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Decision

Matter of: Signals & Systems, Incorporated

File: B-288107

Date: September 21, 2001

George W. Ash, Esq., Hilary S. Cairnie, Esq., and Andrew Starr, Esq., Dykema Gossett, for the protester.

Lynda Troutman O'Sullivan, Esq., and Jeffrey C. Walker, Esq., Miller & Chevalier, for KDS Controls, Inc., the intervenor.

Jeffrey I. Kessler, Esq., Craig E. Hodge, Esq., and Capt. Philip C. Mitchell, Department of the Army, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of an agency's justification for a noncompetitive procurement on the basis of unusual and compelling urgency is sustained, where the agency sought to buy enough engine electrical start systems to replace an earlier, vehicle control unit system that could no longer be used due to safety considerations and the agency did not know, and made no reasonable effort to discover, how many vehicle control units would have to be replaced.
 2. An agency failed to conduct reasonable advanced procurement planning, where, despite knowing of safety concerns with a vehicle control system that would have to be replaced, the agency took nearly 2 years to draft performance specifications that it intended to use to conduct a competitive procurement.
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DECISION

Signals & Systems, Incorporated (SSI) protests the Department of the Army's sole-source award of a contract to KDS Controls, Inc. under solicitation No. DAAE07-01-R-S098 for engine electrical start systems (EESS) for the High Mobility Multi-Wheeled Vehicle (HMMWV). SSI contends that the Army does not have the claimed unusual and compelling urgency justifying the noncompetitive award to KDS and that, even if the record establishes urgency, the Army purchased more units from KDS than was necessary to meet its urgent requirements. SSI also

contends that to the extent the agency has urgent requirements, this urgency resulted from the Army's lack of advanced procurement planning.

We sustain the protest.

BACKGROUND

The HMMWV is a one and one-quarter ton, four-wheel drive, tactical vehicle designed for use over all types of roads and terrain in all weather conditions. Contracting Officer Statement at 1. The vehicle, in various configurations, is used by various agencies supported by the U.S. Army Tank-automotive and Armament Command (TACOM), including the Army, Air Force, Navy, Marine Corps, National Guard, and Border Patrol, Hearing Transcript (Tr.) at I-25,¹ and is relied upon for all of the Army's general transportation requirements. Supplemental Agency Report (Aug. 9, 2001), at 1-2. The Army's fleet of HMMWVs currently exceeds 100,000 vehicles, all of which are powered by V-8, liquid-cooled, diesel engines. Contracting Officer's Statement at 1; Tr. at I-26.

Each HMMWV has a remote control switch that heats the diesel engine's glow plugs to the appropriate temperature before the driver can start the engine. The vehicle operator turns the starter switch, which activates the remote control switch and "wait to start" light system. The remote control switch sends power to the engine glow plugs, heating the plugs to the proper temperature. After the plugs reach the proper temperature, the "wait to start" light extinguishes, and the driver can start the vehicle. Contracting Officer's Statement at 1.

Since the first HMMWVs were fielded in the 1980s, the Army has used several different types of remote control switch systems. The first, which came with the original production HMMWVs, was the protective control box, which the Army used exclusively for 12 years. Because HMMWVs with the protective control box system proved difficult to start in cold weather and experienced "excessive glow plug burn out," the Army decided in 1997 to replace the protective control box system with a new system, the EESS that is the subject of the procurement at issue here. Until the EESS could be designed and fielded, however, the Army decided to replace the

¹ A 2-day hearing was conducted at our Office to receive testimony from the agency's Light Truck Group Sustainment Team Leader, head of engineering and technical data for wheeled vehicles, and contracting officer for this procurement. References to the transcript for each day of the hearing will be identified by roman numerals I and II.

protective control box with an interim system, called the vehicle control unit, which was designed by the Army.² Tr. at II-120-21.

