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# Decision

**Matter of:** FN America, LLC

**File:** B-415261; B-415261.2

**Date:** December 12, 2017

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## DIGEST

1. Sole-source award for a follow-on contract for highly specialized equipment is unobjectionable where the agency reasonably determined that award to any other source would likely cause substantial cost duplication, not expected to be recovered through competition, and unacceptable delays in fulfilling the agency's requirements.

2. Proposed award of a sole-source contract for infantry rifles is unobjectionable where the agency reasonably determined that it needed to acquire the same model of rifle already in use for the purposes of standardization and safety, and the record reflects that the cost to replace the existing rifles would not be recovered if the agency were to change to a new model.

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## DECISION

Fabrique Nationale America, LLC, (FN), of Columbia, South Carolina, protests a notice of intent to award a sole-source contract to Heckler & Koch America (H&K), of Ashburn, Virginia, pursuant to Solicitation No. M67854-17-R-1248, issued by the United States Marine Corps for the purchase of M27 Infantry Automatic Rifles (IARs). The protester alleges that the justification and approval (J&A) supporting the notice of intent is flawed in several respects.

We deny the protest.

## BACKGROUND

In 2006, the Marine Corps first released a solicitation for prototypes of the IAR and received six offers, including offers from FN and H&K. Agency Report at 1. Of those six offerors, three received delivery orders for testing prototypes, while the other three offerors remained eligible to compete for the production contract. Id. at 2. In 2008, the agency issued a J&A limiting competition for the IAR to seven offerors--the original six offerors and one additional offeror--and issued a request for proposals (RFP) seeking technical proposals and product samples for evaluation. Id. The competition resulted in ten proposals from the seven offerors, some of which proposed more than one rifle in response to the RFP. Id.

As part of the 2008 competition, the agency expended approximately \$429,140 for an initial round of tests including rate-of-fire testing, reliability testing, and precision testing. Agency Report at 2. Following evaluation of the proposals, four indefinite-delivery, indefinite-quantity (IDIQ) contracts were issued to three of the offerors, including FN and H&K. Id. Each awardee received a delivery order for ten IARs for second round evaluation. Id. The agency expended approximately \$136,070 to purchase the IARs and another \$1,009,136 for a second battery of tests. Agency Report at 2. The second round of testing involved some of the same performance criteria used in the initial testing, but the testing also included environmental testing and limited user evaluations. Id. After the second round evaluation, in 2009, the agency awarded H&K a delivery order for 24 low rate initial production IARs at a total cost of approximately \$67,571.28, and conducted an expansive third round of tests at a cost of approximately \$1,850,000. Id. These tests included operational testing, comparisons to the M249 squad automatic rifle (SAW), cold weather testing, and humidity testing. Agency Report at 2.

In 2010, the Marine Corps ordered 458 IARs from H&K along with accessories and spare parts and performed a limited fielding to five infantry battalions. Id. As a result of this limited fielding, the agency decided, in 2011, to replace the M249 SAW with the IAR in every infantry battalion and every light armored reconnaissance battalion, which resulted in the purchase of 6,042 additional H&K IARs as well as accessories and spare parts, at a total cost of \$18,430,000. Id. The additional procurement exhausted the maximum order quantity under H&K's 2008 IDIQ contract. Id. At this point in time, the total cost of procuring, developing, testing, and fielding the IAR amounted to approximately \$27.4 million. Agency Report at 2-3.

In January of 2017, the agency began researching industry's ability to accommodate an additional 10,342 IARs to supply almost every member of the Marine Corps' infantry squads with an IAR. Id. at 3. In February of 2017, the agency posted a request for information (RFI) announcing its plan to procure approximately 11,000 new IARs and accessories, and requesting that interested vendors provide production timelines, anticipated delivery dates, and itemized pricing for a potential fixed-price contract. Id. The agency received responses from eight vendors, including FN and H&K. Id.

In response to the RFI, H&K proposed a total unit cost of [DELETED] for both the rifle and accessories, while FN proposed two rifles at a total unit cost of [DELETED] and [DELETED] for the respective rifles and accessories. Agency Report at 3. With the information received in response to the RFI, the agency then conducted a business case analysis (BCA) to determine the most cost effective approach to the procurement. Id. As part of the BCA, the agency analyzed and compared the potential costs resulting from a procurement of IARs from the various vendors responding to the RFI.

