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Richard Martin  
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**DECISION**

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

FILE: B-189306

DATE: October 4, 1977

MATTER OF: Bingham Ltd.

**DIGEST:**

1. Where contracting officer's determination to procure on sole source basis, is based on 10 U.S.C. § 2304 (a)(2), ASPR 202.2(vi), a Uniform Material Movement and Issue Priority designator of 3 and a tight delivery schedule, determination is reasonable and will not be questioned by GAO.
2. Contention that item being procured by agency may violate patent rights of protester will not be considered because remedy of aggrieved party is action in Court of Claims against Government for damages or administrative settlement of claim by agency.
3. Allegation that contractor may not have right to offer item to agency raises questions dealing with dispute between private parties and is not for GAO consideration.

Bingham Ltd. (Bingham) protests the sole source procurement from United States Armament Corporation (USAC) of ammunition conversion kits for the M16A1 rifle by the U.S. Army Armament Materiel Readiness Command (ARRCOM), Rock Island, Illinois. The conversion kits permit the use of caliber .22 long rifle ammunition in place of more expensive 5.56mm ammunition during M16A1 rifle training. The agency expects to save at least 5 cents per round and total estimated annual savings of over \$6,300,000.

Bingham contends that its unsolicited proposal of December 2, 1976 offering a superior and less expensive conversion kit was never properly considered by ARRCOM, that its kit was never fairly tested, that its conversion kit is in production and available as an off the shelf item and that a sole source procurement from USAC is not justified.

B-189306

The Army contends that the USAC kit is the only one available which has been properly tested and type classified under Army Regulations 70-1 and 71-6 as standard for Army use, that the kits are urgently needed in order to realize substantial cost savings in its training programs and that consideration of the Bingham kit would require an expensive test program exceeding 12 months which would require an unacceptable delay.

The record indicates that in the early 1970's, the Army tested various conversion kits offered by industry and one designed by the Army. After extensive tests, the kits offered by USAC and the Military Armaments Corporation (MAC) were found to be acceptable and both companies were solicited in January 1976 for offers for 10,457 kits and spare parts. MAC did not respond because of bankruptcy and a letter contract was awarded to USAC on April 15, 1976 prior to type classification (standardization) pursuant to the above-cited regulations. This letter contract has since been replaced by a formal contract and the USAC conversion kit was type classified on April 29, 1977 pursuant to AR 71-6. A new requirement for 55,000 kits has developed.

The Determination and Findings issued by the contracting officer on May 14, 1977 states an intention to procure by negotiation rather than by formal advertising under the "public exigency" exception of 10 U.S.C. 2304 (a)(2), as implemented by Armed Services Procurement Regulation (ASPR) # 3-202.2(vi). This ASPR provision authorizes procurement by negotiation when the purchase request cites a Uniform Material Movement and Issue Priority System (UMMIPS) designator 1 through 6, inclusive. In this case, the procurement was assigned a UMMIPS designator of 3. Although use of the public exigency exception does not alone provide the procuring agency with authority to procure on a noncompetitive basis, the agency is vested with considerable discretion in determining what amount of competition is consistent with the exigency situation. IN-TROL, a Division of Aseeco Corp., B-181073, October 15, 1974, 74-2 CPD 204. In determining the propriety of an award under a sole source solicitation, the standard to be applied is one of reasonableness and unless it is shown that the agency acted without a reasonable basis this Office will not question the award. North Electric Company, B-182248, March 12, 1975, 75-1 CPD 150.

B-189306

The record indicates that the conversion kit offered by Bingham's unsolicited proposal of December 2, 1976 was an "Atchisson Mark II" whereas the kit previously offered by MAC was an "Atchisson Mark I" model. Neither model has been type classified although the "Atchisson Mark I" had undergone extensive testing by the Army several years ago. The new "Atchisson Mark II" was considered by the Army to be sufficiently different from the Mark I that a complete new testing program of the Mark II would be necessary. Bingham contends that the Army type classified USAC's conversion kit within six weeks and challenges the Army's statement that testing of its kit would take at least a year. The record, however, indicates that the final testing for type classification of the USAC kit followed several years of testing and an initial production run. It provides no basis for the protester's belief that the "Atchisson Mark II" model could be adequately tested within six weeks.


An agency's decision to procure on a sole-source basis can be justified where procurement from other sources would prevent fulfilling the objectives of the procurement within the time permitted, Janke and Company, Incorporated, B-181064, August 29, 1974, 74-2 CPD 126. The procuring agency made a determination that competitive procurement was not feasible because only USAC could meet the required delivery schedule. On the basis of the record before us, we are unable to conclude that this determination was unreasonable. It is noted, however, that the agency's determination that competitive procurement is not feasible in this instance also states that future procurements will be on a competitive basis.

Bingham's allegations challenging the projected cost savings to be realized from use of the USAC conversion kit and purporting to show the superiority of its kit over that of USAC have not been proven to the satisfaction of the agency. We know of no basis in law or logic requiring the agency to suspend procurement of urgently needed items while it performs tests required to substantiate such allegations.

B-189306

Bingham also states that it currently has lawsuits against USAC for patent infringement and contesting the ownership of the conversion kit offered by USAC. These matters are not for resolution by this Office. As regards patent infringement, 28 U.S.C. § 1498 (1970) prevents Government contractors or subcontractors from being subjected to suits for alleged infringement of any patents in providing items to the Government. In such matters, the remedy of the aggrieved party is an action against the Government in the Court of Claims for damages or administrative settlement of claim by the agency, if appropriate. Ultraviolet Purification Systems, Inc., B-185178, July 15, 1976, 76-2 CPD 46; International Tel & Tel Corp. v. United States, 536 F. 2d 1361 (Ct. Cl. 1976). Moreover, the ownership issue which involves a dispute between private parties is properly before the courts and is not for consideration under our Bid Protest Procedures.

Accordingly, this protest is denied.

  
Deputy Comptroller General  
of the United States



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

*R. Martin*  
*PL 2*

B-189306

October 4, 1977

The Honorable Elliott H. Levitas  
House of Representatives

Dear Mr. Levitas:

We refer to your letter of July 8, 1977 in regard to the protest of Bingham Ltd. concerning the sole source award of a contract by the United States Army to the United States Armament Corporation.

By decision of today, copy enclosed we have denied the protest.

Sincerely yours,

*R. Martin*  
Deputy Comptroller General  
of the United States

Enclosure



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

*R. Martin*  
*PLZ*

B-189306

October 4, 1977

The Honorable Richard Stone  
United States Senator  
Suite 200B-2639 North Monroe  
Tallahassee, Florida 32303

Dear Senator Stone:

We refer to your interest in regard to the protest of Bingham Ltd. concerning the sole source award of a contract by the United States Army to the United States Armament Corporation.

By decision of today, copy enclosed we have denied the protest.

Sincerely yours,

*R. Martin*  
Deputy Comptroller General  
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20543

*R. K. Kellum*  
*PLS*

B-189306

October 4, 1977

The Honorable Sam Nunn  
United States Senate

Dear Senator Nunn:

We refer to your letters of June 22, 1977 and September 12, 1977 in regard to the protest of Bingham Ltd. concerning the sole source award of a contract by the United States Army to the United States Armament Corporation.

By decision of today, copy enclosed we have denied the protest.

Sincerely yours,

*R. K. Kellum*  
Deputy Comptroller General  
of the United States

Enclosure