The Army began purchasing the first version of the vehicle control unit, designated type 10, in December 1997. Agency Report, Tab E, Vehicle Control Unit Contract. Approximately 15,000 type-10 vehicle control units were purchased and fielded by the Army. Supplemental Agency Report, Statement of Army Light Truck Group Sustainment Team Leader (Aug. 9, 2001), at 1; Tr. at I-32. Early in 1998, the Army began receiving reports of significant problems with the vehicle control unit, including “phantom cranking” (that is, the vehicle’s starter would engage without operator intervention or while the vehicle was already in gear). In April 1999, a “safety of use message” (SOUM) was issued concerning the type-10 vehicle control unit, in which commanders were directed to ensure that “any time the vehicle [with a type-10 vehicle control unit] is parked and unattended[,] power must be disconnected between the starter and the [unit].”³ Hearing exh. No. 2, SOUM 99-07 (Apr. 1999), at 3. The SOUM informed users as follows:

If the starter cranks on its own, it can continue until the batteries are disconnected, drained of power, or the starter or wiring harness shorts out. Should the starter or wiring harness short out while self-cranking, there is a potential for the vehicle to catch fire and be destroyed. If the starter immediately engages when connecting the battery cable, a significant spark can occur leading to possible battery explosion and injury to personnel.

Id. at 2.

SOUM 99-07 also stated that the type-10 vehicle control unit would be replaced by a newer version, designated version-14.0A, and that the Army would be recalling the type-10 units. Id. at 3-4. In May 1999, the Army began issuing the newer version-14.0A vehicle control units. Supplemental Agency Report, Tab AZ, HMMWV Project Manager Briefing Regarding EECS (Mar. 16, 2000), at 15.

In November 1999, SOUM 00-06 was issued, informing HMMWV users that vehicle control unit version-14.0A was “an approved fix” for the type-10 units. Agency Report, Tab J, SOUM 00-06 (Nov. 1999), at 3. Users were directed to replace all

² The Marine Corps, whose requirements for HMMWV spare parts are supported by TACOM, decided not to use the vehicle control unit and continues to use the older protective control box system.

³ SOUMs are prepared by an “integrated process team” at TACOM, consisting of representatives from the product manager for the light truck vehicle group as well as engineers and quality assurance personnel. Tr. at I-40-41.

“non-version-14.0A” vehicle control units and return the “noncompliant” units to TACOM. Only 1,059 type-10 vehicle control units were returned.⁴ Tr. at I-72, 74, 76-77.

In May 2000, SOUM 00-15 was issued, informing HMMWV users that reports of phantom cranking had been received concerning the newer version-14.0A vehicle control unit.⁵ Agency Report, Tab K, SOUM 00-15 (May 2000), at 2. Users were directed to disconnect power for any HMMWV parked for more than 24 hours, if equipped with any version vehicle control unit. Id. at 3. The Army stopped procuring version-14.0A vehicle control units in mid-2000. Tr. at I-96-97.

Meanwhile, beginning in 1997, the Army and its prime contractor for the HMMWV, AM General Corporation, began work on a design for the EESS.⁶ See Agency Report, Tab C, SSI Proposal to Am General (Mar. 27, 1997); Tab D, AM General Letter to TACOM regarding EESS Status (April 9, 1997). Three vendors, including KDS and SSI, were selected by AM General in 1997 to design, build and test prototypes of the EESS. Agency Report, Tab AQ, TACOM Internal Electronic Correspondence (Aug. 18, 1997), at 2. The vendors’ proposed designs were tested against a design specification developed by AM General and the Army in 1998. See Supplemental Agency Report, Tab AS, Final Report of Science Applications International

⁴ An e-mail from a TACOM equipment specialist reported that 1,784 vehicle control units were returned. Supplemental Agency Report, Tab AT, E-Mail from TACOM Equipment Specialist to Light Truck Group Sustainment Team Leader (May 5, 2000), at 17. The sustainment team leader testified that the equipment specialist’s numbers were incorrect and that only 1,059 units were returned. Tr. at I-71-72. The team leader also testified that a “conservative number of the maximum” “returns” could be 1,500 units, if scrapped units (that is, units that were unserviceable and discarded) were considered. Tr. at I-67-68, 73-74.

⁵ The Army received numerous reports, including telephone calls and submission of quality deficiency reports (QDR), concerning problems with vehicle control units, failing to work, causing phantom cranking, draining batteries, and causing fires. See Supplemental Agency Report, Tab AW, QDRs and Related Documents; Tr. at I-241-42, 302. On the other hand, a Ground Safety Notification System Risk Assessment, while assigning “high” risk to the reported phantom cranking associated with the version-14.0A vehicle control units, also noted that “[t]here had been no reports of actual vehicle fires or operator injury related to this issue to date.” Agency Report, Tab AO, 2000 Ground Safety Notification System Risk Assessment (Apr. 1, 2000), at 4.

