inconvenience of developing such data was improper since contract price apparently included comparable amount for testing necessary because of alleged lack of adequate data.

Purchase order No. DA-8-3998A for \$7,800 was issued on May 22, 1978, to Hoppmann Corporation CNG-00618 (Hoppmann) by the Environmental Protection Agency (EPA) to:

AGC 00024

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"Furnish all labor, materials and including travel required to perform a study, provide general consultant services, and submit design specifications for up-dating and/or modification of existing visual and audio equipment at the EPA Auditorium, Environmental Research Center [ERC], Research Triangle Park, N.C. as set forth in the following 'Scope of work.'"

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The "Scope of Work" set out six "things to be covered in the modification study," and required the contractor to furnish "preliminary design specifications" within 45 days and "final design specifications" within 90 days.

The "preliminary design specifications" delivered under the purchase order were accepted by EPA and became the "final design specifications" without change. They were then attached to request for proposals (RFP) No. DU-78-C-284, issued by EPA to Hoppmann on a sole-source basis to upgrade the ERC audio/visual system and refurbish the ERC auditorium in accordance therewith. The RFP resulted in contract No. 68-02-3090, awarded to Hoppmann on September 28.

Techniarts has protested the issuance of the sole-source solicitation and the resultant contract. Techniarts argues that Hoppmann's performance of the contract in accordance with specifications written by that same firm "represents an obvious conflict of interest on the part of Hoppmann." *swan*
Techniarts also contends that the solicitation was copied directly from Hoppmann's successful proposal under RFP No. DAA608-77-C-0124 for an essentially identical audio/visual system installed at the conference room of the Pentagon Deputy Chief of Staff for Personnel (DESPR). Techniarts states that its own proposal under that solicitation was judged technically acceptable, and argues:

"* * * Hence, Techniarts possesses the same technical knowledge and expertise necessary to complete such a contract. In fact, the performance required by * * * [RFP] #DAA608-77-C-0124 can be shown to be somewhat more complex and intricate due to the nature of the installation required although the specifications for the two contracts are essentially identical."

Finally, Techniarts points out that the Government is paying Hoppmann twice as much under contract No. 68-02-3090 than Hoppmann was paid for the DESPR system, which Techniarts contends involved substantially more contractor-furnished equipment and costly installation.

We note here that Hoppmann has raised as a threshold issue the timeliness of the protest under our Bid Protest Procedures, 4 C.F.R. part 20 (1978) (Procedures). The record shows that notice of the procurement was published in the Commerce Business Daily on September 19, 1978, and Techniarts requested a copy of the sole-source RFP on September 25. On October 4, Techniarts received a copy of the solicitation and was advised that the contract had been awarded to Hoppmann. By letter of that date, Techniarts filed a protest with the contracting officer, and then filed its protest in our Office on October 19, without having received a response from EPA. Accordingly, the protest was timely filed pursuant to section 20.2 of our Procedures, and it will be considered on the merits.

Because of the requirement for maximum practical competition (see Federal Procurement Regulations § 1-3.101 (1964 ed. amend. 153)), agency decisions to procure on sole-source bases must be adequately justified and are subject to close scrutiny by our Office. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402.

EPA's justification for the noncompetitive procurement states:

"* * * The selection and balance of the intricate and sensitive equipment required to interface with the existing equipment to provide the necessary end product effects will require unique specialized knowledge and expertise.

"The major components installed in the existing audio-visual system were manufactured by the Hoppmann Corporation; consequently, the additional equipment required to upgrade the system to the level of capability and quality desired must be compatible and have continuity with the existing equipment. The Hoppmann Corporation is known to possess the engineering and technical knowledge and expertise necessary to accomplish the new equipment installation and interface connection and balancing required to provide an efficient and reliable total audio-visual system. It is not certain that this capability is readily available from other single sources and the Hoppmann Corporation has been previously evaluated and found to be suitable and reliable.

