

# DECISION



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

FILE: B-185267

DATE: April 16, 1976

MATTER OF: Dumont Oscilloscope Laboratories, Inc.

## DIGEST:

Determination not to set aside procurement for labor surplus area concerns on basis that procurement is not severable into two economic production runs is not abuse of contracting officer's discretion where record presented reflects: (1) agency's indication of not insubstantial duplicative costs; (2) fact that there is reasonable indication that at least two competitive bids will be received; (3) possible duplication of certain fixed startup costs; (4) fact that delivery schedule must be tailored to meet agency's needs without consideration of impact on potential set asides; and (5) fact that procurement, although using performance specifications, was designed to achieve standardization of item.

The protest in question regards solicitation No. F41608-76-R-3612 which was issued by the San Antonio Air Logistics Center. The subject solicitation, a two-step formally advertised procurement, requested that as step one bidders submit samples of 100 MHz oscilloscopes as a prerequisite to an award of a fixed-price requirements contract to fulfill the Government's needs for these oscilloscopes for a 3-year period. The solicitation gave the Government's best estimate per year of 1,200 units with a maximum of 1,800 units per year.

Dumont questions the Air Force's failure to utilize a labor surplus area (LSA) set-aside for the foregoing procurement.

Armed Services Procurement Regulation (ASPR) § 1-802 (1975 ed.) states:

"\* \* \* [I]t is the policy of the Department of Defense to aid labor surplus areas (LSA) and encourage increased hiring of disadvantaged individuals by placing contracts with LSA concerns, to the extent consistent with procurement objectives and when such contracts can be awarded at prices no higher than those obtainable from other concerns \* \* \*"

In this regard, ASPR § 1-804.1(a)(1) (1975 ed.) states that:

"In accordance with the policy set forth \* \* \* a portion of each procurement shall be set aside for LSA concerns if:

"(i) the procurement is severable into two or more economic production runs or reasonable lots; \* \* \*"

ASPR § 1-804.1(a)(2) (1975 ed.) adds:

"In determining whether a proposed procurement is susceptible to division into two or more economic production runs or reasonable lots, consideration should be given to the following factors and any others deemed appropriate:

- "(i) price and procurement history of the items,
- (ii) open industry capacity,
- (iii) startup cost including special tooling requirements,
- (iv) delivery schedule, and
- (v) nature of item and quantity being procured."

Dumont essentially complains about the consideration undertaken by the Air Force with regard to the above-noted factors and also points out allegedly harmful consequences flowing from the failure to set this procurement aside for LSA concerns.

(i) Price and procurement history of the items

Dumont admits that there is no price and procurement history for the 100 MHz oscilloscope. It does argue that there is a good deal of analogous experience with other oscilloscopes that the contracting officer could have looked at in his evaluation of this factor. It cites as an example the 50 MHz oscilloscope. Dumont states with regard to the 50 MHz oscilloscope that the suppliers have varied and set-asides have been used extensively and since free and open competition was allowed, the Government has paid far less in the long run than it would have had a sole source been established at the inception of the 50 MHz program. The Air Force, however, indicates that since 1971 it has accomplished four oscilloscope procurements of similar magnitudes. Two of these involved

15 MHz oscilloscopes and two involved 50 MHz. Of the four procurements, one of the 15 MHz and one of the 50 MHz involved partial set-asides while the other two utilized full and open competition. Upon this basis, the Air Force states that "It would appear that recent past experience is inconclusive as to whether a set-aside must be used." The agency also states that on the 50 MHz set-aside procurement different companies were awarded the set-aside and non-set-aside portions.

The Air Force indicates that this 50 MHz procurement resulted in high duplicate costs associated with introducing into the inventory two different items performing the same function and it is upon this basis that it concludes that partial set-asides are inappropriate where such large duplicate costs are likely to be incurred. In this regard, the Air Force's initial calculations based on a 10-year useful life of the equipment indicated that \$702,649 of inventory management costs would be incurred with the introduction of any single type of oscilloscope into the Air Force's inventory. However, a subsequent modification of the Government estimate in two respects results in the Government's estimate of inventory management costs being \$896,849. The Air Force States that this figure contains no amount for operation and maintenance training, additional support (maintenance and calibration) equipment, if any, for a second type of oscilloscope or actual spare parts costs. The estimate includes only introduction and management costs for a single make of oscilloscope.

Dumont questions the contracting officer's characterization of all the costs leading up to this figure as necessarily duplicative if a second make of oscilloscope were to be introduced into the inventory. Dumont also disagrees with the quantum of additional costs which would occur in that event.

