

**DECISION**

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

**FILE:** B-221340                      **DATE:** February 25, 1986  
**MATTER OF:** Gentex Corporation

**DIGEST:**

1. Protest that the procuring agency is required to equalize another contractor's competitive advantage which it has gained from its prior contracting activities is denied since the government is not precluded from taking advantage of legitimate competitive advantages that a firm may have.
2. Where an agency properly determined due to urgent circumstances that it must use non-competitive procedures provided for under the Competition in Contracting Act, the agency properly may limit the procurement to the only firm it reasonably believes can promptly and properly perform the work.

Gentex Corporation protests that Scott Aviation has an unfair advantage in the competition under request for proposals (RFP) No. F41608-86-R-1632 seeking oxygen masks for military aircraft use. Gentex and Scott are the only approved sources for the items in question. We deny the protest.

The solicitation, issued by the San Antonio Air Logistics Center, Department of the Air Force, Kelly AFB, Texas, seeks proposals for a quantity of oxygen masks, in four sizes, which are to be used by Department of the Navy pilots during high altitude flight in various military aircraft. The Air Force reports that this is an "emergency" procurement, conducted under the authority of the Competition in Contracting Act of 1984, 10 U.S.C.A. § 2304(c)(2) (West Supp. 1985), because a potential critical hazard exists to Navy personnel and aircraft from improperly fitting oxygen masks. Accordingly, the solicitation contains a stringent delivery schedule, with first article delivery required within 45 days after award

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of the contract and first delivery of production units required within 90 days after first article approval.

By way of background, the Air force procured a technical data package for the oxygen masks from Scott under a prior production contract that was awarded in 1978. The initial production items from this contract were successfully "fit tested" to insure that the face pieces were properly contoured and performed satisfactorily in field use. Although the masks were developed for the Air Force, the Navy was also given the masks for operational tests and evaluation. The Navy did not experience any leakage with the masks and reported back to the Air Force that the masks were operational.

For the following 4 years, until approximately 1983, Scott received award of all production contracts for the masks; the Air Force did not receive any complaints from users concerning these masks. In 1983, Gentex was awarded a contract for these masks and problems immediately surfaced that were peculiar to the Navy. Specifically, the Navy uses a constant flow oxygen system in its aircraft while the Air Force uses a "demand system." According to the agency, the Navy's constant flow oxygen system requires a closer fitting mask; a loose mask develops leakage directly into a pilot's eye. The Navy therefore funded a study to develop a better fitting mask. The Scott masks were found to be acceptable and therefore dimensional data from the Scott masks were incorporated into new specifications. These specifications make minor revisions to the nose piece and measure the contour of the masks in smaller increments. The Air Force provided both Gentex and Scott with the new specifications in June 1985, 5 months before the solicitation was issued and 6 months before the closing date for receipt of proposals.

Gentex does not expressly dispute the critical urgency of this procurement. Nevertheless, Gentex argues that the Air Force's incorporation into the solicitation of the new specifications (with actual dimensions obtained from Scott's masks), transforms the procurement into an improper sole-source acquisition from Scott. Specifically, Gentex argues that, unlike Scott, it now has to extensively revise its tooling to comply with the new specifications. Gentex estimates that its retooling expenses would be approximately \$100,000 and the time necessary for it to retool would be at least 6 to 7 months. Thus, Gentex states that it is unable to submit an offer under the solicitation's stringent delivery schedule at a price competitive with Scott's, since the procurement is "written around" the

configuration of Scott's masks. Accordingly, Gentex states that the Air Force, which paid for Scott's tooling when the item as now configured was developed, should also reimburse Gentex for its retooling expenses, and also extend the delivery schedule.

This protest fails for three reasons.

First, the protester does not allege and has not presented any evidence to question the Air Force's determination that more stringent specifications are required to prevent oxygen leakage during use of the masks. In this regard, the protester's allegation that the specifications are "written around" Scott's product fails to provide a valid basis for protest where the agency, as here, establishes that the specification is reasonably related to its minimum needs. Tooling Technology, Inc., B-215079, Aug. 6, 1984, 84-2 CPD 155. In the same vein, a specification is not improper merely because a potential contractor cannot meet its requirements. Id.

Second, the fact that a firm, by virtue of its prior contracts, previously may have acquired the cost of the equipment necessary to perform the contract is a legitimate competitive advantage which the government is not required to equalize. GTE Automatic Electric, Inc., B-209393, Sept. 19, 1983, 83-2 CPD 340. As a consequence, where one firm may be able to offer a lower price than another firm because of the competitive advantages it has gained from its prior contracting activities, the government is not precluded from taking advantage of that offer. Id.

Third, as indicated above, the Air Force relied on 10 U.S.C.A. § 2304(c)(2) (West Supp. 1985), to justify the expedited competition. That provision authorizes an executive agency to use noncompetitive 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 the bids or proposals;"

In using noncompetitive procedures, however, the agency must request offers from "as many potential sources as is practicable under the circumstances." 10 U.S.C.A. § 2304(e) (West Supp. 1985).

Here, all parties agree that there are only two approved sources for the masks. Gentex, by its own admission, is unable to meet the required delivery schedule. Therefore, we believe that an agency, where compelled do so by urgent circumstances, may limit the procurement to the only firm it reasonably believes can promptly and properly perform the work. See Industrial Refrigeration Service Corporation, B-220091, Jan. 22, 1986, 86-1 CPD \_\_\_\_.

The protest is denied.

*for Seymour E. Gros*  
 Harry R. Van Cleve  
 General Counsel