As part of this analysis, the agency highlighted the need to provide standardized equipment to combat forces. Accordingly, if the agency were to procure the IAR from a source other than H&K, the newly procured IAR would either need to be interchangeable in form, fit, and function, with H&K's IAR, or the agency would need to replace 5,636 of the IARs already purchased from H&K with IARs from the new vendor. BCA at 2. In analyzing this issue, the agency concluded that procuring from any vendor other than H&K would require the procurement of 15,978 IARs and significant additional costs for testing and training, while a procurement from H&K would require the purchase of 10,342 IARs and limited additional testing. BCA at 2-3. The agency conducted these comparisons both including and excluding testing costs, and using a "low" and "high" estimate for potential training costs to reflect the fact that future testing and training costs would not necessarily be identical to previous testing and training costs. Id. at 10-14. Additionally, the agency compared the potential costs and cost recovery over a larger quantity procurement, comparing the costs of procuring 56,450 units from non-H&K manufacturers to procuring 50,814 units from H&K. Id. at 12-14.

Ultimately, the agency concluded that, even using the most optimistic assumptions--considering various order quantities, excluding testing costs, and using its lower estimate for training costs--procuring from H&K was still several million dollars cheaper than procuring from the lowest-priced vendor, and at least [DELETED] cheaper than procuring from FN. Id. Finally, the Marine Corps estimated that it would need to procure at least [DELETED] IARs to break even on a competitive procurement using the most optimistic assumptions. BCA at 14.

On July 31, 2017, the agency signed a J&A approving a sole-source contract for the anticipated requirement of 10,342 IAR units, with a maximum order quantity of 50,814 IAR units, at an estimated unit price of [DELETED] for the rifle and accessories. J&A at 1-2. The J&A supported the planned sole-source contract on the grounds that: (1) it would be a follow-on contract for highly specialized equipment; (2) the government would incur substantial duplication of costs, which would not be recovered through competition; and (3) the agency would experience unacceptable delays of approximately four to six years. See J&A at 6 citing Federal Acquisition Regulation (FAR) § 6.302-1(a)(2)(ii). Of note, the J&A was primarily focused on the agency's anticipated procurement quantity of 10,342 IAR units and did not fully reproduce the BCA analysis described above. See J&A at 6-8.

On August 11, the agency posted a notice of intent to award a sole-source contract to H&K on the Federal Business Opportunities website, with a maximum order quantity of

50,814 units. Agency Report at 4. In response, FN submitted capability statements for two rifles, one of which had been previously submitted in response to the February RFI and one that had not been previously submitted. FN offered these two rifles at a cost of [DELETED] and [DELETED]. Id. Of note, FN revised its pricing for the previously submitted rifle from a total unit cost of [DELETED] for the rifle and accessories to a total unit cost of [DELETED]. Id.

The agency then prepared a memorandum for the record analyzing the newly provided information and re-conducting some elements of the BCA's analysis with the newly received pricing information. This analysis again concluded both that a sole source to H&K would be cheaper by a significant margin and that none of the received capability statements would ameliorate an estimated four-year delay resulting from the conduct of a competition, testing of the selected weapon, and training personnel in using the selected weapon. Agency Analysis of Responses to Notice of Intent to Sole Source at 1-3. On August 31, the agency rejected FN's capabilities statement, noting that the revised pricing did not negate the anticipated cost duplication or unacceptable delays supporting the J&A. Agency Report at 5. This protest followed.