The Air Force in its calculations indicates that the 100 MHz oscilloscope is composed of 850 "bits and pieces" and of that number 110 items per new oscilloscope can be expected for introduction and maintenance during the 10-year expected life of the oscilloscope at an introduction cost of \$171 per item and a management cost of \$375 per item (later revised upward to \$662 per item). Dumont alleges that this figure of 110 bits and pieces is high and thus leads to a 10-year management and introduction cost for bits and pieces which appears to be enormously inflated. The basis for Dumont's allegation is that with regard to the 50 MHz Dumont oscilloscope introduced into inventory November 1973 only 43 items have been provisioned, i.e., substantially less than 110 items projected by

the contracting office for the 100 MHz oscilloscope. However, in this regard, the contracting officer states:

"\* \* \* Dumont's 50 MHz oscilloscope \* \* \* is made up of 519 different parts. This includes 238 items which did not have an existing National Stock Number (NSN). While the Air Force itself provisioned only 39 of these items, all 238 will require DOD cataloging and procurement action. The experience with the 50 MHz oscilloscope indicates not that the government estimate for the 100 MHz oscilloscope is inflated but rather that it is extremely conservative."

Moreover, Dumont states that:

"\* \* \* even accepting the [Air Force's initial] estimated cost figures as correct, the additional costs to the Government, when spread out over the total procurement, result in only \$13.08 per unit."

It is true that if the maximum 5,400 units are ordered, the Government's initial estimate of the duplicate costs represents only \$13.08 per unit per year. However, as noted above, the Government estimate has been modified and now totals \$896,849 or \$16.61 per unit per year or based on an estimated unit cost of \$1,800, this amount represents an additional cost to the Government equal to that of procuring 498 of the oscilloscopes. The agency states that this is hardly a negligible amount.

(ii) Open industry capacity

Dumont states that without such a set-aside, competition for this procurement would be limited to the two largest oscilloscope manufacturers in the country, and that "\* \* \* without little Dumont there to keep these two giants 'honest,' they will have a field day in pricing their proposals, to the everlasting detriment of the Government." (Emphasis added.)

While the other two companies to which Dumont refers (Tektronix, Inc., and Hewlett-Packard Company) may be much larger than Dumont, the fact remains that recently the Size Appeals Board of the Small Business Administration has found Dumont not to qualify as a small business. Appeal No. 796, September 12, 1975. Moreover, there is no basis for giving consideration to a firm's size unless it qualifies as a small business under the law and regulations. Furthermore, as the Air Force notes, there is no evidence to support the suggestion of collusion between the two companies referenced. In addition, if such collusion existed, it would not only be improper but would be

violative of the antitrust laws, a matter cognizable by the Department of Justice. Thus it appears that there is a reasonable indication that at least two competitive bids will be received for the oscilloscope procurement.

(iii) Startup costs including special tooling requirements

Dumont acknowledges that startup costs for any manufacturer of the 100 MHz oscilloscope will be substantial since it is the first governmental buy and existing commercial production requires some modification. Moreover, it states that each competitor for the procurement, whether for the major portion or a set-aside portion, will have to face these costs and in no event will the Government pay any more as a result of a set-aside. The Air Force does not agree. It indicates that if the procurement were to be severed, bidders both on the non-set-aside portion and the set-aside portion would incur certain fixed costs which would have to be spread over the production run. Thus, bidders on the non-set-aside portion would necessarily have to inflate their per unit bid prices to cover these fixed costs since these costs would not be spread over the total requirement but only on that portion of the requirement which is not set aside. The same rationale would apply to bidders on the set-aside portion of the procurement.

(iv) Delivery schedule

Dumont argues that the proposed delivery schedule is significant because it is that proposed delivery schedule which might prevent Dumont from competing absent a labor surplus set-aside. The Air Force states that in such situations the first requirement is to establish a delivery schedule which is tailored to meet the Air Force's needs as was done in this procurement and only then is the question of severability addressed to determine if severability is possible in view of the agency's needs.

Other factors

The agency indicates that two other factors bearing on its determination were: (1) that the procurement in question utilized performance specifications as opposed to design specifications; thus, if two awards were to be made under the procurement, although the oscilloscopes in question each would meet the performance requirements, they might have significantly different design configurations which would result in additional cost to the Government in connection with maintenance support, etc.; and (2) the procurement of two different oscilloscopes, as might be the case utilizing a

set-aside, would do harm to the standardization program for which the military services oscilloscope working group was created and under which this is the first procurement. Dumont asserts that on the basis of the policy statement in ASPR § 3-213.3(i) (1974 ed.), since this is an initial procurement of the 100 MHz oscilloscope, the agency's reliance upon standardization in support of its decision not to set aside the procurement is wholly inappropriate.

