

Comptroller General  
of the United States  
Washington, D.C. 20548

Ahearn  
145203

## Decision

**Matter of:** Durodyne, Inc.  
**File:** B-243382.3  
**Date:** October 29, 1991

Thomas L. McGovern III, Esq., Hogan & Hartson, for the protester.  
Ronald M. Pettit, Esq. and Thomas M. Hillin, Esq., Defense Logistics Agency, for the agency.  
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Award for ship-to-ship refueling hoses based on limited competition pursuant to 10 U.S.C. § 2304(c)(2) (1988) is unobjectionable where, based on urgent wartime requirement, agency reasonably determined that only awardee--the only source eligible for waiver of first article testing (FAT), based on having previously completed FAT for same item and having supplied acceptable item--could supply the item within the required time frame.

### DECISION

Durodyne, Inc. protests the sole-source award of a contract by the Defense Logistics Agency (DLA) to Goodyear Tire & Rubber Co. under request for proposals (RFP) No. DLA770-91-R-2611, for 7-inch (internal diameter) ship-to-ship refueling hoses (military specification No. MIL-H-22240F(SH)) for use by the Navy. Durodyne alleges that the sole-source award was not properly justified and that the agency improperly waived first article testing (FAT) for Goodyear.

We deny the protest.

### BACKGROUND

This contract resulted from DLA's "Operation Desert Shield/Storm" supply policies. For weapons systems in support of these campaigns, DLA instructed buying activities to achieve a minimum 12-month supply based on a consumption rate of 1.5 times the demand rate experienced after July 1990. Due to the low amount of stock on hand--245 hoses, 79 days of supply--and no immediately foreseeable stock due for

delivery,<sup>1</sup> DLA prepared and approved a justification and approval (J&A) dated February 27, 1991, for procurement of the hoses on a sole-source basis, citing the authority of 10 U.S.C. § 2304(c)(2) (1988), as implemented by the Federal Acquisition Regulation (FAR) § 6.302-2, which allows for limited competition where the agency's need for the property or services is of such an unusual and compelling urgency that the United States otherwise would be seriously injured. The J&A supporting documentation explained that, due to the urgent need for the hoses, in order to meet the required delivery schedule it was necessary to limit competition to sources eligible for waiver of FAT, since FAT would unacceptably delay the procurement for at least 120 days. The J&A further cited Goodyear as the only known source eligible for FAT waiver at the time, based on Goodyear's passing of FAT under its previous contract (No. DLA700-89-C-AB20) for the same item.<sup>2</sup>

DLA issued the solicitation on March 14, with a March 22 closing date for receipt of proposals. The solicitation noted that the accelerated delivery schedule--beginning 30 days after the date of award and concluding 180 days after award--was predicated on waiver of FAT, and that competition thus would be limited to offerors eligible for a FAT waiver, i.e., sources that had successfully passed testing for the 7-inch hose under the required military specification. Durodyne then protested the terms of the

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<sup>1</sup>The only stock due in was under an invitation for bids which had long been delayed due to preaward survey difficulties.

<sup>2</sup>Prior to the inception of Operation Desert Shield/Storm, DLA had procured similar 7-inch refueling hoses under three contracts awarded to Durodyne on a 100 percent small business set-aside basis, pursuant to military specification No. MIL-H-22240E, a predecessor to the current hose specification. In response to alleged hose failures from these contracts, the agency changed the specification to Revision F, dated February 15, 1989 (the current specification), which imposed a more stringent fabrication process as well as new testing and inspection requirements. The agency also decided not to grant waivers of FAT to first time contractors under the revised specification, and that future solicitations for the item would not be set aside. Following these changes, Goodyear received the next contract award (contract No. DLA700-89-C-AB20) for the 7-inch refueling hose under the revised specification. Durodyne competed for that award, but the agency determined the firm non-responsible on the basis of a negative preaward survey and the Small Business Administration declined to issue a certificate of competency.

solicitation on March 21. Award was made to Goodyear notwithstanding the protest on September 19, under the urgent and compelling circumstance exception to the stay provision of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(2) (1988).

#### URGENCY

Durodyne argues that DLA has failed adequately to establish the urgency of this requirement, citing the fact that, after the protest was filed on March 21, the agency waited until September 4 to override the CICA stay and proceed with award.<sup>3</sup> According to the protester, the failure to act promptly in this regard shows a lack of actual urgency.

