Hutchinson

The Comptroller General
of the United States

Washington, D.C. 20548

136546

Decision

Matter of: Abbott Products, Incorporated

File: B-231131

Date: August 8, 1988

DIGEST

1. Although Department of Defense (DOD) set-aside program for small disadvantaged businesses (SDB) does not contain a provision for an economic impact analysis of other small businesses affected by a total SDB set-aside, such an impact analysis is not prohibited and is within DOD's discretion to perform in attempting to reconcile the statutory goal of increasing SDB participation while also increasing overall small business participation, as well as maintain a sufficient industrial mobilization base.

2. Protest that urgent situation requiring other than competitive procedures was a result of lack of agency advance planning is denied where agency engaged in planning by attempting to procure the item through a total set-aside for small disadvantaged businesses, which was mandated by regulation, but agency plans were disrupted and failed to achieve the expected results.

3. Urgent sole-source award is reasonable where there is a critical inventory shortage and awardee is the incumbent currently producing the item and is the only firm which would not need to submit a first article prior to production.

4. Protester's allegation that it was unreasonably found to be nonresponsible is without merit where protester was not solicited in noncompetitive procurement based on urgency not because it was found nonresponsible but because there was insufficient time for the first article testing that would have been required of it.

DECISION

Abbott Products, Incorporated protests the sole-source award of a contract to the Delfasco of Tennessee Division of the David B. Lilly Company, Inc., under oral request for proposals (RFP) DAAA09-88-R-0565, issued by the United States Army Armament, Munitions and Chemical Command (AMCCOM), Rock Island, Illinois. The procurement is for the supply of 601,040 BDU-33 practice bombs, industrial

mobilization base items used by the Air Force for pilot proficiency training. Abbott contends that the noncompetitive award to Lilly, the incumbent contractor for the past 2 years, was improper because the award cannot be justified on the basis of an urgent and compelling need for the items. Abbott also argues that the procurement should have been conducted under a total set-aside for small disadvantaged businesses (SDBs) since at least two SDBs, itself included, are available to compete for the contract award.

We deny the protest.

This requirement was a portion of an original fiscal year 1988 requirement for 1,274,000 BDU-33 practice bombs, synopsized September 10, 1987, as a total set-aside for SDBs. The BDU-33 practice bomb is an industrial mobilization base item which has previously been procured pursuant to the industrial mobilization base exception to full and open competition, found at 10 U.S.C. § 2304(c)(3) (Supp. IV 1986). According to AMCCOM, the BDU-33 practice bomb has, historically, been competed among small businesses within the industrial mobilization base but has not been previously set-aside exclusively for small businesses. Lilly, one of four industrial mobilization base producers for the BDU-33 practice bomb, has been the sole producer of the item since April of 1986.

Use of a total SDB set-aside was required because Abbott and another SDB, both members of the industrial mobilization base, had submitted competitive prices for prior BDU-33 procurements. This special category of small business set-asides was established for the Department of Defense (DOD) in section 1207 of the National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986), which also established a goal for DOD of awards to SDBs of 5 percent of the dollar value of total contracts to be awarded for the fiscal year. DOD's interim regulations implementing this program, which were in effect at the time this requirement was synopsized in September 1987, required that an acquisition be set aside exclusively for SDBs if a contracting officer determined that there was a reasonable expectation that offers would be obtained from at least two responsible SDB concerns and that award would be made at a price not exceeding the fair market value by more than 10 percent. See 52 Fed. Reg. 16,263 (1987). Such was the case here.

Immediately after the fiscal year 1988 requirement was synopsized in September as a total SDB set-aside, Lilly, the incumbent contractor, and several members of Congress complained to AMCCOM that restricting the procurement to SDBs would adversely affect Lilly, since Lilly, a small

nondisadvantaged business, would not be eligible to compete under a total SDB set-aside. Lilly argued that it was not the intent of Congress in establishing the DOD program to increase SDB participation at the expense of other small businesses.

In this regard, Congress stated in early December 1987, in the National Defense Authorization Act for fiscal years 1988 and 1989, Pub. L. No. 100-180, §§ 806(a) and 806(b)(7), 101 Stat. 1019 (1987), that DOD must "to the maximum extent practicable" maintain current levels in number and dollar value of contracts awarded under the other two set-aside programs for small businesses, in addition to providing new opportunities for SDBs under the program.1/

Because of the potential adverse impact on Lilly and in light of the new statutory language in the Authorization Act, the Army's Director of Contracting, Office of the Assistant Secretary, directed AMCCOM, in late December 1987, to suspend the unissued solicitation, contemplating the total SDB set-aside, pending a review of the impact of Lilly's exclusion from the competition for the BDU-33 practice bomb contract. The directive also stated that if the proposed set-aside was found to adversely impact Lilly, a small nondisadvantaged business and member of the industrial mobilization base, then AMCCOM should seek an individual deviation from the interim regulations in accordance with Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 1.403 (1986 ed.).