"The Hoppmann Corporation performed an indepth and extensive study of the existing facility and audio-visual system and prepared technical specifications for subsequent upgrading to meet EPA requirements. The system and specific knowledge gained from this study, plus the engineering and design data on file with the company from the original installation, should greatly reduce the overall total contract cost. These facts obviously place the company in a position of having very favorable competitive advantage. In view of the foregoing and the fact that this project, in a sense, is a continuation of a previous contractual effect, it seems logical and reasonable to request a proposal from the Hoppmann Corporation."

In a report on the protest, which includes a contracting officer's statement and an addendum thereto, EPA expands on that justification in responding to each of Techniarts' arguments. EPA first contends that the specifications developed by Hoppmann under purchase order No. DA-8-3998A are not "technical specifications" that would be appropriate for a competitive procurement. EPA states:

"* * * The study [under the purchase order] resulted in Hoppmann Corporation providing basic information which they labeled 'technical specification' but in essence is a study providing what would be required to upgrade the auditorium utilizing existing installed equipment, modified to meet requirements, and additional Hoppmann Corporation equipment and materials. . The specification, as provided by Hoppmann, did not set forth salient characteristics of the equipment required, the modifications required to existing installed equipment, how and where the equipment must be installed to provide satisfactory performance, and how the proper results would be obtained. The study was not intended to provide a complete and detailed specification which would be adequate for competitive procurement. After the study, a determination would be made as to how to accomplish the task of upgrading the auditorium to a satisfactory standard at the most economical cost to the Government. Upon receipt of the study it seemed more economical to award a contract to the firm with the capability and knowledge to design, engineer, fabricate, integrate,

and install a system meeting the requirements without another step of developing an acceptable 'technical specification' detailed adequately for competition. Hoppmann Corporation has the capability and knowledge to provide a finished product that will meet the 'performance standards.' * * * with knowledge of the previous installation and the details as a result of the extensive study, it seemed in the best interest of the Government to award a contract to Hoppmann Corporation."

EPA contends that the cost of developing specifications appropriate for a competitive procurement would be at least 25 to 30 percent of the contract price of \$161,000.

Second, EPA argues that the ERC project and the DESPR project are similar only in that they are each for an audio/visual system. In view of alleged differences in the "sites, their configuration, size, and ambient characteristics," EPA contends that a comparison of cost between the two is irrelevant. The contracting officer's statement sets out a list prepared by Hoppmann of eight differences between the DESPR and EPA systems regarding required equipment and services. The addendum to that statement includes a list prepared by the EPA project officer of seven additional differences. Also, EPA states that Hoppmann's contract price may appear high because it includes a considerable amount for engineering labor to test the audio/visual system.

In response to the report, Techniarts contends that EPA's projection of the cost to obtain specifications adequate for competition is grossly overstated. Techniarts argues that the amount paid to Hoppmann under the purchase order was more than sufficient to obtain adequate specifications.

Techniarts further contends that EPA's comparison of the DESPR and EPA systems is misleading, and that the requirements under both solicitations are in fact sufficiently similar to refute the necessity for a sole-source contract with Hoppmann. Techniarts argues that in any case a prospective contractor would as a standard practice "furnish proposed test plans for insuring that the installed system will meet performance requirements * * * [and] would have approached such a requirement * * * as a standard part of the investment he must make in competing for such contracts."

We have recognized that there are certain circumstances under which a sole-source procurement is justified, such as: where the Government's minimum needs could only be satisfied by items or services which are unique; where time is of the essence and only one known source can meet the Government's needs within the required time-frame; where data is unavailable for a competitive procurement; where it is necessary that the desired item manufactured by one source be compatible and interchangeable with existing equipment; and where only one firm could reasonably be expected to develop or produce a required item without undue technical risk. See Ampex Corporation, B-191132, June 16, 1978, 78-1 CPD 439, and cases cited therein. On the other hand, we have objected to sole-source procurements when the circumstances did not justify noncompetitive awards. Environmental Protection Agency sole-source procurements, 54 Comp. Gen. 58 (1974), 74-2 CPD 59.

