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Proc I

DECISION



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

FILE: B-195487

DATE: February 6, 1980

MATTER OF: EMI Medical Inc.; Picker Corporation *CV 40418*

DLG 13819

DIGEST:

1. Protesters' disagreement with contracting agency's sole-source determination is essentially disagreement with agency's judgment concerning its technical requirements. Such disagreement does not carry protesters' burden of proving that agency's sole-source determination has no rational basis.
2. GAO's recommendation under prior decision that if agency canceled original solicitation that requirement be readvertised does not exclude use of sole-source method upon reprocurement if agency can properly justify use of such method.
3. In reviewing protest against sole-source procurement, GAO is concerned with whether determination is supportable not whether it was properly supportable at time it was made. Thus, GAO will consider justifications for sole source procurement that existed at time determination was made even if they are not reflected in contracting officer's Determination and Findings.

Army
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This decision is in response to separate protests filed by EMI Medical Inc. (EMI) and the Picker Corporation (Picker). Both companies protest request for proposals (RFP) No. M6-Q135-79 issued by the Veterans Administration Marketing Center (VA), Hines, Illinois, as a sole-source procurement to the General Electric Company (GE).

DLG 00677

CNG 00303

*[Protest Involving
008567 111481]*

The purpose of this procurement is to purchase on behalf of the United States Army four Computerized Tomography (CT) scanners--advanced x-ray equipment--to be installed at four Army Medical Centers. The VA based its decision to conduct a sole-source procurement on the information it received from the United States Army's Office of the Surgeon General (Army) which justified the need for a sole-source procurement on the grounds that only GE's CT/T 8800 scanner offered all the features that the Army considered essential. The protesters, however, argue that GE's equipment is not the only CT scanner available that will meet the minimum needs of the Army. They indicate that the Army is simply biased in favor of GE and is determined to purchase only that company's equipment. For the reasons indicated below, we find no legal basis to object to the conduct of this procurement.

This procurement is a resolicitation of an earlier formally advertised procurement which was canceled due to our decision in Picker Corporation; Ohio-Nuclear, Inc., B-192565, January 19, 1979, 79-1 CPD 31. The relevant facts concerning that earlier procurement are as follows. The VA issued an invitation for bids (IFB) soliciting bids for three CT scanners which, as in the present procurement, were actually being purchased for the Army. After the bids received had been evaluated, Picker's bid was found to be low, but was nevertheless rejected as nonresponsive. The basis for this decision was that, in the VA's opinion, the equipment offered by Picker did not meet the IFB requirement that all CT scanners be capable of 360-degree rotation--a feature which the Army believed important in order to reduce the radiation dose that patients would be exposed to during treatment.

Picker, however, protested this decision to our Office arguing that its scanner did in fact rotate 360 degrees. But in presenting the Army's position, the VA argued that even though the Picker scanner rotated 360 degrees, it did not acquire data throughout the entire rotation process, but only over a 230-degree arc. According to the

VA, there would be no point to requiring the scanners to rotate 360 degrees unless they were also capable of collecting data through the entire rotation process. But Picker maintained that the reason its scanner rotated 360 degrees was to achieve a "fast scan capability" (the ability to make a scan in a matter of seconds), a feature which would insure a clear x-ray image and which was also required by the IFB.

After weighing the arguments presented by both sides, we held that the Picker bid met the literal requirements of the IFB. Therefore, we sustained the protest and recommended that the agency either accept the Picker bid or, if it determined that the specification did not accurately state the Government's minimum needs, cancel the solicitation and readvertise.

Upon learning of this recommendation, the Army decided that the specification did not accurately state its minimum needs. Therefore, the VA notified Picker that the solicitation was canceled.

In the meantime, the Army began to reconsider its minimum needs. It developed a list of features that it believed were essential on any CT scanner that might be procured. In the Army's opinion, the only company whose scanner could provide all these features was GE--the same company that had been in line for the contract award until we sustained the Picker protest. Accordingly, the Army wished to negotiate a sole-source contract with GE for the four CT scanners it needed. The VA indicated that this could be done provided that after thoroughly investigating the availability of products that might meet its needs, the Army could determine that only one company (GE in this case) was able to satisfy those needs.

