The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Pacific Sky Supply, Inc.

**File:** B-225420

**Date:** February 24, 1987

## DIGEST

1. An agency violated the statutory requirement for adequate presolicitation notice of proposed contract actions by publishing a synopsis of its intent to issue a sole-source solicitation which only identified two out of 15 items to be acquired and gave no indication that there were other items beyond the two described.

2. The sole-source award of certain items to the only known approved source was proper under the "compelling urgency" exception of 10 U.S.C. § 2304(c)(2) where the items were indeed critical and where the agency had neither the data needed to procure the items competitively nor the time necessary to qualify a new source.

## DECISION

Pacific Sky Supply, Inc. (Pacific) protests the award of a contract to United Technologies Corporation, Hamilton Standard Division (Hamilton Standard), under certain solicitations issued by the Department of the Air Force. The procurement was for the acquisition of spare parts applicable to the C-130 aircraft and was awarded to Hamilton Standard on a sole-source basis. Pacific complains that the Air Force failed to synopsize properly the contemplated acquisition and thereby deprived it of an effective opportunity to compete.

We sustain the protest in part and deny it in part.

## BACKGROUND

The Air Force published notice in the June 26, 1986, Commerce Business Daily (CBD) of its intent to issue solicitation No. FD2060-86-55538 (No. -55538) to Hamilton Standard for the acquisition of varying quantities of three specific parts items, identified by National Stock Number and part number, for use in the C-130 aircraft. The CBD notice made no reference to any other items to be procured.

The notice provided that a sole-source award to Hamilton Standard was contemplated under the authority of 10 U.S.C. § 2304(c)(1) (Supp. III 1985), which provides, as pertinent here, that a military agency may use other than competitive procedures when the needed property or services are available from only one responsible source and no other property or services will satisfy the agency's needs.1/ This statutory provision is implemented by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 6.302-1 (1986).

Because the CBD notice synopsized a proposed sole-source action, it specifically referenced "Note 22," which, as set forth in the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS), 48 C.F.R. § 205.207(d)(70) (1985), advises potential offerors that, notwithstanding the government's intent to solicit and negotiate with only one source, interested firms may identify their interest and capability to respond to the requirement or may submit proposals which will be considered by the government for purposes of determining whether to conduct a competitive procurement if received within 45 days of the CBD synopsis.

On October 14, the Air Force synopsized in the CBD the award of a contract to Hamilton Standard for three identified parts items "and 23 other line items" applicable to the C-130 aircraft. Upon Pacific's request, the Air Force advised the firm that the requirement had been synopsized on June 26 as part of solicitation No. -55538. Pacific then protested the award on the ground that the Air Force failed to synopsize properly all of the items which it intended to award on a sole-source basis, thus precluding Pacific from a reasonable opportunity to compete for those items which it could supply.

PROTEST AND ANALYSIS

The administrative record as developed in response to the protest has established that the sole-source award to Hamilton Standard for the 26 items was actually a consolidation of five different requirements. In this regard, contract items 0001 and 0002 were awarded to the firm under the authority of 10 U.S.C. § 2304(c)(2), as implemented by the FAR, 48 C.F.R. § 6.302-2, which provides that an agency may use other than competitive procedures when the agency's need

1/ The Air Force invoked the authority of 10 U.S.C. § 2304(c)(1) here on the ground that the government had insufficient data on the needed items since the data was held by Hamilton Standard as proprietary to the firm. See the Federal Acquisition Regulation, 48 C.F.R. § 6.302-1(5)(2) (1986).

for the supplies or services is of such an "unusual and compelling urgency" that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits offers. Here, the Air Force's justification for invoking 10 U.S.C. § 2304(c)(2) was that both items 0001 and 0002 were urgently needed to avoid critical "work stoppage" and "stock out" situations, Hamilton Standard being the only qualified supplier. These two sole-source acquisitions were not synopsized in the CBD in accordance with the FAR, 48 C.F.R. § 5.202(a)(2), which excuses presolicitation notice of proposed contract actions under the "compelling urgency" conditions of 10 U.S.C. § 2304(c)(2) if compliance with the prescribed CBD publication time periods (see the FAR, 48 C.F.R. § 5.203) would seriously injure the government.

Contract line items 0003 through 0017 were in fact part of solicitation No. -55538, which had been synopsized on June 26. Of these 15 items, only items 0006 and 0015 were identified in that CBD notice. (The third item identified in the synopsis apparently was not part of solicitation No. -55538 when issued and was not awarded.)

