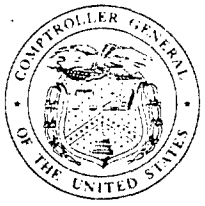
12626 Sorell Proc. 71

**DECISION**



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

FILE: B-195736 DATE: January 24, 1980

MATTER OF: Tracor, Inc. CVG00218

DIGEST:

1. Determination not to set aside procurement for labor surplus area concerns on basis that procurement is not severable into two economic production runs is not abuse of discretion where record reflects reasonable indication that there would be duplication in tooling and first article testing costs and experience with prior procurements for similar items indicates substantial unit cost savings on larger production runs.

2. Protest that agency improperly set aside procurement totally for small business participation in violation of DAR 1-706.1(j)(ii), which prohibits total small business set-aside where large business "planned producer" of "planned" item under DOD Emergency Preparedness Mobilization Planning Program desires to participate in procurement, is denied where record establishes no planned producer of planned item existed by date of solicitation's issuance.

3. Although coordinated acquisition responsibility for procurement of chaff items was assigned to Navy prior to Army's issuing solicitation for chaff, Army had authority for conducting procurement as this was an emergency procurement properly excepted from coverage of coordinated commodity assignment.

[Protest Against Small Business IFB]

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This is a protest by Tracor, Inc. (Tracor), regarding the decision of the United States Army Armament Research and Development Command (Army) to totally set aside for small business participation invitation for bids (IFB) DAAK 10-79-B-0094 for M-1 countermeasures chaff. Award has been made to Lundy Electronics & Systems Inc. DLG03384 DLG03681

Tracor, a large business labor surplus area concern, contends that the Army acted in derogation of the order of precedence set forth in Defense Acquisition Regulation (DAR) 1-706.1(a) (1976 ed.) which allegedly requires the procuring activity to conduct this procurement on a partial set-aside basis for Labor Surplus Area (LSA) businesses. Tracor also maintains that the total set-aside violates the express terms of DAR 1-706.1(j)(ii) which forbids the use of total set-asides when a "planned producer" under the Industrial Preparedness Production Planning (IPPP) mobilization planning program desires to participate in the procurement. Tracor submits that it is a planned producer of chaff items. For the reasons given below, the protest is denied.

Tracor initially protests that the Army's set-aside of the procurement for small business violates the express terms of DAR 1-706(a) governing the order of precedence for set-aside procurements. This regulation states:

> "Small business and labor surplus area set-asides should be considered in the following order of precedence:
> (i) Combined small business/LSA set-aside (see 1-706.7).
> (ii) Partial set-aside for LSA firms (see 1-804.2).
> (iii) Total set-aside for small business firms (see 1-706.5).
> (iv) Partial set-aside for small business (see 1-706.6)."

The Army selected the third preference. Tracor submits that this selection was in error because the second preference of a partial set-aside for LSA firms was available.

The Army acknowledges that, if possible, the procurement should be conducted in accordance with the first or second preference but explains that, in accordance with DAR 1-804.1(a)(1), the contracting officer determined

that a partial LSA set-aside could not be made because the procurement was not susceptible of being severed into two or more economic production runs or reasonable lots. DAR 1-804.1(a)(2) provides guidance as to how a contracting officer shall arrive at this determination:

> "In determining whether a proposed procurement is susceptible to division into two or more economic production runs or reasonable lots, consideration should be given to the following factors and any others deemed appropriate:
> (i) price and procurement history of the items,
> (ii) open industry capacity,
> (iii) startup cost including special tooling requirements,
> (iv) delivery schedule, and
> (v) nature of item and quantity being procured."

