

DECISION



12884 PLI
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-194517

DATE: February 19, 1980

MATTER OF: Industrial Acoustics Company, Inc.; DLG-03923
Ferguson Door Company, Inc.; DLG-03924
Environmental Elements Corporation DLG-03925

DIGEST:

1. Validity of decision to negotiate requirement for "hush houses" carrying "priority 2 designator" must be measured by pre-September 1979 regulatory authority authorizing negotiation for "priority 2" procurement since priority designator was assigned in early 1979 before issuance of GAO decision recommending abolition of authority. In any event, based on review of record, GAO cannot question exigency of procurement.
2. It is clear that Air Force accepts proposed award-ee's position that expansion of hush house to accommodate F-111 aircraft will not adversely affect item's performance characteristics. Protesters have not shown this position to be arbitrary.
3. Protesters have not established arbitrariness of Air Force's positions that neither Navy hush house nor other sound suppression equipment can fulfill Air Force's exigent needs for sound suppression.
4. Grounds of protest asserting proposed awardee's lack of responsibility will not be considered since: (1) fraud is not alleged or shown; (2) definitive responsibility criteria are not involved; and (3) improper "resources-infusion" agreement is not alleged nor shown.

Industrial Acoustics Company, Inc. (IAC), Ferguson Door Company, Inc. (FDC), and Environmental Elements Corporation (EEC) have protested the decision of the Air Force to purchase 25 "hush house noise suppression systems" (enclosures for jet engine testing) plus "reprocurement and provisioning data" from Aero Systems Engineering, Inc. (ASE), under a noncompetitive, "sole-source" procurement.

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The protesters' attack on the noncompetitive procurement essentially raises two main issues, namely: (1) the validity of the negotiating authority employed for the procurement and (2) the validity of the technical evaluation of the ASE product which led to the sole-source decision. We reject these positions for the below reasons.

Validity of Negotiating Authority

EEC contends that the Air Force's negotiating authority here--the "public exigency" exception set forth in 10 U.S.C. § 2304(a)(2) (1976)--does not justify the "decision to use negotiated, much less sole-source, procurement" authority. We do not agree with this position for the reasons that follow.

The Air Force contracting officer reports that the 25 hush houses to be noncompetitively procured carry "DOD Issue Priority Designator 02" and have been declared "Emergency" Air Force requirements. The Air Force's reasoning for the "emergency" character of the procurement is evidenced in a February 1979 purchase request which found that "25 bases would either have no [engine noise] suppression or inadequate suppression" for a 20-month period if any manufacturer other than ASE were considered to supply the requirement. This would be so, the writer of the purchase request maintained, because:

"No other manufacturer has built and demonstrated a Hush House comparable to this unit. Any manufacturer other than ASE would be required to develop a unit and provide a first article test which would take approximately 30 months [20 months longer than the period contemplated for the initial delivery of ASE items]."

In November 1979, the Air Force provided explanation of the urgent need for the 25 units and the projected 30-month period needed for a competitive procurement as follows:

"* * * the Aero Systems Engineering design is the only Hush House known to meet Air Force performance requirements and be available for delivery in time to satisfy emergency needs. The need for this noise suppressor

equipment became critical principally as a result of three factors. First, a development program underway since 1975 for the A/F 32T-8 test cell noise suppressor was recently substantially curtailed due to failure of the equipment to meet specification. Secondly, the ANG [Air National Guard] is converting, during the FY79/80/81 time frame, to later model aircraft which necessitated the use of different noise suppression equipment. Many of these ANG conversions take place on commercial airports where noise suppression is a sensitive local issue. Thirdly, existing equipment located in the European and Pacific area is only marginally operational. Breakdown of noise suppressor equipment in these areas results in the termination of testing and subsequent curtailment of operational readiness. The 25 units will be used to satisfy these needs until deliveries can be received from a competitive follow-on. The decision to contract sole source with ASE was made based on both economic and operational needs to receive delivery of equipment of proven design at the earliest date. The production lead time for the ASE Hush House is 10 months, with delivery to be accomplished at the rate of approximately one per month over a two-year period. * * * The buy of the Hush House initially on a competitive basis would extend the delivery of the first production units by approximately 20 months * * *. This additional time would be necessary to develop a performance specification, solicit industry using either a source selection or two step process, award a contract, accomplish first article testing and then release the contractor for production. Even then, we would have no guarantee that a Hush House purchased by this method would perform with the efficiency and low maintenance cost as demonstrated by the ASE unit."

