



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Golten Marine Co., Inc.--Reconsideration

File: B-228398.2

Date: April 18, 1988

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### DIGEST

Request for reconsideration is denied where protester essentially reiterates arguments initially raised and basically disagrees with original decision and therefore fails to show any error of fact or law that would warrant reversal or modification.

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### DECISION

Golten Marine Co., Inc., requests reconsideration of our decision in Golten Marine Co., Inc., B-228398, Dec. 22, 1987, 87-2 CPD ¶ 217, in which we denied or dismissed its protests against engine repair work on three vessels to be part of the National Defense Reserve Fleet by the United States Maritime Administration (MARAD). Golten had complained that Barber Ship Management, Inc., as agent for MARAD, had made an improper noncompetitive award for the subject ships' repairs, and alleged various procedural violations of the Federal Acquisition Regulation (FAR).

On September 8, 1987, Barber issued a solicitation for engine repair work for the vessels "Cape Diamond," "Cape Decision," and "Cape Domingo" with a September 15 bid opening date. Two bids were received and award was made to the low bidder on September 25. Golten telephoned Barber on September 25 to say that it never received a solicitation. By letter of September 30, Golten protested to Barber the failure of Golten to be solicited. On October 1 Golten filed its first protest with our Office concerning the nonreceipt of the solicitation. On October 6 Golten filed another protest with our Office and alleged that the specifications for spare parts in the September 8 bid package were contrary to the Buy American Act because the parts required were manufactured only in France. On October 8 Golten filed a third protest alleging an unauthorized sole-source award for engine start-up on the three vessels in issue. We denied or dismissed all three protest allegations.

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With regard to Golten's alleged failure to receive a bid package, we concluded that the record reasonably indicated that Golten actually did receive the correct bid package, but inadvertently lost or misplaced it. We stated that, in any event, Golten's nonreceipt of the IFB would not be a basis to sustain the protest absent a showing, not present here, that the agency made a deliberate attempt to preclude the bidder from competing, did not make a significant effort to obtain competition or failed to obtain reasonable prices.

We also found without merit Golten's contention that the contract for engine repair violated the Buy American Act by specifying use of foreign parts for repair work. We found that MARAD had made a required determination that available domestic spare parts might not fit properly which could affect ship performance and ultimately its missions during wars and emergency circumstances. We concluded that the use of foreign parts reflected MARAD's legitimate needs and was consistent with Barber's agreement with MARAD to use domestic products unless the products are not available in reasonable quantities and of satisfactory quality.

Finally, we found that the alleged sole-source award involved work by the foreign private seller of the ships to MARAD to meet the terms of the sale and thus was not a federal procurement subject to review by our Office.

We deny the request for reconsideration.

At the outset, we note that to obtain reversal or modification of a decision the requesting party must convincingly show that our prior decision contains either errors of fact or of law or information not previously considered that warrant its reversal or modification. See 4 C.F.R. § 21.12(a) (1987); Roy F. Weston, Inc.--Reconsideration, B-221863.3, Sept. 29, 1986, 86-2 CPD ¶ 364. Repetition of arguments made during resolution of the original protest or mere disagreement with our decision do not meet this standard. Id.

Initially, we address Golten's allegation that we were incorrect in concluding that the record reasonably indicated that Golten received a copy of the September 8 solicitation at issue. Golten contends that Barber's alleged failure to furnish it a solicitation was deliberate, and "that GAO [General Accounting Office] did not read or understand the comments of the parties or the documents in the record."

As indicated in our decision, the record established that Barber mailed a solicitation to Golten on September 8. A transmittal letter from Barber to Golten dated September 8 stated, in relevant part:

"Enclosed please find our Bid Specifications for Repair Work to be performed on the vessels: M/V Cape Diamond, Cape Decision and Cape Domingo."

Golten maintains that this transmittal letter refers to a solicitation for the installation of smoke detectors on those vessels rather than the solicitation for engine repairs. Golten refers to its letter to Barber dated September 10 as conclusive proof of the protester's contention that it did not receive the September 8 solicitation for engine overhauls, but another unrelated solicitation. The September 10 letter states, in relevant part:

"Golten Marine Co. Inc., will not submit a bid for installation of smoke detector on M/V Cape Diamond, Cape Decision, Cape Domingo and Cape Douglas."

