



Comptroller General
of the United States
Washington, D.C. 20548

Matter of: ABA Industries, Inc.; Department of the
Air Force; Dexter Tool Company--
Reconsideration

File: B-250186.2; B-250186.3; B-250186.4

Date: June 2, 1993

Robert Allen Evers, Esq., and Dennis A. Adelson, Esq.,
Schnader, Harrison, Segal & Lewis, for the protester.
David B. Dempsey, Esq., and Sheila C. Stark, Esq., Akin,
Gump, Hauer & Feld, for Dexter Tool Co., an interested
party.
Joseph Goldstein, Esq., and Milton D. Watkins, Esq.,
Department of the Air Force, for the agency.
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Decision recommendation to delete a line item for
43 diffuser cases from awardee's contract and resolicit that
quantity, which the record showed was not urgently required,
is modified to allow the contract award for the quantity to
stand; new information shows that only the awardee can
provide the items in the time required, and that
cancellation and resolicitation would therefore not be in
the best interests of the government.

DECISION

ABA Industries, Inc., the Department of the Air Force, and
Dexter Tool Company request reconsideration of our decision,
ABA Indus., Inc., B-250186, Jan. 13, 1993, 93-1 CPD ¶ 38, in
which we sustained ABA's protest against an Air Force
contract award to Dexter Tool Co., under request for
proposals (RFP) No. F34601-92-R-60249, for 59 diffuser
cases. The requesters seek reversal of the decision or
modification of the recommended remedy.

As discussed below, we modify the recommendation in our
initial decision.

BACKGROUND

The decision concerned an Air Force procurement for
59 diffuser cases, critical components of F-111F aircraft
engines, needed for an engine repair program to prevent

grounding of the aircraft. We found that the agency included a line item for 43 of the cases in the contract solely in the erroneous belief that they, like the other 16 cases, were urgently needed. Finding that the record showed the 43 cases were not urgently required, we concluded that ABA--whose price was lower, and which received source approval shortly after the award was made--had been unreasonably precluded from being considered for the 43-unit quantity.

Our finding was based on the fact that the delivery schedule for the 43 items, both in the solicitation as amended and in the contract awarded to Dexter, did not reflect the urgency claimed by the agency. As issued in April 1992, the RFP provided for a total of 43 items. On May 20, the Air Force issued amendment No. 1, which upgraded the requirement to urgent and shortened the required delivery schedule accordingly. (Amendment No. 1 reduced the time for submission of first article test (FAT) units from 270 days after receipt of order to 60 days, and accelerated the time for commencement of production deliveries from 60 days after FAT approval to 30 days.) On June 17, the Air Force determined that 16 additional diffuser cases were urgently required; on June 23, the agency issued amendment No. 2 (misnumbered 3), which provided for expedited delivery of the 16 additional cases. Inexplicably, however, this amendment also extended the delivery schedule for the original 43 units; while it required delivery of the 16 additional units commencing 30 days after FAT approval, it delayed commencement of delivery of the original 43 units until 18 months after FAT approval (or until January 1995 without a FAT), resulting in a 1-year gap between delivery of the last of the initial 16 cases and delivery of the first of the 43 units.

On June 24, the Air Force executed a justification and approval (J&A) limiting competition for the additional 16 cases to approved sources, based on unusual and compelling urgency, pursuant to 10 U.S.C. § 2304(c)(2) (1988) and Federal Acquisition Regulation (FAR) § 6.302-2. The J&A stated that overusage of F-111F engines had resulted in a shortened life for engine components and created an urgent requirement for additional diffuser cases; it indicated that the requirement could only be met by a qualified source because the specialized manufacturing and inspection processes required in manufacturing the item necessitated the prequalification of alternate sources. On August 1, citing the same circumstances, the Air Force executed a similar J&A for the original 43 units. In response to the RFP, two approved sources, including Dexter, and two unapproved sources, including ABA, submitted proposals. ABA also submitted a source approval request, on the basis of which ABA ultimately was approved as a source

on September 1. On August 24, however, based on uncertainty as to when ABA's source review would be completed, as well as the J&As' findings of urgency, the Air Force determined that award could not be further delayed and awarded the contract to Dexter, the lowest-priced approved source.

