Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: **Protest of J & J Electronic Systems**
Pursuant to Purchase Order Nos. 03251 and 04089

Docket No.: **05-ODRA-00340**

Appearances:

For the Protester: J & J Electronic Systems: Mr. Jan Goldberg

For the Agency: A. Lester Haizlip, Esq., Senior Attorney
FAA Mike Monroney Aeronautical Center

I. Introduction

J & J Electronic Services Incorporated ("J & J") filed this bid protest ("Protest") on March 7, 2005 challenging the award of two Purchase Orders by the Mike Monroney Aeronatical Center, of the Federal Aviation Administration ("FAA"). The Purchase Orders were issued to Flight Light Incorporated ("Flight Light") for various quantities of the Godfrey Circuit Card ("Card") used to provide runway lighting for the Godfrey Airport Landing System. Honeywell Systems Incorporated ("Honeywell") reportedly owns the proprietary rights to the Card, and advised the Center that it recently gave a license to manufacture the item to Flight Light. J & J challenges the two single source Purchase Order awards to Flight Light contending that J & J submitted a lower priced quote for this item, and offered the "best value" since its quote included the cost of providing the Center with technical drawings for the Card. In its Comments on the

Agency Response ("Comments"), J & J also contends that it should be permitted to compete for future awards of this item.

For the reasons set forth herein, the Office of Dispute Resolution for Acquisition ("ODRA") recommends that J & J's protest be denied. The ODRA further recommends that the Center consider competing its future needs for this item.

II. Findings of Fact

1. Pursuant to its mission to support aviation safety, the Center requires the Godfrey Circuit Cards to provide runway lighting for the FAA's Godfrey Airport Landing System. *See Brief in Support of Agency Response ("AR")*, page 1, ¶ 1.A. The Card currently is identified by its assigned national stock number (NSN) 5998-01-165-1914. *Id*. The Card was originally manufactured by Grim Incorporated. *See AR, Exhibit J*, page 13. According to the Center, this Card has been single sourced to Honeywell "for more than ten (10) years" because the Center believes that Honeywell owns the drawings and specifications necessary to manufacture this item. *See Brief in Support of AR*, page 2, ¶ 1.B; *See Statement of General Engineer*, page 1.

2. The record reflects that both the Center and Honeywell believe that the Godfrey Circuit Card and its "designs" are the "proprietary property of Honeywell, Inc." *See AR, Exhibit L*, page 1.

3. The record shows that the Center historically has struggled to maintain its stock of the Card. According to a January 30, 2001 "Technical Assist Response," the "absence of schematic drawings precludes component level repair operations" of existing Cards by the Center engineers. *See AR, Exhibit J*, page 13. In addition, the Center has historically been unable to physically dismantle the Card into its component parts because of epoxy. *Id.* The record also shows that attempts to

secure other sources to repair or manufacture this Card have either been unsuccessful or not cost effective. *Id*.

4. On May 3, 2004, and July 8, 2004, the Center's item manager ("Item Manager") issued two single source Purchase Orders to Honeywell for small quantities of the Card. *See Brief in Support of AR*, pages 1, ¶ 1.B, and page 2, ¶1.F. J & J reports the Item Manager advised it that although the Center requested 16 Cards in May, Honeywell was only able to provide a quantity of 10. *See Protest*, page 2; Comments, page 2. J & J also reports that the Item Manager advised it that she had subsequently issued a second request for an additional quantity of 10 Cards from Honeywell, but that the company was only able to deliver 6 Cards. *Id.* In effect, according to J & J, of the total 26 Cards requested by the Center, only 16 were able to be procured.

5. By letter dated June 22, 2004, Honeywell advised the Center that it was closing two of its manufacturing facilities located in California and Canada by the end of September 2004, but that Honeywell "would continue to fulfill current orders and contractual agreements" for its products, and would also "communicate transition plans directly to [the Center] over the coming months." *See AR, Exhibit L*, page 3.

6. By letter dated August 16, 2004, Honeywell advised the Center that its production of items for "airport productivity, safety and control systems" would be relocated to Honeywell's headquarters in Germany, and consolidated with the company's other "airport lighting and controls business." *See AR, Exhibit L*, page 2. Honeywell further advised the Center that it would "continue to support selected current production of products that are not commercially available" by means of a "customer support system" which it had established in California to "support and service North American Airport Installations" including the Center. *See AR, Exhibit L*, page 1.