The impact analysis on Lilly was completed in February 1988 and revealed that sales for the BDU-33 practice bomb, over Lilly's Delfasco Division's 2-year incumbency, accounted for 99 percent (fiscal year 1985), 93 percent (fiscal year 1986), and 95 percent (fiscal year 1987) of the Delfasco Division's business. Of the Lilly company's overall

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1/ DOD responded to this congressional mandate by revising its interim regulations to reflect these competing concerns. DOD issued a second set of interim regulations, applicable only to solicitations issued on or after March 21, 1988, providing that a total SDB set-aside shall not be conducted when the product has been previously acquired successfully through one of the other two set-aside programs for small businesses. See 53 Fed. Reg. 5,123 (1988) (to be codified at 48 C.F.R. § 219.502-72). This exception to the mandatory SDB set-aside rule would not have been available here because the BDU-33 practice bomb requirement has not previously been acquired under one of the other small business set-aside programs.

business, the BDU-33 sales accounted for 69 percent (fiscal year 1985), 71 percent (fiscal year 1986), and 77 percent (fiscal year 1987). Based on this data, AMCCOM requested an individual deviation from the interim regulations mandating a total SDB set-aside. The deviation was requested to allow Lilly, as well as the two SDBs who are also members of the industrial mobilization base, to compete for the contract under a total small business set-aside, pursuant to Federal Acquisition Regulation (FAR) § 19.502-2 (FAC 84-37), with application of an evaluation preference for SDBs, pursuant to 53 Fed. Reg. 5,126 (1988) (to be codified at 48 C.F.R. § 219.7000). The deviation was granted on March 31.

Meanwhile, the Air Force's inventory of BDU-33 practice bombs had become critically low, such that the Air Force sent an urgent message on February 24 to AMCCOM stating that further delay in procurement of the practice bombs for fiscal year 1988 would result in serious deterioration in the Air Force's pilot proficiency training program. The Air Force indicated that its current inventory of practice bombs was only 30,950 with 111,370 on back order and that its expenditure rate was 90,000 bombs per month. The Air Force added that by September 1988 it would be unable to support its pilot proficiency training program unless award was made to a competent producer capable of manufacturing at a rate of 90,000 bombs per month by that time.

At this point, rather than proceed with the planned small business set-aside based on the regulatory deviation, the AMCCOM contracting officer determined that, because of the Air Force's critical inventory shortage, a noncompetitive procurement was required and he therefore issued an oral sole-source solicitation, RFP No. DAAA09-88-R-0565, on February 25 to Lilly. The oral solicitation incorporated by reference all the terms and conditions of the fiscal year 1987 solicitation for BDU-33 practice bombs. Based on the oral solicitation, a contract was awarded to Lilly on March 30.2/ The contract required delivery over an 8-month period, with the first delivery of 51,000 bombs due by July 29 and 90,000 bombs due each month in August, September, October, and November. During the last 3 months of the

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2/ Although the Air Force's fiscal year 1988 requirement for BDU-33 practice bombs was publicized in the original synopsis as 1,274,000, that quantity was later reduced to 810,320. The sole-source award to Lilly accounted for 601,040 of the 810,320 requirement. A competitive solicitation for the remaining 209,280 bombs was issued on May 5, 1988 as a total small business set-aside pursuant to the DFARS deviation approved on March 31.

contract, 80,000, 70,000 and 40,040 each were to be delivered for a total of 601,040 bombs. A justification statement was subsequently prepared and approved by the head of the contracting activity on May 19 which invoked 10 U.S.C. § 2304(c)(2), authorizing the use of other than competitive procedures based on an unusual and compelling urgency to justify the award to Lilly, based on the conclusion that an immediate award was necessary to meet the critical inventory shortage of the Air Force and that Lilly was the only active producer of the item capable of meeting that urgent need.