In protesting the award to our Office, ABA argued that the requirement for the cases was not so urgent that the Air Force could not have delayed the award for a short additional period (ultimately only 8 days) until ABA was qualified. We found that the Air Force had properly proceeded with the award of the 16-unit quantity based on urgency. Concerning the other 43 cases, however, we found that the 1-year gap in deliveries introduced by amendment No. 2 was not consistent with the finding of urgency in the J&A for those items. Based on the unexplained relaxed delivery schedule, we concluded that the only reason the agency had included the 43 units in the contract was its erroneous belief that they were urgently needed. We recommended that Dexter's contract be modified to delete the separately-priced line item for the 43 units and that the quantity be resolicited, and found ABA entitled to recover its protest costs, including reasonable attorneys' fees, pursuant to 4 C.F.R. § 21.6(d)(1) (1993).

REQUESTS FOR RECONSIDERATION

The Air Force and Dexter ask that we reverse the decision sustaining ABA's protest based on information newly submitted by the agency that the entire quantity was and is urgently required. In the alternative, the Air Force requests that we modify our recommendation to permit the award to Dexter for all 59 units to stand, since it is the only firm that can meet its required delivery schedule. ABA, on the other hand, asks that we modify our recommendation to direct award of all or part of the 43-unit portion to ABA.

The Air Force and Dexter Requests

The Air Force (supported by Dexter) asserts that the relaxation of the delivery schedule for the 43 items by amendment No. 2--which indicated that the need was not in fact urgent--was a mistake. The agency explains:

"When the Air Force issued amendment No. 2 to the solicitation, the contract negotiator overlooked amendment No. 1 [which had upgraded the RFP to urgent] and erroneously relied on the original RFP's [more relaxed] delivery schedule for the other 43 units in preparing amendment No. 2. While the Air Force had taken steps to correct this mistake soon after [the August 24, 1992]

contract award, due to a lack of communication between the different branches . . . it never presented such evidence to the GAO."¹

To correct the mistake, the agency reports, it negotiated a contract modification with Dexter, dated January 28, 1993, which provides for a continuous production schedule and delivery of the 43 units commencing in October 1993, thereby eliminating the prior 1-year gap. Instead of beginning in January 1995, as in the original contract, deliveries will be made as follows: 3 cases in October 1993; 4 cases in November; 5 cases each, December 1993 through May 1994; 1 case in June 1994; and 5 cases in October 1994. According to the Air Force, failure to adhere to this revised schedule would preclude the agency from replacing a large number of cases currently in service on a timely basis, which in turn would result in unacceptable numbers of returned engines. Since the case is the single most important component in the engine repair program, termination of the 43 units at this stage of the repair program would ground the entire F-111F aircraft fleet. Accordingly, the agency asks that we either reverse our decision sustaining ABA's protest, or modify our recommendation so that the award to Dexter may stand.

ABA's Request

ABA agrees with the Air Force that the requirement for prompt delivery precludes resolicitation, but questions whether all 43 of the units are needed on the schedule contained in Dexter's modified contract. According to ABA, when the requiring activity first requested that the procurement be upgraded to "urgent," Air Force contracting officials issued amendment No. 1, requiring delivery of all 43 units in October 1993. However, when Dexter's contract was modified on grounds of urgency, Dexter was given the more relaxed schedule of deliveries set forth above, beginning with only 3 units in October 1993 and continuing with about 5 units per month until October 1994. These schedules, according to ABA, are inconsistent, and indicate that the Air Force has exaggerated the urgency of its current need. The appropriate remedy, ABA concludes, is for the Air Force to award ABA a contract for those units it can reasonably produce in a timely fashion. If such a contract were to be awarded to it now, ABA argues, it could deliver the last 26 to 36 of the units in accordance with the Air Force's new schedule. Accordingly, ABA maintains, the

¹In its comments on the agency's report on the protest, ABA cited the relaxed delivery schedule as evidence that the requirement for the 43 items was not urgent. Although we provided the Air Force an opportunity to respond to the allegation, the agency provided no explanation until now.