7. That same day, the Item Manager submitted a Request for Technical Assistance ("RTA") to the Center's designated Equipment Specialist for this item which advised that the Godfrey Circuit Card "is now obsolete without replace[ment] from the vendors" and asked if the Center's designated engineer ("Designated Engineer") "can repair with the drawing or if this Card will need to be re-engineered." *See AR, Exhibit J,* page 10. The Item Manager also advised that the agency's supply shortage of this item—a "problem" first reported in 2001—"has not been corrected" and that "a good source to repair or procure this card" was needed. *Id.*

8. In the Fall of 2004, J & J contacted the Center "to see if there were any items [J & J] might have the chance to bid on." *See Statement of General Engineer,* page 1. The record shows that the President of J & J is an engineer who formerly worked at the Center. *See Brief in Support of AR,* page 17. As a result, the Protester is very familiar with the Center's staff, technical engineering requirements and the FAA procurement rules. *Id.; Comments,* page 1. On October 1, 2004, after consulting with the Item Manager, the Designated Engineer for this item reports that he provided J & J with two schematic drawings of the Card and requested a price quotation. *See Statement of General Engineer,* page 1.

9. On November 17, 2004, the Protester submitted two price quotations to the Center to manufacture quantities of 10 and 15 Cards. *See Statement of General Engineer, Attachment 2.*

10. On December 8, 2004, the Item Manager submitted a second "RTA" to the Center's designated Equipment Specialist which again asked for a new source for the Card. In the RTA, the Item Manager reported that Honeywell had advised her that it would no longer manufacture the Card:

> This is a . . . Circuit Card that is now obsolete without replacement from Honeywell. Honeywell had enough assets to make 6 cards for [the] FAA and then were going to stop

> making this card. I now have 5 of the cards left with a demand of 12 per year. This NSN has had two Technical Assistance completed, TE-1038 and TE-1122, and we were told to go to Honeywell to have cards made and now I need new source to procure stock.

See AR, Exhibit J, page 4.

The Item Manager also reported that technical drawings of the Card were "not available". *Id.* The Equipment Specialist forwarded the RTA to the Designated Engineer for this item, who tasked a Contract Engineer to investigate the Center's options. *See Statement of General Engineer*, page 1.

11. On December 10, 2004, after completing his review, the Contract Engineer confirmed that "Honeywell no longer produces this part" but reported that Honeywell had advised that it still owned the "drawings and specifications to produce this [Card]." *See AR, Exhibit J,* page 2. The Contract Engineer also reported that "Honeywell had signed a licensing agreement with Flight Light to produce parts previously made by Honeywell" and had provided Flight Light with the "necessary drawings and specifications to produce parts previously made by Honeywell." *Id.* The Contract Engineer also provided the Item Manager with a Flight Light price quotation to provide 10 Cards. *Id.*, page 3.

12. On December 20, 2004, J & J sent the Designated Engineer a proposed "Statement of Work" for 10 Cards. *See Protest, Exhibit 1; Statement of General Engineer,* page 1. J & J proposed providing the first Card as a first article testing "sample" and promised delivery of the remaining 9 Cards within 2 weeks of the agency's completion of the testing. *Id.*

13. Shortly after receiving the December 20, 2004 submission, the Designated Engineer contacted J & J and reported that the Center could not "give J & J or any company the chance to build" the Card because "Honeywell . . . confirmed that they still own the drawings and specifications to produce" the Card. *See Statement of General Engineer,* page 1.

14. On January 10, 2005, J & J sent a letter to the Designated Engineer advising that the Center's concerns about Honeywell's claimed proprietary interests in the Card should not preclude a purchase order award to J & J. *See Statement of General Engineer, Attachment 5.* The Protester argued that Honeywell had "by inference . . . relinquished their proprietary rights to their technical data" because the company had advised the Item Manager that it was closing the facilities where the Card was manufactured. *Id.*, page 2. According to the Protester, a "window in time where new sources could be sought began in May of 2004" because "[b]y inferring that they would no longer support the product, [Honeywell] left it to the discretion of the FAA to either seek out new sources or do nothing." *Id.*, page 3. The Protester also advised that Honeywell's claimed "[p]atent rights are not a consideration" since the technical architecture of the Card has been rendered obsolete by current technology. *Id.*, page 2. Claiming that it could manufacture the Card for less money than Flight Light, and emphasizing that its submitted quote "included the artwork as a deliverable" so that the "FAA could have the boards made by any . . . [Card] manufacturing company," J & J urged the Designated Engineer to award it a Purchase Order for the Card. *Id.*, page 3.

15. On January 28, 2005, the Center awarded a Purchase Order to Flight Light for 10 Godfrey Circuit Cards in the amount of $21,177.50. *See AR, Exhibit C*, pages 4-5. On February 28, 2005, Flight Light received a second Purchase Order for 15 additional Cards from the Center in the amount of $32,225.00. *Id.*, pages 1-2.

