Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Carolina Parachute Corporation

File: B-236153

Date: November 16, 1989

DIGEST

Military agencies need not obtain full and open competition and may use other than competitive procedures when it is necessary for industrial mobilization purposes to award the contract to a particular source or sources. Therefore, since the normal concern of maximizing competition is secondary to the needs of industrial mobilization, decisions as to which and how many producers should be included in the mobilization base are left to the discretion of the military agencies absent compelling evidence of an abuse of that discretion.

DECISION

Carolina Parachute Corporation protests its exclusion from the competition under request for proposals (RFP) No. DAAA09-89-R-0399, issued by the Army for BSU-49/B inflatable retarders.1/ The acquisition is restricted to two listed mobilization base producers, Irvin Industries and Loral Engineered Fabrics. Carolina challenges the restriction of the mobilization base to those two firms.

We deny the protest.

The Army prepared a justification and approval (J&A) for the use of other than full and open competition as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (1988). The J&A authorized the acquisition of 46,764 retarders and a 50 percent option in fiscal year 1990. The authority cited for the restricted

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1/ The retarders are used to slow and guide the flight of bombs released from aircraft to delay impact until the aircraft is beyond fragmentation range.

procurement is 10 U.S.C. § 2304(c)(3) which allows the head of a military agency to use other than competitive procedures in awarding a contract to a particular source or sources when such action is necessary to maintain a facility, producer, manufacturer or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization.

The J&A states that the retarder is an industrial mobilization item since it is a vital military supply item that is not commercially available because of the specialized tools, equipment and skills required for its manufacture and because new producers are required to be qualified through an extensive flight test program using high performance military aircraft. According to the J&A, some of the equipment required to produce the retarders, including specialized sewing machines, can only be purchased from foreign suppliers and would not be available in wartime. Also, because of the qualification requirement, if the mobilization base were lost, it would take approximately 12 months to establish new sources, assuming the necessary sewing machines could be obtained.

The J&A further explains that restriction of this requirement to Loral and Irvin is necessary to influence those firms to reserve the required plant, facilities and equipment, which they possess, for production of retarders. According to the J&A, Loral and Irvin could easily convert their facilities to other uses or dispose of the specialized tools and equipment necessary to produce retarders in order to use the capital investment on other products.

On July 3, 1989, the Army published in the Commerce Business Daily a synopsis of the solicitation which stated that the acquisition would be restricted to the mobilization base producers. On July 12, Carolina protested to our Office. The Army issued the solicitation on September 18.

Carolina generally argues that Loral and Irvin are not qualified to be members of the mobilization base. First, the protester explains that Loral recently acquired Goodyear Aerospace Corporation, the original producer of the retarder and the sole producer of the item until 1985. The protester states that Loral has not produced retarders for many months and questions whether the firm has the required tooling and equipment and whether the firm's retarders should be flight tested. Further, Carolina argues that there are charges of fraud pending by the government against Loral and, for that reason, the firm cannot certify, as the solicitation requires, that it has not been charged by the government for fraud.

Carolina further argues that Irvin also should not be in the mobilization base since that firm was recently acquired by Hunting Associated Industries, PLC, a British firm. Carolina maintains that Hunting cannot assume Irvin's position in the mobilization base unless Hunting acquired all assets and liabilities of the firm, including outstanding contract obligations.

Finally, Carolina argues that it should be included in the mobilization base because it is qualified to produce the "retarder segment," the "most critical segment" of the BSU-49/B. According to Carolina, it has produced 100,000 retarder segments for Goodyear Aerospace since 1981 and it still has the required facilities, personnel, equipment and capability. Carolina also argues that no more time and effort would be involved in an award to it than an award to Loral since Loral also must produce first articles and have its retarders flight tested if it receives an award.