Air Force could award a contract for a substantial portion of the 43 units to ABA and still meet any legitimate need for prompt delivery.

ANALYSIS

We will reconsider a decision only where the requester shows the decision was based on factual or legal error, or presents information not previously considered that warrants reversal or modification of our prior decision. General Servs. Admin.--Recon., 69 Comp. Gen. 346 (1990), 90-1 CPD ¶ 321. In order to provide a basis for reconsideration, information not previously considered must have been unavailable to the party seeking reconsideration when the initial protest was being considered. Ford Contracting Co.--Recon., B-248007.3, B-248007.4, Feb. 2, 1993, 93-1 CPD ¶ 5; Norfolk Dredging Co.--Recon., B-236259.2, Oct. 31, 1989, 89-2 CPD ¶ 405. A party's failure to make all arguments or to submit all information available during the course of the initial protest undermines the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of the parties' arguments on a fully-developed record--and cannot justify reconsideration of our prior decision. Id.; Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

As noted above, the Air Force acknowledges (and Dexter confirms) that its reconsideration request is based on information that was in the agency's possession during our consideration of ABA's protest, and that was at issue in the protest, but was not presented at that time. This information, accordingly, does not provide a basis for reconsideration of our decision. General Servs. Admin.--Recon., supra. Since the Air Force has not alleged (and there is no evidence) that our prior decision was incorrect based on the record which the agency provided, we will not reconsider our prior decision.

In light of the newly presented information, however, reconsideration of our recommendation is appropriate. In determining the appropriate recommendation where we have found a violation of procurement law or regulation, we consider all the circumstances surrounding the procurement, including the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation on the contracting agency's mission. Department of the Air Force--Recon., supra; Science Applications Int'l Corp. et al.--Recon., 71 Comp. Gen. 481 (1992), 92-2 CPD ¶ 73. Here, we conclude that modification of our recommendation is warranted on the ground that the record shows that only Dexter is able to meet the agency's needs in the time frame required.

Our recommendation that the 43-unit quantity be recompeted reflected our finding that, since the quantity was not urgently required, the agency's needs would not be compromised by the time necessary for a recompetition. The Air Force has explained that failure to obtain the items on an expedited basis would result in unacceptable numbers of returned engines and would ground the entire F-111F aircraft fleet. This explanation is consistent with the findings of the J&A concerning the deficit supply status of the cases--a factual determination which our decision did not question. The agency's statements also are consistent with the actual revised schedule that has now been incorporated into Dexter's contract. Consequently, we have no basis for questioning the agency's explanation that the revised contract accurately reflects its current needs.

We reject ABA's assertion that the legitimacy of the delivery schedule is in doubt because the revised schedule is not as expedited as the one initially included in amendment No. 1. The contract now provides for delivery of the 43 units to commence in October 1993, rather than January 1995 as in the original contract; deliveries are to be made on a continuous basis immediately following delivery of the 16-unit initial quantity. This continuous stream of deliveries on an accelerated basis eliminates the major (and unexplained) inconsistency between the J&A's determination of urgency and the schedule in the original contract--the 1-year gap between delivery of the 16-unit and 43-unit quantities. Unlike the original contract schedule, the accelerated schedule is consistent with the J&A's finding (not disputed in ABA's reconsideration request) that there was a serious shortfall in cases which had to be eliminated promptly. ABA has not shown, and we find nothing in the record to indicate, that the revised delivery schedule, while not as expedited as ABA argues it should be, does not accurately reflect the agency's needs.

Further, the record shows that only Dexter is capable of meeting the agency's requirements, since only Dexter is eligible for waiver of FAT. The Air Force has explained that ABA's approval as a source does not make it eligible for waiver of FAT, which is required because the firm has had no previous experience manufacturing this item or a closely related item. The need for FAT is based on the complexity of manufacturing the item and on the criticality of its application. The diffuser case is a complex item, manufactured from many different individual components which must be welded together at final assembly. These components include forgings, castings, tubes, and sheet metal details. The assembly and inspection of the cases involves many critical processes, such as heat treating, welding, riveting, radiographic inspection, magnetic inspection, fluorescent penetrant inspection, and hardness inspection.