We fail to recognize a connection between the Barber letter of September 8 concerning repair work and the Golten letter of September 10 which refers to the installation of smoke detectors on the same three ships and, in addition, on the "Cape Douglas." We do not agree with the protester that these letters serve as "contemporaneous documentation to prove Golten received the solicitation for the installation of smoke detectors on those vessels under cover of Barber's letter of September 8, 1987, rather than the solicitation for main engine overhauls on those vessels." To the contrary, we understand these letters to refer to two separate solicitations sent under separate cover as Barber's transmittal letter contains no reference to the "Cape Douglas" mentioned in Golten's letter of September 10. Furthermore, we are not convinced that Barber should have known, as the protester asserts, that Golten did not receive the solicitation for engine overhaul by the mere receipt of Golten's letter of September 10 referring to a totally different solicitation. Barber, as agent for MARAD, apparently sends many solicitations for a variety of services. Therefore, reference to one solicitation would not necessarily draw receipt of a completely different solicitation into question.

We agree with the protester that MARAD's reference regarding a September 10 solicitation for smoke detectors on the "Cape Ducato" to be irrelevant to the question of what solicitation was actually received by Golten on September 9. Our reliance in our prior decision on MARAD's representation

regarding "the smoke detectors solicitation" was misplaced since apparently there was more than one solicitation for smoke detectors. However, we do not find this misplaced reliance to be dispositive of whether Golten received the September 8 solicitation for engine overhaul. We refer to our discussion above in noting that Golten's argument about a solicitation for smoke detectors on the "Cape Douglas" does not show our finding was incorrect.

Contrary to the protester's allegation, in its request for reconsideration, we did not take issue with Golten's insistence that it failed to receive the engine overhaul solicitation. We did note, however, that Golten's position regarding the circumstances of the alleged nonreceipt was inconsistent. A sworn statement of the Secretary/Treasurer of Barber confirms that in a telephone call to Barber on September 25, Golten's representative initially advised it received no bid package. When advised that Barber had documents showing Golten's receipt of the solicitation, Golten claimed it received an empty envelope. When asked by the Barber representative why Golten had delayed so long in raising the issue of nonreceipt, Golten's representative stated that the envelope had contained the wrong bid package. Golten subsequently claimed that it received a bid package for smoke detectors. We find this to be a reasonable indication of inconsistency on the part of the protester as to what it did or did not receive from Barber which supports our conclusion that the record fails to show Golten's nonreceipt of the IFB in question.

In this connection, MARAD and Barber produced a delivery receipt, the carrier's log, a transmittal letter for the solicitation in question, and the sworn statement of a Barber official regarding a September 25 telephone conversation to establish that the engine overhaul solicitation was sent to Golten on September 8, 1987. The protester bears the burden of submitting probative evidence to prove its case, and this burden is not met where the only evidence is the protester's self-serving statements which conflict with the agency report. A. J. Fowler Corp., B-224156, Jan. 8, 1987, 87-1 CPD ¶ 33; Inter Systems, Inc., B-220056.2, Jan. 23, 1986, 86-1 CPD ¶ 77. While the record contains conflicting affidavits/statements from the parties, we conclude that the preponderance of the evidence indicates that on September 9, 1987, Golten received a solicitation package to bid on the engine overhaul of the "Cape Diamond," "Cape Domingo" and the "Cape Decision." See Great Lakes Roofing Co., Inc., B-228484, Feb. 2, 1988, 88-1 CPD ¶ \_\_\_\_\_, Boniface Tool & Die, Inc., B-226550, July 15, 1987, 87-2 CPD ¶ 47.

Also, as we noted in our prior decision, Golten's nonreceipt of the IFB would not be a basis for sustaining the protest. A procuring agency's failure to solicit a potential bidder does not provide a compelling reason for resolicitation absent a showing that the agency made a deliberate attempt to preclude the bidder from competing, did not make a significant effort to obtain adequate competition, or failed to obtain reasonable prices. Ansonia Copper & Brass, Inc., B-227002, July 23, 1987, 87-2 CPD ¶ 76; G&L Oxygen and Medical Supply Services, B-220368, Jan. 23, 1986, 86-1 CPD ¶ 78.

The protester asserts that MARAD proceeded in bad faith and that Barber's alleged failure to send the protester the solicitation was deliberate. Where agency bad faith is alleged, the protester must present supporting factual evidence; contracting officials are presumed to act in good faith and, in order to establish otherwise, there must be virtually irrefutable proof that the agency had a malicious and specific intent to harm the protester. Air Tractor, Inc., B-228475, Feb. 5, 1988, 88-1 CPD ¶ 115; Urdan Industries, Ltd., B-222421, June 17, 1986, 86-1 CPD ¶ 557. Again, the record simply does not support the protester's allegation.

Golten reiterates that there were procedural deficiencies in MARAD's conduct of the procurement at issue. Specifically, Golten alleges failure to provide adequate time to prepare a bid, failure to send the solicitation to all qualified bidders, and a failure to publish the solicitation requirement in the Commerce Business Daily (CBD).

