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

B-194445 September 9, 1981

The Honorable Louis F. Oberdorfer
The United States District Court
for the District of Columbia

Dear Judge Oberdorfer:

We refer to your order dated June 29, 1981 regarding Aero Corporation v. Department of the Navy, Civil Action No. 79-2944, asking us to review requests for reconsideration filed by the Navy and Lockheed Corporation in response to our letter of June 5, 1981.

Essentially, the Navy and Lockheed seek correction of what they state are factual and conceptual errors reflected in our June 5 opinion. They ask for a conference in order to explain their position to us more fully. As explained below, we affirm our earlier views.

Our June 5 letter dealt with the Navy's plans to order the overhaul of additional C-130 series aircraft from Lockheed in connection with the Navy's C-130 Service Life Extension Program (SLEP).

We concluded that the Navy had not justified placing additional noncompetitive SLEP installation orders with Lockheed; that the Navy should attempt to compete SLEP installation for as many of the remaining aircraft as possible, and that further orders should be placed with Lockheed only on an individual airplane-by-airplane basis as necessary to meet specific, urgent schedule requirements. In this connection, we found that the record did not support the Navy's assessment of the time which would be required to prepare so-called Military Specification (Mil. Spec.) kits which would be used if SLEP installation were performed by a firm other than Lockheed. The Navy contended that use of kits would be essential if SLEP were performed by a contractor other than Lockheed in order to control risk and to assure that the Navy receives a uniform, standardized product.

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Our conclusion that the Navy had not adequately justified continued sole-source SLEP installation awards was based on findings: (1) that, in light of the Navy's examination of initial SLEP performance at Lockheed, the record did not show that three to four years would be required to design, assemble and validate kits tailored for use by experienced C-130 maintenance contractors such as Aero, but showed at most that one to one and one-half years might be needed, and (2) that the time required to obtain parts for the kits was not a factor precluding competition.

We also noted, in response to a question asked in your February 26 order, that the Navy has an express regulatory duty under Defense Acquisition Regulation (DAR) § 3-101(d) to take appropriate steps to avoid noncompetitive follow-on procurements, where as here it has made an initial noncompetitive award, if competition for its follow-on requirements is possible. While such steps could include the acquisition of parts, data, and tooling, we did not express an opinion regarding specific steps which should be taken, it being our view that it was for the Navy to determine in the first instance how it can best meet its legal responsibilities.

In its request for reconsideration, the Navy insists that its determination that kits would require a minimum of three years to develop was rationally founded and that by disagreeing with it we substituted our judgment for that of cognizant Navy technical and program personnel. According to the Navy, availability of needed parts remains a controlling factor in determining the time required to prepare kits. With respect to the time required to design and assemble kits once parts are available, the Navy argues that even though it has now identified much of the data, parts and problems it will encounter with SLEP: (1) this knowledge cannot be simply translated into suitable specifications for inclusion in kits, (2) Lockheed has only developed drawings and instructions for use by it, and (3) these drawings are far less detailed than would normally be provided with a kit.

Further, the Navy says we misinterpreted its position by failing to recognize that the objective of its monitoring study of work done by Lockheed to perform SLEP was to determine whether competition was possible, which it says is not the same thing as determining whether competition is feasible once time constraints are taken into consideration. Competition may be possible in the abstract, the Navy says, but not feasible within the time available.

Regarding the sequence in which kit development work would have to be performed, and therefore, the time needed to complete kit development, the Navy and Lockheed say that unless the Navy first completes kit design, then orders parts and assembles the kits, and fully verifies and validates the kit design with trial installations, the initial kits may be defective and delay would ensue while the kits are modified. The Navy says:

> "To assemble kits in a piecemeal fashion from raw data in the Navy's and Lockheed's possession, include parts on an ad hoc basis as they become available, and concurrently validate and verify that kit would not only undermine the very purpose of a kit, but would jeopardize the objectives which the imposition of a kit requirement is designed to accomplish."

Moreover, the Navy says, its contractor has "a right to expect the kit (as Government furnished equipment) to be complete, including all parts and instructions needed to successfully perform the installation."

Alternatively, the Navy argues that only Lockheed can assure that the SLEP schedule will be met because only Lockheed can meet unexpected parts needs by diverting parts from its production line should the need arise. It contends that such parts could in fact include long leadtime items. While it admits that 30 percent of the nonscheduled parts used during the SLEP monitoring study were drawn from Navy stocks, it says that some of these items are not presently identified or stocked in the Government supply system.