## DISCUSSION

The protester alleges that the government erred in several respects in preparing the notice of intent to award a sole source contract and the supporting J&A. Specifically, the protester alleges: (1) that competing the procurement would not result in substantial duplication of costs; (2) that competing the procurement would not result in unacceptable delays; (3) that the J&A did not adequately support the full scope of the proposed sole-source procurement; and (4) that the IAR is not highly specialized equipment as contemplated by FAR § 6.302-1(a)(2)(ii).<sup>1</sup>

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 permits 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 agency requirements. See 10 U.S.C. § 2304(c)(1); FAR § 6.302-1(a)(2). As relevant here, for purposes of applying this exception, CICA and the FAR provide that in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment, or the continued provision of highly specialized services, such 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 costs to the United States which is not expected to

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<sup>1</sup> The protester advanced additional arguments in its pleadings. While we do not address each argument individually in this decision, we have considered all of them, and find that they do not provide a basis to sustain the protest.

be recovered through competition; or (ii) unacceptable delays in fulfilling the agency's needs. See 10 U.S.C. § 2304(d)(1)(B); FAR § 6.302-1(a)(ii).

When using noncompetitive procedures pursuant to 10 U.S.C. § 2304(c)(1), such as here, agencies must execute a written J&A with sufficient facts and rationale to support the use of the cited authority. 10 U.S.C. § 2304(f)(1)(A), (B); FAR §§ 6.302-1(d)(1), 6.303-1, 6.303-2, 6.304. 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; where a J&A sets forth a reasonable basis for the agency's actions, we will not object to the award. Chapman Law Firm Company, LPA, B-296847, Sept. 28, 2005, 2005 CPD ¶ 175 at 3.

### Substantial Duplication of Cost

The protester argues that the agency's J&A and underlying BCA were unreasonable because the agency assumes that all costs of training and testing previously incurred would be duplicated when procuring an IAR from a source other than H&K. Protester's Comments on the Agency Report at 8-10. For example, the protester contends that the cost of testing to determine whether the IAR could replace the M249 SAW will not be repeated because the M249 SAW has already been replaced by H&K's IAR. Id. at 9. The protester argues that the agency failed to consider which prior incurred costs would necessarily be repeated in a new procurement, and therefore made an unreasonable assessment of cost duplication. Id. Further, the protester argues that, even when the agency's low-range estimates for training and testing are added to the cost of purchasing FN's rifles, the final cost to the agency after procuring 50,842 IARs from either FN or H&K would be roughly comparable, because one of FN's proposed IARs is cheaper than H&K's IAR.<sup>2</sup> Id. at 9-10.

We need not reach the question of whether the agency's estimates of training and testing costs were reasonable,<sup>3</sup> because the protester's arguments overlook the need to

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<sup>2</sup> The protester also argues that the BCA and J&A cannot reasonably support the sole-source award because they both relied on outdated pricing for FN's IAR, and because FN's new pricing offer changes the analysis significantly. Protester's Comments on the Agency Report at 9, Supplemental Protest at 4-5. The record, however, demonstrates the spurious nature of the protester's arguments in this regard. First, FN's revised price offer is higher than the lowest-priced offer considered in the original BCA. Even using that lower price, the agency found that there would be significant cost duplication. BCA at 14. Second, the record reflects that the agency reconsidered some of the BCA's analyses using the revised pricing information in a memorandum for the record, but reached the same conclusion. Agency Analysis of Responses to Notice of Intent to Sole Source at 1-3. Accordingly, we have no basis to find that the agency's analysis was unreasonable.

<sup>3</sup> We note, in this connection, however, that the agency considered a range of testing and training costs by conducting several analyses both with and without certain

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purchase 5,636 additional IARs to replace the 5,636 H&K IARs already in use.<sup>4</sup> While the protester argues that FN's and H&K's IAR offerings are extremely similar and have [DELETED] percent parts interchangeability, the protester does not argue that FN's IAR offerings are identical in form, fit, and function to the existing IAR, and that, therefore, the agency need not re-procure the 5,636 IARs.<sup>5</sup> Protest at 5. As a result, the proper cost comparison is not between the cost to procure 50,842 FN IARs and 50,842 H&K IARs, but rather between the cost to procure 56,450 FN IARs and 50,842 H&K IARs. Therefore, even at the maximum order quantity,<sup>6</sup> an award to FN would result in cost duplication of at least [DELETED] million dollars (approximately [DELETED] percent of the total cost) solely on the basis of the need to repurchase existing IARs, even if there were no training and testing costs whatsoever.<sup>7</sup> On this record, there is no question that the agency reasonably determined that there would be substantial duplication of cost not expected to be recovered through competition.