Initially, the VA questioned the Army's justification for a sole-source procurement--it was concerned over the considerable difference between the Army's original purchase description

and its current one. However, the Army eventually provided what the VA considered an adequate explanation for the change. The Army maintained that the original purchase description had been developed in October 1977 at a time when it did not have an operating CT system and was therefore unfamiliar with CT scanners. At that particular time, the Army believed that the original description was complete and accurately described the essential characteristics it needed in a CT system. The Army now maintains, however, that it has gained a more extensive knowledge of the capabilities of CT equipment. Accordingly, it believes that the changes reflected in its current purchase description represent new capabilities either not previously available or which experience has shown to be essential to the Army's needs. The specific features which the Army emphasizes, but argues are not the only ones it considers essential, are:

- 1) Pulsed beam generation system;
- 2) Stable gas detection system;
- 3) Large data matrix size; and
- 4) Scout-View accessory.

Generally, the Army emphasizes these particular features because it believes that they help reduce the amount of radiation that a patient will be exposed to during treatment.

In reviewing the CT scanners available, the Army found that only the GE CT/T 8800 scanner offered all the features it considered essential. The VA was now satisfied that the Army had thoroughly investigated the availability of products that might meet its needs and had determined that only one company--GE--could meet those needs. Accordingly, the VA issued a Determination and Findings (D&F), pursuant to Federal Procurement Regulations (FPR) § 1-3.210(b) (1964 ed. circ. 1), authorizing the procurement to be negotiated on a sole-source basis. Subsequently, the VA issued the RFP to

GE as the sole source for all four CT scanners needed by the Army. GE has submitted an offer in response to this solicitation; but, due to the Picker and EMI protests, this offer has not been opened and no negotiations have been conducted.

As noted above, both protesters object to the VA decision to negotiate with GE on a sole-source basis. EMI focuses on the technical reasons advanced for this decision. Picker, while also questioning the technical justification for a sole-source procurement, further contends that, based on the recommendation in our prior decision, once the VA decided to cancel the original solicitation, it was restricted to readvertising on a competitive basis only. In the alternative, Picker argues that the reasons relied on for this sole-source procurement are inadequate under recognized procurement practice. Since a part of Picker's protest can be addressed by looking at EMI's, we will first consider the specific arguments presented by EMI.

EMI seeks to refute the Army's justification for a sole-source procurement by showing that the features it finds so essential are not as critical as the Army maintains and that EMI can supply a CT scanner which will meet the Army's minimum needs. Since EMI offers a feature equivalent to GE's Scout-View accessory, it finds no need to address that particular requirement. Therefore, it concentrates on the Army's needs for: 1) a pulsed beam generation system; 2) a stable gas detection system; and 3) a large data matrix size.

The Army wants a pulsed beam generation system because it believes that pulsed beam radiation, in contrast to continuous beam, provides a lower dosage

of radiation to the patient. It has presented published articles in support of this position. EMI, however, categorically denies that a pulsed beam system is more dose efficient than the continuous beam system used by its scanners. According to EMI, although it might seem logical that if the x-ray beam is on only a fraction of the time that the amount of radiation delivered would be reduced proportionately, this is not the case. EMI argues that in order to produce an image of the same quality as that produced by a continuous beam, the pulsed beam must be more intense. Based on this, EMI contends that actually there is no dose advantage, or disadvantage, in pulsing the x-ray beam. Moreover, EMI maintains that the published literature which the Army relies on in support of its decision to require a pulsed beam system does not in fact prove the superiority of such a system.

The Army also wants its CT scanners to have a stable gas detection system. Again, the main reason for this requirement is the Army's belief that this feature will help reduce the radiation dosage to the patient. However, because it manufactures scanners that utilize both stable gas detection systems and solid state detection systems, EMI believes that it is probably in the best position to evaluate the relative merits of each. In EMI's opinion, the stable gas detection is not the most efficient detection system available in CT technology today. Moreover, EMI maintains that there is no evidence to support the claim that a stable gas detection system is necessary for a reduction in radiation dosage.