⁶ According to the protester, in 1997, AM General provided SSI and other vendors with an EESS performance specification to use in designing the new EESS. Protester’s Post-Hearing Comments at 12.

Corporation (SAIC) to TACOM for the HMMWV EESS (Mar. 17, 1999), at 7, 10. In June 1999, a technical design package for the EESS was approved and released to AM General to include the EESS in the production vehicle.⁷ Tr. at I-307-08, 355. None of the vendors initially passed qualification testing of their units during 1998 and 1999.⁸ However, after December 1999, new production HMMWVs included the EESS built by KDS. Agency Report, Tab Q, 1st Urgency J&A (Apr. 14, 2000), at 2. On July 17, 2000, KDS's design passed AM General's testing. Supplemental Agency Report at 6. SSI's and the other vendor's designs have yet to pass the design specification's testing requirements. Contracting Officer's Statement at 6.

Also, in June of 1999, TACOM's commanding general determined that the future competitive procurement of the EESS would be done on the basis of a performance specification, rather than a design specification. Tr. at I-110-11; Supplemental Agency Report, Tab AT, Memorandum for TACOM Deputy for Life Cycle Management from TACOM Commanding General, at 2. Use of a performance specification was intended to increase competition.⁹ Tr. at I-314. Work on a performance specification for the EESS had begun some time before February of 1999. See Supplemental Agency Report, Tab AX, Draft Performance Specification for EESS (Feb. 18, 1999), at 1. It was not until December 2000 that final approval was received for the performance specification for the EESS. Hearing exh. No. 3, EESS Timeline.

On April 14, 2000, the Army executed a justification and approval (J&A) to procure on an urgency basis 22,360 EESS units from KDS, based upon the AM General design specification.¹⁰ Agency Report, Tab Q, 1st Urgency J&A for the EESS (Apr. 14, 2000). The stated basis for the Army's unusual and compelling urgency was that the agency did not have any EESSs in inventory to support the new production HMMWVs that included the EESS as standard equipment.¹¹ The J&A estimated that deliveries of EESSs, under an anticipated competitive procurement, could not be available until

⁷ The technical design package was actually comprised of nine design specifications. Tr. at I-307.

⁸ KDS and another vendor were allowed to continue testing of their proposed units. SSI was not.

⁹ The Light Truck Group Sustainment Team Leader testified that if the design specification had been used, the agency could have conducted an earlier competitive procurement for the EESS. Tr. at I-237.

¹⁰ As noted above, KDS did not pass all the qualification tests for the EESS until July 17, 2000, after the J&A was executed.

¹¹ The Army's first noncompetitive procurement of EESS units from KDS was not protested.

13 months after the production HMMWVs with EESSs were in the field. Id. at 2; see Tr. at II-123-24.

On March 5, 2001, the Army initiated a competitive procurement for the EESS by issuing request for proposals (RFP) No. DAAE07-01-R-S038, which provided for the award of an indefinite-delivery, indefinite-quantity contract. Initial proposals were due by May 4.¹² Contracting Officer's Statement at 8. The RFP used the performance specification to describe the Army's requirements.

Also in March, the Army issued SOUM 01-012, which required users to inspect HMMWVs with vehicle control units and determine whether the vehicles were equipped with version-14.0A units or the earlier type-10 units. If the vehicle was equipped with a type-10 unit (or if the user could not determine the type of vehicle control unit because the inspection label was missing), the user was directed to:

remove the distribution box and replace with the new [EESS],
NSN 6110-01-463-9260 within 60 days of receipt of this message. After
60 days, vehicles not in compliance are deadlined.

Agency Report, Tab L, SOUM 01-012 (Mar. 2001) at 2. A vehicle that is "deadlined" cannot be used until it is in compliance with the SOUM. Tr. at I-202-03. Deadlining of vehicles would adversely affect the Army's mission readiness. Contracting Officer's Statement at 3. The newer version-14.0A vehicle control unit was not affected by SOUM 01-012 and could continue to be used in accordance with the earlier safety messages.