The only alternative to allowing other manufacturers to develop comparable hush houses was also considered unacceptable in the Air Force's view. This alternative would have required the reworking of specifications for the "A/F32T-8 engine test cell" involved in an on-going 1977 contract which was experiencing performance difficulties. The rework effort and follow-on competitive procurement was also estimated to take an unacceptably long 30-month period.

In furtherance of EEC's main argument against the exigency authority employed here, EEC and the other protesters argue:

(1) The exigency cannot be as stated because the Air Force took 7 months to report on the protests.

(2) It was not until August 1979 that the Air Force obtained actual support (primarily relating to marginal operating equipment and adverse local effects of noise pollution) for the requirements involved; before that time the number of items supposedly required increased without any real justification.

(3) The secrecy clouding the events surrounding the proposed procurement and the Air Force's failure to involve the noise suppression industry raise general doubts about the claimed exigency, especially since earlier noise suppressor systems were obtained through industry competition.

In reply to these arguments, the Air Force insists:

(1) The documentation supports both the exigency and the quantity of items required even if some of the supporting documentation was not obtained until later in 1979.

(2) Although the contract for the T-8 sound suppression systems has not been terminated for default, a "number of engineering problems and test failures were and have been encountered" such that the "Air Force has still not received a fully tested and acceptable unit and it is unclear when such a unit will be received"; in any event, the "more important justification for [the

exigency of the procurement] was based on the deplorable state of the European sound suppression equipment and new Air National Guard activations."

(3) As to the secrecy allegation, the Air Force points out that IAC submitted an unsolicited proposal in anticipation of the pending procurement; this proposal was duly evaluated by the Air Force. Further, while it is true that most earlier suppressor systems were obtained competitively, this lengthy process is not suitable for the Air Force's urgent needs here.

Analysis

Defense Acquisition Regulation (DAR) § 3-202.3 (July 1976), the regulation in existence when the Air Force assigned "priority designator 2" to the units in question, conferred automatic authority to negotiate a procurement given the presence of priority designator 2. Although this regulatory authority was abolished in September 1979, the validity of the decision to negotiate must be measured by the pre-September regulatory authority in effect when the priority designator was assigned in February 1979. (February 1979 was also prior to our decision in Electrospace Systems, Inc., 58 Comp. Gen. 415 (1979), 79-1 CPD 264, in which we recommended that the regulatory authority be abolished.)

In any event, we have reviewed the record of the stated urgency. One of the many Air Force installation reports justifying the urgency--reported in August 1979--reads as follows:

"Operations * * * have been hampered over the years with the restriction of not being able to run aircraft and engines simultaneously due to high noise levels. Recent environmental testing * * * highlighted this problem. Sound levels directly behind the test cell at approximately 250 feet exceeded 110 decibels. This factor and the recent growth by the corporate community in the vicinity has not only hampered our operation but has strained our community relationship.

Dependent on weather conditions, prevailing winds often carry noise towards commercial business companies located one and one half miles from the test cell. Thirty-nine complaints have been registered against the guard in recent months, with the number of complaints rising as the vicinity becomes more populated. Our present testing facility is located two and one-half miles from our parking ramp and engine shop. This distance adds approximately one hour to our maintenance time due to towing aircraft to and from the test cell. The installation of the hush house adjacent to present guard facilities would be highly desirable and advantageous."

Given the above character of the justifications supporting the need for noise suppression systems demanded by the installations, we cannot consider the needs or urgency determination to have been made other than on good faith--even though the needs may have developed over a substantial time period and may not be capable of fulfillment for years. Thus, we reject the protesters' arguments that the date of the Air Force protest report and the date of the August 1979 justifications undercut the character of the Air Force's needs.