We note, as indicated in our prior decision, that the procedure for the accomplishment of vessel repairs as administered by MARAD is set forth in 46 C.F.R. part 338 (1986). In brief, this procedure allows independent contractors to be listed and qualified on a yearly basis to make vessel repairs after their application for a Master Lump-Sum Repair Contract has been approved. Notice of the annual listing requirement is publicized in the CBD. Depending on geographical area and factors of scope and nature of work, location of vessel and time and expense involved in shifting and returning the vessel to its loading berth, MARAD exercises its administrative judgment to determine which contractors meet the requisites for a particular solicitation. Bid packages are then sent to all contractors holding a Master Lump-Sum Repair Contract which MARAD thinks can meet its needs and to any other firm expressing an interest in a particular solicitation. There

is no allegation by Golten that the agency did not comply with this procedure here, that a CBD notice was not issued for the master contract or that insufficient time was provided for qualifying for that contract.

The protester specifically alleges that MARAD failed to publish the subject solicitation in the CBD as required by the Department of Transportation FAR supplement. See 48 C.F.R. chapter 12, subpart 1205.4 (1986). As indicated in our prior decision, MARAD has devised the Master Lump-Sum Repair Contract procedure as the appropriate means to obtain adequate, full and open competition. Because of the volume of engine repair work required by MARAD, a yearly qualifying application for a Master Lump-Sum Repair Contract to make such repairs is required for all interested contractors. This application requirement is published in the CBD, and the requirement solicited here is purchased pursuant to that notice. Moreover, we concluded in our decision that the protester was sent a solicitation for the subject repairs so that the adequacy of the CBD notice is irrelevant.

To the extent Golten alleges insufficient time to prepare a bid for the engine repairs, we find this argument untimely. Our Bid Protest Regulations require that protests concerning solicitation improprieties shall be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1987). Since Golten did not raise the objection until after bid opening, this objection is untimely and will not be considered.

Golten next claims that MARAD has violated its regulatory procurement procedures in not sending the solicitation to all qualified contractors within the geographic region determined eligible to receive invitations for bids. See 46 C.F.R. part 338, section 4 (1986). We note only that the regulation and the Master Lump-Sum Repair Contract allows considerable agency discretion in determining which potential bidders are financially qualified and capable of performing all the work set forth in the specifications. We fail to see how MARAD's conduct on this matter prejudices the protester. We have determined that MARAD sent the subject solicitation to Golten and, absent any protests from other prospective bidders on the bidders listing, we must reject the protester's concern as immaterial to its protest.

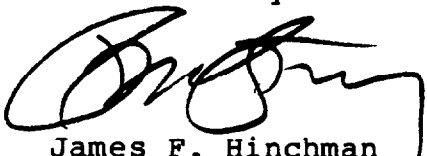
Golten also alleges that the solicitation is in violation of the Buy American Act by specifying the use of foreign-made spare parts. Golten further alleges that the GAO "has absolutely no factual support whatsoever" for our finding that the foreign-made spare parts requirement "represented the agency's legitimate needs." Golten's allegations of a Buy American Act violation are based upon its understanding of the Pielstick PC2 diesel engine and the availability,

from a firm based in Wisconsin, of spare parts which may fit the foreign-made diesel engines. The Barber-MARAD General Agency Agreement did not preclude the use of foreign items, such as spare parts, where they are not available in sufficient and reasonably available quantities and of satisfactory quality.

Contrary to the protester's allegation of GAO's lack of "factual support," our prior decision was based on the agency's finding that the domestic parts were not of satisfactory quality for use in these foreign made vessels. Given the agency's need that the vessels operate properly in critical situations, the foreign parts requirement reflected the agency's legitimate need. It was not our intention in the prior decision to make an independent technical evaluation of the domestic-end item, nor do we here discount Golten's "expertise" in dealing with Pielstick PC2 diesel engines as espoused by the protester's counsel. The record however, indicated that the agency had a legitimate concern in requiring foreign made engine parts and thus, we found sufficient support for the foreign-made spare parts requirement. While Golten continues to criticize this decision, this technical disagreement does not invalidate the agency determination.

As to Golten's repeated allegation that a contract to H. W. Ramberg, for engine start-ups on the three vessels may be a federal procurement, the record showed that this work was done pursuant to an "in-class" requirement of MARAD. The foreign seller of the ships must meet certain fitness/seaworthiness requirements ("in-class") before sale to the MARAD fleet is effected. It is the sole responsibility of that foreign seller to comply accordingly and any contracts entered into on behalf of such seller in its efforts to effect sale are of a private contractual nature. MARAD has advised our Office that this involves no federal procurement activity. The protester has not offered any new evidence which would refute the agency's position.

Golten's request for reconsideration is denied.



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General Counsel