Where an agency's requirements are of unusual and compelling urgency, the agency may limit a procurement to only those firms or the one firm it reasonably determines can properly perform the work in the available time. 10 U.S.C. § 2304(c)(2); Lundy Technical Center, Inc., B-243067, June 27, 1991, 70 Comp. Gen. \_\_\_\_, 91-1 CPD ¶ 609; Forster Enters., Inc., B-237910, Apr. 5, 1990, 90-1 CPD ¶ 363. Specifically, an agency properly may make a sole-source award to the only offeror qualifying for waiver of FAT when such a waiver is essential to the fulfillment of the required delivery schedule. Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579. Further, a military agency's assertion that there is a critical need for certain supplies, which impacts military operations, carries considerable weight and the protester's burden to show unreasonableness is particularly heavy. Greenbrier Indus., Inc., B-241304, Jan. 30, 1991, 91-1 CPD ¶ 92; Honeycomb Co. of Am., supra. We will object to the agency's determination to limit competition on the basis of urgent circumstances or its determination of the number of available sources only when the agency's decision lacks a reasonable basis. See AT&T Information Servs., Inc., 66 Comp. Gen. 58 (1986), 86-2 CPD ¶ 447; Gentex Corp., B-233119, Feb. 13, 1989, 89-1 CPD ¶ 144.

We think the record clearly establishes urgency. In addition to the considerations cited in the J&A, the record shows that at the time the decision to limit competition was made, Operation Desert Storm was underway, DLA anticipated a possibly protracted military engagement, there was a 79-day current stock that would be depleted in May, and there was uncertainty as to when the stock would be replenished through deliveries under other contracts. Based on the

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<sup>3</sup>Durodyne initially protested on March 21, but subsequently amended its protest grounds on two occasions, the second on June 20, based on newly available information.

anticipated depletion time, the solicitation contemplated an April award, with deliveries commencing in May. There is nothing in the record that shows DLA's supply situation was other than the agency represents and, this being the case, the agency's further conclusion that there was insufficient time for FAT appears to us entirely reasonable; FAT reportedly would have taken 120 days, and thus would have extended the commencement of delivery well beyond the May depletion of current stock.

The agency's good faith attempt to abide by the CICA stay provisions, and resulting delay in proceeding with the award, has little bearing on the urgency issue, since the relevant consideration is whether the urgency determination was valid at the time this procurement was initiated. See Lundy Technical Center, supra. As indicated above, we find the record shows that the determination was valid. The delay in the award process apparently became possible for some period due to the cease-fire in March, an unknown consideration at the time DLA developed its requirement and determined the best way to assure an adequate supply under all contingencies.

#### WAIVER OF FAT

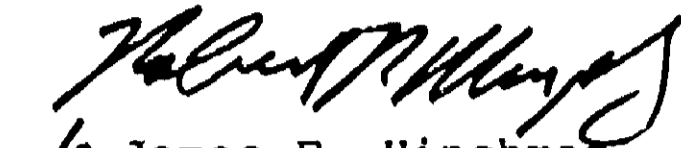
Durodyne argues that Goodyear is ineligible for waiver of the FAT requirement under this contract. According to the protester, Goodyear did not conduct the "resistance to ozone test" portion of the FAT in accordance with the specification, and did not receive government approval to deviate from the specification. Durodyne actually contends that the ozone test is impossible to perform as written and, because no firm could have met this aspect of the FAT, that Goodyear was ineligible for FAT waiver and, thus, the award.

A contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to assure product compliance with specifications. Lunn Indus., Inc., B-210747, Oct. 25, 1983, 83-2 CPD ¶ 491. Our review of an agency's decision to waive FAT for a particular offeror is limited to determining whether it was reasonable. Whittaker Technical Prods., Inc., B-239428, Aug. 29, 1990, 90-2 CPD ¶ 174.

Durodyne's argument is based on the faulty premise that the propriety of the waiver hinges on whether Goodyear has passed every aspect of the FAT. This is not the case. Even if it had not passed the entire FAT, Goodyear--by virtue of having passed most of the FAT and delivered acceptable items under its prior contract--still would be differently situated than Durodyne and other potential offerors, which have neither performed any of the FAT, nor furnished the item under the current specification. As the agency

considered waiver necessary to meet its urgent requirement,  
there was nothing unreasonable in its waiving the FAT for  
Goodyear in these circumstances.

The protest is denied.

  
James F. Hinchman  
General Counsel