Finally, we do not agree that the alleged "secrecy" of the development of the proposed procurement diminishes the character of the installations' needs. In any event, since at least one concern submitted a proposal for noise suppression during the time when the proposed procurement was being considered, it is clear that the industry had some knowledge of developments within the Air Force. Therefore, we do not agree that the "secrecy" label is justified. Further, we believe the Air Force has developed considerable justification, as discussed at length below, for the noncompetitive procurement approach here. Thus, we do not agree that the noncompetitive approach should be viewed as diminishing the urgent character of the Air Force's needs.

Validity of the Sole-Source Decision

As EEC points out, it is clear that the authority to negotiate for reasons of urgency is not necessarily synonymous with restricted competition. As we said in Engineering Research, Inc., B-180893, September 12, 1974, 74-2 CPD 161:

" * * * [E]ven though a procurement may be negotiated, contracting officials must, within the time allowed, obtain competition to the maximum extent possible. Thus, reliance on the public exigency exception to formal advertising does not in itself authorize a sole-source award * * *."

Nevertheless, our Office has recognized that sole-source contracts are appropriate where the reasonable needs of the Government can be satisfied only by one firm without undue technical risk within the required time. Hughes Aircraft Company, 53 Comp. Gen. 670 (1974), 74-1 CPD 137. Finally, it is important to note our longstanding position that procuring agencies' technical conclusions concerning their actual needs are entitled to great weight and will be accepted unless there is a clear showing that the conclusions are arbitrary. See, for example, Interstate Commerce Commission--Reconsideration, B-193693, June 11, 1979, 79-1 CPD 409.

The issues raised by the protesters concerning the Air Force's technical conclusions may be divided into two general categories: (1) allegations that ASE's hush house does not meet the Air Force's reasonable needs and (2) allegations that other existing noise suppression equipment--especially existing Navy "hush houses"--would fulfill the Air Force's urgent needs under competitive procurements.

ASE's Hush Houses Do Not Meet Air Force's Needs

Before outlining the protesters' contentions here, we summarize the Air Force's statements of its actual needs for the noise suppression enclosure (hush house) being purchased:

1. An "existing design."
2. Proven extended life.
3. Little or no maintenance problems.
4. Demountable.
5. Capable of Housing various full size fighter aircraft using afterburner engines.
6. Meeting technical performance criteria.
7. Purchasable full data rights suitable for future competitive procurements.

Present noise suppression Air Force equipment does not meet these requirements, in the Air Force's view, because of maintenance and repair problems; further, existing equipment is only compatible with the aircraft for which it is designed.

The Air Force found the ASE hush house unit met its actual needs by conducting tests on the company's installed unit at the Royal Air Force base, Coningsby, England, as well as by observing other ASE units in Sweden where the design originated. As explained by the Air Force:

"The parent company of ASE, Granges-Nyby Steel Company, Sweden, was the builder of a Hush House at Royal Air Force Base, Coningsby, England, which was used for noise suppression testing of US aircraft in late Oct 78. The basic Hush House noise suppressor has been in use with RAF and Swedish aircraft for a period of 12 years.

"* * * The Granges-Nyby design which will be used by Aero Systems did meet in the exhaust system as well as over all current U. S. A. F. acoustical and other design requirements and is in fact large enough to accept aircraft and engines.

* * * * *

"The Air Force [also] visited four sites in Sweden where Hush Houses of the same design proposed by ASE have been in operation for up to twelve years. As a result of these visits, a detailed report was filed based on discussion with individuals who have had hands-on knowledge. The report revealed that the highest average yearly maintenance cost experienced on any of these units, despite almost continuous use, was \$600.00 per year. In addition the amount of savings that will result from the purchase of this equipment due to low maintenance costs, a cost analysis was performed on the twenty-five units to be bought initially from ASE versus the cost of rehabilitation and relocation of existing equipment necessary to maintain the operational capability of the Air Force until deliveries under competitive conditions could be received. This analysis showed that approximately \$4.5M could be saved by the early delivery of the ASE Hush House over what we would experience if the program were delayed an additional 20 months in order to obtain deliveries under competitive conditions."