The remaining items awarded, 0018 through 0024, were part of two other solicitations which Pacific does not assert were improperly synopsized.

Accordingly, Pacific's protest against the award to Hamilton Standard principally concerns items 0003 through 0017, only two of which were identified in the June 26 CBD notice. Pacific complains that the agency's failure to describe the remaining 13 items or to give any indication that more items than the two identified were part of the acquisition precluded it from requesting a copy of the solicitation and submitting an offer for those items it had the capability to furnish, thus unreasonably excluding it from the procurement.

The firm also challenges the award of contract line items 0001 and 0002 on the ground that the agency was required to solicit other offers before proceeding to award the items on a sole-source basis under the "compelling urgency" conditions of 10 U.S.C. § 2304(c)(2). Pacific asserts that, especially with regard to item 0001, the Air Force had knowledge that numerous potential sources existed. The firm's argument is founded upon 10 U.S.C. § 2304(e), which in part provides that an agency proceeding to use other than competitive procedures under 10 U.S.C. § 2304(c)(2) nevertheless "shall request offers from as many potential sources as is practicable under the circumstances."

We agree that items 0003 through 0017 (excepting items 0006 and 0015) were not properly synopsized. The Small Business Act, as amended, 15 U.S.C. § 637(e)(1)(A)(1982), provides that an agency intending to solicit bids or proposals for a contract for property or services expected to exceed $10,000 shall furnish notice of the proposed solicitation to the Secretary of Commerce for publication in the CBD. It is mandatory that the CBD notice include "an accurate description" of the property or services to be acquired, including, as appropriate, the agency's nomenclature, National Stock Number or other part number, and a brief description of the item or similar information to assist a prospective offeror in making "an informed business judgment as to whether a copy of the solicitation should be requested." 15 U.S.C. § 637(f)(1). These statutory provisions are implemented by the FAR, 48 C.F.R. §§ 5.201 and 5.207.

In a recent case involving the parallel presolicitation notice requirements of the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 416, we held that an agency's failure to synopsize adequately its acquisition needs was a failure to conform to the CICA's overriding mandate that "full and open competition" be obtained. Reference Technology Inc., B-222487, Aug. 4, 1986, 86-2 CPD ¶ 141. There, we found that the proposed contract had been improperly synopsized because the CBD notice, while identifying various microfilm items, had failed to mention that the agency was also acquiring optical disk equipment, a requirement which formed part of the resulting solicitation. We concluded that the protester, a manufacturer of such equipment, was prejudiced by the agency's failure to provide the statutorily required notice of its requirement, and that full and open competition, in consequence, had not been obtained. Id. at 2.

We reach the same result here. Because the June 26 CBD notice only referenced two of the 15 parts items which comprised the resulting solicitation issued to Hamilton Standard on a sole-source basis, it clearly did not conform to the "accurate description" requirement of 15 U.S.C. § 637(f)(1), supra. Although the Air Force contends that Pacific was not prejudiced by this lack of adequate notice because the firm was not an approved source for the items, we believe that the agency's argument misses the point.

The fundamental purpose of the presolicitation notice requirement is to improve small business access to acquisition information and thereby enhance competition by

identifying contracting and subcontracting opportunities. FAR, 48 C.F.R. § 5.201(c); see also Morris Guralnick Assocs., Inc., B-214751.2, Dec. 3, 1984, 84-2 CPD ¶ 597. Therefore, it is immaterial that Pacific was not an approved source at the time the CBD notice was published. As already indicated, firms interested in an acquisition are to be given the opportunity to submit an offer even though the agency contemplates the making of a sole-source award. DFARS, 48 C.F.R. § 205.207(d)(70), supra; see also the FAR, 48 C.F.R. § 5.207(e)(3). It is significant to note that the FAR provides no exception to the statutory notice requirement for a prospective sole-source award to the only presently approved source under the authority of 10 U.S.C. § 2304(c)(1), supra. Cf. the FAR, 48 C.F.R. §§ 5.202(a)(1)-(12) (which delineate the specific exceptions to the notice requirement).