The Army anticipated that the issuance of SOUM 01-012 would create a significant "spike" in demand for a replacement electrical starter system for type-10 vehicle control units. Under a "best case" scenario, the agency estimated that the demand generated by the SOUM would affect 15 percent of the HMMWV fleet (that is, 15,000 vehicles), which reflected the number of HMMWVs that were originally equipped with type-10 units. Under a "worst case" scenario, the demand for the new EESS would be to replace all vehicle control units, of any version, which was 40 percent of the HMMWV fleet (that is, 40,000 vehicles). Tr. at I-28-30.

At the time SOUM 01-012 was issued and thereafter, the Army did not know how many HMMWVs were actually equipped with type-10 vehicle control units. Tr. at I-198, 270. To determine a likely quantity of vehicles with the type-10 units, the Army estimated that there may be as many as 13,941 vehicles (that is, the 15,000 vehicles that were originally fielded with type-10 vehicle control units less the 1,059

¹² The Army awarded a contract under the RFP to KDS on August 6, and SSI protested this award to our Office on August 20 (B-288641, B-288641.2). We intend to issue a separate decision in that matter.

type-10 units that were returned to TACOM in response to SOUM 00-06). Tr. at I-141-43. The Sustainment Team Leader testified, however, that it was possible that type-10 vehicle control units had been removed from vehicles and not returned to TACOM. See, e.g., Tr. at I-141. In fact, he admitted that some number of type-10 units may have been replaced by the 3,000 EESSs that had been received and disbursed from KDS's first sole-source award. Tr. at I-268-69. He also testified that he was aware that some customers had removed type-10 vehicle control units and replaced them with the older protective control box systems, which the customers could acquire from commercial sources. Tr. at I-93-94.

On April 25, 2001, TACOM's Deputy for System Acquisitions decided that all vehicle control units, of any version, would be replaced with the EESS "as soon as sufficient stock of the EESS is available." Agency Report, Tab AB, Memorandum for Program Manager, Light Tactical Vehicles (Apr. 25, 2001).

On that same date, a second sole-source contract was awarded to KDS for 30,137 EESSs, based upon the AM General design specification. A J&A supporting this second noncompetitive acquisition of the EESS from KDS was executed on May 1, 2001, on the basis of unusual and compelling urgency.¹³ Agency Report, Tab AM, 2nd Urgency J&A for the EESS (May 1, 2001). The stated basis for the urgency was that SOUM 01-012 required the replacement of type-10 vehicle control units within 60 days and that therefore 30,137 EESSs were needed "immediately to relieve approximately 40 [percent] of the HMMWV fleet from [SOUM 01-012]." ¹⁴ Id. at 3. The J&A stated that deliveries from KDS could begin within 60 to 90 days, but that a new contractor would need at least 120 to 150 days to pass qualification testing and begin deliveries. Id. at 4. The J&A also indicated that the Army had total available assets of 19,529 EESS units (9,526 units currently on-hand and 10,003 units expected from KDS's first sole-source contract). Id.

SSI filed an agency-level protest of the noncompetitive award to KDS. The agency-level protest was denied, and SSI protested to our Office.

CONTENTIONS

SSI contends that the Army does not have unusual and compelling urgency to support the second noncompetitive award of 30,137 EESSs to KDS in April 2001. SSI also contends that, even if the record does establish urgency, the Army procured

¹³ The J&A for an urgent procurement may be executed after the contract is awarded. 10 U.S.C. § 2304(f)(2) (1994).

¹⁴ This aspect of the J&A was misleading in that 40 percent of the HMMWV fleet reflects the number of vehicles equipped with all versions of vehicle control units, and not just type-10 units, as the J&A suggests.

more EESS units than were required to satisfy its urgent needs. That is, SSI contends that, as indicated by the May 1, 2001 J&A, the Army's stated urgency basis for the EESS units was only to replace the type-10 vehicle control units that were required to be removed from HMMWVs in accordance with SOUM 01-012, and the number of type-10 vehicle control units to be replaced was at most approximately 14,000 units, not the 30,137 EESSs that the Army noncompetitively acquired. SSI also contends that even if there was an urgent requirement for the EESSs, the Army's failure to perform reasonable advanced procurement planning caused the urgency.