The protesters' objections to the ASE unit may be summarized, as follows:

(1) The Coningsby unit is too small to accommodate the F-111 aircraft; thus, the Air Force will have to buy an expanded unit. Nevertheless, the Air Force should not accept ASE's claim that the tested unit is easily expandable to accommodate the desired sizes of

planes since expanding the unit will adversely affect performance without redesign effort; moreover, since the expanded unit is the unit to be purchased, the history of low maintenance costs is not applicable. As stated by IAC:

"Enlarging the structure (length and/or width) alters the juxtaposition of the side-positioned air inlet silencers (in the Coningsby type Hush House) to the air intake of the aircraft engines to be tested -- thus changing the critical air flow pattern of these engines. Such pattern changes affect the most vital aspect of any test procedure. While noise levels which exceed the specifications would still permit the facility to operate, the facility's inability to deliver air in a smooth laminar pattern to the engines are likely to result in engine stall, with risk of dangerous blow back. Change of size affects performance and constitutes a different unit with different problems that requires precise testing on its own. This is especially indicated when as many as 25 are being purchased."

(2) The Coningsby unit was not demountable as required.

(3) The actual performance results at Coningsby were not compliant with Air Force requirements, especially since turbo fan jets could not be tested; a "correction factor" was needed; personnel need to be "tethered" in the enclosure; and fire protection criteria were not met.

(4) The Air Force examination of the performance of similar units in Sweden was too hasty and inconclusive.

The Air Force has responded to the above criticism as follows:

(1) The Air Force is purchasing the ASE existing design which is basically expandable to accommodate the projected aircraft size by the addition of modular sections already incorporated into the present ASE design.

(2) Even though the Coningsby unit is not demountable, the ASE design has always made provisions for modular sections to be bolted together; the Air Force proposes to buy the bolted together option.

(3) The Air Force's analysis of the Coningsby unit showed that in overall performance the unit met Air Force requirements for noise attenuation, even though the test was not run under ideal weather conditions; as to "correction factors," although the Air Force is not aware of any hush house requiring a correction factor, this would not present a problem since the use of a "correction factor" is a common practice. As to fire suppression, the units observed in Sweden use a "light breathable foam" system.

(4) The Air Force has already described its Swedish evaluation of the ASE units.

Analysis

(keyed to the above-numbered paragraphs)

(1) It is the apparent position of the Air Force that it accepts ASE's claim that the Coningsby and Swedish units are easily expandable to accommodate the desired sizes of planes without adversely affecting any performance characteristics. As stated by ASE to our Office:

"Because of the length of the F-111, it was tested at Coningsby with the main doors open. All other aircraft and engines were tested with the doors closed. The USAF elected to test in this configuration, because it was considered a valid test of the hot section of the augmentor (the area of most concern due to past USAF experience), and it might be noted that acoustic performance was reasonably good even with the doors open.

"The modular design of the ASE Hush House makes it easy to extend the length of the Hush House to any desired length using proven inlet and interior modules. Span (width) increase is simply a matter of extending the roof arches and adding more proven roof panels to effect

enclosure. For the protesters to pretend that these extensions of size require further testing is as if to say that no architect can design a building larger than has been previously built."

We cannot conclude that the protesters have shown this position to be arbitrary.

(2) We cannot question the Air Force's position that the "bolted together modular section" ASE design option constitutes a demountable design even recognizing the associated fixed, in-ground items (for example, concrete floor) associated with the hush houses.

(3) Based on our review of the record we must conclude that the protesters have not shown the Air Force position (namely, that the tested unit met overall Air Force performance requirements, especially considering that the test was not run under ideal weather conditions) to be clearly arbitrary.

(4) We cannot question the thoroughness of the Air Force evaluation of the hush house performance in Sweden. This evaluation is evidenced by a five-page memo in the protest file which has not been released to the protesters; nonetheless, in keeping with our general practice, we have reviewed the materials in the memo.

Navy Hush House and Claims of Performance Equality

We now turn to an examination of the protesters' claims that a hush house developed under Navy auspices for which competitive specifications are available would suit Air Force needs or, alternatively, that existing products or products to be developed would meet the Air Force's needs.

