



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Kollmorgen Corporation

**File:** B-242602

**Date:** June 5, 1991

Paul Shnitzer, Esq., and Robert P. Davis, Esq., Crowell & Moring, for the protester.  
Jeffrey I. Kessler, Esq., and Anthony B. Sconyers, Esq., Department of the Army, for the agency.  
M. Penny Ahearn, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in preparation of the decision.

### DIGEST

Agency reasonably determined that offerors which had received prior production contracts for items being procured, completed in-house testing and appeared to be making satisfactory progress under the contracts, satisfied solicitation provision restricting procurement to "producers with a proven ability to produce the item(s) under a previous procurement."

### DECISION

Kollmorgen Corporation protests the award of contracts to Lenzar Optics Corporation and Opto Mechanik, Inc. for sight assemblies for the M1A1 Abrams Tank, under request for proposals (RFP) No. DAAA09-91-R-0063, issued by the Department of the Army. Kollmorgen contends that neither awardee is a "producer with a proven ability to produce the item(s) under a previous procurement," as required by the solicitation.

We deny the protest.

The RFP solicited offers for two items, the gunner's auxiliary sight (GAS) and the commander's weapon station sight (CWSS). The Army issued the RFP to Kollmorgen, Lenzar, and Opto only, justifying less than full and open competition on the basis of urgency. The justification and approval document stated that only certain identified sources (which had previously been awarded contracts for the items)--Kollmorgen and Opto for the GAS and Kollmorgen and Lenzar for the CWSS--possessed the necessary production capabilities, technical expertise, and overall knowledge required to produce the items within the time frame required to support the tank production schedule.

Due to the urgency of the delivery schedule, the justification stated that there was insufficient time for first article testing (FAT), and that delay in the procurement would compromise the operational readiness of the tanks, a primary weapon system. The RFP also was amended to provide that "this request is issued as an urgent requirement and only producers with a proven ability to produce the item(s) under a previous procurement will be considered."<sup>1/</sup>

Kollmorgen, Lenzar, and Opto submitted offers in response to the RFP. Their unit prices for the required quantity of 171 each of the 2 types of sights were as follows:

	<u>GAS</u>	<u>CWSS</u>
Kollmorgen	\$5,875	\$3,165
Lenzar	No offer	1,808
Opto	4,200	No offer

Based on the prices offered, the agency made award to the low offerors, Opto for the GAS on January 25, 1991, and Lenzar for the CWSS on January 28.

Kollmorgen argues that the awardees should not have been considered for award because they did not meet the solicitation requirement for a proven ability to produce the items under a previous procurement. Kollmorgen recognizes that both awardees have existing contracts with the Army to produce the subject items, and that those contracts require the firms to pass FAT. Kollmorgen notes, however, that as of the award dates for this solicitation, neither firm had received first article approval or produced the items under a prior procurement; it asserts that FAT approval or production is necessary to meet the proven ability requirement.

We disagree. There was nothing in the RFP that made completed FAT, production, or delivery prerequisites for consideration of an offeror's proposal. The requirement speaks only in terms of a "proven ability to produce the item(s) under a previous procurement;" it contains no detailed criteria defining proven ability. Consequently, compliance with the requirement cannot be determined objectively beyond an offeror having been awarded a prior contract. Thus, as in Telex Communications, Inc., B-236981, Jan. 29, 1990, 90-1 CPD ¶ 120, cited by the agency, the proven ability requirement here was a

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<sup>1/</sup> While the RFP did not specifically identify this requirement as a special standard of responsibility, all parties have treated it as a condition that had to be satisfied to be eligible for award; we adopt this view.

general requirement, largely a judgmental matter for the agency's determination.

In concluding that this general requirement was met, the agency considered the progress the awardees had shown under their prior GAS and CWSS contracts, as well as favorable information previously obtained during the preaward surveys conducted prior to award of those contracts. Specifically, with respect to their progress under the prior contracts, the contracting officer took into account the facts that, at the time of award, Lenzar had begun prototype production of the CWSS and was expected to perform FAT during June 1991, while Opto had completed in-house testing of the GAS and was scheduled for FAT in April 1991. Based on these observations, the agency reconfirmed that FAT would not need to be included in the proposed contracts with Opto and Lenzar. In other words, the agency found that the awardees appeared to be making satisfactory progress under their production contracts for the CWSS and the GAS to warrant concluding that the firms met the proven ability requirement. We conclude that the Army's application of the less restrictive interpretation of the requirement was proper, see Computer Sciences Corp., B-213287, Aug. 6, 1984, 84-2 CPD ¶ 151, and find that the agency's determination that the awardees met the proven ability requirement was reasonable.<sup>2/</sup>

The protest is denied.

  
James F. Hinchman  
General Counsel

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<sup>2/</sup> While Kollmorgen contends that one of the agency's contracting personnel orally advised the firm that first article approval was required by the time of contract award, the agency has submitted an affidavit from the employee denying that the advice alleged was given to Kollmorgen. Furthermore, the contracting officer reports that she specifically advised Kollmorgen that the procurement would be competitive. In any event, it is well established that offerors who rely on oral advice that alters the written terms of the solicitation do so at their own risk. Air Inc., B-236334, Nov. 13, 1989, 89-2 CPD ¶ 455.