Weiskopf

31439

DECISION

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

FILE: B-216312.2; B-218108.2; B-218244.2 **DATE:** June 12, 1985

MATTER OF: Julie Research Laboratories, Inc. Reconsideration

DIGEST:

GAO properly dismissed one protest and denied another challenging sole-source specifications requested by a Foreign Military Sales (FMS) customer, since applicable regulations require the contracting agency to honor an FMS customer's request for a particular source.

Julie Research Laboratories, Inc. (JRL), requests reconsideration of our decisions in Julie Research Laboratories, Inc., B-216312, Nov. 30, 1984, 84-2 C.P.D. ¶ 613 (dismissing one protest), and Julie Research Laboratories, Inc., B-210435.2, Feb. 14, 1985, 85-1 C.P.D. ¶ 196 (denying another), involving two solicitations issued by the Department of the Army to procure calibration equipment on behalf of a foreign military sales (FMS) customer, Egypt. JRL originally contended that the two solicitations, Nos. DAAH01-84-R-0361 (0361) and DAAH01-84-R-0360 (0360), were reissuances of two canceled solicitations for FMS sales to Egypt and two other countries, in which cases Egypt and one of the other countries basically requested standard calibration sets as used by the Army. The Army canceled those solicitations after finding, in response to a protest filed by JRL, that the Army had included in the specifications certain brand name components that were not standard, for which alternative items were available.

We dismissed the protest under 0361 because that solicitation did not involve the same requirement as the previous solicitation and because the specifications for 0361 were not drafted by the Army as in the previous solicitation, but by the FMS customer. We pointed out that this last distinguishing factor was significant since pertinent regulations expressly provide that a contracting officer shall honor an FMS customer's request for sole-source prime and subcontracts. Department of Defense Federal Acquisition Regulation Supplement (DOD FAR Supp.), 48 C.F.R. § 225.7307(a) (1984). While we considered the merits of the second protest because the solicitation in question, 0360, in fact did involve the same requirements

032290

as a solicitation JRL previously had challenged, we denied that protest since, again, the FMS customer specifically requested the brand name components. The customer submitted its request after the original solicitation had been canceled.

JRL's reconsideration request basically alleges two material errors in our prior decisions: 1) that we misconstrued the DOD FAR Supp., and 2) that our upholding the brand name specifications based on Egypt having requested them ignores the fact that the Army improperly developed the specifications in the first place.

We affirm our prior decisions.[1]

DOD FAR Supp., 48 C.F.R. § 225.7307 (hereinafter the regulation), upon which our previous decisions heavily relied, is set forth in its entirety below:

> "(a) Purchases for FMS customers shall be implemented under normal acquisition and contract management procedures set forth in the FAR and this supplement, and other directives. However, the FMS customer may request that a defense article or defense services be obtained from a particular prime source. In such cases, FAR 15.210 provides authority to negotiate on a sole source basis. The FMS customer may also request that a sole source subcontract be placed with a particular firm. The contracting officer

---

[1] In conjunction with its request for reconsideration of these two decisions, JRL also requests reconsideration of our notice dismissing another protest (under the Army's request for proposals No. DAAH01-85-R-0020) involving the same substantive issues. We dismissed the protest because JRL did not furnish the Army a copy of the protest within 1 day after filing the protest here, as required by our Bid Protest Regulations. 4 C.F.R. § 21.1(d) (1985). JRL argues that dismissing the protest on this basis was unfair, and that we should reopen the case and consider the merits. There is no point in our doing so, however, since we affirm our decision denying on the merits JRL's protest under 0360.

> shall honor requests for sole source prime and subcontracts from the FMS customer as specified in the Letter of Agreement or other written direction by the military sales organization.
>
> "(b) Representatives of the FMS customer shall not be permitted to direct the deletion of names of firms from bidders mailing lists or slates of proposed A-E firms. They may, however, suggest that certain firms be included. Contracting offices shall not accept directions from the FMS customer as to source selection decisions or contract terms (other than the special contract provisions and warranties referred to in Condition A.2 of the DD Form 1513), nor shall the FMS customer be permitted to interfere with a prime contractor's placement of his subcontracts. Requests by the FMS customer for rejection of any bid or proposal shall not be honored unless the rejection is justified on the basis of reasons which would be sufficient in the case of a purchase by the Department of Defense to meet its own needs."