The Navy also reasserts its contention that it has no duty to immediately procure parts and materials which might be needed. In this regard, the Navy notes that the competition statute speaks of seeking competition "consistent with the nature and requirements of the supplies or services to be procured" and says that it knows of no statutory or regulatory mandate that an agency acquire specific goods to "create" competition.

In addition, Lockheed takes exception to our construction of the Navy's internal procedures regarding the preparation of Mil. Spec. kits, and disagrees with our recommendation that the Navy defer exercising further contract options except on an airplane-by-airplane basis.

In reaching our decision with respect to whether the kits the Navy says would be required can be prepared by the time they are needed, we recognized that the time needed to prepare such kits would depend upon a number of factors, including: (1) how detailed the technical instructions included in the kits would be; (2) how many and what types of parts would be furnished in the kits; and (3) whether and if so how scheduling constraints would be interrelated. We also considered the Navy's legal obligations with respect to kit design in light of the court's directions to the Navy to examine the extent to which "tailored kits" might be used to foster competition. The Navy's monitoring study reports state that any kits which are used would be tailored to the skill and experience level of the contractor believed qualified to install them. Taking the Navy at its word that tailored kits would be used, we stated in our June 5 letter that (as we understood what the Navy intended to do) the Navy would prepare kits varying in detail from task-to-task, depending on the Navy's assessment of the degree of difficulty and risk involved in performing each planned SLEP task.

The Navy and Lockheed now dispute this conclusion, contending in effect that they have no intention of tailoring kits to reflect the differences in difficulty and risk associated with particular tasks. Rather, they now indicate they plan to describe every task in equal

detail, without regard for the skill of experienced C-130 maintenance contractors, notwithstanding the impact this would have by increasing the time required to prepare the technical materials included in the kits.

Use of tailored kits reflecting only the minimum necessary technical detail is the lynchpin of our conclusion in our June 5 letter that it would be proper for the Navy to insist that contractors other than Lockheed use kits. Commonly, competition is enhanced if an agency can describe the work to be done under a contract in great detail because a larger class of offerors may be able to compete, or those which do may be able to do so more effectively. The more detail an agency seeks to provide, however, the greater the time which may be necessary to prepare for the procurement. Where, as here, time is of the essence and there are two potential classes of offerors, one which the agency believes can perform satisfactorily if given less technical data than the other, the level of detail insisted upon by the agency, if unrelated to its actual needs, can become an unreasonable impediment to competition.

We did not envision the Navy as writing detailed technical documentation without regard for its needs. Insofar as the record shows, preparation of kit documentation for use by experienced C-130 maintenance contractors should involve little more than a process of documenting tasks which Lockheed has performed on the initial quantity of C-130 series aircraft to undergo SLEP. Although there are a large number of separately identified SLEP tasks, many of the tasks are relatively simple and straightforward. Only a handful are identified in the SLEP monitoring study as complex enough to require special skill, tooling or care in any particular aspect of the required work. While the few tasks which can be considered to be generally complex (i.e., which potentially involve a number of complex or interrelated functions) involve a significant amount of effort and cost for parts, the sequence of sub-tasks, inspection criteria, tooling, and fit-up/clamp-up criteria which Lockheed has used is known, at least to Lockheed. In fact, were this not so the Navy would have no assurance that Lockheed was itself performing the work in a uniform, standardized manner.

Regarding potential schedule constraints (arising from causes other than parts availability), we recognized that the Navy argued that it would have to validate any kit design (by having Lockheed perform trial installations), or itself assume responsibility for the completeness and accuracy of the kit, but stated that the record did not indicate why the work which Lockheed would perform to prepare kits could not be overlapped, allowing, for example, validation to be accomplished with SLEP on some of the aircraft currently scheduled for SLEP at Lockheed. We assumed, of course, a validation requirement which would conform to the Navy's needs. Based on our review of the several different schedules submitted by the Navy for completion of kits, we found no basis for concluding that three to four years is needed to prepare kits if parts are available. We expressed the view that at most a year to a year and a half might be justifiable.

Both the Navy and Lockheed argue on reconsideration that parts are not available and in fact cannot be ordered until kit development is completed, and that they will take two to three years to obtain. Kit development, however, includes kit validation through trial installation, a process which also requires parts. Lockheed calculates that competition is impossible unless kits are completed within seven months -- a figure it computes by subtracting the three years (36 months) it insists are needed to obtain parts from the 43 months remaining before the last Navy C-130 series aircraft is scheduled to undergo SLEP. Were such reasoning to be literally applied, validation could not begin in less than three years after the kit design had been finalized, after which another three years would be needed to acquire parts for use in the finished kits which would then still have to be assembled. Actually, the schedules submitted previously by Lockheed and the Navy make no such assumption, but rather, assume that the time to acquire parts and to design and prepare kits will overlap. Moreover, Lockheed elsewhere states that parts can be ordered from a preliminary airframe change (AFC) instruction; a preliminary AFC could be prepared in a matter of months, as shown by Lockheed's own schedule data; and there are only a limited number of three-year parts, all of which are probably identified already.