The Air Force also urges that its own internal regulation allows it to limit the number of items that are described in the CBD notice. In this regard, the Air Force Supplement to the Federal Acquisition Regulation (AF FAR Sup), § 5.207(b)(4)(iii), Apr. 1, 1984, provides that the agency need list in the synopsis the stock numbers of only the six items of highest value if the contract is for a large number of items. The Air Force frankly concedes that, because of a "clerical error," the June 26 CBD notice listed only the three items of highest value, but the agency nevertheless contends that this description was sufficient to put Pacific on notice of the overall nature of the acquisition. The Air Force notes that Pacific could have requested and obtained a copy of the solicitation, but chose not to do so.

We find no merit in the agency's argument. The statutory presolicitation notice provisions make it clear that their fundamental purpose of improving access to procurement information so as to enhance competition is not served by a notice which gives only a limited or vague indication of the overall nature of the acquisition. Although we appreciate that an acquisition such as that in issue here may involve a large number of items, we do not believe that the identification of only a few of those items, even if of the highest dollar value, constitutes "an accurate description" of the contemplated acquisition or serves to assist a propective offer in making "an informed business judgment" as to whether it should request a copy of the solicitation. We agree with Pacific that a prospective offeror should not bear the risk of relying upon a poorly drafted notice when deciding whether or not to compete. Hence, we conclude that AF FAR Sup, § 5.207(b)(4)(iii), is inconsistent with 15 U.S.C. § 637(f)(1). At a minimum, any notice identifying only the

six highest value items should also state the number and nature of the other items being acquired. In any event, even under the Air Force's own regulation, the June 26 CBD notice was inadequate since it listed only three parts items rather than the prescribed six.

Therefore, because the CBD notice of June 26 was legally insufficient to convey the agency's actual requirements, we conclude that Pacific was unreasonably excluded from an opportunity to compete for contract line items 0003 through 0017 (excepting items 0006 and 0015, which were properly described). Reference Technology Inc., B-222487, supra. By separate letter of today, we are recommending to the Secretary of the Air Force that, to the extent consistent with agency needs, items 0003-0005, 0007-0014, and 0016 and 0017 be resynopsized and Hamilton Standard's contract with respect to those items be terminated for the convenience of the government if public response to the synopsis now indicates that a competitive procurement should be conducted. We further recommend that the agency consider revising AF FAR Sup, § 5.207(b)(4)(iii), so that it more closely conforms with the statutory presolicitation notice requirements.

We do not allow Pacific its claimed costs of filing and pursuing the protest, including attorney's fees. Since we have recommended that the items in question be resynopsized, Pacific will now receive a full and fair opportunity to express any interest it may have in competing for them. Accordingly, the recovery of protest costs would be inappropriate. See The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 CPD ¶ 132.

To the extent Pacific has challenged the award of line items 0001 and 0002 to Hamilton Standard on a sole-source basis, we find nothing to indicate that the agency's actions were objectionable. As already indicated, 10 U.S.C. § 2304(c)(2) allows an award to be made on a sole-source basis when the requirement is of a "compelling urgency." Although the firm contends that the Air Force violated 10 U.S.C. § 2304(e) by not requesting offers from other potential sources, the record does not show that such requests would have been "practicable in the circumstances." Id.

We conclude from our review that the immediate acquisition of both items was critical to the activity's mission. For example, with regard to item 0001, the Air Force states that "[a] work stoppage condition exists on repair of an end item in the . . . Propeller Shop due to the lack of this component." As to item 0002, the Air Force states that there was "a rapidly approaching stock out position of this item."

The fact that numerous potential sources had indicated an interest in supplying the predecessor part number for item 0001, which had been sought competitively, does not compel us to conclude, as urged by Pacific, that the agency in the circumstances was required to solicit from these sources before proceeding under 10 U.S.C. § 2304(c)(2) to award the item to Hamilton Standard as the only approved source. The record shows that item 0001 was changed to a new part number for which there was a lack of data in the Air Force's possession, and that the part had been upgraded to an emergency requirement. We have held that an agency's decision to award a sole-source contract to the only known qualified source is proper where the agency has neither the data needed to conduct a competitive procurement nor the time necessary to qualify a new source, which appears to be the case here. See Aerospace Engineering and Support, Inc., B-222834, July 7, 1986, 86-2 CPD ¶ 38. We note that Pacific has made no persuasive argument that it could have met the agency's urgent need for either item 0001 or item 0002. See Gentex Corp., B-221340, Feb. 25, 1986, 86-1 CPD ¶ 195. Hence, we conclude that the agency's sole-source actions concerning these two items were not improper.

The protest is sustained in part and denied in part.

for Shelton J. Fortier
Comptroller General
of the United States