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M. Boyle RL. I

DECISION

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

FILE: B-191432 DATE: June 30, 1978

MATTER OF: Vega Precision Laboratories, Inc.

DIGEST:

Protester contends that proposed sole-source procurement of transponder sets should be opened to competition because it is capable of manufacturing item from existing production drawings and Government-furnished model and is willing to assume risk of concurrent first article testing and production to deliver timely. Contracting officer, with concurrence of agency's Sole-Source Review Board, believes that inherent risk of changing from most recent supplier is too great because critical item is urgently needed. In circumstances, GAO concludes that protester has not met its heavy burden of clearly showing that agency's determination is unreasonable.

Vega Precision Laboratories, Inc. (Vega), protests the Marine Corps' proposed procurement of 106 transponder sets (AN/PPN-18) from Motorola, Incorporated, Government Electronics Division (Motorola), on a sole-source basis under request for proposals (RFP) No. M00027-78-R-0011. No award has been made pending our resolution of the protest.

BACKGROUND

The AN/PPN-18 is a crucial element in close air support missions; it provides a signal to an attacking aircraft thus enabling the aircraft to home in on ground targets in all weather conditions. The Marine Corps, as the designated Department of Defense Primary Inventory Control Activity for this item, is responsible for procuring all the military departments' requirements. Currently, the Army (Special Forces) and Navy (Seals) have an urgent need for the requested quantities as soon as they can be delivered; however, the fastest realistic delivery schedule would begin with six units in January 1979 and 20 units per month thereafter until completion. This schedule contemplates waiver of

first article testing for Motorola, the most recent supplier, and Motorola's use of "unaudited" drawings; the schedule also includes adequate time for Motorola to procure certain long lead-time items required for the transponder sets.

Chronology

The following brief history of this procurement will be helpful in our consideration of this matter.

The Syracuse Research Corporation initially developed what is now called the AN/PPN-18. The Vega 326K and Motorola SST-22 models were forerunners of the current configuration.

Vega supplied 112 units under a contract dated August 1, 1969, which was awarded as a result of competitive negotiations. Although the initial units produced by Vega under the contract met basic performance requirements the design was not entirely successful. The antenna had to be replaced on all the units.

Following completion of the Vega 1969 contract and actual field usage of the transponder in Vietnam a new requirement of 113 units surfaced. Under the 1969 contract Vega had supplied the required drawings which were to be suitable for reprocurement of this unit. It was believed by the procuring activity that an advertised procurement would be suitable for the new requirement based on availability of complete design specifications.

While repairing and rebuilding the units, it was discovered that discrepancies existed between the then correct performance specifications and the drawings which Vega had supplied. Specifically, there was reason to believe that the drawings and design data would not meet the system time delay requirements of the performance specifications which had been upgraded since the initial Vega procurement. The time delay requirement is a crucial factor in the actual field performance of the transponder unit. In order

to insure the time delay performance capability a new design and engineering effort was required.

Consequently, the procurement plan was revised to allow for competitive negotiations This was to be the first reprocurement of the item since the Vega production was completed on April 30, 1971. An RFP was issued to forty-six (46) contractors on December 22, 1975. A list of all performance specification changes was included with the RFP in addition to Vega's original reprocurement package. It was also indicated that the Vega equipment did not meet the performance requirements with respect to the time delay factor. Eight proposals were received and five firms were requested to submit best and final offers. The Source Selection Board made the following findings with regard to the best and final offers as submitted by Vega and Motorola:

	TECHNICAL POINTS	PRICE
Motorola	278.70	$579,490.00
Vega	269.10	601,054.00

The system time delay element was used as a basis for a significant portion of the technical evaluation of each proposal. This was considered to be one of the highest technical risk areas as it was directly related to the accuracy of the offset bombing performance. The contract was awarded to Motorola in June 1976.

After award of that contract, 13 PCO modifications, 12 field modifications, 3 ACO modifications, 53 approved master change orders, and 1 variation change have been issued. These changes and modifications to the existing contract are the result of upgrading the Vega data package and incorporating subsequent desired changes. Many are minor, and some are clarifications of the drawings not affecting the performance specifications; however, other changes do have a significant impact on performance. For example, Motorola developed an electronic switch which performed the function of the Silicon Controlled Rectifier (SCR), in the Vega model. This switch is part of the current configuration.

Secondly, the engineering change proposal for the Built In Test (BIT) capability is undergoing final technical and cost evaluation. It is a requirement for the instant procurement.

On February 6, 1978, the Marine Corps Sole Source Procurement Review Board approved the selection of Motorola as the sole source of supply for the procurement. The contracting officer executed two separate Determination and Findings (D&F) citing 10 U.S.C. §§ 2304(a)(2) and (10) (1970) as authority to negotiate. On February 23, 1978, the RFP was issued to Motorola.