The Army reports that the item being procured is a new item which is still in the development stage. Tracor is the only firm that has made the M-1 chaff--but only for a quantity of 5,000 units, whereas this production run is for 109,000 units. As a result, the contracting officer determined that although Tracor had recently produced M-1 chaff units it would be necessary for Tracor to incur additional tooling costs were it awarded a large production run. In this regard, the Army reports that Tracor had only developed "soft tooling" which was inadequate to accommodate the larger production run and, therefore, the Army could not expect to encounter any savings by awarding a portion of the requirement to Tracor. There would have been a cost redundancy as both Tracor and another awardee would have had to develop new tooling were partial contract awards made to both concerns. The Army also explains that had it decided to make a partial award to Tracor, it would have been necessary to conduct first article testing for all contractors, including Tracor, since M-1 chaff is a new item, although similar

to chaff which Tracor manufactures for the Air Force. To award separate contracts for the requirements would therefore require duplicate testing costs. Finally, the Army reports that on the previous procurement for the M-1 chaff, Tracor originally bid $10.51 per unit for 29,000 units and later, when the requirement was reduced to 5,000 units and some of the quality assurance and package requirements were dropped, the unit price was reduced to $9.66 per unit. The Army explains that when compared to a unit price of $3.00 for a procurement of 272,000 units for a similar chaff item required by the Air Force, the anticipated cost to the Army for segregating the current requirement would be prohibitive as the Army would be paying a premium in order to make a partial LSA set-aside.

Tracor disagrees with the Army's position on every point and maintains that the procurement was severable into two or more economic production runs or reasonable lots. It first argues that there would be no duplication of tooling costs in the event a partial LSA set-aside award was made to it. However, the protester presents no probative evidence to substantiate this argument, and has not persuaded us that the Army's expectation that Tracor's "soft tooling" is inadequate to handle a large production run is in error. Pioneer Recovery Systems, Inc., B-192120, September 28, 1978, 78-2 CPD 242.

Tracor also argues that first article testing could have been, and most likely would have been, waived for Tracor because its production line has already produced M-1 chaff cartridges which have passed first article testing. The Army's position is that first article testing would not have been waived because the initial production of 5,000 M-1 chaff units by Tracor was for development testing purposes only whereas this requirement is for a production run of 109,000 M-1 chaff units for field use. We do not consider Tracor's argument on this matter to be persuasive as we consider an agency's determination not to waive first article testing to be a matter of administrative discretion which we will not question unless there is a clear showing that the decision is arbitrary or capricious. BEI Electronics, Inc., 58 Comp. Gen. 340 (1979), 79-1 CPD 202. Tracor only differs with the Army as to the necessity for conducting first

article testing on the M-1 chaff to be produced under this procurement but has not demonstrated that the contracting officer would have abused his discretionary powers by not waiving first article testing for it on this procurement.

Finally, Tracor admits that there is a large price differential between the $3.00 unit price for the 272,000 unit production run and the unit price it charged to produce the initial production run of M-1 chaff for the Army, but Tracor maintains that this price differential is attributable to a number of costly requirements for the initial run which are not present in the instant solicitation. Further, Tracor asserts that it has produced similar chaff items for the Navy and Air Force over the years under contracts for production lots smaller than 109,000 units which were divided into two or more production lots in order to accommodate the set-aside awards for small businesses.

We do not question the validity of Tracor's statements; however, we believe the protester has not demonstrated that the contracting officer clearly abused his discretion in determining that dividing the present production run would probably result in the Government's paying a substantial premium for the items. Even where we may not agree with such a determination, we have declined to substitute our judgment for that of the contracting officer where, as here, there is no showing of a clear abuse of discretion. Dumont Oscilloscopes Laboratories, Inc., B-185267, April 16, 1976, 76-1 CPD 259; 45 Comp. Gen. 228, 231 (1965). Tracor merely quarrels with the contracting officer's judgment but has not made a clear showing that his determination that the procurement should not be severed into two or more production runs lacked a reasonable basis in fact. Accordingly, we conclude that the contracting officer did not act in violation of DAR 1-706.1(a).

Tracor's second ground of protest is that the Army's decision to set aside the procurement totally for small business participation violates the express terms of DAR 1-706.1(j)(ii) which states:

> "None of the following is, in itself, sufficient cause for not making a set-aside:
>
> * * * * *

(ii) the item is on an established list under the Industrial Preparedness Program, except that a total set-aside shall not be authorized when one or more large business Planned Emergency Producers of the item desire to participate in the acquisition (but see 1-706.6 as to partial set-aside);" (Emphasis added.)

