The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fairchild Weston Systems, Inc.

File: B-225649

Date: May 6, 1987

DIGEST

1. Use of other than competitive procedures to procure equipment needed for Congressionally mandated testing of Bradley Fighting Vehicle based on "unusual and compelling urgency" under 10 U.S.C. § 2304(c)(2) was justified where there was insufficient time to conduct the procurement using fully competitive procedures due to reasonable determination by contracting agency that testing, for which the equipment being procured was needed, had to be completed within a short time after the testing requirement was imposed.

2. Contracting agency's failure to solicit proposal from protester in procurement using other than competitive procedures did not comply with statutory requirement that offers be solicited from as many sources as practicable where protester shows that contracting agency's technical personnel, who provided the list of sources to be solicited at a minimum should have known of protester's interest, and there is no indication that the agency could not have considered an additional proposal within its established schedule for the procurement.

DECISION

Fairchild Weston Systems, Inc. protests any award under request for proposals (RFP) No. DABT60-87-R-0068, issued by the Army for the upgrade of 170 units of government furnished equipment from the Multiple Integrated Laser Engagement System (MILES). Fairchild contends that the Army lacked adequate justification for using other than competitive procedures in conducting the procurement and improperly failed to give Fairchild an opportunity to compete under the RFP. We sustain the protest.

The MILES equipment involved in the procurement at issue is for use during testing of the Bradley Fighting Vehicle, which transports infantry squads into battle and then supports the squads and accompanying tanks. During testing under simulated battlefield conditions, the MILES equipment is used to

record the firings and target hits by weapons which for testing purposes are equipped with lasers instead of ammunition. In the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 121, 100 Stat. ___ (1986), Congress directed the Army to submit a plan for testing and evaluating the Bradley's combat survivability. Responsibility for the testing was assigned within the Army to the Training and Doctrine Command Combined Arms Test Activity (TCATA) at Fort Hood, Texas. According to the Army, after the Defense Authorization Act was enacted on November 14, 1986, the Bradley test requirement was first discussed at TCATA on December 11. On December 18, TCATA decided that the existing MILES equipment would have to be upgraded to generate data regarding an issue considered critical to evaluating the Bradley, its vulnerability to Soviet handheld antitank weapons.1/

The Army scheduled the Bradley test for March 20-April 29, 1987, based on its determination that the test results should be available for reporting to Congress before action was taken on fiscal year 1988 defense appropriations. Based on a 65-day lead time for the contractor, the contract for the MILES upgrades thus had to be awarded in early January 1987 to ensure delivery for the March testing. In view of the short time in which the procurement had to be completed (approximately 1 month from the time the requirement was known), the Army decided that its need for the MILES upgrades involved an "unusual and compelling urgency" justifying the use of other than competitive procedures as provided in 10 U.S.C. § 2304(c)(2) (Supp. III 1985).

The RFP was issued on January 2 to the three firms identified by the testing activity, Loral Corporation, Schwartz Electro-Optics, Inc., and Simulaser Corporation, and called for initial proposals to be submitted by January 9. On January 7, the Army issued the first amendment to the RFP, providing that for evaluation purposes an offeror's technical approach was three times more important than price. Two of the three firms which had received the RFP, Loral and Schwartz, then submitted initial proposals by the January 9 due date.

1/ As discussed later in the decision, there is a dispute regarding whether the specific need for the MILES upgrades called for by the RFP was first known by the Army on December 11 or December 18.

According to the Army, the technical evaluation was begun immediately and continued the following day, Saturday, January 10. That day, the Army also issued the second amendment to the RFP, setting out the Army's requirements that the MILES upgrades be external so that they could be removed in the field, if necessary, and reuseable in subsequent tests. Revised proposals in response to the amendment were submitted by Loral and Schwartz on January 13.

