

**DECISION**

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

**FILE:** B-213247

**DATE:** August 27, 1984

**MATTER OF:** DANTEC Electronics, Inc.

**DIGEST:**

1. Complaint alleging that grantee's invitation for bids was deficient in several respects is moot where grantee canceled invitation for bids and determined that award on sole-source basis to other than complainant was justified.
2. Grantee investigated complainant's assertions that it could provide laser doppler anemometer system adequate to meet grantee's research needs and determined complainant's system to be inadequate in several areas. Complainant disagrees with grantee's findings of inadequacies and sole-source justification. However, complainant bears heavy burden to show that grantee's determination that only awardee could meet grantee's research needs was arbitrary, capricious or abuse of procurement discretion. Where adequacies/inadequacies of complainant's system are subject of technical dispute between complainant and ultimate user of the laser doppler anemometer system, complainant has not carried burden of proof.

DANTEC Electronics Inc. (DANTEC) complains that Texas A&M University (Texas A&M) improperly awarded a contract to TSI Inc. (TSI) on a sole-source basis under grant No. AFOSR-83-0259 issued by the United States Air Force (Air Force).

We deny the complaint.

The grant was provided to Texas A&M under the Department of Defense University Research Instrumentation Program for the purpose of improving the university's capability to perform research in support of the national defense. The grant funds were given to Texas A&M for purchase of a laser doppler anemometer (also called a laser

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velocimeter) system for use in turbomachinery seal research, including the study of flowfields inside labyrinth seals and the forces exerted on rotors by seals. Basically, DANTEC argues that the sole-source award to TSI contravened the requirement of section 3.b of attachment 0 to Office of Management and Budget (OMB) Circular No. A-110, applicable to grants to institutions of higher education, for open and free competition to the maximum extent practical. DANTEC claims that it could provide a laser doppler anemometer system which would meet Texas A&M's requirements.

The record shows that Texas A&M, by letter of August 22, 1983, requested that the Air Force approve its plan to procure the equipment from TSI on a sole-source basis. This request indicated that Dr. G. L. Morrison, the ultimate user of the laser doppler anemometer system, had investigated over a 3-month period the capabilities of both DANTEC and TSI, the only manufacturers of the systems, and had determined that TSI produces "a better product with more capability." DANTEC wrote to the Air Force and objected to Texas A&M's proposed award to TSI, asserted that it could meet Texas A&M's requirements, and stated that Dr. Morrison's analysis was based upon DANTEC's "pre-solicitation proposal" which would be changed, if necessary, to meet Texas A&M's actual needs. The Air Force notified Texas A&M, among other things, that its sole-source justification was questionable, in part, based upon DANTEC's assertions that it could provide equipment to meet Texas A&M's requirements. By letter of September 9, Texas A&M notified the Air Force that it had decided to negotiate with both TSI and DANTEC for the required laser system. On that date, Texas A&M also issued proposal packages, in the form of an invitation for bids with an October 3 closing date, to both firms. When bids were opened, DANTEC was the apparent low bidder at \$151,530 and TSI was second low at \$221,867.

Shortly before the time set for bid opening on October 3, DANTEC filed its initial complaint in our Office alleging that the invitation's specifications were overly restrictive because they were modeled after TSI's initially proposed laser system. DANTEC also contended that the invitation was defective because it allowed Texas A&M to accept offers which deviated from the stated specifications without setting forth the criteria under which deviations would be evaluated and because the invitation stated that

bids would be evaluated on the basis of "optimum performance to accomplish the purposes" without defining those terms.

From October 3 to 19, Texas A&M was in the process of reviewing bids. During that period, DANTEC provided Texas A&M with descriptive literature and provided a demonstration of its supporting software on Texas A&M's computer. Texas A&M determined that DANTEC's equipment was inadequate to perform the required research as described in the invitation and rejected DANTEC's offer in favor of TSI's offer. However, during the evaluation process, Dr. Morrison noted that the invitation's specifications were deficient because certain essential requirements involving expected turbulence intensities and measurement of instantaneous velocities had been inadvertently omitted from the solicitation. The Air Force reviewed Texas A&M's findings concerning the unacceptability of DANTEC's equipment and on November 4 suggested that Texas A&M either: (1) amend the solicitation to correct the specification deficiencies noted by Dr. Morrison in his evaluation and possibly to clarify use of "optimum performance" as an evaluation criterion and the invitation's permissive waiver of deviations provision (both of which had been challenged by DANTEC) or (2) cancel the invitation and award on a sole-source basis to TSI, the only technically acceptable offeror.

On November 14, Texas A&M canceled the invitation and informed DANTEC that it would purchase the laser velocimeter from TSI because DANTEC's proposed equipment had been determined to be unacceptable for Texas A&M's requirements. The contract was awarded to TSI on November 17, 1983. DANTEC filed a supplemental complaint in our Office on November 23 contending that the sole-source award was contrary to the directive of OMB Circular No. 110 for procurement by open and free competition and that DANTEC could supply a laser system to meet Texas A&M's requirements. TSI made full delivery of the equipment to Texas A&M on March 19, 1984.

We need not consider the issues raised in DANTEC's initial complaint alleging deficiencies in the invitation for bids concerning evaluation on the basis of "optimum performance," permissive waiver of deviations from the specifications, and specifications modeled after TSI's equipment, because the cancellation of the invitation for

bids renders moot a decision on these issues. See Mayfair Construction Co., B-203837, July 31, 1981, 81-2 C.P.D. ¶ 80; Security Assistance Forces & Equipment OHG, B-200350, Mar. 18, 1981, 81-1 C.P.D. ¶ 212. In this regard, we have upheld cancellation of a solicitation as a proper exercise of a contracting officer's discretion where the solicitation's specifications were inadequate because they omitted a material requirement and, therefore, the minimum needs of the government were not met. See Winandy Greenhouse Company, Inc.--Reconsideration, B-208876.2, Dec. 20, 1983, 84-1 C.P.D. ¶ 2.