Notwithstanding the validity of the comparisons in the EPA report of the DESPR and EPA systems as they concern whether Techniarts' acceptable proposal under the former shows the capability to upgrade the latter, the report clearly indicates that Techniarts could in fact fulfill EPA's present requirements. The addendum to the contracting officer's statement provides:

"* * * This [the sole-source award to Hoppmann] is not implying that Techniarts does not have the capability and knowledge to perform the required work if they were placed under the same circumstances. * * *

"Techniarts' claim that they possess the technical knowledge and expertise necessary to complete such a contract is not denied nor is it questioned.
* * *"

In addition, the record contains a statement from the Deputy Director, EPA Contracts Management Division, that he is "unable to agree that it was impracticable to obtain competition in this instance." (On the other hand, the record also indicates that the Director recommends that the protest be denied.) Thus, there was admittedly at least one source other than Hoppmann--Techniarts--that could fulfill EPA's minimum needs if "placed under the same circumstances."

It is clear, therefore, that the reason Techniarts was not afforded an opportunity to compete with Hoppmann was EPA's view that the specifications were not sufficiently "refined" for a competitive procurement. In addition to the agency's statements set out above, the contracting officer states:

"* * * it seemed more economical to award a contract to the firm with the capability and knowledge to design, engineer, fabricate, integrate, and install a system meeting the requirements without another step of developing an acceptable 'technical specification' detailed adequately for competition.
* * *"

There are no regulatory or applicable statutory provisions regarding the type of conflict of interest alleged by Techniarts.

The lack of detailed, or as EPA states, "refined," specifications may justify the use of a negotiated procurement instead of an advertised one. 41 U.S.C. § 252(c)(10) (1976); Federal Procurement Regulations (FPR) § 1-3.210(a)(13) (circ. 1, 1964 ed.). But see FPR 1-2.501 (circ. 1, 1964 ed.), which sets forth two-step formal advertising procedures for use when "available specifications are not sufficiently definite to permit a formally advertised procurement." However, the lack of detailed specifications alone does not justify a noncompetitive negotiated procurement. Id.

EPA possessed rather extensive "design specifications"--36 pages, plus a 23-page test plan, delivered by Hoppmann under the purchase order. Since there is no indication in the record that only Hoppmann could work from those materials, other firms should have been afforded the opportunity to submit proposals based thereon. See G.A. Braun, Inc., B-189563, February 1, 1978, 78-1 CPD 89. Such proposals presumably would have included the cost of refining the materials for the offeror's own purposes, and apparently could have been subjected to the same testing necessary with regard to Hoppmann's offer.

Alternatively, even assuming that EPA's position is that it actually lacked adequate "data" for competition (see our above listing of acceptable sole-source award justifications), such "data" could have been developed at an estimated cost of \$40,000. We have stated that it is EPA's view that the sole-source contract appears high because it includes considerable testing necessitated by the lack of "refined specifications"--the contracting officer states that such element of Hoppmann's cost "would essentially be the cost of developing an adequate specification for use in a competitive procurement." In view thereof, it appears to us that this justification for the sole-source award

would in effect reduce to an election by EPA for reasons of administrative convenience to pay an available source, with an apparent competitive advantage, the same \$40,000 (approximately) for testing that could have been spent to refine for competition the "final design specifications" delivered under the purchase order and thereby eliminate the need for testing. We do not consider such election to be a proper basis for precluding an admittedly qualified offeror from competing for a Government contract. Kent Watkins & Associates, Inc., B-191078, May 17, 1978, 78-1 CPD 377. In fact, even if the contracting officer assumed that other firms would not be interested in competing against Hoppmann because of the latter's apparent competitive advantage, a sole-source award to Hoppmann would still be questionable. See Burton Myers Company, B-190723, B-190817, April 13, 1978, 78-1 CPD 280; Olivetti Corporation of America, B-187369, February 28, 1977, 77-1 CPD 146; National Health Services, Inc., B-187399, January 7, 1977, 77-1 CPD 14.

Nevertheless, no remedial action would be possible at this point, since we have been advised that the performance under the contract essentially has been completed. However, we are by separate letter to the Administrator of EPA recommending that appropriate action be taken on the basis of this decision with respect to future procurements.

Deputy Comptroller General
of the United States