ASPR § 3-213.1 (1974 ed.) states that:

"Pursuant to 10 U.S.C. § 2304(a)(13), purchases and contracts may be negotiated if--

"for equipment that he [the Secretary] determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;"

ASPR § 3-213.3 (1974 ed.) states that "The authority of this paragraph 3-213 shall not be used (i) for initial procurements of equipment and parts." It is upon this provision that Dumont relies. However, Dumont's reliance seems to be misplaced. While we agree that the section in question does prohibit the use of negotiation techniques to secure standardization on initial procurements, the section does not exclude standardization considerations on initial procurements so long as the procurement in question is conducted on a formally advertised or two-step formally advertised basis.

Dumont also states that if the Air Force is truly interested in standardizing its equipment and not merely the supplier of such equipment, clearly the best way to do so would be to use a design specification that will assure receipt of the same equipment regardless of its source and still permit future competition. The Air Force argues, however, that the use of a performance specification is in accordance with the ASPR since ASPR § 1-304.2(b) (1974 ed.) states:

"When the Government desires to purchase privately developed items but does not have the necessary data with unlimited rights for use in a specification for competitive procurement \* \* \*

"When practical, procurement shall be competitive using performance or other specifications,

including purchase descriptions, which do not contain data developed at private expense to which the Government does not have unlimited rights. Procurements on this basis will normally not provide items of identical design. \* \* \*

The Air Force indicates that it does not presently have rights to necessary technical data nor can it acquire such rights unless necessary to fill Government needs as set forth in ASPR § 9-202.2(a) (1974 ed.). Dumont lastly implies that if only one award is to be made on this initial purchase of 100 MHz oscilloscopes due to the agency's intention to keep only one oscilloscope in inventory, this will result in the perpetuation of sole source.

We do not necessarily agree. First, since, as noted above, there is reasonable likelihood to expect at least two firms to compete for the procurement, this initial procurement cannot be categorized as a sole source. What Dumont seems to be alleging is that award of the initial contract to one firm will automatically result in award of any follow-on contracts to that same firm. However, this need not be the case. First, the Air Force, citing the procurement history of the 50 MHz oscilloscope, states that by the time the multiyear contract in question is at an end, the 100 MHz oscilloscope might have been replaced by a more advanced item and would not, therefore, be procured any longer. Moreover, in the event that the 100 MHz procurement were to be procured at the end of the 3-year period, the Air Force might then be in a position to issue a solicitation with either design specifications or perhaps a brand name or equal solicitation listing the salient characteristics of the brand name which must be met by all bidders. In doing so, a truly competitive procurement could be had.

#### SUMMARY

In B-173857, January 13, 1972, affirmed B-173857, May 31, 1972, we stated that:

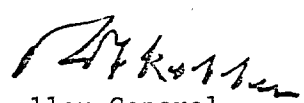
"While it is the policy of the Government to award a fair proportion of purchases of supplies and services to small business and labor surplus area concerns, whether a certain procurement should be set aside in whole or in part for small business or labor surplus area concerns is for determination by the administrative agency involved. We do not think that the applicable provisions of ASPR make it mandatory that there

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be set aside for labor surplus area concerns any particular procurement. Cf. 43 Comp. Gen. 657, 659 (1964); 41 id. 351 (1961). We have also stated that even where we may not agree with such a determination, \* \* \* 'we are reluctant to substitute our judgment for that of the contracting officer in the absence of a clear showing of abuse of the discretion permitted by him.' 45 Comp. Gen. 228, 231 (1965). \* \* \*"

We have reviewed the record presented to us with regard to the agency's determination that the instant procurement should not be set aside in that it is not severable into two economic production runs. Based on this record which includes (1) the agency's indication of not insubstantial duplicative costs; (2) the fact that there is a reasonable indication that at least two competitive bids will be received; (3) the possible duplication of certain fixed startup costs; (4) the fact that the delivery schedule must be tailored to the agency's needs without consideration of the impact on potential set-asides; and (5) the fact that the procurement, although utilizing performance specifications, was designed to achieve standardization of the item, we do not believe that Dumont has made a clear showing that the contracting officer abused his discretion in reaching his determination.

Accordingly, Dumont's protest is denied.

  
Deputy Comptroller General  
of the United States