After reviewing the revised proposals, the Army concluded that its requirement for disconnection of the MILES upgrades in the field had not been explained adequately; accordingly, on January 14, the Army issued the third amendment to the RFP, restating the requirement and calling for the offerors to clarify their proposals on that point the same day. The Army then requested best and final offers by January 15 at 1 p.m. After reviewing the best and final offers, the Army asked the offerors to describe their methodology for disconnecting the MILES upgrades from approximately 70 pieces of equipment, an area which had not been discussed in either offeror's best and final offer. The Army found Loral's explanation acceptable; Schwartz was found technically unacceptable because its methodology required soldering in the field. Award then was made to Loral on January 15.

Fairchild first contends that the procurement involved no urgency sufficient to justify using other than fully competitive procedures. Fairchild challenges the Army's justification for restricting competition--the need for the Bradley test results in time for consideration by Congress before action on the 1988 defense appropriations act--because there was no Congressionally imposed deadline for completing the testing. Fairchild also argues that, even under the Army's timetable, there was sufficient time to publish notice of the procurement in the Commerce Business Daily (CBD) in order to increase competition. In particular, Fairchild argues that since the Army knew or should have known that Fairchild and Loral were the only two principal sources for MILES equipment, the Army acted unreasonably by not soliciting Fairchild along with the other three firms.

As discussed above, the Army relied on 10 U.S.C. § 2304(c)(2), which authorizes the use of other than competitive procedures when

> "the agency's need for the property 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 bids or proposals."

When restricting competition based on 10 U.S.C. § 2304(c)(2), the contracting agency also must request offers "from as many potential sources as is practicable under the circumstances." 10 U.S.C. § 2304(e). In addition, the decision to restrict competition must be supported by a written justification which, in this case, had to be approved by the contracting activity's competition advocate.2/ 10 U.S.C. §§ 2304(f)(1)(A) and (B)(i).

To support its position that there was insufficient urgency, Fairchild argues that since Congress did not impose a deadline for the Bradley test, there was no requirement that the testing be completed according to the Army's expedited schedule. In our view, the lack of a Congressional deadline for the testing is not controlling, in light of the Army's conclusion, which Fairchild does not refute, that the testing results would be most useful if available to Congress before action on the 1988 appropriations. In fact, as Fairchild recognizes, the Army's testing schedule is consistent with a recommendation in a recent report on the Bradley by our Office that the test results be available to Congress in time for its deliberations on the Army's 1988 budget request for the procurement of Bradley vehicles. See "Bradley Vehicle-Army's Efforts to Make It More Survivable," GAO/NSIAD-87-40 November 4, 1986.

Fairchild further argues that even if it accepts the Army's testing schedule, there was sufficient time for the Army to publish notice of the procurement in the CBD. We disagree. The Army's initial report on the protest was unclear regarding whether the decision to procure the MILES upgrades was made

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2/ With regard to the competition advocate's approval, the record contains a memo of a conversation between the contracting officer and the competition advocate on the morning of December 30, the day the justification was approved. According to the contracting officer's memo, the competition advocate said that he did not concur with the "compelling urgency" in the justification, but would approve it "as it is in the best interest of the Government." While we do not agree that this statement invalidates the competition advocate's subsequent written approval of the justification, as Fairchild suggests, we believe that it calls for close scrutiny of the Army's rationale in the justification.

on December 11 or December 18; in a subsequent affidavit submitted to our Office, the contracting officer states that, while the general need for the Bradley testing first arose at TCATA on December 11, the specific decision to acquire the MILES upgrade to carry out the testing was not made until December 18.3/ Measured from either date, however, the contract award was required to be made approximately 1 month later, in early January, clearly an insufficient period of time to conduct a procurement using fully competitive procedures. Further, while the Army could have chosen to publish notice of the procurement in the CBD, as Fairchild argues, there was no requirement that it do so where, as here, the procurement was being conducted pursuant to the exception to full and open competition in 10 U.S.C. § 2304(c)(2). See 41 U.S.C. § 416(c)(2) (Supp. III 1985).

