The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

Matter of: Mine Safety Appliances Company

File: B-227839

Date: July 8, 1987

## DIGEST

1. General Accounting Office will dismiss protest which raises issue already decided by a court of competent jurisdiction.

2. The regulations do not require an agency to make an award based on an unsolicited proposal just because that proposal meets the criteria necessary for consideration of an unsolicited proposal.

## DECISION

Mine Safety Appliances Company (MSA) protests the Army's decision to exclude it from competing for award of a contract to produce chemical/biological masks under request for proposals (RFP) No. DAAA15-87-R-0035. We dismiss the protest.

In 1982, as the first phase of a program to develop a new design for the chemical/biological mask used by soldiers, the Army awarded contracts to three firms, including MSA, to design and produce a prototype mask; in the second phase of the program, the Army awarded contracts to only two of the firms, excluding MSA, for production test items and development of a technical data package for the new design. The RFP at issue here is for production of masks based on the new design.

On January 12, 1987, the Army published a notice in the Commerce Business Daily (CBD) that the competition for production of the masks would be limited to the two firms which had participated in the second phase of the development program. In a justification dated January 15, the Army relied on 10 U.S.C. § 2304(c)(1) (Supp. III 1985), as amended by the 1987 National Defense Authorization Act, Pub. L. No. 99-661, as authority for restricting the competition.

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Before the 1987 amendment, 10 U.S.C. § 2304(c)(1) authorized using other than competitive procedures where the needed property or services were available from "only one responsible source"; as amended, the provision extends the authority to restrict competition to cases such as this one where, in the Army's view, the needed product or services are available from "only a limited number of responsible sources." The amendment did not take effect, however, until 180 days after its enactment on November 14, 1986, and the Army subsequently conceded that it was not in effect on January 15, when the initial justification for restricting competition for the mask procurement was issued. Consequently, on February 4, the Secretary of the Army issued a second justification for restricting the competition, based on his determination under 10 U.S.C. § 2304(c)(7) that it was necessary in the public interest to use other than competitive procedures.

On January 28, MSA filed suit in the U.S. District Court for the Eastern District of Virginia seeking a declaratory judgment and injunctive relief preventing the Army from excluding MSA from the mask procurement. MSA challenged the Army's action on several grounds, including its contention that excluding MSA violated the requirement for full and open competition in the Competition in Contracting Act of 1984 (CICA) and the implementing regulations. On May 1, the court granted the government's motion for summary judgment and dismissed MSA's complaint. The transcript of the court's ruling issued from the bench indicates that the court rejected each of the arguments MSA raised; with regard to the alleged violation of CICA, the court found that the Army "properly invoked the public interest exception" in 10 U.S.C. § 2304(c)(7). MSA has appealed the decision to the U.S. Court of Appeals for the Fourth Circuit.

In its protest filed with our Office on June 9, MSA states that in February 1987, after its lawsuit had been filed, it submitted a proposal to the Army in response to the RFP. By letter dated May 22, received by MSA on May 27, the Army advised MSA that it did not plan to award a contract to MSA based on its proposal because it related to the existing procurement for the masks under which competition had been restricted to two firms other than MSA. In its protest, MSA argues that the Army had no basis to reject its "unsolicited proposal" because its decision to restrict competition under the RFP was improper.

When a protest raises an issue that already has been decided by a court of competent jurisdiction, the court's decision

bars further consideration of the issue by our Office. See Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1986); Santa Fe Corp., 64 Comp. Gen. 429 (1985), 85-1 CPD ¶ 361, aff'd on reconsideration, B-218234.3, May 3, 1985, 85-1 CPD ¶ 499. Here, MSA's lawsuit and protest both challenge the Army's decision to exclude MSA from the procurement, based on MSA's contention that the Army improperly restricted the competition in reliance on 10 U.S.C. §§ 2304(c)(1) and (c)(7). In its protest, MSA casts its objection to the Army's action in terms of the propriety of the Army's refusal to consider its "unsolicited proposal" submitted in response to the RFP, in an apparent attempt to distinguish it from the allegation in its lawsuit that the Army had improperly restricted the competition; however, the underlying basis for MSA's complaint in both the lawsuit and the protest is the same, MSA's objection to the Army's rationale for excluding it from the procurement and restricting the competition to two other firms. Since the court's decision on that issue is binding on our Office, we dismiss the protest. See Monterey City Disposal Services, Inc., B-218624.3, Feb. 6, 1987, 87-1 CPD ¶ 128.

Finally, in its May 22 letter rejecting MSA's proposal, the Army, in addition to stating that MSA's proposal would not be accepted because the competition had been restricted to two other firms, also stated generally that a contract would not be awarded to MSA based on its proposal because it related to an "existing competitive procurement." MSA argues that under Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.507(a)(2) (1986), a contracting agency is allowed to reject an unsolicited proposal only when its substance "closely resembles a pending competitive acquisition requirement." Since the restricted procurement for the masks does not qualify as a "competitive acquisition," MSA argues, the Army could not reject MSA's proposal based on FAR, section 15.507(a)(2). FAR, section 15.507(a), only sets out the circumstances where an agency is required to reject an unsolicited proposal; it does not follow that in all other circumstances the agency must accept an unsolicited proposal, as MSA suggests. Rather, the decision whether to make award based on an unsolicited proposal is in the agency's discretion, and is proper only where the requirements set out in FAR, section 15.507(b) are met. In this case, we see no basis to object to the Army's decision not to make award to MSA based on its unsolicited proposal,

given that, as the court found, the Army properly restricted the procurement to two other firms.

The protest is dismissed.

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