Tracor submits that it is a "Planned Procuder" of chaff items and, that under DAR 1-2206(a), the Army is required to permit Tracor to participate in this or any other procurement in excess of $10,000.

DAR 1-2206(a) requires:

" * * * solicitation of Planned Producers in all procurements over $10,000 - of item for which they have signed industrial preparedness agreements * * *."

In American Air Filter Co., 55 Comp. Gen. 703, 712 (1976), 76-1 CPD 73, we held that a total set-aside was proper when no planned producer existed prior to the issuance of the solicitation. We also held that ASPR 1-706.1(e)(ii), now DAR 1-706.1(j)(ii), allows for no discretion on the part of the procuring activity. In that case, we determined that the protester was not a planned producer prior to the date the solicitation was issued, notwithstanding the fact that the firm had expressed the intent to become a planned producer, and therefore held that a total small business set-aside was not required to be withdrawn. We believe the same is true for the situation here.

DAR 1-2201(d) defines "Planned Producer" as:

"An industrial firm which has indicated its willingness to produce specified military items in a national emergency by completing an Industrial Preparedness Program Production Planning Schedule (DD Form 1519)."

The record discloses that when the solicitation was issued the Government had not provided for a planned producer for this chaff item. Tracor was a planned producer for production of fiberglass chaff

items which are similar but not identical to the Army's M-1 chaff. Further, the M-1 chaff was not on an established list under the Industrial Preparedness Program at the time the solicitation was issued. The subject item was still in the development stage. Each military component within the Department of Defense is charged with the responsibility of determining whether an item should be included on that list. DAR 1-2206; Bancroft Cap Company, Inc., B-184482, April 16, 1976, 76-1 CPD 258. Because Tracor was not a planned producer of the M-1 countermeasures chaff at the time the solicitation was issued and the item was then not on an established list under the Industrial Planning Program, we find no merit in the protester's contention that the contracting officer violated the terms of DAR 1-706.1(j)(ii) by making a total small business set-aside of this procurement.

Finally, Tracor contends that the Army lacked the authority to conduct this procurement. Its objection is based upon a memorandum dated March 8, 1979 of the Deputy Under Secretary (Acquisition Policy) of Defense which instructed the Army, Navy, and Air Force that effective April 1, 1979, coordinated acquisition responsibility for chaff production and associated expendable items was assigned to the Navy in accordance with DAR 5-1100. The solicitation was issued on June 7, 1979.

Tracor argues that the Navy, rather than the Army, should have conducted this procurement. It recognizes that the Army could have acquired procurement authority here but submits that this could only be accomplished by obtaining authorization from the Department of Defense office which established the coordinated acquisition policy on chaff procurements. By Tracor's account, all the Army did was notify the Navy command that it had determined to proceed with the procurement. This, Tracor maintains, cannot be construed as authority for deviating from the policy on chaff procurement.

The record does not support Tracor's contentions that the Army lacked authority to conduct this procurement. The record discloses that the Army contacted the Navy's representative for chaff procurement on June 4, 1979 in connection with the procurement. At that time, the Navy representatives agreed with Army procurement

officials that the Army should continue with the instant procurement with the understanding that future chaff procurements would be conducted by the Navy.

Although military chaff requirements were subject to coordinated procurements, DAR 5-1201.1(i) permits an exception to the applicability of commodity assignments when the requiring department determines the procurement to be an emergency procurement. The funding document designated the procurement as having an "02" priority, thereby indicating urgency for filling the requirement. The fact that the Army set aside the procurement for small business participation did not reflect an attitude on the part of the Army that the requirement was not urgently needed as Tracor argues; rather, it only indicated that the Army believed that it could make a total small business set-aside and still meet the required delivery schedule. In these circumstances, we believe the Army and the Navy had the authority to act as as they did under DAR 5-1201.1(i).

The protest is denied.

Milton J. Socolar

For The Comptroller General
of the United States