Based on notice of the contract award published in the Commerce Business Daily (CBD) on April 13, Abbott filed its protest in our Office on April 25 complaining that the sole-source award of the 601,040 bombs, on unusual and compelling urgency grounds, was improper because AMCCOM created the conditions it used to justify the urgent award by delaying the procurement pending the analysis of Lilly's exclusion from the competition.3/ Abbott contends that the economic impact analysis of Lilly was improper because the statutes and regulations establishing the SDB set-aside program do not require that such a review be conducted prior to issuing a total SDB set-aside. Abbott also apparently argues that even if the impact analysis was proper, the urgency was a result of lack of advance planning by AMCCOM since any

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3/ Abbott also argues that AMCCOM should be required to suspend contract performance, pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d) (Supp. IV 1986), because Abbott claims it filed its protest in our Office "as soon as practicable after receiving notice of the award." Abbott complains that it did not learn of the March 30 contract award until publication of the CBD notice on April 13 since AMCCOM failed to synopsize the proposed contract action prior to award. However, agencies are not required to synopsize proposed contract actions which are of unusual and compelling urgency. See FAR § 5.202(a)(2) (FAC 84-13). Further, the applicability of the statutory suspension is determined by reference to the date of award, not the date the protester received notice of award. See United States Pollution Control, Inc., B-225372, Jan. 29, 1987, 87-1 CPD ¶ 96. Since Abbott filed its protest in our Office more than 10 calendar days after contract award, AMCCOM was not required to suspend performance under the contract. In addition, even if AMCCOM would have been required to suspend performance, it could have easily overcome the suspension by invoking the statutory exception, found at 10 U.S.C. § 3553(d)(2)(A)(ii) (Supp. IV 1986), based on the urgent and compelling circumstances.

impact analysis should have been conducted prior to a determination by AMCCOM to set aside the requirement exclusively for SDBs, as announced in the September 1987 synopsis.

Under CICA, an agency may use other than competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2). When citing an unusual and compelling urgency, the agency is required to request offers from "as many potential sources as is practicable under the circumstances." 10 U.S.C. § 2304(e). An agency, however, has the authority, under 10 U.S.C. § 2304(c)(2), to limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. Arthur Young & Co., B-221879, June 9, 1986, 86-1 CPD ¶ 536. In addition, an agency is not required to synopsize such urgent contract actions where the government would be seriously injured if the agency complies with the time periods required for publication of the synopsis. FAR § 5.202(a)(2) (FAC 84-13). We will not object to the agency's determination to limit competition based on an unusual and compelling urgency unless we find that the agency's decision lacks a reasonable basis. Honeycomb Co. of America, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209. We have also recognized that a military agency's assertion that there is a critical need for certain supplies carries considerable weight, and the protester's burden to show unreasonableness is particularly heavy. Dynamic Instruments, Inc., B-220092, B-220093, B-220552, Nov. 25, 1985, 85-2 CPD ¶ 596.

Here, AMCCOM complied with the statutory procedural requirements under CICA calling for written justification for, and higher-level approval of, the sole-source action. As permitted under 10 U.S.C. § 2304(f)(2), the required justification was prepared within a reasonable time after the contract was awarded based on the unusual and compelling urgency. The contracting officer also made a written determination that synopsizing the requirement would unduly delay the procurement.

Abbott's primary concern is that AMCCOM improperly delayed the original procurement by considering the impact of a total SDB set-aside on Lilly and thereby created the urgent need by allowing the Air Force's practice bomb inventory to be depleted. Abbott contends that no such economic impact analysis is required under the SDB program and that performing such an analysis on Lilly was unfair prejudicial treatment.

We find that although such an economic impact analysis is not required by the statutory and regulatory scheme establishing the SDB program, it is not prohibited and is within DOD's discretion to perform in carrying out the program. In establishing the SDB program, Congress left to the Secretary of Defense the responsibility to "exercise his utmost authority, resourcefulness and diligence" to develop a program that would meet the rather difficult-to-reconcile goals of increasing SDB participation while also presumably increasing overall small business participation. See National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, § 1207, 100 Stat. 3816 (1986); Techplan Corp.; American Maint. Co., B-228396.3, B-229608, Mar. 28, 1988, 88-1 CPD ¶ 312. Further, as noted above, Congress directed DOD, in the National Defense Authorization Act for fiscal years 1988 and 1989, Pub. L. No. 100-180 § 806, 101 Stat. 1019 (1987), to increase both disadvantaged and nondisadvantaged small business participation in implementing the new SDB program. In addition to the responsibility to increase overall small business participation, AMCCOM also had a responsibility to maintain its industrial mobilization base for the BDU-33 practice bomb. See, e.g., NI Industries, Inc., Vernon Division, B-223990.2, June 16, 1987, 87-1 CPD ¶ 597. Given DOD's discretion in setting up the SDB program and the subsequent statutory mandate to increase overall small business participation, as well as AMCCOM's responsibility to maintain a sufficient industrial mobilization base for the BDU-33 practice bomb, we see nothing improper in AMCCOM's suspending the unissued total SDB set-aside pending a review of its impact on Lilly, a small nondisadvantaged business and member of the industrial mobilization base.