The sole remaining issue is whether Texas A&M properly awarded the contract to TSI on a sole-source basis in view of DANTEC's assertions that its laser system also meets Texas A&M's research needs.

Since there is no indication in the record that Texas A&M handled this procurement under procedures reflecting applicable state or local law, rules or regulations, our review is undertaken in terms of Texas A&M's compliance with the fundamental principles or norms of federal procurement. Complete Irrigation, Inc., B-187423, Nov. 21, 1977, 77-2 C.P.D. ¶ 387 at 3.

Because of the requirement in federal procurements for maximum practical competition, agency decisions to procure sole-source must be adequately justified and are subject to close scrutiny. See Stryker Corporation, B-208504, Apr. 14, 1983, 83-1 C.P.D. ¶ 404 at 8. In determining the propriety of a sole-source award, the standard this Office applies is one of reasonableness; unless it is shown that the contracting agency's justification for a sole-source award is unreasonable, we will not question the procurement. Stryker Corporation, B-208504, supra; Diesel Parts of Columbus, B-200595, July 20, 1981, 81-2 C.P.D. ¶ 50. Where a contracting agency justifies a sole-source award on the basis that only one source of supply can meet its requirements, the complainant must meet the heavy burden of presenting evidence to show that such action is arbitrary, capricious or an abuse of procurement discretion. Power Testing Incorporated, B-197647, July 11, 1980, 80-2 C.P.D. ¶ 26; Allen and Vickers, Inc., 54 Comp. Gen. 1100 (1975), 75-1 C.P.D. ¶ 399. Moreover, we have held that, where a procuring agency has information which indicates that a

second-source may well be capable of fulfilling the agency's needs, it is incumbent upon procuring officials to investigate further prior to awarding a sole-source contract, if there is sufficient time. See Aerospace Research Associates, Inc., B-201953, July 15, 1981, 81-2 C.P.D. ¶ 36 at 8.

The record clearly shows that Texas A&M fulfilled its duty to investigate whether a sole-source to TSI was justified or whether DANTEC was just as capable of providing a laser system which could meet its research needs. The primary user of this equipment, Dr. Morrison, initially spent approximately 3 months investigating the DANTEC and TSI systems. He reviewed and evaluated technical literature supplied by both companies and viewed demonstrations of each company's system. This investigation led Texas A&M to conclude that it should request approval of a sole-source award in August 1983. When the Air Force questioned the sole-source justification in light of DANTEC's assertions that it could supply a laser system which would meet Texas A&M's requirements, Texas A&M issued an invitation describing its needs to each company. Admittedly, this statement of specifications was deficient in at least two respects. However, the proposal submitted by DANTEC was evaluated by Dr. Morrison and found to be inadequate for the university's actual research needs in a number of areas. Two of the inadequacies which Dr. Morrison perceived in DANTEC's system were in areas in which the specifications did not state certain essential requirements--expected turbulence intensities and measurement of instantaneous velocities. However, the other inadequacies enumerated by Texas A&M were in areas covered by the specifications. These were: (1) DANTEC's equipment did not have the precision in repeatability of the traversing system required by the specifications; (2) DANTEC's individual measurement volumes were too large to fit within the gap between the labyrinth seal's tooth and stator wall and exceeded those allowed by the specifications; (3) DANTEC did not have "3-D" software currently available as required by the specifications; and (4) DANTEC did not offer a three-color system. Dr. Morrison reevaluated DANTEC's system in light of DANTEC's complaint and its supporting technical arguments and affirmed his earlier findings of deficiencies. Dr. Morrison also pointed out that timely delivery of the

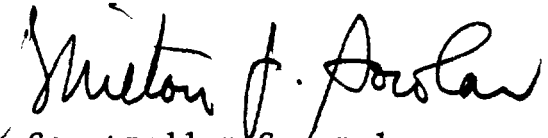
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software was essential to the successful completion of various research projects. We note that the invitation stated that ability to make early delivery would be an important consideration in the award process.

DANTEC disagrees with all of Texas A&M's findings of inadequacies. It has provided our Office with technical arguments designed to show that its equipment is adequate for Texas A&M's research needs.

Concerning the charge that its software was inadequate, DANTEC states that this perceived failure was actually due to the fact that Texas A&M failed to provide compatible hardware for demonstration purposes. The Air Force argues that the ability of DANTEC to provide a "3-D" color laser system is in doubt because DANTEC does not currently have such software available, and Dr. Morrison disagrees with the charge that Texas A&M was at fault because of incompatible hardware and reported that DANTEC was using "2-D" software for its demonstration in any event.

Essentially, this case presents numerous areas of disagreement between the complainant and the user agency. Both sides have presented highly technical support for their points of view. However, it is the complainant which must bear the burden of showing that the contracting officials' actions were arbitrary, capricious or an abuse of procurement discretion. Power Testing Incorporated, B-197647, supra. While DANTEC disagrees with Texas A&M's opinions and has provided highly technical arguments to support its positions, DANTEC has not shown the expert technical opinion of Dr. Morrison--the primary user--to be unreasonable. We, therefore, defer to the contracting agency's expert in these circumstances, since DANTEC has not met the heavy burden of proof placed upon it. See London Fog Company, B-205610, May 4, 1982, 82-1 C.P.D. ¶ 418; Stryker Corporation, B-208504, supra at 4; Power Testing Incorporated, B-197647, supra. Accordingly, we conclude that Texas A&M's determination that only TSI's equipment could meet the research requirements of the university and that a sole-source was therefore justified was reasonable.

for   
Comptroller General  
of the United States