According to the Army, its need for an "adequately large data matrix for acquisition, processing and storage" is again due to a desire to reduce radiation dosage to the patient. The Army contends that a data matrix of 300 x 300 or greater (a measurement in picture elements, also

called pixel) will allow certain medical conditions to be more clearly visualized at a lower radiation dose. EMI, however, disagrees. It believes that the size of the data matrix has absolutely no bearing on dose or on resolution (image quality). To obtain better resolution, as the Army wants, EMI believes that the real consideration should be the variability of pixel size rather than the size of the data matrix or the number of pixels.

Based on the foregoing, EMI believes that it has demonstrated that there is insufficient technical justification to support the decision to conduct a sole-source procurement. Therefore, in order to allow EMI to compete and to insure that the Army obtains the "state of the art" system it wants, EMI indicates that the present solicitation should be canceled and after that the procurement should be advertised on a competitive basis.

Agencies are permitted to conduct sole-source procurements under the authority of 41 U.S.C. § 252(c)(10) (1976) and FPR § 1-3.210(a)(1) (1964 ed. circ. 1). But because of the requirement for maximum practical competition in the conduct of Government procurements, agency decisions to procure sole source must be adequately justified and are subject to close scrutiny. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402. Such decisions, however, will be upheld if there is a reasonable or rational basis for them. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14. Therefore, when a contracting agency justifies a sole-source procurement on the basis that only one source of supply can meet its requirements, the protester must meet the heavy burden of presenting evidence which shows that such action is arbitrary, capricious and an abuse of administrative discretion. Allen and Vickers, Inc., 54 Comp. Gen. 1100 (1975), 75-1 CPD 399.

The Army has justified its decision to use a sole-source procurement on the grounds that: 1) it

needs a production model CT scanner, thoroughly tested in a clinical situation, which will provide the highest quality image at the lowest possible radiation dose to the patient; and 2) after surveying the equipment available, it determined that only the GE CT/T 8800 scanner satisfied the above criteria as well as offered all the features that the Army believed to be essential.

EMI, however, has presented several arguments intended to show that the Army is not justified in using the sole-source procedure. These arguments are generally technical in nature with EMI seeking to prove that the Army's decision is incorrect on technical grounds.

As noted above, the protester of a sole-source procurement bears the burden of proving that the agency's action is arbitrary, capricious and an abuse of discretion--in other words, unreasonable. Allen and Vickers, Inc., supra. Mere disagreement with the agency's grounds for a sole-source procurement is not sufficient to carry this burden; the protester must affirmatively prove that the features required are unreasonable or do not reflect the minimum needs of the agency. Bell & Howell Corporation; Realist, Inc., B-193301, February 6, 1979, 79-1 CPD 82.

EMI's arguments show that there is some controversy regarding the preferability of a pulsed beam system over a constant beam system, whether a stable gas detection system is superior to a solid state detection system, or whether a 300 x 300 data matrix insures a high quality image at a lower radiation dose. However, EMI does not show that the Army acted unreasonably in making the selections that it did, but only that one can argue that the Army has made the wrong selections. In our opinion, such an argument amounts to a disagreement with an agency's technical judgment, but does not prove that there

is no rational basis for the sole-source determination. Under the circumstances, we believe that EMI has failed to meet its burden of proof in this matter and, therefore, its protest is denied. Allen and Vickers, Inc., supra; Bell & Howell Corporation; Realist, Inc., supra; see also Omni Spectra, Inc., B-190086, January 24, 1978, 78-1 CPD 61.

Picker has made similar arguments concerning the several technical features discussed above. However, we do not believe that Picker has raised anything new in this regard. Therefore, we will only consider Picker's argument that under our prior decision or, in the alternative, under recognized procurement practice, a sole-source procurement is not permitted in this case.

As to our recommendation in Picker Corporation; Ohio-Nuclear, Inc., supra, that if the IFB was canceled it should be readvertised, we do not believe that such a recommendation absolutely excludes the use of a negotiated method for the reprocurement of the Army's CT scanner requirement. The determination of the needs of the Government and the methods of accommodating such needs is primarily the responsibility of the contracting agencies. On-Line Systems, Inc., B-193126, March 28, 1979, 79-1 CPD 208. Since an agency's needs can change with the passage of time, we see nothing to prevent an agency from determining that it can best satisfy its revised needs under a negotiated procurement. However, in making such a determination, the agency must adequately support its decision as required by applicable law and regulation.