We do not agree with Abbott's alternative assertion that the urgent situation was created by AMCCOM's lack of advance planning based on its failure to conduct the impact analysis on Lilly prior to determining, in September 1987, to set aside the requirement exclusively for SDBs. In this respect, 10 U.S.C. § 2304(f)(5)(A) prohibits award of a contract using other than competitive procedures because of a lack of advance planning by contracting officials. The announcement in the September 1987 synopsis that the solicitation would be exclusively for SDBs reflected the fact that the AMCCOM contracting officer was bound by the mandatory requirement in DOD's regulations for such a set-aside since the conditions mandating an exclusive set-aside were present and no exceptions were currently available. However, these plans were changed when it was discovered that such a set-aside could adversely impact the incumbent contractor, Lilly, a small nondisadvantaged business and member of the industrial mobilization base. Here, AMCCOM

did not fail to engage in advance planning; its plans to procure this item through a total SDB set-aside were simply disrupted and failed to achieve the expected results. Although CICA requires advance procurement planning, it does not require that the planning be successful. Honeycomb Co. of America, B-225685, June 8, 1987, 87-1 CPD ¶ 579.

We find, under the circumstances, that AMCCOM's determination that award of a new contract was urgently needed was reasonable. A critical inventory shortage can be the basis for an urgent and compelling noncompetitive award. See Daylight Plastics, Inc., B-225057, Mar. 10, 1987, 87-1 CPD ¶ 269. We also find that AMCCOM's decision to limit the noncompetitive award to Lilly was reasonable. The record supports AMCCOM's conclusion that only Lilly was capable of timely meeting the agency's urgent need based on Lilly's current established production of the item. AMCCOM determined that because of specification changes made since any other firm than Lilly had produced the item, all other firms would have to provide a first article for approval prior to production, causing an unacceptable delay which would severely impair the Air Force's pilot proficiency training program.

In this connection, we note that Abbott alleges that the February 24 message from the Air Force to AMCCOM, stating that the Air Force's inventory was critically low, was a "fabricated message justifying, or providing backup documentation to justify" AMCCOM's action. Abbott also argues that even if the Air Force message is valid, it does not justify the sole-source award to Lilly because the message indicates that 111,370 practice bombs were on back order. Abbott contends that this indicates that Lilly already was behind schedule and that the additional, urgent award to Lilly made no sense. We find these allegations to be unsubstantiated. Abbott offers no evidence in support of its assertion that the Air Force message regarding its critical inventory shortage was fabricated. Also, even though the Air Force indicated that 111,370 practice bombs were on back order, Lilly, the incumbent, was not behind schedule under its contract. The Air Force statement meant, according to AMCCOM, only that 111,370 practice bombs were yet to become due for delivery under that contract.

Abbott also complains that AMCCOM's determination that Lilly was the only firm capable of performing the contract in the available time was an unreasonable determination that Abbott was nonresponsible. However, this allegation is without merit since Abbott was precluded from competing for the urgent need, not because it was found nonresponsible, but because there was insufficient time, given the urgency of the circumstances, for conducting the first article testing

that would be required of it. Abbott does not dispute the fact that it would be required to submit a first article prior to production.

Abbott also expresses concern that since the oral solicitation incorporated by reference all of the terms and conditions of the fiscal year 1987 solicitation, AMCCOM will be able to exercise the 100-percent option clause of the 1987 solicitation and increase the quantity of supplies called for under the contract up to 400 percent pursuant to the clause found at paragraph I-15 in the 1987 solicitation. Although these concerns are speculative and premature and therefore not for consideration, we note that AMCCOM's justification and approval for the urgent sole-source award was only for the 601,040 quantity. The justification stated that neither an option nor quantity variation was included in the oral solicitation and that future requirements would be solicited competitively. As we noted, AMCCOM issued a competitive solicitation on May 5, 1988, for the remainder of its fiscal year 1988 BDU-33 practice bomb requirement. In addition, we point out that where a noncompetitive award is justified on the basis of urgency, the inclusion in the contract of options to extend the length of time of the contract or of quantity variances to increase the amount of supplies under the contract would not be justified beyond the time or amount necessary to cover the urgent need. See, e.g., IMR Systems Corp., B-222465, July 7, 1986, 86-2 CPD ¶ 36; A&C Building and Industrial Maint., 64 Comp. Gen. 565 (1985), 85-1 CPD ¶ 626.

The protest is denied.

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for James F. Hinchman
General Counsel