16. By letter dated April 6, 2005, Honeywell responded to a contracting officer's inquiry by advising the Center "that the items and designs" for the Card "are the proprietary property of Honeywell." *See AR, Exhibit L*, page 1.

17. In early March 2005, J & J learned of the January and February Flight Light Purchase Order awards and timely filed this protest at the ODRA on March 7, 2005.

III. Discussion

In reviewing bid protests, the ODRA determines whether a contract award decision has a rational basis, is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence. *Protest of Royalea'L Aviation Consultants, 04-ODRA-00304; Protest of IBEX Group Inc.,* 03-ODRA-00275; *Protest of Computer Associates Inc.,* 00-ODRA-00173; *Protest of Information Systems and Networks Corporation,* 98-ODRA-00095 and 99-ODRA-00116, *affirmed* 230 F.3d 52 (DC Cir. 1999). The Protester bears the burden of proof under this standard. *See Protest of L. Washington & Associates, Inc.,* 02-ODRA-00232; *Protest of Glock, Inc.,* 03-TSA-003.

A. The Single Source Purchase Order Awards to Flight Light

According to the Acquisition Management System,[1] the FAA's acquisition policy is to provide for reasonable competition among interested firms. *See Wilcox Electric, Inc.,* 96-ODRA-0001. The goal of this acquisition policy is to acquire the most advantageous solution to meet the FAA's mission needs. *Id.* While the "preferred method" of procurement is to compete requirements among vendors, contracting with a single source is permitted under certain circumstances when it is in the "best interest" of the FAA and the rational basis for the single source award is documented. *Id.; see also* AMS §§ 1.4.2 and 3.2.2.2. Under the AMS, having only one source available to satisfy FAA requirements within the specified time frame justifies a single source award. *See* AMS § 3.2.2.4. The AMS also permits single-source contracting "when necessary to fulfill the FAA's mission." *See* AMS § 3.1.3. Because the AMS favors competition, any decision to award a single source contract must have a documented rational basis and will be

[1] The 1996 Department of Transportation Appropriations Act, Public Law 104-50, exempted the FAA from federal acquisition laws and regulations, including without limitation, the Competition in Contracting Act of 1984 and the Federal Acquisition Regulations, and directed the FAA to develop an acquisition management system that addresses the unique needs of the agency and that provides for more timely and cost-effective acquisitions. The FAA responded to this directive by developing the Acquisition Management System ("AMS"), which was adopted by the FAA on April 1, 1996, to govern FAA procurements. AMS § 3.1.2.

subjected to close scrutiny. *See Raisbeck Commercial Air Group, Inc.*, 99-ODRA-00123, *citing Wilcox Electric, Inc., supra.*

Based on the well-documented record in this case, the ODRA concludes that the Center has demonstrated that the January and February 2005 single source Purchase Order awards to Flight Light had a rational basis. First, as noted above, the record shows that despite several attempts to locate alternate sources for the Card, the Center had been historically unsuccessful in this quest. Second, the record shows that both before and after these purchase order awards were made, the Center contacted Honeywell concerning its proprietary interests in the Card. Honeywell confirmed each time that it held an exclusive proprietary interest in the Card—which was consistent with the Card's established procurement history, indicating prior sole-source awards to Honeywell for various quantities of this item. *See Brief in Support of AR*, page 9; *see also AR, Exhibit E*. Since Honeywell represented that it continued to maintain a proprietary interest in the Card, and because Honeywell also advised the Center that ***only*** Flight Light held a license to produce this item, the Center reasonably determined that the Card could legally only be procured from one source. *See Wilcox Electric, Inc., supra (single source award justified where the awardee was the only technically competent vendor in a position to deliver civil aviation navigation system on time and within established budge).*

Although J & J has since made an argument that Honeywell may no longer hold any colorable claim to the Card due to an expired patent, that argument was not before the Center when it made the two Flight Light single source Purchase Order awards, and in any event, the record does not provide a basis that would permit the ODRA to adjudicate the patent rights of competing parties in the context of this bid protest. Moreover, at the time of the January and February 2005 purchase orders, the record shows that the Center had been experiencing a Card shortage since at least the early Summer of 2004[2]—and that each of the Item Manager's requests for more sources to repair or manufacture the Cards had been unsuccessful. In this regard, the record shows that the Item Manager executed clearly written "sole source justifications" which relied Honeywell's

[2] *See Statement of General Engineer*, page 1.

representations that the Card could only be procured from its licensee, Flight Light, in compliance with the AMS. In addition, there was no evidence before the Center that J & J could manufacture the Card in time to replenish the Center's shrinking supply, particularly given its status as a new source. Under these circumstances, and particularly given its dwindling Card supply, the two single source Purchase Order awards to Flight Light had a rational basis in that they were necessary and justified.