The Navy, however, takes the argument further. Navy asserts that it can validate the complete kit only after full test kits are assembled (and thus, cannot overlap functions or limit validation to specific portions of the work considered especially risky) since, it says, a maintenance contractor would "expect" a complete and fully tested "kit."

Whatever may be said about the necessity for using a kit approach, it is not Aero which has demanded kits; Aero has insisted for several years that it is willing to compete without kits. Nor is elimination of all risk an essential prerequisite to competition, as the Navy seems to believe. Regardless of the degree of detail which can be worked into kits, there will be differences in the degree of schedule, technical and legal risk which will be assumed by different offerors in a competitive SLEP procurement if only because Lockheed, as the original equipment manufacturer, plays a special role as the designer and parts supplier. The place where such differences appropriately should be considered is in evaluating proposals in connection with a negotiated procurement.

We turn now to the question of parts availability.

Following a distinction drawn by the Navy in its reports, we differentiated in our June 5 letter between so-called "scheduled" and "non-scheduled" (or "unplanned") parts.

By scheduled parts we identified parts which the Navy expects to replace during SLEP and which included all long leadtime parts which could be identified as such on the record before us. Acquisition of these parts did not appear to be a problem at the time of our June 5 letter because it was our understanding (referred to without objection in connection with our March 27, 1981 decision in this matter) that the Navy had negotiated options with Lockheed covering all 29 remaining aircraft, thus providing a contractual basis through which the Navy could obtain scheduled parts.

By nonscheduled parts we refer to those parts which are required to replace parts which the Navy does not plan to replace but which are found during SLEP to be cracked, damaged or corroded, and thus, in need of replacement. We noted in our letter that notwithstanding the Navy's view that only Lockheed can avoid schedule delays altogether, the Navy had not treated the nonscheduled parts problem as insurmountable in its reports. Rather, it had assumed throughout the litigation that competition would be possible with kits.

The Navy continues to maintain that it has no duty to acquire parts to "create" competition. The Navy also says that award to Lockheed on a sole-source basis is justified in any event because it cannot otherwise be assured that, if long leadtime parts should be necessary, Lockheed would be willing to divert such parts from its inventory as it has done in some instances with regard to aircraft which have undergone SLEP.

In response, Aero argues that parts were never an issue in this litigation because parts must be obtained regardless of who installs them, because nonscheduled parts are nothing more than the same kind of parts which the Navy routinely furnishes to maintenance contractors, and because Lockheed can be required to provide the parts under the Defense Production Act of 1950 (50 U.S.C. Appendix §§ 2061, et seq. (1976)).

We agree with the Navy that it is not required as a general rule to acquire Government-furnished material in order to "create" competition. However, the Navy's normal practice in situations such as this is to provide parts. Moreover, SLEP involves a parts procurement -- from Lockheed for installation by Lockheed, if not by someone else -- and a Government agency may be required to break out portions of its requirements for separate procurement in order to facilitate competition where competition is possible as to only a portion of them. Interscience Systems, Inc.; Cencom Systems, Inc., 59 Comp. Gen. 438 (1980), 80-1 CPD 332, aff'd. 59 Comp. Gen. 658 (1980), 80-2 CPD 106.

Further, although it would not be possible to break out the SLEP installation requirement unless the Navy could obtain parts separately, it appears that the Navy should be able to do so.

Lockheed, in documents it has filed in this matter has not asserted that it is unwilling to cooperate with the Navy regarding parts requirements are met were another firm awarded a SLEP installation contract. It has advised the Navy that it would not feel obligated in that event to furnish parts on the same schedule it would otherwise (Lockheed and the Navy have agreed that if Lockheed performs the work they will accelerate the work, performing SLEP on some of the aircraft faster than the Navy originally projected) and it has advised the Navy that it cannot give it an across the board

advance guarantee regarding parts availability. It has cooperated, however, with the Navy in the past whenever asked to prepare engineering change proposals to support a kit-based program, and it has indicated to the Navy that it will continue to provide such support in connection with a kit-based SLEP program.