Under CICA, military agencies need not obtain full and open competition where a procurement is conducted for industrial mobilization purposes and may use other than competitive procedures where it is necessary to award the contract to a particular source or sources. 10 U.S.C. § 2304(c)(3); Oto Melara, S.p.A., B-225376, Jan. 6, 1987, 87-1 CPD ¶ 15. Therefore, although it is the established policy of this Office to scrutinize closely procurement actions using other than competitive procedures, see Jervis B. Webb Co. et al., B-211724 et al., Jan. 14, 1985, 85-1 CPD ¶ 35, it is also our view that decisions as to which and how many producers should be included in the mobilization base involve complex judgments which must be left to the discretion of the military agencies. Minowitz Mfg. Co., B-228502, Jan. 4, 1988, 88-1 CPD ¶ 1; Right Away Foods Corp., B-219676.2 et al., Feb. 25, 1986, 86-1 CPD ¶ 192. This Office will question those decisions only if the record convincingly shows that the agency has abused its discretion. Martin Elec. Inc., 65 Comp. Gen. 59 (1985), 85-2 CPD ¶ 504.

The record fails to show that the Army abused its discretion here. The Army reports that although Goodyear Aerospace and not Loral was previously a mobilization base producer, Loral purchased all assets, obligations and liabilities of Goodyear Aerospace in 1987 and, as a result, Loral has the same proven management, personnel and facilities that Goodyear Aerospace previously used to produce the retarders. In this regard, the agency reports that at the time of the sale Goodyear Aerospace had begun performance under a contract for the BSU-49/B. According to the Army, that contract was novated to Loral which satisfactorily delivered

the units. Further, the Army says that Loral was recently awarded a contract for the BSU-50/B retarder, a similar item which is produced using the same processes and equipment as the BSU-49/B. According to the Army, prior to that award, an on-site contract administration official verified that Loral still possesses the equipment and skills to produce the retarders. The agency states that if an award is made to Loral that firm will be required to submit a first article which will be flight tested.

Concerning the alleged pending charges of fraud against Loral, the Army states that in January 1989, Loral signed an agreement with the Army which settled many of the matters which were the subject of a civil fraud suit against Loral. Further, Loral pledged to take numerous actions to assure the government of its integrity and to provide adequate assurances that the government's interests were protected. Further, although Loral had been suspended from contracting with the government on September 29, 1988, on January 30, 1989, the government lifted the suspension.

Since the firm is no longer suspended and appears to have the ability to produce the item, we are unable to find anything in the record here which shows that the Army's decision to include Loral as a mobilization base producer constituted an abuse of the agency's discretion.2/

With respect to Irvin, the Army explains that Hunting's acquisition of Irvin is to be a complete transfer of stock. The assets, equipment, management and personnel of Irvin will remain the same. The Army says that the sale will not violate any regulations or mobilization base policies and the protester has pointed out none. Under the circumstances, we also have no basis to question the agency's decision to include Irvin in the mobilization base.

Finally, Carolina argues that it is capable of producing the retarders and therefore should be included in the mobilization base. The Army's decision to limit the mobilization base to Loral and Irvin was based on the

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2/ The Army also explains that the solicitation includes Federal Acquisition Regulation (FAR) clause 52.209-5, entitled "Certification regarding debarment, suspension, proposed debarment, and other responsibility matters." Contrary to Carolina's contention, however, information submitted by Loral under this clause relating to indictments, convictions or previous debarments or suspensions does not automatically prohibit award to Loral. See FAR § 9.408 (FAC 84-46).

agency's judgment that this restriction would influence those firms to continue to reserve their facilities and equipment for the production of the retarders.3/ The Army's decision included consideration of a constraining rate analysis which compared the mobilization requirements for the retarders to the capacity of the mobilization base producers. In accordance with Army mobilization base policy, this analysis concluded that there was an insufficient quantity to expand the mobilization base and, under the circumstances, the acquisition is required to be limited to the existing base. We have no legal reason upon which to challenge the Army's judgment concerning its mobilization requirement.

The protest is denied.

James F. Hinchman
General Counsel

3/ This does not necessarily mean that the agency considers Carolina incapable of producing a satisfactory item. See Oto Melara, S.p.A., B-225376, supra.