B. Future Requirements for the Godfrey Circuit Card

In its Comments, J & J disputes Honeywell's claimed proprietary interest in the Card by arguing that Honeywell's patent for this item has expired. As a general rule, most United States patents expire 20 years after they are filed.[3] Once expired, any party may use the invention without the owner's permission. J & J also questions whether this Card is still proprietary to Honeywell since many of the Card's technical components—*i.e.,* the Card's extremely slow modem speed—have long been rendered obsolete by new technologies.

Except for summary representations that the Card and its designs continue to be "proprietary property," the record contains no evidence to substantiate whether or not Honeywell still holds a valid proprietary interest in the Card. For example, no copy of the Card's patent has been provided by any party, nor do the two technical drawings set forth in the record contain any reference to Honeywell or reflect any other proprietary interest. This is significant because as pointed out by J & J in its Comments, it is often standard practice among vendors and manufacturers to protect their proprietary rights in a technology or item by marking technical data and drawings with some kind of proprietary legend or identification. *See Comments,* page 12.

[3] The term of a patent determines the scope of potential infringement—*i.e.,* one cannot infringe an expired patent. *See Golan v. Pingel Enterprises,* 310 F.3d 1360, 1371 (Fed. Cir. 2002) (*noting that an expired patent is an unenforceable one).* On June 8, 1995, the United States patent laws were amended to change the term of a patent from 17 years measured from the date the patent is issued to 20 years measured from the filing date of the earliest U.S. application for which priority benefit is claimed. Applications that were filed on or after June 8, 1995 have a 20 year term measured from the date of filing. All patents that were in force on June 8, 1995, or that issued on an application that was filed before June 8, 1995, have a term that is the greater of the 20 year term or 17 years from the patent grant. *See* 35 U.S.C. § 154(c)(1) (2000).

J & J's Comments emphasize at least seven key technical features or components of the Card which are not identified in either of the Center's two schematic drawings, but which the Protester has been able to identify and incorporate into its technical drawings—or "artwork"—which it has produced so that it can successfully manufacture the Card. *See Comments*, pages 4-6. J & J also asserts that it does not need a sample Card or require any further technical assistance from either the Center or Honeywell to manufacture the Card, largely because of a well-described reliance on commercially available software that has enabled the Protester to reverse engineer this item. Based on the record and J & J's Comments, the ODRA recommends that the Center consider competing future requirements for this Card. J & J and possibly others may be viable manufacturing sources for this item.[4]

In this regard, it has long been recognized that an acquisition may go forward and that all potential sources should be permitted to compete for a contract regardless of a patent infringement allegation or concern. This is because under federal law, government contractors are relieved of liability for infringing patents during their contract performance; specifically, 28 U.S.C. § 1498 is intended to give patent owners an adequate and effective remedy for infringement of their patents, while saving the government from having its procurements delayed pending litigation of a patent dispute. *See Tracore Development Incorporated*, B-231774; B-231778, July 20, 1988, 88-2 CPD ¶ 66 *citing* 28 U.S.C. § 1498.[5]

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[4] Under the FAA's Patent Indemnity clause, a contractor without a proprietary interest such as J & J obligates itself to indemnify the FAA against the infringement of any patent arising from the contractor's performance of the contract. Using this clause places the financial risk of patent infringement on the offerors—who are expected to take the uncertainties or risks of such litigation into account in computing their prices. *See Barrier Wear*, B-245063, Nov. 23, 1990, 90-2 CPD ¶ 421. The FAA's Patent Indemnity clause is set forth at http://204.108.10.60/conwrite/wSsearchlist.cfm, and is essentially identical to the one used in procurements subject to CICA, which is set forth in the FAR at 48 C.F.R. § 52.227-3.

[5] While the CICA standard of "full and open" competition is not applicable to FAA acquisitions, like CICA, the AMS similarly favors a policy of competition and outlines a clear preference for procuring products and services from among two or more sources; specifically, the AMS calls for the FAA to "provide reasonable access to competition for firms interested in obtaining contracts." AMS § 3.2.2.2; *Consolidated Protests of Camber Corporation and Information Systems & Networks Corporation*, 98-ODRA-00079 and 98-ODRA-00080.

IV. Conclusion and Recommendation

For the reasons set forth above, the ODRA denies the Protest but recommends that the Center consider competing its future requirements for the Godfrey Circuit Card.

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APPROVED:

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