On June 26, 1978, the Marine Corps advised our Office that it has decided not to procure the BIT capability under the existing Motorola contract and that there is a serious question of whether the BIT will be procured at all.

Sole-Source Determination

The contracting officer, with the concurrence of the Marine Corps Sole Source Procurement Review Board, determined that Motorola alone has the technical data necessary to timely produce the units in an acceptable configuration. The reasons for such determination cited by the Board and those later stated by the contracting officer are: (1) current configurations are significantly different from prior versions; (2) the current versions, which satisfy the Government's needs, were manufactured by Motorola, and delivery of drawings reflecting the current version was not scheduled until March 31, 1978; (3) after delivery of the drawings, an audit of about 3 months in duration would be required to ascertain whether the drawings accurately reflected the acceptable unit in order to permit a fully competitive procurement; (4) first article testing of any unit manufactured by a firm other than Motorola would require up to an additional 150 days; and (5) the additional 8 months required to issue a fully competitive solicitation would necessitate an unacceptable delivery delay.

The procurement was synopsized in the Commerce Business Daily on February 14, 1978. Upon notice of the Marine Corps' intent to procure the AN/PPN-18's

on a sole-source basis, Vega requested a conference with the Marine Corps, which was held on March 3, 1978. Vega presented arguments to the contracting officer on why the procurement should not be sole source to Motorola. Later Vega was informed of the reasons for the Marine Corps decision and that the decision was administratively final. Thereafter, Vega filed a timely protest here.

VEGA'S BASIS OF PROTEST

Vega and the Marine Corps agree that Vega possesses the technical capability to successfully manufacture the transponder sets. In support of this contention is a report--completed after the contracting officer's and Board's determinations--dated March 17, 1978, containing the results of a survey of Vega's capability conducted by the Defense Contract Administration Services (DCAS), which concludes that Vega has the technical capability. However, the Marine Corps believes that Vega cannot meet the required delivery schedule based on the recited circumstances. In contrast, Vega believes that (1) adequate information now exists to permit Vega to compete, and (2) if first article testing for Vega was waived or performed concurrently with production then Vega could meet the delivery schedule established by the Marine Corps.

Changed Specifications

Vega has reviewed the various specification changes and believes that it is capable of producing the AN/PPN-18 to current configuration and the specifications of the instant solicitation without advance access to the final data package under the Motorola contract, although that package will be available in ample time for use by Vega in the final phases of negotiation and, of course, in performance. As to the BIT, the DCAS report states:

> "The requirement of a BIT capability can be addressed from [illegible] (2) aspects of design; modification of an existing design or generation of an original design. During the meeting, VEGA suggested several approaches to the implementation of a BIT capability. The company has produced a hand-held independent unit from which a BIT could be adapted for use in the AN/PPN-18 * * * [Since] the company has considered and developed external test capabilities, it is well within the range of competency to determine that the company can develop a BIT capability unique to the AN/PPN transponder."

Vega states that it can, as DCAS found, provide a competent design for a BIT--the design and manufacture of a BIT is, in fact, a relatively simple matter--and Vega states that it can accomplish the necessary design within 2 weeks of a request by the Marine Corps, thus having no adverse impact on required delivery schedule. We believe that the effect of this specification change has become moot since the Marine Corps' intended procure- of the BIT under the Motorola contract was eliminated and may be eliminated from the instant procurement.

With regard to the other specification changes, including the switch used in the Motorola unit, Vega notes that it is currently in production on 13 different models of transponders and produces between 700 and 1,000 units each year, many of much higher complexity than the AN/PPN-18. While it is true that none are of the exact configuration and performance characteristics of the AN/PPN-18, Vega states that many are very similar in electrical and mechanical design, particularly with respect to the plug-in modules which are the basic building blocks of the AN/PPN-18. In this regard, DCAS concludes that Vega can build the unit to the required configuration.

Finally, Vega is willing contractually to assume the obligation to duplicate the last Motorola transponder delivered, provided the Marine Corps will furnish one unit, and Vega is willing to assist

in auditing and revising Motorola drawings to the end product desired.

Delivery Schedule

The DCAS report concludes as follows:

> "CONCLUSION: Based on positive evaluations of all areas of consideration, VEGA has the capability to build and supply AN/PPN-18 transponders to the configuration available (i.e. Basic drawings supplied by VEGA and the MASTER CHANGE ORDERS from MOTOROLA) within the time frame of deliverables of the solicitation."

Vega states the Marine Corps argument that Vega should be saddled with a 3-month, final data package audit in the context of this "urgent" procurement is wrong because Vega can meet the requirements of the solicitation without this package. Vega contends that this argument is made possible principally by the failure of the Marine Corps to enforce the Motorola contract provision requiring delivery of all drawings showing all changes to the current configuration; such drawings must certainly exist in Motorola's plant in order to permit Motorola's manufacture of the equipment.