In any event, under 15 C.F.R. pt. 350,[1] the Government may award "mandatory acceptance contracts" under a procedure implementing section 101 of the Defense Production Act of 1950 (50 U.S.C. Appendix § 2071 (1976)), which provides in material part that:

> "The President is authorized * * * to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance * * *." (Emphasis added.)

The Navy as a defense agency (see 15 C.F.R. pt. 350 Schedule I) is authorized to place orders for needed parts (15 C.F.R. pt. 350 §§ 2(p), 3, 6) which must be given precedence by contractors, who ordinarily must fill orders from products or materials in inventory. 15 C.F.R. pt. 350 § 7(e). (For a fuller discussion of the history and past application of the Act, see Eastern Air Lines, Inc. v. McDonnell Douglas Corporation, 532, F.2d 957 (5th Cir. 1976)).

Finally, we briefly consider several incidental issues raised by the requests for reconsideration.

The Navy and Lockheed argue that, in effect, our June 5 decision reverses an earlier decision (Aero Corporation, supra (59 Comp. Gen. 146)) regarding the C-130 SLEP program. There we reviewed at this court's request a protest filed by Aero against award of the initial Navy C-130 contract to Lockheed.

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[1] The provisions of part 350 of title 15 were transferred from title 32A, pt. 651 by the Office of the Federal Register as announced in 43 Fed. Reg. 44575, July 1, 1978.

That case is clearly distinguishable. There we: (1) recommended that the Navy monitor initial performance at Lockheed (a recommendation reflecting the Navy's responsibility under DAR § 3-101(d) to avoid wherever possible the need for a noncompetitive follow-on award) and (2) specifically limited our approval of a sole-source award to an initial quantity of aircraft. We expressly pointed out in that decision that knowledge gained from actual observation of SLEP might permit competition for SLEP follow-on requirements, reflecting our view that there is a significant difference between a sole-source determination based only on an agency's judgment concerning problems which may be encountered in an untried program and such a determination once it becomes possible to negotiate on the basis of actual experience.

As indicated, Lockheed also objects to our recommendation that the Navy exercise further contract options on an airplane-by-airplane basis and only if it is unable to complete a competitive procurement in time to meet specific schedule requirements. According to Lockheed, our recommendation if followed would require an adjustment to prices negotiated under the last portion of the current noncompetitive Lockheed contract (which as indicated in our March 27 decision contains one five aircraft option quantity for a lot of KC-130F airplanes). Further negotiation would also be required with respect to the follow-on contract, which Lockheed says has also been written to contain optional quantity lots. To renegotiate these terms, Lockheed adds, might have an impact on price and schedule terms.

Nothing in our recommendation was meant to prevent the Navy from ordering SLEP for more than one airplane at a time, provided the Navy can justify a sole-source award for each airplane ordered. The intent of our recommendation was to assure that sole-source SLEP installation would be limited to those airplanes which are critically needed before a competitive award can be made. Use of a contract providing for annual optional quantity lots would be consistent with the intent of our recommendation, provided an accelerated contract schedule is not used (i.e., the schedule reflects only

the Navy's critical needs) and provided it is understood by the parties that the remainder of any lot will be terminated for the Government's convenience once a competitive award to another firm is made.

As indicated, the Navy and Lockheed have requested a conference in order to further explain their views. A request for a conference in connection with a request for reconsideration is not accorded as a matter of right or privilege, since our bid protest procedures do not explicitly provide for conferences on a request for reconsideration. Serv-Air, Inc. -- Reconsideration, B-189884, March 29, 1979, 79-1 CPD 212. Rather, a decision to conduct a conference in such circumstances is to be resolved by our Office as a matter of discretion. Such requests normally are not allowed if the matter can be resolved without a conference. Serv-Air, Inc. -- Reconsideration, supra; Slack Associates, Inc. -- Reconsideration, B-195305, October 27, 1980, 80-2 CPD 319. In the circumstances presented in this case, we do not believe a conference is necessary.

In closing, it may be useful to comment on one additional aspect of the Navy's argument on reconsideration. Concerning the parts problem the Navy says that, assuming it has a duty to order parts, it should be permitted to first compete SLEP, since kits (and the cost of preparing kits) are not required should Lockheed be selected.

The underlying assumption the Navy makes, that kits would be prepared first, is the Navy's; our Office has never indicated that the Navy must prepare kits before conducting a competitive procurement. If the Navy will prepare a solicitation immediately, or after completing a preliminary AFC, there is no impediment of which we are aware preventing it from conducting a negotiated procurement within the next few months, in connection

with which it could properly weigh the relative risks and costs it would incur using proposed alternative approaches.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

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The Honorable John F. Lehman
The Secretary of the Navy