The Army responds that the issuance of SOUM 01-012, which directed the removal of type-10 vehicle control units from HMMWVs within 60 days or the deadlining of those vehicles, created urgent requirements that the agency did not have sufficient inventory to satisfy. Contracting Officer's Statement at 3. The Army also states that the failure of the vehicle control units, as an interim fix, was unanticipated. In this regard, the Army disagrees that its urgent requirements resulted from a lack of advanced procurement planning, noting that its procurement planning included replacing protective control boxes with vehicle control units, upgrading the vehicle control units, and developing design specifications and then performance specifications for the EESS. Supplemental Agency Report at 5-7.

With respect to SSI's complaint that the agency noncompetitively acquired more EESSs than was required, the Army took partial corrective action at the hearing conducted in connection with this protest. Specifically, the Army informed us that it was "capping the quantity under the protested procurement at the number of suspected [Type-10 units] in the field, [13,941]." Tr. at II-4; Agency's Post-Hearing Comments at 2. This resolved, in part, SSI's protest allegation that even assuming urgency, the Army had procured more EESS units that was required to satisfy its urgent needs.¹⁵

DISCUSSION

The Competition in Contracting Act of 1984 (CICA) requires "full and open competition" in government procurements except where otherwise specifically allowed by the statute. 10 U.S.C. § 2304(a)(1)(A). One exception to this competition requirement is where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2); Federal Acquisition Regulation (FAR) § 6.302-2(a)(2). Although the agency must request offers from as many sources as practicable under

¹⁵ Notwithstanding the reduction of the number of EESSs being sole-sourced, SSI continues to contend that the Army is noncompetitively procuring more EESS units from KDS than was necessary to meet its urgent requirements. Protester's Post-Hearing Comments at 21.

the circumstances, 10 U.S.C. § 2304(e), FAR § 6.302-2(c)(2), the agency may still limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. National Aerospace Group, Inc., B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 at 5; Hercules Aerospace Co., B-254677, Jan. 10, 1994, 94-1 CPD ¶ 7 at 3.

If noncompetitive procedures are used pursuant to 10 U.S.C. § 2304(c)(2), such as here, the agency is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority. See 10 U.S.C. § 2304(f)(1)(A), (B); FAR §§ 6.302-1(d)(1), 6.302-2(c), 6.303, 6.304. Our review of the agency's decision to conduct a noncompetitive procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. National Aerospace Group, Inc., *supra*; Marconi Dynamics, Inc., B-252318, June 21, 1993, 93-1 CPD ¶ 475 at 5; Dayton-Granger, Inc., B-245450, Jan. 8, 1992, 92-1 CPD ¶ 37 at 4. However, noncompetitive procedures may not properly be used where the agency created the urgent need through a lack of advanced planning. 10 U.S.C. § 2304(f)(5)(A); New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6. In addition, the urgency justification cannot support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement. See Immunalysis/Diagnostix of Calif. Corp., B-254386, Dec. 8, 1993, 93-2 CPD ¶ 309 at 5.

We find, as explained below, that the record supports the rationale of the J&A that the Army's urgent requirement for EESSs arose from the issuance of SOUM 01-012, which required the replacement of type-10 vehicle control units or the deadlining of those vehicles within 60 days. The record establishes that this safety message was issued in response to the continuing problems with the type-10 vehicle control units. Nevertheless, the record does not establish that the Army purchased only the minimum quantity necessary to satisfy its immediate urgent requirement. That is, the record shows that the Army did not know, and made no attempt to learn, how many HMMWVs were equipped with the type-10 vehicle control units that were affected by SOUM 01-012; indeed, the record clearly evidences that the quantity of type-10 units to be replaced is less than estimated by the agency. In addition, the record does not support the Army's claim that it engaged in reasonable advanced procurement planning to acquire the EESSs competitively.

Urgent Requirement

SSI argues that the repeated safety concerns with the type-10 vehicle control units that led to the issuance of SOUM 01-012 did not present an immediate need to replace those units, as stated in the J&A. The protester bases this argument on the fact that there were few reported safety-related problems with the vehicle control unit, of any version, when the number of reported concerns is compared to the overall number of HMMWVs equipped with vehicle control units. In addition, SSI notes that the Army continued to use the type-10 vehicle control units for several

years, despite receiving the same safety-related reports that caused the Army in March 2001 to declare that the type-10 units could longer be used.