Vega also states that the Marine Corps has known of the current requirement for the AN/PPN-18 since at least early October 1977, and the intervening 4 months to announce the instant solicitation in February 1978 could well have been spent in developing a data package the Marine Corps could feel comfortable in presenting to a highly competent and experienced producer of the AN/PPN-18, such as Vega, for a competitive proposal; instead, the passage of time was permitted to aggravate the urgency which, in turn, is being advanced in support of the sole-source determination. Vega argues that, citing 46 Comp. Gen. 651 (1967), the Marine Corps' conduct is inconsistent with the principles of sound procurement practice.

Vega argues that there is no reasonable basis for the Marine Corps (1) to waive first article testing for Motorola and not for Vega, and (2) to not permit first article testing to be conducted concurrently with production activities. Vega notes that in the 1969 procurement, Vega accomplished rigorous first article and acceptance tests, including shock testing and endurance testing which Marine Corps representatives at the protest conference admitted ran for over twice the hours of any performed by Motorola (1,000 to 2,000 hours for Vega vs. 500 hours for Motorola). In contrast, Vega states that although the Motorola contract provided that it was mandatory to meet specifications, Motorola sought and received extensive waiver and relaxations of first article performance and/or testing, shock test, including electromagnetic compatibility test, and others, without any corresponding reduction in contract price.

Vega also contends that in the 1969 situation, fraught with urgency, Vega was required to deliver production quantities prior to first article testing and approval and in the 1976 solicitation only 45 days were scheduled between first article approval and first production delivery. Thus, Vega concludes that while the AN/PPN-18 procurement has been refined and made routine over the past decade with the successful purchase of over 270 copies, the Marine Corps--which in 1976 found Vega qualified to deliver production quantities 45 days after first article acceptance--now concludes that 240 (150 for testing and 90 for audit) days would be required.

In summary, Vega proposes to eliminate the risk of inadequate drawings by tying the contract to an actual acceptable unit and Vega proposes to eliminate the risk of lack of first article testing by conducting the testing while production activities are ongoing. In the event of failure of first article testing, the Government would not be liable for production costs incurred.

It should be noted here that we find it unnecessary for purposes of this decision to consider

whether first article testing should be waived in Vega's case because of Vega's offer to conduct the testing concurrently with production.

MARINE CORPS' RESPONSE

The Marine Corps, in timely and thoroughly documented reports to this Office, explains that the contracting officer recognizes that Vega, given sufficient time and a complete current data package, could produce the item in question; however, the item is not the same item that Vega produced under prior contract. The Marine Corps states that the numerous changes reinforce the contracting officer's judgment that a drawing audit is absolutely necessary before a competitive award can be made.

The Marine Corps explains that Vega's offer to assist in the audit of the Motorola drawings cannot be accepted because the responsibility to perform the audit belongs to the Government and a competent Government agency (NAVWESA) will be tasked to perform this function; the Government cannot abrogate its basic responsibility and delegate a Government administrative function to a contractor.

Secondly, the Marine Corps contends that the Vega model did not meet all the performance specifications according to test results compiled at the Marine Corps request by Syracuse, thus indicating poor design and/or poor quality control. The Marine Corps reports that some of the more critical areas where the AN/PPN-18 did not meet specifications in the test results are time delay and antenna polarization, among others. The Marine Corps also reports that data (made a part of the record) proves conclusively that the original Vega antenna did not meet specifications in free space or mounted on the transponder and, further, the "holes" in the antenna pattern were as a result of mating the antenna to the top of the beacon (its normal operating position), not as a result of the battlefield

environment as inferred by Vega. The Marine Corps explains that while Vega contends it was "entrusted" with a contract to produce a substitute antenna which would solve the difficulty, in fact, it was because of the Vietnam emergency that Vega was given the contract since it would have taken longer to go to anyone else at that point in the program. Consequently, the Marine Corps concludes that the contracting officer has a rational basis to doubt Vega's capacity even though the Marine Corps conceded that Vega could ultimately produce the item.

Finally, the Marine Corps submits that the standard of review which this Office consistently applies to matters of administrative judgment demands that the Marine Corps' position be upheld; the GAO will not overturn an agency decision unless it is clearly unreasonable. The Marine Corps concludes that the record demonstrates that the contracting officer's determination is founded on fact and that he has a reasonable basis to believe that Vega cannot meet the requirement in the time available.

It should be noted here that for purposes of this decision it is unnecessary for our Office to consider (1) whether the Vega model was changed significantly as compared to the current Motorola model because all parties agree that Vega could build the model to meet the agency's requirements, and (2) whether the Vega model substantially deviated from the performance or delivery requirements because those events transpired over 7 years ago. (See United Office Machines, 56 Comp. Gen. 411 (1977), 77-1 CPD 195.)