The protesters claim the Navy hush house meets Air Force and Navy needs. For example, IAC states:

"Standardized specifications [for hush houses] do exist. The second installation at Naval Air Station Miramar represents the standard Navy specification to handle all fighter aircraft in the Navy inventory. This installation has been in place in operation for several years, with

operating data reflecting a service life greater than that suggested by ASE with respect to the hush houses of its parent's design. All such data, including maintenance cost, are and have been readily available throughout the period the Air Force was negotiating for a sole source procurement of an offshore design as representing the only means of satisfying its requirements."

On the other hand, the Air Force's examination of the hush house at the Miramar Naval Air Station shows that the Air Force considered the Navy's hush house "not acceptable for Northern bases because of possible snow and ice accumulation in the ducts" caused by the air intake design. Increased noise levels over those found in the Coningsby test unit made conversations more difficult. Finally, the evaluators considered that the ASE unit employed more sophisticated engineering designs than those found in the Navy hush house, especially in the exhaust tube area. As to the protesters' claim that the Navy hush houses are as, or even more, demountable than the Coningsby unit, the Air Force rejects this characterization since "substantial amounts of concrete are used in construction of the [Navy hush house] thus their demountability and capability of being relocated would be totally impractical."

Based on the above positions, we must conclude that the protesters have not shown the Air Force's position on the unsuitability of the Navy hush house for Air Force needs to be arbitrary.

The claims that other existing products may meet urgent Air Force needs primarily relate to claims that an extant contract for "A/F32T-8 Noise Suppressor Systems" ("T-8") could produce suitable noise suppression together with other existing noise suppression systems. Mention is also made of IAC's unsolicited proposal for a universal noise suppression enclosure.

The Air Force insists that the "T-8" contract program has been "curtailed and [is] completely behind schedule due to serious design problems" and that the "contractor still has not produced an acceptable unit even though the contract was awarded in February 1977

and millions of dollars have been expended." Further, as noted above, the Air Force insists that correcting the specifications for the T-8 contract would take an unacceptably long period of time and that all other existing Air Force suppressor systems have unacceptable maintenance problems. Finally, the Air Force states its position that it properly rejected the unsolicited proposal for a hush house system essentially because only "concepts" rather than proven designs were discussed. Based on our review of the record, we do not agree that the protesters have shown these Air Force positions to be arbitrary.

Other Issues

Responsibility

The protesters essentially argue that ASE should not be considered responsible for performance of the contract because of alleged deficiencies in engineering personnel and staff in general and net worth. As a related issue, the protesters assert that ASE's "Swedish parent" will improperly be the real party of interest in the contract.

Our Office will not question a decision finding a concern to be responsible unless either fraud is shown on the part of the procuring officials or the solicitation contains so-called "definitive" responsibility criteria which allegedly have not been met. Stancil-Hoffman Corporation, B-193001, October 30, 1978, 78-2 CPD 308. Further, we have held that the mere fact that a bidding entity obtains needed resources under agreement from a third-party concern is not a reason to reject the bid (or offer) unless the terms of the agreement cause the bidding (or offering) entity to "no longer exist" or cause the effective transfer of the bid (or offer) to the third party. Gull Airborne Instruments, Inc., 57 Comp. Gen. 67 (1977), 77-2 CPD 344.

The protesters have not shown that the present case is one for review under the criteria of the Stancil-Hoffman Corporation decision or that the relationship between ASE and its parent company offends the Gull Airborne Instruments, Inc., decision. Consequently, we will not consider the protesters' allegations under this issue.

"Buy-American" and "Dollar Outflow" Considerations

The protesters have urged that the proposed purchase offends the above-captioned considerations. We cannot disagree with the Air Force position which rejects these allegations, as follows:

"The Air Force recognizes that ASE is now a subsidiary of the Granges-Nyby Steel Company, located in Sweden. However, we are aware of no regulation that would prohibit us from contracting with a firm simply because they are a subsidiary of a foreign parent or from paying normal profit and overhead if audit and analysis show them to be fair and reasonable. In this particular case, it should also be pointed out, that the units will be built in the United States using domestic products. The only non-domestic product that will be used is insulation material that is not available in the United States. It should also be pointed out that provisions of the Buy American Buy are applicable and will be included in the contract."

Conclusion

Protest denied.



Deputy Comptroller General
of the United States