It is true that the record indicates that the number of reported problems in the type-10 vehicle control units is small in comparison to the overall number of HMMWVs that were equipped with vehicle control units. Nevertheless, the fact remains that there are reports of incidents involving the vehicle control units that present significant safety considerations that could have substantial impact on military readiness and human safety. For example, there are reports of vehicle fires related to the phantom cranking phenomenon associated with the vehicle control unit. See, e.g., Supplemental Agency Report, Tab AW, QDRs, at 15, 71; Tr. at I-288. There are also reports of vehicles equipped with vehicle control units starting on their own while a mechanic was attempting to service the engine. See, e.g., Supplemental Agency Report, Tab AW, Quality Deficiency Reports, at 83. The Army reasonably concluded from these reports that “the [vehicle control unit] wasn’t operating as it was supposed to operate, and because it wasn’t, it created a safety hazard to the vehicle for sure and to the operators of the equipment in the field.” Tr. at I-302.

We have held that military mission readiness and personal safety are important considerations in judging the reasonableness of an agency’s determination that unusual and compelling urgency prevents the agency from conducting a procurement on the basis of full and open competition, as provided for by CICA. See McGregor Mfg. Corp., B-285341, Aug. 18, 2000, 2000 CPD ¶ 151 at 7; Logics, Inc., B-256171, May 19, 1994, 94-1 CPD ¶ 314 at 2. It is beyond cavil that an agency need not risk injury to personnel or property in order to conduct a competitive acquisition.

As noted by the protester, the record shows that the safety-related reports (by QDRs, e-mail, and telephone) concerning the vehicle control units are not a recent phenomenon, but date back to 1998. Nevertheless, despite the protester’s concerns with the length of time the Army dealt with problems associated with the vehicle control units, the record shows that the agency had legitimate safety concerns that ultimately resulted in the issuance of SOUM 01-012, which caused the agency’s urgent requirement that is protested here. The record reflects that beginning in 1998, the Army investigated the vehicle control units in an effort to determine the cause of the problems. Hearing testimony indicates that engineers at TACOM and a subsidiary command, the TACOM Automotive Research and Development Center, disagreed as to the cause of the problems. See Tr. at I-155, 328-29. Although, beginning in 1999, the Army issued a series of safety messages addressing the vehicle control units, and also in 1999, redesigned the type-10 vehicle control unit and started distributing the redesigned unit as a version-14.0A unit, this still has not resolved the problems the agency had with the vehicle control units. Although one could question the promptness of the agency’s response to concerns with the vehicle

control units, the record does show that there were problems requiring immediate attention.

In sum, we find, as reported by the J&A, that the requirement in SOUM 01-012 to replace type-10 units within 60 days or deadline those vehicles resulted in a tangible urgency requirement.

Minimum Quantity

As noted above, the J&A limited the Army's urgency requirement to the replacement of type-10 vehicle control units, which was consistent with the urgency resulting from SOUM 01-012. Thus, the Army's immediate urgent requirement was to acquire enough EESS units to replace type-10 vehicle control units, and it could not use this J&A authority to acquire EESS units for other purposes. See Sabreliner Corp., B-288030, B-288030.2, Sept. 13, 2001, 2001 CPD ¶ ____ at 5; Marconi Dynamics, Inc., supra, at 5 (as required by CICA, 10 U.S.C. § 2304(f)(1)(A), the J&A must accurately describe the agency's requirements).

SSI complains, however, that the Army purchased more than the minimum quantity necessary to satisfy the agency's immediate urgent requirement for replacements for the type-10 vehicle control units, even after the Army's partial corrective action that "capped" the quantity of EESS units being acquired under this acquisition at 13,941.¹⁶ Protester's Post-Hearing Comments at 21. Specifically, SSI argues that, although the Army contends that there are as many as 13,941 HMMWVs with type-10 vehicle control units, in reality the Army does not know how many vehicles are equipped with type-10 units.

