



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Van Ben Industries, Inc.; Survival Products, Inc.; Defense Logistics Agency--
Reconsideration

File: B-235431.4; B-235431.5; B-235431.6

Date: January 29, 1990

DIGEST

Prior recommendation that contracting agency suspend performance on current contract, resolicit and terminate current contract if appropriate is modified on reconsideration where agency establishes urgent and compelling need for contract performance and advises that performance is substantially completed.

DECISION

The Defense Logistics Agency (DLA), Survival Products, Inc. and Van Ben Industries, Inc. request reconsideration of our decision in Survival Prods., Inc., B-235431.3, Nov. 16, 1989, 89-2 CPD ¶ 464. In that decision, we sustained Survival's protest of the award of a contract to Van Ben for the supply of solid fuel bars used for the emergency heating of food rations, under invitation for bids (IFB) No. DLA400-89-B-1599 issued by the Defense General Supply Center (DGSC). Van Ben argues that the decision is incorrect; Survival and DLA request reconsideration of our recommendations, which we now modify.

We sustained Survival's protest primarily because the solicitation contained ambiguous shipping requirements and, as a result of these ambiguities, each of the bidders proposed to ship the fuel bars by different methods at different costs, such that the relative standing of the bidders may have been affected. We recommended that DLA suspend performance of the Van Ben contract; reexamine its requirements concerning the shipping of the fuel bars; resolicit under shipping terms which would place bidders on a clear and equal footing; and terminate Van Ben's contract for the convenience of the government if under the resolicitation it is not the low responsive and responsible bidder. We also awarded Survival its costs of filing and pursuing its protest, including reasonable attorneys' fees.

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In its request for reconsideration, Survival asks that we find Van Ben's bid nonresponsive because of its proposed shipping methods and direct that the contract be terminated for the convenience of the government, and award made to Survival as the lowest, responsive bidder, without a resolicitation.

Van Ben takes issue with our reading of Military Standard 147C^{1/}, argues that the difference in price between the two proposals is not primarily due to the costs associated with the different shipping methods proposed, and argues that Survival's post-bid opening protest was untimely since our findings "make the packing provisions of the solicitation apparently and patently ambiguous."

DLA does not contest the merits of our prior decision. The agency advises that it has implemented the recommendation that it reexamine the shipping requirements for the fuel bars and that it is rewriting the solicitation clause to clearly describe its requirements in future solicitations, such as one for an estimated 17 million fuel bars which DGSC expects to issue in the near future. DLA also reports that it will implement our recommendation that it pay Survival's protest costs after Survival submits its fee request to the agency.

DLA does ask, however, that we withdraw our recommendation that it suspend performance under Van Ben's contract, resolicit, and terminate Van Ben's contract if it is appropriate. The agency advises that because of circumstances and the urgent need for the fuel bars, it is impracticable to implement this recommendation.

DLA advises that Van Ben's contract does not have a provision authorizing the government to suspend performance short of a termination for the convenience of the government, which would place DGSC in an unacceptable supply position. The contract was awarded to Van Ben on July 27, 1989, while Survival's protest was pending, under the urgent and compelling circumstance exception to the stay provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(2) (Supp. IV 1986). At that time, DGSC had 140,367 fuel bars on hand, back orders for 4.9 million bars, a projected quarterly demand for 1.3 million bars and an anticipated requirement for 3.2 million bars for a training exercise. DLA states that although deliveries

^{1/} Military Standard 147C was included in the solicitation and established the methods, materials and techniques to be employed in packing and shipping loads of military supplies.

under the contract have reduced this shortage, the urgent and compelling circumstances that justified the award initially have not significantly changed. Now, with performance more than 50 percent complete, DGSC has only 2,538,458 fuel bars on hand, back orders of 7,350,355 bars, and a monthly requirement of 1,006,846 bars, making a total demand of 8,357,199 bars. According to the agency, the current shortfall (based on total demand minus bars on hand) equals 5,818,741 bars, which would only increase during the time required for a resolicitation and because of the production lead time needed by a new contractor. Since most of its requirements for the solid fuel bars are for the Marine Corps, DLA states, a failure to supply the necessary fuel could adversely impact the Corp's training and combat readiness needs and its preposition and war reserve requirements.

DLA also advises that if the Van Ben contract is terminated the agency will incur substantial termination costs which would approach the full contract price, making the total price of the acquisition unreasonable.

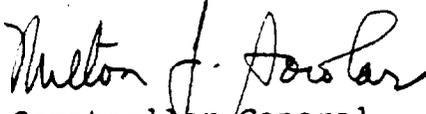
In view of the agency's explanation of the urgency of this requirement and the substantial performance of the contract, we agree with the agency that suspension/termination of the Van Ben contract and resolicitation of the requirement is not feasible. Department of the Interior; Presentations South, Inc.--Request for Reconsideration, B-229842.3, Aug. 15, 1988, 88-2 CPD ¶ 148; Southwest Marine, Inc., B-225686, May 14, 1987, 87-1 CPD ¶ 510. Accordingly, we modify our previous recommendation in accordance with DLA's request.

In view of this modification, our decision will no longer have any potential adverse impact on Van Ben's performance under its current contract and it would therefore serve no purpose to address the arguments made in its request for reconsideration.

Since, contrary to our expectation at the time we issued our prior decision, Survival will not have an opportunity to participate in a resolicitation for the remainder of this requirement, and since no other corrective action is appropriate, Survival is entitled to recover its proposal preparation costs, as well as the costs of pursuing its

initial bid protest, which were previously awarded.
4 C.F.R. § 21.6(d) (1989); Department of Health and Human
Servs.--Reconsideration, E-231885.2, June 2, 1989, 89-1 CPD
¶ 521. Our prior decision is further modified in this
regard.

The prior decision, as modified, is affirmed.

for 
Comptroller General
of the United States