In support of the decision to conduct a sole-source procurement, the Army points out that its original specification for CT scanners was drafted in 1977. It now believes that this specification no longer reflects its needs. Based on the greater experience and knowledge that it has gained regarding CT scanners, the Army now believes that only the GE CT/T 8800 scanner meets its minimum needs.

The Army's position is reflected in both the D&F prepared by the VA contracting officer and in the Army's submissions responding to the Picker/EMI protests.

Picker has argued that the decision to conduct a sole-source procurement can only be supported by what is contained in the contracting officer's D&F. In Picker's opinion, some of the material which the Army has submitted as a basis for the sole-source determination is untimely and cannot be part of our consideration. However, we have held that in reviewing a protest against a sole-source procurement, our Office is concerned with whether the action is supportable and not whether it was properly supported. Under this standard, we determine whether the action is supportable in light of the totality of the circumstances that existed at the time the action was taken. Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329. Therefore, we may consider all the reasons which the VA and the Army could have advanced in support of the sole-source determination even if they are not apparent from the D&F.

Picker has presented arguments, similar to EMI's, which attempt to refute the claim that only a certain package of features available on the GE CT/T 8800 will meet the Army's minimum needs. Once again, however, this is essentially a criticism of the agency's technical judgment. Therefore, as in EMI's case, we do not believe that Picker has met the burden of proving that the VA (relying upon the recommendations of the Army) acted in an arbitrary and capricious manner in making the sole-source determination. Allen and Vickers, Inc., supra. While the Picker/EMI protests raise questions concerning the propriety of this sole-source procurement, we cannot say that there is no rational basis for it. Winslow Associates, supra. Consequently, the Picker protest is also denied.

In conclusion, we wish to address a few remaining points that Picker raises.

First, Picker claims that the Army never evaluated any Picker machines when it surveyed the available scanners. However, the record indicates that after a meeting between the Army and the VA to discuss the Army's needs and the various scanners available, the VA sent a letter to the Army summarizing the results of the meeting. That letter lists the various manufacturers considered. Among those listed is Picker. Further, the letter indicates four features which the Army believed essential but found that the Picker scanner did not offer. In light of this, then, we believe that there is sufficient evidence to conclude that the Army did in fact evaluate Picker's equipment along with that of other manufacturers.

Next, Picker cites 50 Comp. Gen. 209 (1970) to prove that this procurement should be formally advertised. In that decision, we held that a sole-source procurement of medical sterilizers was not justified. We noted that there was nothing particularly unique about the design or manufacture of the desired sterilizer. In fact, it was one of the simplest type of portable sterilizers available. We concluded that merely because a sterilizer manufactured by one company has proven satisfactory in use is not sufficient to justify a sole-source procurement of the same sterilizer to the exclusion of others.

That case, however, can be distinguished from the present one. Here, the Army is not procuring a relatively simple device, but a complex machine which can contain a large range of features. Moreover, the Army does not base its need for a GE CT/T 8800 exclusively on its past performance in clinical situations but on a number of grounds, including past performance, specific features and the capabilities of the system as a whole. Thus, in view of the foregoing, we do not believe 50 Comp. Gen. 209, supra, is analogous to the situation presented here.

Finally, Picker notes that the VA has recently opened bids on a formally advertised procurement

for CT scanners. It also notes that in 50 Comp. Gen. 209, supra, we indicated that the ability of other Government agencies to procure a similar item by formal advertising or competitive negotiations raises doubts as to the validity of a sole-source procurement for that item. Picker believes, therefore, that these facts undermine the sole-source determination made in the present case. But, as noted above, the equipment being procured here is not a relatively simple device, but a complex machine. Under the circumstances, the needs of one Government agency may differ greatly from the needs of another. Thus, while one agency may be able to procure the type of scanner it needs under formal advertising, another agency may need to employ a negotiated method of procurement. If, as in the present case, an agency should decide that it needs to conduct a sole-source procurement, it must nevertheless justify that determination as required by applicable law and regulation. And, as noted above, we have found that the sole-source determination made here has been properly justified. Therefore, we find no basis to object to this procurement action.

Protests denied.



For The Comptroller General
of the United States