Even though paragraph (a) of the regulation clearly states the contracting officer shall honor the FMS customer's request for a particular prime or subcontract source, JRL argues that we misconstrued the regulation. JRL points out that the last part of the paragraph permits sole-source contracts or subcontracts as specified in the Letter of Agreement or other written direction by the "military sales organization" and otherwise requires the use of normal acquisition procedures, which include a requirement for maximum practicable competition. Defining the military sales organization as the procuring activity, JRL argues that the regulation thus contemplates the procuring agency's review of requested sole-source specifications for its approval.

The protester next points out that paragraph (b) of the regulation provides that the procuring agency should not accept directions from the FMS customer as to source-selection decisions, or be permitted to interfere

with a prime contractor's selection of its contractors. JRL then concludes that there exists no authority for the procuring agency to honor an FMS customer's request for a particular source unless the circumstances would justify the issuance of a sole-source contract in any event.

The protester's interpretation of the term "military sales organization" (the DOD FAR Supp. does not define it) is tenuous at best, since the term would appear to refer to the entity outside the procuring activity that actually administers the foreign sale, as opposed to the domestic purchase. Even if military sales organization does mean the procuring activity, however, we do not believe that the regulation requires anything more than that the FMS customer's request be documented in writing before the contracting officer limits competition. In this case, the FMS customer submitted the specifications in writing to the Army, which included them in the contract file, thus satisfying the requirement for documentation.

Further, to the extent JRL relies on paragraph (b) of the regulation, it is clear that paragraph (b) pertains to competitive procurements conducted by the procuring agency where the FMS customer does not designate a particular source or sources. (As an example of a reference to competition, the first sentence of paragraph (b) discusses forms to be included in the bidders mailing list for the purpose of soliciting offers.) The requirement in paragraph (a) that the contracting officer honor an FMS customer's request for a particular source provides a limited exception to the general requirement for competition, however. We therefore believe paragraph (b) does not pertain to the protested procurements and reject JRL's argument that we misconstrued the regulation.

JRL's second basis for reconsideration is that our decision upholding the current brand name specifications, based on Egypt having requested them, ignores the fact that the Army initially developed the specifications improperly. As explained previously, the Army recognized that it had drafted overly restrictive specifications in response to the previous requests for standard calibration sets. The Army therefore canceled the solicitations and announced its intention to prepare competitive specifications. Before the Army did so, however, Egypt submitted its request for the brand name components the Army earlier had specified.

We are unwilling to decide, however, that the Army's impropriety, which the Army attempted to correct, operates to deny Egypt or other FMS customers of the prerogative to request brand name items in subsequent procurements, unless it is shown that the Army has acted in bad faith in those procurements to preclude JRL from competing. We believe that our taking exception to this procurement simply would penalize the FMS customer for the Army's deficiency, notwithstanding the Army's attempts to rectify the error.

JRL also repeats its argument that the DOD FAR Supp. requiring contracting officers to accept FMS customers' requests for sole-source prime and subcontracts is inconsistent with the Department of Defense (DOD) "Security Assistance Management Manual," which states that an FMS customer must justify a sole-source request, and that such a request shall not be honored in any case of patently arbitrary, capricious or discriminatory exclusion of other sources. DOD Manual 5105.38-M Ch. 8, § II, B.1 (1984).

In our prior decision, we pointed out that the DOD Manual is an internal instructional manual for DOD personnel and therefore sets out executive branch policy that lacks the force and effect of law. In any case, we do not agree with JRL's reading of the manual. JRL urges that the manual declares a policy that, in effect, renders meaningless the DOD FAR Supp.'s authorization for FMS customers to designate sole sources, since under JRL's interpretation a sole-source request only may be accepted under the same circumstances as authorized under normal acquisition regulations and procedures. We do not think this is reasonable, especially since the manual elsewhere states that it is DOD's policy not to agree to a sale where the customer's request for sole-source contracts appears to be motivated by objectives in conflict with Unites States legislation, the FAR, or the DOD FAR Supp. Ch. II, § III, B.2. In such cases, the manual states that the request must be reviewed further within DOD and may be forwarded to the Department of State for its determination. Thus, the policy expressed in the manual is not to limit the FMS customer's prerogative to request a particular source, which expressly is granted by the DOD FAR Supp., but to deny requests that appear to be otherwise motivated to obtain objectives that conflict with our laws. It is not our function to question an FMS customer's motives or DOD's

31439

reasons for accepting a sole-source request, absent a showing of bad faith. JRL has failed to make such a showing.

JRL thus has failed to present any basis warranting the reversal or modification of our prior decisions. The decisions are affirmed.

Shelton J. Cooper

for Comptroller General
of the United States