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categories of costs to assess their effect on the results of the analysis. For example, the BCA considered cost duplication both with and without training costs, and at various procurement quantities. BCA at 10-14. While the protester is correct that not all of the testing and training costs previously incurred in procuring the H&K IAR would necessarily recur, the agency's analyses underlying the J&A appear to consider that possibility at some length.

<sup>4</sup> Of the approximately \$27.4 million expended by the agency on procuring, testing, and fielding the IAR, approximately \$18 million was expended on the purchase of the H&K IARs, accessories, and spare parts. Agency Report at 2-3.

<sup>5</sup> Protester argues that FN's IAR offerings operate in the same manner as the H&K IAR in some respects (e.g., safety and fire controls, and the loading or unloading of ammunition), but concede that they are similar but not identical in several others. Protest at 5. For example, according to the protester, FN's rifles operate in a manner "nearly" identical to the H&K IAR, have "similar levels" of accuracy and precision, use "similar grips or grips that are otherwise interchangeable," use "identical or nearly identical" methods for field stripping, cleaning, and maintenance, and, therefore, "most, if not all" of the agency's prior training on H&K's IAR would be applicable to FN's rifles. Id.

<sup>6</sup> Where the protester cannot prevail at the maximum order quantity, we need not consider the matter at the agency's expected order quantity of 10,342 IARs, because the maximum order quantity is the best case for the protester since it represents the lowest expected cost duplication.

<sup>7</sup> When the agency's "low" estimates of training and testing costs are added, and the agency's estimated procurement quantity is considered, the cost duplication more than triples. Agency Analysis of Responses to Notice of Intent to Sole Source at 2.

## Unacceptable Delays

CICA and the FAR provide that either substantial duplication of cost to the government or unacceptable delays in fulfilling the agency's requirements are alternative bases to support a sole source of a follow-on contract for highly specialized equipment. As a result, a finding that either ground is reasonable is sufficient to deny these protest grounds, but we will nonetheless address the protester's unacceptable delay arguments as well.

In this regard, the protester argues that the agency's conclusion that procuring an IAR from a source other than H&K would result in an unacceptable delay of at least 4 years is similarly based on a flawed expectation that a new procurement would require the exact same amount of time as the previous procurement. Protester's Comments at 10-11. Specifically, the protester again cites the comparison testing of the IAR with the M249 SAW, which would not be repeated because the M249 SAW has already been replaced by the IAR. Id. Additionally, FN notes that it could produce the rifles in question at a significantly faster rate than H&K, therefore potentially delivering the total quantity of IARs sooner than a sole source to H&K. Id.

As a preliminary matter, in its focus on the speed at which it could potentially produce the required number of IARs, the protester appears to misconceive the nature of the agency's anticipated delays. The J&A contemplates a 4 to 6 year delay, 4 years of which is entirely decoupled from the rate of vendor production, instead deriving from the period of time the agency expects will be required to conduct a large competitive procurement for the IAR that involves several rounds of testing. J&A at 8-9. The protester is correct that the number is preliminarily based on the length of time required previously for the down-select and testing phase of the prior IAR procurement, but the agency also discusses other factors that would have the effect of lengthening the procurement process, such as the increase from three to nine vendors offering prospective IARs, which would likely increase the time required to evaluate offers and test prospective IARs. Id. Additionally, the agency's 4-year estimate excludes any time that may be required for prototyping or other projects that may be necessary after award, but prior to initial operating capability. Id.

While we agree with the protester that at least one previously performed testing round would not need to be repeated in a hypothetical future IAR procurement, that test was only one of a significant battery of tests, and was conducted over 10 months concurrently with other tests that would likely need to be repeated as part of a new procurement.<sup>8</sup> Agency Report at 2. On this record we have no basis to conclude that the agency unreasonably found that a competitive procurement for the IAR would result in an unacceptable delay.

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<sup>8</sup> For example, in addition to the SAW comparison testing, cold weather tests and high humidity tests were both conducted during that 10-month period. Agency Report at 2.

