

*L. Lebowitz*



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Fraser-Volpe Corporation

**File:** B-240499; B-240500; B-240501; B-240502

**Date:** November 14, 1990

Joseph B. Volpe, Jr. for the protester.  
Dorothy Found and Michael L. Whalen for Lockheed Canada, Inc.,  
an interested party.  
Craig E. Hodge, Esq., and Dennis D. Cohen, Esq., Department of  
the Army, for the agency.  
Linda S. Lebowitz, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

### DIGEST

Where Commerce Business Daily (CBD) notices announcing agency's plans to make sole-source awards gives other potential sources 45 days to submit expressions of interest showing their capability to respond to agency's requirements, potential offerors must, as a prerequisite to filing protests challenging the sole-source decisions, submit timely expressions of interest in response to CBD notices. Where protester waited anywhere from approximately four to thirteen months to submit expressions of interest in response to respective CBD notices, protests are dismissed as untimely.

### DECISION

Fraser-Volpe Corporation (FVC) protests the awards of sole-source contracts to Lockheed Canada, Inc. under request for proposals (RFP) Nos. DAAA09-89-R-1003 (RFP-1003), DAAA09-89-R-0416 (RFP-0416), DAAA09-89-R-0673 (RFP-0673), and DAAA09-89-R-0713 (RFP-0713), issued by the Department of the Army for items used in the Vulcan Air Defense System (Vulcan), an anti-aircraft gun used to protect military forces in the field from air attack. FVC argues that it is a manufacturing source for item part numbers 9360875 (servo board assembly) under RFP-1003; 9360878, 9360881, and 9397510 (circuit card assemblies) under RFP-0416; 9360890 (fire control processor) under RFP-0673; and 9360871 (synchro interface assembly) under

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RFP-0713. FVC contends the agency should have competed these items instead of awarding sole-source contracts to Lockheed.<sup>1/</sup>

We dismiss the protests.

Synopses of the proposed sole-source awards to Lockheed were published in the Commerce Business Daily (CBD) on October 31, 1989 (RFP-1003), February 17, 1989 (RFP-0416), April 12, 1989 (RFP-0673), and April 25, 1989 (RFP-0713). According to the Army, the decision to proceed with sole-source awards was because it did not own specifications and drawings (technical data packages) to permit full and open competition. The CBD notices identified Lockheed as the sole-source contractor for the requirements.<sup>2/</sup> A footnote referenced in each CBD notice indicated offerors had 45 days to identify their interest and capability to respond to the requirements. FVC did not submit evidence of its interest and capability to respond to the requirements within the 45-day timeframe.

RFP-1003 was issued on November 7, 1989, and the closing date for receipt of proposals was December 22, 1989; RFP-0416 was issued on May 1, 1989, and the closing date for receipt of proposals was June 15, 1989; RFP-0673 was issued on June 14, 1989 and the closing date for receipt of proposals was August 1, 1989; RFP-0713 was issued on June 27, 1989, and the closing date for receipt of proposals was July 27, 1989.

FVC submitted an unsolicited proposal (which included item descriptions and part numbers, prices, and delivery terms) to the Army on March 14, 1990. By letter dated March 20, the

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<sup>1/</sup> FVC also protested the sole-source awards of item part numbers 9361010 (printed wiring board) and 9360925 (circuit card assembly) under RFP-1003 and item part numbers 9360884 and 9360925 (circuit card assemblies) and 9360949 and 9360952 (bit boards) under RFP-0416. However, its protests concerning these items are academic because the Army, on September 27, 1990, terminated for the convenience of the government Lockheed's sole-source awards of these items, and the Army is reprocurring these items using competitive procedures.