ANALYSIS

We recognize that in situations involving "exigency" the contracting officer has considerable discretion to determine the extent of competition that is consistent with the urgent needs of the Government and unless it is shown that the contracting officer, in authorizing a sole-source procurement, acted without a reasonable basis, our Office

will not question the award. See e.g., Aydin Corporation, Vector Division, B-188729, September 6, 1977, 77-2 CPD 175.

Past decisions of this Office have found that expected delivery delays and their potential adverse impact on an agency's missions are particularly compelling reasons to justify sole-source procurements based on urgency. For example, in BioMarine Industries, B-180211, August 5, 1974, 74-2 CPD 78, the urgency related to the Navy's need for life support breathing devices to outfit submarine rescue ships which had already joined the fleet.

In North Electric Company, B-182248, March 12, 1975, 75-1 CPD 150, the Army decided to negotiate sole-source with a vendor for a modified AN/TTC-38 switch to be supplied to another contractor as a Government-furnished component of a RED Analog Telephone System--a state-of-the-art automatic electronic telephone central office. Although the protester had experience manufacturing similar switches, significant design changes were subsequently developed but no performance specification existed. In order for a competitive procurement to be feasible, the Army showed that a proper performance specification and statement of work would have to be developed which would require about 7 months. While other vendors may have been able to comply with the required time of delivery, the additional 7 months would have presented an unacceptable impact on the delivery of the end product. There, we found no basis to object to the Army's determination.

The situation in BioMarine Industries, supra, is substantially similar to the instant one. There, the Navy urgently required a number of underwater breathing apparatus systems for use in dive depths up to 1,000 feet. The Navy's contracting officer determined that a General Electric Company (GE) system--an integral portion of which was proprietary to GE--would satisfy the Government's needs and that

the Government did not have data available to give others to assure that any other firm could provide the required equipment. The Navy's Sole Source Board approved the contracting officer's determination and also noted that the Navy did not own the model being procured and suitable data would be available for future competitive procurements. BioMarine contended that the sole-source procurement was improper because for about 5 years it produced a system similar to GE's and test results showed that the BioMarine system would meet the Navy's requirements. The Navy contended that the test data was insufficient so BioMarine offered to perform all tests requested by the Navy at its own expense or accomplish the same result by means of first article testing to be performed concurrent with production of the units under an awarded contract. The Navy rejected BioMarine's offer because: (1) a high degree of confidence in the capability of the unit is manadatory to assure maximum diver safety--a minimum need of the Navy--and this confidence can only be achieved by a series of tests culminating in a completed system, such as GE's; (2) the ultimate availability date of the BioMarine system cannot be established with confidence. We concluded that BioMarine did not meet the heavy burden of showing that the Navy's sole-source was arbitrary or an abuse of procurement discretion because the BioMarine proposal would have exposed the Navy to technical risks and the possibility of delivery delays of the urgently needed equipment.

While as noted earlier the instant situation contains many of the above considerations, we have present here the following significant factors: (1) Vega produced a substantially similar item to the one being procured; (2) through its work on other projects Vega has kept pace with technological developments since it completed the prior contract; (3) Vega has reviewed information made available to it by the Marine Corps and concludes that it can produce the transponder required and the Marine Corps agrees; (4) the DCAS report concludes that

Vega can do the work in the time required under the instant solicitation; (5) Vega's delivery schedule under the prior contract was shorter than under the one in the instant RFP; and (6) unlike the situation in BioMarine, the Marine Corps owns the latest acceptable model of the transponder, which can be made available to Vega. Unquestionably, the instant situation is more compelling than that in either the BioMarine or North Electric decisions.

Because of the statutory requirement for maximum practical competition, agency decisions to procure sole-source are subject to close scrutiny by our Office. Capital Recording Company, Inc., B-189319, February 15 1978, 78-1 CPD 126; Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402 (there we recommended termination of a contract, which was awarded sole-source based on the preference of agency personnel rather than on a determination that only that supplier's item could satisfy the Government's minimum needs).

After carefully reviewing the entire record, we must conclude that in the circumstances, we have no basis to disturb the Marine Corps proposed procurement for the reasons stated below. First, the urgency of the requirement and its critical nature make it imperative that timely delivery be made. A delay incident to a misunderstanding of the specifications (contained in production drawings or Government-furnished equipment) may not be known until revealed by the first article testing. Design changes or production modifications, necessitating prolonged first article testing, or unanticipated production delays constitute inherent risks incident to a procuring agency's changing contractors; in the contracting officer's judgment, with concurrence from the Marine Corps Sole Source Procurement Review Board, those risks are unacceptable. Second, the record indicates that for future procurements, adequate data will be available to permit competitive procurement.

B-191432

Protest denied.

R.F. Keller

Deputy Comptroller General
of the United States