## Failure to Justify Full Scope

The protester also asserts that, even if the J&A is adequate to support a sole-source procurement of 10,342 IARs, it is inadequately detailed to support the maximum procurement quantity of 50,842 IARs. Supplemental Protest at 3-4. FN bases this argument on the fact that the J&A does not expressly address the 50,842 order quantity in assessing duplication of costs and unacceptable delay. Id. These allegations provide no basis to question the agency's sole-source decision.

As set forth above, the record reflects that the agency's BCA underlying the J&A includes significant analysis supporting a finding of substantial cost duplication at the 50,842 IAR procurement quantity, even with extremely optimistic assumptions, which protester has not successfully refuted. BCA at 12-14. While the protester is correct that the J&A does not itself include a copy of all the analysis concerning the higher order quantity performed in the BCA, the only error committed by the agency, if error it was,<sup>9</sup> was a failure to cut and paste the entire BCA into the J&A. See J&A at 7-8. Prejudice is an element of every viable protest. See Piquette & Howard Elec. Serv., Inc., B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8 at 10; Supreme Foodservice GmbH, B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292 at 14. Because the agency's contemporaneous analysis reasonably shows that there is likely to be substantial cost duplication even at the maximum procurement quantity, protester has not shown any harm in connection with the agency's failure to fully incorporate that cost analysis in the J&A. Likewise, where the bulk of the agency's anticipated unacceptable delay is related to the time required for procuring, testing, and fielding the IAR, and is therefore largely unrelated to the order quantity, we fail to see how the protester suffered any harm associated with its contentions. J&A at 8-9.

## Highly Specialized Equipment

The protester argues on several grounds that H&K's IAR is not highly specialized equipment, and therefore the agency inappropriately relied on section 2304(d)(1)(B) of Title 10 and FAR § 6.302-1(a)(2)(ii) to support its sole-source decision.<sup>10</sup> For example, the protester argues that H&K's IAR is a commercial item, and that the agency has failed to identify any salient characteristics of the IAR that would distinguish it as more "highly specialized" than any other commercial assault rifle, such as FN's IAR offering.

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<sup>9</sup> For example, the agency contends that a sole source J&A may reasonably focus on the most likely order quantity rather than the maximum order quantity, where the underlying record of analysis supports the maximum order quantity. Supplemental Agency Report at 4-5.

<sup>10</sup> 10 U.S.C. § 2304(d)(1)(b) and FAR § 6.302-1(a)(2)(ii) may be invoked for follow-on contracts for either major systems or highly specialized equipment. The agency concedes that the IAR is not a major system. Agency Report at 6.



Protester's Comments at 6-8. Furthermore, the protester argues H&K's IAR is composed of parts that are, in [DELETED] percent of cases, interchangeable with other similar rifles, to include FN's proposed IAR. Protest at 5. The protester goes on to argue that H&K's IAR, in addition to being a commercial item, is virtually mechanically identical to another H&K rifle available to the general public, with the only distinguishing features being the H&K IAR's automatic firing capability and some minor alterations. Protester's Comments at 7. Finally, protester notes that, in the normal course of assault rifle development, it is the automatic version of the weapon that is first developed and tested, and then the manufacturer modifies the automatic rifle to create a semi-automatic consumer rifle. Id. Therefore, the protester argues that H&K's IAR is not highly specialized equipment because it is neither equipment purpose-built for the agency nor a commercial item modified for the agency's use, but rather a purely commercial item in a field of very similar items, one variant of which happens to be suitable for the government's use with only minimal modifications. Id. at 8.

CICA and the FAR do not define the phrase "highly specialized equipment," and our Office has only addressed it on a handful of occasions. In addressing the phrase, our Office has concluded that equipment specially developed for the agency was "highly specialized" notwithstanding that the underlying technology was mature and had been in production for a number of years. Magnavox Electronic Sys. Co., B-258076.2, B-258076.3, Dec. 30, 1994, 94-2 CPD ¶ 266 at 6. We have also concluded that commercial equipment specially modified to meet the agency's specific needs was "highly specialized." Unitron LP, B-406770, Aug. 14, 2012, 2012 CPD ¶ 247 at 3.