Even when a contracting agency properly relies on 10 U.S.C. § 2304(c)(2) to use other than competitive procedures, however, it still must solicit offers from as many potential sources as is practicable under the circumstances. 10 U.S.C. § 2304(e). Here, the contracting activity sent the RFP to three firms identified as potential sources by the testing activity at TCATA. The Army maintains that the contracting activity was unaware of Fairchild's interest in the procurement. According to the agency, the contracting activity had conducted two prior procurements for similar equipment in which only the three sources solicited, not Fairchild, had participated.

Fairchild states that there are only two principal sources of MILES equipment, Fairchild and Loral; Schwartz and Simulaser, the other two firms solicited by the Army in this case, are subcontractors to Fairchild under a current contract to provide MILES equipment to the Army (contract no. N61339-86-C-0078, awarded to Fairchild on March 6, 1986). Although Fairchild concedes that that contract was awarded by a contracting activity other than TCATA, Fairchild contends that TCATA personnel have been involved directly in the design and testing phases of the contract, and thus were aware that Fairchild was a potential offeror under the RFP at issue here.

3/ The date of another document relating to the using activity's review of the solicitation package is also in dispute. Based on the record as a whole, however, we see no basis to challenge the Army's position that the date appearing on the document (December 4) is incorrect and the document actually was prepared on December 31.

In support of its position, Fairchild submitted records showing attendance by TCATA technical and engineering personnel at design review meetings under Fairchild's current contract. In addition, Fairchild states, and the Army does not dispute, that the design and operational tests under the contract are scheduled to be held later this year at Fort Hood.

In response to Fairchild's contention, the Army states that the equipment to be provided under Fairchild's current MILES contract is not for use by TCATA. The Army does not directly respond to Fairchild's assertion that TCATA technical personnel have participated in design review activities under Fairchild's contract, however; rather, the Army asserts only that TCATA contracting officials were unaware of Fairchild's potential interest in the procurement.

We find that Fairchild has shown that TCATA technical personnel were or should have been familiar with Fairchild's current MILES contract with the Army and thus at a minimum should have known that Fairchild was a potential source under the RFP at issue. In our view, the failure to solicit Fairchild is not justified by the Army's contention that the TCATA contracting activity was unaware of Fairchild's interest, since the contracting activity relied on technical personnel in the TCATA testing activity, who should have known of Fairchild, to identify the potential sources to be solicited under the RFP.

We recognize that under some circumstances, a contracting agency may be justified in not soliciting all known sources if, for example, time constraints preclude consideration of a large number of offers. See Industrial Refrigeration Service Corp., B-220091, Jan. 22, 1986, 86-1 CPD ¶ 67. We see no such basis for the Army's failure to solicit Fairchild, however, since there was a limited number of potential sources and there is no indication that the Army would have been unable to evaluate an additional proposal from Fairchild within its schedule for making award. Accordingly, we find that by not soliciting a proposal from Fairchild, the Army failed to comply with the requirement to solicit as many offerors as practicable when using other than competitive procedures pursuant to 10 U.S.C. § 2304(c)(2). 10 U.S.C. § 2304(e); see also Gateway Cable Co., B-223157, et al., Sept. 22, 1986, 65 Comp. Gen. ___, 86-2 CPD ¶ 333.

In view of our finding that Fairchild was unreasonably excluded from the procurement, we sustain the protest. We are unable to recommend that the contract with Loral be terminated for convenience since delivery under the contract was

completed on March 18.[4]/ As a result, we find that Fairchild is entitled to recover the costs of filing and pursuing the protest, including attorneys' fees. See Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1986); Hobart Brothers Co.--Reconsideration, B-222579.2, Sept. 19, 1986, 86-2 CPD ¶ 323. The protester should file its claim for costs directly with the contracting agency. 4 C.F.R. § 21.6(f).

The protest is sustained.

Milton J. Socolar

Acting Comptroller General
of the United States

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[4]/ The Army decided to allow performance to continue under the contract notwithstanding the protest based on its determination pursuant to the Competition in Contracting Act, 31 U.S.C. §§ 3553(d)(2)(a)(ii) (Supp. III 1985), that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for the decision on the protest.