The case also requires a great deal of tooling and fixturing to ensure its dimensional accuracy. The processes and dimensions involved are all deemed critical to the successful functioning of the cases.

Based on these considerations, Air Force engineers have determined that the FAT requirement could not be waived for ABA or any other firm which had not produced this particular diffuser case or a closely similar item. The record contains Air Force estimates that ABA would require a minimum of 270 days to manufacture the first articles, based on the complexity of manufacturing the diffuser cases and the fact that the lead time required to obtain the necessary forged parts is extremely long. The combination of the 270 days required to manufacture the first articles, and the estimated 180 days required to test them, would leave ABA incapable of beginning manufacture of production quantities until at least 450 days after contract award--even assuming that the firm delivered the first article on time and that it passed the government's testing on the first attempt.

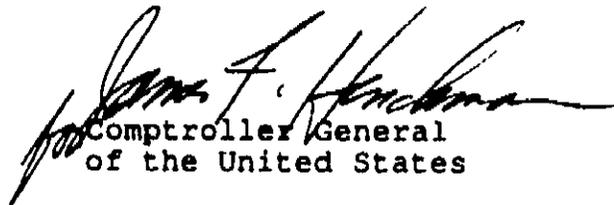
On the other hand, the record shows that, since Dexter already had produced diffuser cases for aircraft-based applications, and in fact had begun production of this particular case under a previous contract, Air Force engineers were satisfied that Dexter's items would meet the critical performance and quality requirements and were able to waive FAT for that firm. As a consequence, if ABA had received award of a contract for all or part of the 43 units in March 1993--even if ABA could actually begin delivering the production units within 30 days after first article approval--the earliest ABA could start delivering the 43 units would be August 1994. As discussed above, however, the agency requires deliveries to be essentially completed by that date--as reflected in Dexter's modified contract.² Thus, Dexter will be able virtually to complete deliveries by the time ABA would be able to begin.

Although ABA maintains that the Air Force has inflated its estimates of the time it will take for ABA to receive first article approval, the firm does not dispute the agency's explanation of why ABA must undergo FAT, does not attempt to show that the agency's estimates are faulty, and does not provide any estimates of its own. The Air Force's estimates, on the other hand, are consistent with findings in our prior decision that ABA's source approval was reasonably and properly delayed for reasons similar to those discussed here, relating primarily to the fact that ABA, unlike Dexter, had not manufactured a similar item, and to the undisputed complexity and criticality of the flight

²Five more cases are to be provided by October 1994.

safety items, which are essential to the proper functioning of F-111F aircraft engines.³

Based on this record, we conclude that too much time would be required to obtain approval for ABA's first articles for that firm to be able to meet the agency's delivery schedule. Since the record shows that only Dexter is able to meet the agency's required expedited delivery schedule at this time, we modify our previous recommendation to allow the award to Dexter to stand with respect to the entire contract quantity of 59 cases. See Van Ben Indus., Inc. et al.--Recon., B-235431.4 et al., Jan. 29, 1990, 90-1 CPD ¶ 118; Department of the Navy--Request for Modification of Remedy, B-246869.2, May 29, 1992, 92-1 CPD ¶ 477 (recommendation to terminate contract found not practical, and modified accordingly, based on agency's showing that timely completion of tasks would not be possible if recommendation were followed).⁴


Comptroller General
of the United States

³We also observed that ABA did not dispute the Air Force's explanation that, given the critical, complex nature of the diffuser cases, it was necessary to undertake a thorough, in-depth review of ABA's capability to manufacture the cases, including its in-house capability, quality assurance procedures, quality deficiency records and prior performance. ABA still does not dispute these matters in its request for reconsideration.

⁴The agency also presents information which, it argues, shows that our recommendation should be modified because the costs of termination and resolicitation would be excessive compared to the value of the contract. We need not address this argument in view of our findings concerning FAT.