Notwithstanding the protester's arguments, we cannot conclude that H&K's IAR is other than highly specialized equipment. It is not disputed that H&K's IAR is distinct from H&K's consumer offerings, at a minimum in that the IAR is capable of automatic fire and is compatible with accessories specific to the Marine Corps. Protester's Comments at 7. H&K's IAR has been modified in a nontrivial way for the agency's use, and is therefore highly specialized equipment, notwithstanding that other rifles, such as FN's proposed IAR, may well also be highly specialized equipment in exactly the same sense.<sup>11</sup>

In any event, even if we were to conclude that H&K's IAR is not highly specialized equipment, we believe that the agency's intent to award a sole-source contract in this case would still be supportable on an alternative basis, i.e., to standardize on a single model of IAR, so any error in that regard is not prejudicial to the protester. Specifically, we note that CICA and the FAR do not contemplate that an agency may only find supplies to be available from one responsible source in the specific circumstances identified in sub-subparagraphs 6.302-1(a)(2)(i)-(iii). See FAR § 6.302-1(a)(2) and

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<sup>11</sup> Indeed the agency adopts precisely this position, noting that it does not contend that H&K's IAR, alone, is highly specialized equipment. Supplemental Agency Report at 8, n.5. Rather the agency argues that the IAR requirement as a whole is a requirement for highly specialized equipment which required substantial testing during competition. Id.

10 U.S.C. § 2304(c)(1). Rather, those circumstances are non-exhaustive examples of scenarios in which an agency may reasonably find that only one responsible source exists. In prior cases, we have found no basis to disturb sole-source decisions in which the agency relied directly on 10 U.S.C. § 2304(c)(1) and subparagraph 6.302-1(a)(2) alone, rather than on any of the sub-subparagraphs. Accordingly, in several cases, we have found that an agency's reasonable need for standardization can be an independent basis for a sole-source award, especially in contexts where safety is a factor.

For example, we did not object to the Navy's sole-source procurement of autotitrators for submarines where the competitor's autotitrators were entirely able to meet the Navy's technical needs, but were not identical in form, fit, and function to the existing autotitrators. Brinkmann Instruments, Inc., B-309946, B-309946.2, Oct. 15, 2007, 2007 CPD ¶ 188 at 2-3. We agreed that the Navy's training and safety needs demanded that they only field a single model of autotitrators, and denied a protest of the sole-source procurement. Id. Likewise, we did not object to similar sole-source awards for fetal monitors and radar systems where the agency's reasonable needs required deployment of only a single model of the relevant item. See, e.g., Advanced Med. Sys., Inc., B-259010, Jan. 17, 1995 (agency's need to standardize fetal monitors in order to maximize patient care was reasonable); Sperry Marine, Inc., B-245654, Jan. 27, 1992, 92-1 CPD ¶ 111 (sole-source acquisition of particular radar system was reasonable where agency needed to utilize the same radar system it had already deployed at training school).

Here, there is no question that the item to be procured is key to the Marine Corps' combat mission and to personnel safety,<sup>12</sup> and that the agency has expended significant resources on testing, training, and initial fielding of a single standard IAR. As noted above, while the protester argues that FN's and H&K's IAR offerings are extremely similar and have [DELETED] percent parts interchangeability, the protester does not argue that FN's IAR is identical in form, fit, and function to the existing IAR. Protest at 5. In addition, as set forth above, the agency's need for a single IAR is a fundamental foundation of the agency's sole-source justification, driving the agency's conclusion that if it were to change to a different IAR, it would need to re-procure at least the previously fielded 5,636 IARs at significant cost in order to field a single standard IAR. Based on

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<sup>12</sup> The J&A notes, for example, that having all controls and features in the same location on all IARs allows Marines to operate any IAR properly in lowlight conditions, which the agency asserts is a lifesaving quality under the extreme stresses of combat.

this record, it is readily apparent that the agency's need for standardization of the IAR provides an independent basis for justifying the sole source to H&K, a justification which does not depend on whether the IARs at issue are "highly specialized" equipment.

The protest is denied.

Thomas H. Armstrong  
General Counsel