We agree with SSI that the Army did not know at the time of this noncompetitive procurement, and apparently still does not know, how many HMMWVs were equipped with type-10 vehicle control units. The testimony of the sustainment team leader established that, apart from the 1,059 type-10 units that were returned in response to SOUM 00-06, the Army has no way of knowing if a type-10 unit was replaced and, if so, with what it was replaced. See Tr. at I-74, 78-80, 94, 140-43, 269-70. Indeed, this witness testified that the agency calculated the number of HMMWVs with type-10 vehicle control units by "assum[ing] that all of them were out there, minus the 1,059 that had been turned in." Tr. at I-143. At the same time, the sustainment team leader testified that he believed that some field units had replaced its vehicle control units with the earlier protective control box system and that it was

¹⁶ It appears as though the Army could have satisfied its stated requirements for 13,941 EESSs with the more than 19,000 EESSs its J&A showed as total available assets on hand or expected in delivery. These assets were acquired, however, under an earlier, justified noncompetitive procurement to provide a secondary parts inventory for the new production HMMWVs that included the EESS.

possible that other type-10 vehicle control units were replaced with EESS systems the agency acquired under the earlier noncompetitive acquisition from KDS.¹⁷ Tr. at I-141-42, 268-69. In addition, it is likely that some number of type-10 vehicle control units were replaced by the newer version 14.0A units that the Army acquired to replace the type-10 units. In sum, the Army simply did not know how many type-10 vehicle control units would have to be replaced in response to SOUM 01-012.

CICA requires that the agency's justification of its use of noncompetitive acquisition procedures include a description of the agency's needs and that the contracting officer certify the accuracy and completeness of the justification. 10 U.S.C. §§ 2304(f)(a)(1)(A), (f)(3). Implicit in this obligation is the requirement that the agency take reasonable steps to accurately determine its needs and describe them. This is an important obligation because the urgency justification cannot support the procurement of more than a minimum quantity needed to satisfy the immediate urgent requirement. See Immunoanalysis/Diagnostixx of California Corp., *supra*, at 5; Tri-Ex Tower Corp., B-239628, Sept. 17, 1990, 90-2 CPD ¶ 221 at 5; Honeycomb Co. of Am., B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209 at 4.

Here, the Army did not know the minimum quantity necessary to satisfy its immediate urgent requirement because it did not know how many type-10 vehicle control units were still in the field and would have to be replaced. Despite this lack of knowledge, the Army made no effort to ascertain how many type-10 vehicle control units were in place. Furthermore, there is no explanation in this record of why the Army could not, through reasonable diligence, determine the number of type-10 units that would be replaced. In the absence of evidence that the agency could not reasonably develop a better estimate of the number of type-10 units to be replaced, we find unreasonable the Army's assumption as to the quantity of EESSs that would be necessary to replace type-10 units in accordance with SOUM 01-012. This is all the more troubling, given the evidence in the record that indicates that many of the type-10 vehicle control units included in the agency's assumption had likely already been replaced. We sustain SSI's protest on this basis.

Advanced Procurement Planning

SSI also argues that the Army failed to engage in reasonable advanced procurement planning to allow for the competitive acquisition of the EESS units. Specifically, SSI complains that the Army was dilatory in drafting performance specifications to allow

¹⁷ The May 1, 2001 J&A indicates that nearly 3,000 EESSs from the earlier noncompetitive acquisition have been distributed, although the Army does not know what type of remote control switches have been replaced.

the competitive acquisition of the EESS, which caused the urgency for this sole-source acquisition.¹⁸ We agree.

Under the competition requirements of CICA, contracting officials have a duty to promote and provide for competition and to obtain the most advantageous contract for the government. National Aerospace Group, Inc., *supra*, at 8. Thus, CICA provides that under no circumstances may noncompetitive procedures be used due to a lack of advance planning by contracting officials. 10 U.S.C. § 2304(f)(5).

Although the requirement for advanced planning is not a requirement that such planning be successful or entirely error-free, *see, e.g., Sprint Communications Co., L.P.*, B-262003.2, Jan. 25, 1996, 96-1 CPD ¶ 24 at 8-9, the advanced planning must be reasonable. *See New Breed Leasing Corp.*, *supra*, at 6. In enacting CICA, Congress explained: “Effective competition is predicated on advance procurement planning and an understanding of the marketplace.” S. Rep. No. 50, 98th Cong., 2d Sess. 18 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2191. The Senate Report also quoted with approval the following testimony regarding the need for advanced planning:

Opportunities for obtaining or improving competition have often been lost because of untimely, faulty, or the total lack of advance procurement planning. Noncompetitive procurement or inadequate competition also has resulted many times from the failure to develop specifications By requiring effective competition, Congress will serve notice on the agencies that they will need to do more than the minimum to comply with the statute.

