



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Outdoor Venture Corporation

File: B-279777

Date: July 17, 1998

Marc Lamer, Esq., Kostos and Lamer, for the protester.
Scott Arnold, Esq., and Douglas Many, Esq., Howrey & Simon, for Teledyne Brown Engineering, an intervenor.
Maria Ventresca, Esq., Defense Logistics Agency, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly accepted a price reduction for a delivery order issued under an option to another firm's contract without first subjecting the requirement to competition is denied where record shows that agency properly made original contract award on a sole-source basis for purposes of maintaining an industrial mobilization base producer's manufacturing capacity; in such circumstances, considerations relating to maximizing competition are secondary to the agency's mobilization base needs.

DECISION

Outdoor Venture Corporation (OVC) protests the issuance of a delivery order under contract No. SPO100-96-D-5068, awarded to Teledyne Brown Engineering (TBE) by the Defense Logistics Agency (DLA) for a quantity of tents. OVC maintains that the delivery order amounts to an improper sole-source acquisition.

We deny the protest.

The contract was awarded to TBE in 1996 on a sole-source basis. The agency's justification for the award was that TBE was an industrial mobilization base producer that required the work contemplated under the contract in order to remain a viable producer of the tents. See 10 U.S.C. § 2304(c)(3) (1994). The contract included a base year and 1 option year. The unit price originally included in the contract was \$9,700 for the base year quantity and \$9,600 for the option quantity.

The agency issued two delivery orders against the base term contract at the \$9,700 price. Thereafter, in April 1997, DLA exercised the option in TBE's contract and simultaneously issued a delivery order for 400 tents at a unit price of \$7,700; the

price reduction was offered by TBE in a letter to the agency dated March 28, 1997. In April 1998, the agency issued a second delivery order against the option contract, this time for 305 tents at a unit price of \$8,900. The record shows that this price reduction was offered after TBE was contacted to ascertain whether the firm would offer the same price for these units that it had offered for the 400 units ordered in April 1997. TBE responded by offering the price noted above. OVC's protest is against the award of this latest delivery order for 305 units.

OVC argues that, in obtaining a reduction in price for the 305 units, the agency improperly engaged in post-award negotiations with TBE. According to the protester, once the agency negotiated with TBE, it was obliged to conduct a competitive procurement for the requirement, thereby affording other manufacturers an opportunity to offer a lower price than TBE's. In support of its position, OVC directs our attention to two decisions of our Office, Magnavox Elec. Sys., Co., B-231795, Nov. 2, 1988, 88-2 CPD ¶ 431, and Varian Assocs., Inc., B-208281, Feb. 16, 1983, 83-1 CPD ¶ 160, aff'd, Department of the Army-Recon., B-208281.2, July 12, 1983, 83-2 CPD ¶ 78. According to the protester, these decisions support its position that, where an agency determines that a lower price might be available for option quantities, the agency must provide all potential offerors an opportunity to compete for those quantities, instead of engaging in post-award negotiations with only the original awardee of the contract.

There is no merit to OVC's position. Military agencies have authority to conduct procurements using other than full and open competition (and may properly award sole-source contracts to a particular concern) for purposes of establishing or maintaining industrial mobilization base sources of supply. 10 U.S.C. § 2304(c)(3); Magnavox Elec. Sys., Co.; Ferranti Techs., Inc., B-247316.2, B-247316.3, May 28, 1992, 92-1 CPD ¶ 475 at 4. Where a military agency makes a sole-source award for purposes of maintaining a particular supplier of an item, concern for maximizing competition is secondary to the agency's industrial mobilization needs. Id.

DLA made its sole-source award to TBE because of its finding of a risk that the firm would be unable to maintain its tent manufacturing operations without the contract. OVC does not challenge the propriety of the agency's original rationale or award decision, and we have no basis to question either. This justification is not rendered invalid by the fact that the agency obtained lower prices from TBE after award, or by OVC's asserted ability to offer even lower prices if it were permitted to compete. The need to maintain TBE as a viable producer by permitting it to perform this contract remains, regardless of the possibility that lower prices would be available through competition. Further, to the extent OVC believes TBE's reduced option prices indicate that the award prices were too high, we note that an agency may properly pay a price premium in awarding a contract for mobilization base purposes. Minowitz Mfg. Co., B-228502, Jan. 4, 1988, 88-1 CPD ¶ 1 at 4.

The decisions cited by OVC are inapplicable here, since they involved firms which had competed unsuccessfully for the original award and which then protested that they could have offered better option prices than those negotiated without competition with the awardee. Magnavox Elec. Sys., Co., B-231795, supra; Varian Assocs., Inc., supra. This was true even in Magnavox, where there was less than full and open competition for the initial award. In that case, the agency had conducted a limited competition among industrial mobilization base producers, and had made its original award decision, in part, on the basis of low price. Subsequently, the agency modified the awardee's contract to acquire additional units at a lower price. We sustained the protest, holding that the additional quantity should have been competed, because the record showed that another of the mobilization base competitors may have been the low-priced offeror, and therefore entitled to the award, had the agency originally awarded a contract for the increased quantity. In the current case, there was no competition among industrial mobilization base producers for the original award; rather, the agency made award to TBE on a sole-source basis--admittedly at a price premium--in order to maintain that firm's manufacturing capacity. Because, as explained above, the sole-source justification remained valid at the time the option was exercised, nothing in Magnavox or Varian suggests that a competition had to be held for the option quantity.

The protest is denied.¹

Comptroller General
of the United States

¹In its supplemental comments to the agency report, OVC alleged for the first time that, collectively, the delivery orders issued to TBE are for more units than were contemplated when the agency prepared its justification and approval (J&A) to make the sole-source award to TBE. This argument is dismissed as untimely. OVC was provided the agency's J&A when it received its copy of the agency report responding to its protest. OVC did not raise this argument until more than 10 days after it received that document, as it was required to do under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2) (1998).