<sup>2/</sup> The Army executed a justification and approval (J&A) for other than full and open competition for each of the four solicitations. Each J&A stated that Lockheed was "the only known contractor [with] the expertise, production facility, configuration control, and overall management capability to produce and deliver these [items] within an acceptable timeframe. [Lockheed] is the actual manufacturer of these items[;] there are no breakout vendors." See 10 U.S.C. § 2304(c)(1) (1988); Federal Acquisition Regulation (FAR) § 6.302-1(b)(1)(i) (FAC 84-52).

contracting officer requested additional technical information from FVC and indicated until this information was provided and related technical issues were resolved, FVC's proposal would be held in abeyance. By letter dated March 23, FVC, referencing its proposal of March 14 and outlining its capabilities, requested the support of the commanding Army officer to procure the Vulcan items on a competitive basis and to ensure that FVC would be considered for future Vulcan procurements. By letter dated March 27, FVC provided additional technical information to the contracting officer. By letter dated April 13, the commanding officer responded that the Army supports competition in procurement situations when it is possible, and that the Army was reviewing the Vulcan technical data to determine which items may be suitable for competition in the future. The commanding officer stated he was aware of FVC's interest and that FVC would be permitted to submit offers on any competitive procurements (implicitly, future competitive procurements).<sup>3/</sup>

On July 12, 1990, the Army awarded four sole-source contracts to Lockheed. FVC received notification of the awards on July 18 and filed these protests with our Office on July 20.

The Competition in Contracting Act requires agencies to achieve full and open competition through the use of competitive procedures. 10 U.S.C. §§ 2301, 2304(a)(1). The law requires agencies, prior to making a sole-source acquisition, to publicize their intention to do so in order to provide those who believe they can satisfy agency requirements the opportunity to demonstrate to the agency that they can do so and that a sole-source procurement is not warranted. 10 U.S.C. §§ 2304(c)(1), (f); FAR § 6.302-1; see WSI Corp., B-220025, Dec. 4, 1985, 85-2 CPD ¶ 626.

The publication of a proposed sole-source procurement in the CBD constitutes constructive notice to potential offerors of a solicitation and its contents. S.T. Research Corp., B-232751, Oct. 11, 1988, 88-2 CPD ¶ 342. Our cases have differed in the timeframe applied for filing of a timely protest challenging the sole-source nature of the procurement where, as here, the CBD notice gives offerors the opportunity to identify their interest and capability to respond to the requirement within 45 days. In some cases we have required a potential offeror to file a protest by the closing date for written expressions of interest to the CBD notice. See Pro-Tem, B-231087, Apr. 29, 1988, 88-1 CPD ¶ 427. In other cases, we have required a potential offeror to file a protest by the 10th working day after the publication of the CBD notice. See S.T. Research Corp., B-232751, supra. Also, at one time it

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<sup>3/</sup> See footnote 1, supra.

had been our view that where a CBD synopsis of a sole-source solicitation contains a closing date, any protest of that decision had to be filed prior to that date. See Detroit Broach and Mach.--Recon., B-213643.2, July 12, 1984, 84-2 CPD ¶ 43.

Recently, we have held that it is appropriate to require the protester to submit a timely expression of interest in fulfilling the potentially sole-source requirement in response to the CBD notice as a prerequisite to filing a protest; if the agency rejects the protester and proceeds with its sole-source approach, the protester then must file its protest within 10 days after it knows or should have known of the rejection. Keco Indus., Inc., B-238301, May 21, 1990, 90-1 CPD ¶ 490. This new rule gives the agency an opportunity to consider an offeror's preliminary proposal in order to decide whether to open a procurement to competition, while allowing only serious potential offerors to challenge the agency's sole-source decision. Id.

Applying this new rule, FVC's protests are not for consideration because FVC did not submit its expression of interest in these procurements until March 14, 1990, substantially more than 45 days after the publication of the respective CBD notices on October 31, 1989 (RFP-1003), February 17, 1989 (RFP-0416), April 12, 1989 (RFP-0673), and April 25, 1989 (RFP-0713). Moreover, FVC's protests are untimely under any of the theories enunciated in our previous cases as well, since the protests were not filed until July 20, 1990, well beyond the 45-day period for expressions of interest established by the above-stated CBD notices; the 10-day period after publication of the respective CBD notices; and the respective closing dates for receipt of proposals on December 22, 1989 under RFP-1003, June 15, 1989 under

RFP-0416, August 1, 1989 under RFP-0673, and July 27, 1989 under RFP-0713.4/

Accordingly, these protests are dismissed.5/

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4/ Here, the synopses did not contain notice of the closing dates, but invited interested parties to request solicitations which contained closing dates. As stated above, the protester filed its expression of interest substantially after these closing dates.

5/ It was not apparent from the face of FVC's protest letters that its protests were not timely filed with our Office. Only after full development of the record did it become apparent that all four of FVC's protests were untimely.