S. Rep. No. 50, 98th Cong., 2d Sess. 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2192.

Here, we find that the Army should reasonably have known by the end of 1999 that the vehicle control unit would not be the successful “interim fix” that it had hoped would allow the agency time to design and then competitively procure the EESS. As

¹⁸ SSI also complains that the Army’s decision to use formal source selection procedures unreasonably delayed the competitive procurement. Protester’s Post-Hearing Comments at 14-15. We disagree. Contracting agencies are given discretion to determine what method of procurement will best satisfy their needs. SSI’s disagreement does not show the Army’s determination to competitively acquire the EESS under a negotiated procurement using formal source selection procedures to be unreasonable. SSI also complains that the agency could have initiated its competitive procurement sooner if the Army had used the existing design specification rather than a performance specification. Although this is undoubtedly true, the agency’s decision in 1999 to use a performance specification was intended to encourage competition. If the Army had promptly drafted the performance specification, this would not have been an issue.

noted above, the Army had been receiving safety-related reports concerning the vehicle control units since 1998 and had taken unsuccessful actions to upgrade the vehicle control units. The reports continued and should have conveyed to the Army a pressing need to timely act on acquiring the EESS units. The record does not reflect, however, that the Army expeditiously acted in response to these reports.

It is true, as the Army reports, that the agency began work on the EESS design in 1997 and continued working on both the design and performance specifications for the EESS through years 1999 and 2000. Nevertheless, the record indicates that the Army lacked any sense of urgency to finalize a performance specification for the EESS that would allow the agency to conduct a competitive procurement. That is, the record establishes that work on the performance specification began well prior to February 1999,¹⁹ yet a final performance specification was not approved until December 1, 2000. See Hearing exh. No. 3, EESS Timeline. Although Army witnesses testified that the engineers drafting the performance specification were not experienced in drafting specifications that were performance-based and that questions concerning such matters as the inclusion of design elements in the performance specification had to be addressed, this testimony does not adequately explain why it took the Army approximately 2 years to prepare the performance specification. A comparison of the draft performance specifications with the final approved specification shows substantial similarity between the documents. Compare Agency Report, Tab AX, Draft Performance Specifications, with Protester's Post-Hearing Comments, attach. No. 1, Performance Specification, ATPD 2291.

Thus, we find that the Army failed to timely and diligently prepare the performance specification and that this resulted in the noncompetitive procurement of the EESS units, which is protested here. Contracting officials must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a noncompetitive position where they could reasonably take steps to enhance

¹⁹ The initial performance specification was apparently prepared by SAIC. See Supplemental Agency Report, Tab AS, Final Report for the HMMWV Engine Electrical Start System Study (Mar. 17, 1999), which includes a March 1999 Performance Specification and states regarding that specification that:

SAIC also evaluated requirements for an improved HMMWV engine start system, and developed a new performance-based specification emphasizing end-user needs over detailed design requirements. The new specification includes most of the technical performance requirements of the earlier start system specifications, while resolving several discrepancies and shortcomings of the earlier documents. The new specification is intended as a basis for competitive procurement.

Id. at i.

competition. National Aerospace Group, Inc., *supra*, at 8. In short, we find that the Army's failure to engage in reasonable advanced procurement planning created its urgent requirements.²⁰

The protest is sustained.

We recommend that the agency promptly undertake a review to determine the number of EESS units needed to satisfy its immediate urgent requirement, as documented in its justification, and not acquire more than that number. Until that determination is complete, the agency should take steps to limit the further incurrence of costs under the protested contract. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2001). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision.

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²⁰ SSI also complained that the Army did not consider using the older protective control box to satisfy its urgent needs until a competitive acquisition of the EESS could be conducted. In this regard, the Army had existing contracts for the protective control box to support the Marine Corps, which intended to continue use of this system in its HMMWVs. Although the record reflects some early consideration of this option by the Army, the agency ultimately, and we think reasonably, determined that it was not sensible to purchase additional units of a system that it would not further support.