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

REDACTED VERSION*

Decision

Matter of: Golden Manufacturing Co., Inc.

File: B-255347

Date: February 24, 1994

Jeffrey B. Mulhall, Esq., Robert S. Brams, Esq., and Christopher Lerner, Esq., Gadsby & Hannah, for the protester.
Joel R. Feidelman, Esq., Anne B. Perry, Esq., and Jay D. Majors, Esq., for American Apparel, Inc., an interested party.
Michael Trovarelli, Esq., and Michael McGonigle, Esq., Defense Logistics Agency, for the agency.
Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Post-award protest challenging the contracting agency's proposed use of industrial mobilization exception to requirement for full and open competition is untimely where agency use of the exception was explained in detail in four broad agency announcements published in the Commerce Business Daily, including one to which the protester responded.

2. Allegation that agency failed to adhere to evaluation criterion concerning production capability set forth in broad agency announcement by awarding to a firm that does not have the required production capability is denied where agency reasonably determined that, despite the awardee's performance problems under a previous contract, the awardee is capable of producing the required items as evidenced by its improved performance under that contract.

3. Protester's contention that agency failed to determine that awardee's price was fair and reasonable is denied where

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*The decision issued on February 24, 1994, contained proprietary information and was subject to the terms of a General Accounting Office protective order. It was released to the parties admitted to the protective order. The parties have agreed that this decision should be released in its entirety.

record shows that, in fact, agency conducted multiple price analyses of awardee's price and ultimately determined that the price was fair and reasonable.

DECISION

Golden Manufacturing Co., Inc. protests the award of a contract to American Apparel Manufacturing, Inc. pursuant to a broad agency announcement (BAA) issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center (DPSC), to acquire clothing and textile items. Under the contract, American is to establish an "Electronic Data Interchange/Quick Response System" in connection with supplying an indefinite quantity of field coats. In addition, American is required to "work with the Government" to commercialize manufacturing processes in order to reduce costs and improve surge production capabilities. Golden primarily argues that the contract was awarded "without competition" and that the agency has not properly justified a noncompetitive award.

We dismiss the protest in part and deny it in part.

A BAA is a contracting method by which government agencies can acquire basic and applied research. BAAs may be used by agencies to fulfill requirements for scientific study and experimentation directed toward advancing the state of the art or increasing knowledge or understanding rather than focusing on a specific system or hardware solution. Unlike sealed bidding and other negotiated procurement methods, a BAA does not contain a specific statement of work and no formal solicitation is issued. Under a BAA, the agency identifies a broad area of interest within which research may benefit the government, and organizations are then invited to submit their ideas within a specified period of time. The firms that submit proposals are not competing against each other but rather are attempting to demonstrate that their proposed research meets the agency's requirements. Avogadro Energy Sys., B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229. The agency may decide to award contracts to those offerors who submit ideas which the agency finds suitable. See FAR § 35.016.

The contract awarded to American was one of several awards resulting from four BAAs which were issued by DPSC between March 1992 and April 1993. The BAAs were issued to implement the first phase of an acquisition strategy set forth in the "DPSC Industrial Preparedness Demonstration Program." The program was initiated as a result of DPSC's experience supporting Operation Desert Storm which revealed an overall lack of capacity in the clothing, textile and equipage industry. The Department of Defense (DOD) found current manufacturing technology and inventory management

practices to be inadequate to meet the rapid surge in military requirements. The program was established to test unique and innovative approaches for maintaining and/or expanding a viable industrial base with sufficient surge capability to meet DOD requirements during mobilization or contingencies short of a declared national emergency.

The program focuses on two main areas: electronic commerce and shared production agreements. Electronic commerce, as contemplated under the program, entails the "rapid electronic exchange of meaningful data between the vendor and the customer" to facilitate "quick vendor response to changes in customer requirements." The program outline states that a shared production agreement "establishes a long-term business relationship between a military vendor and one or more of its major commercial or other non-DLA Government customers." It explains further that the third party "shares the production facility with DLA during peacetime, thereby reducing the share of allocated overhead costs payable by any one customer." The program outline states that a shared production agreement would permit the vendor to dedicate production to meet surges in military demand . . . during mobilization or contingencies . . . without jeopardizing the vendor/customer relationship."

The program sets forth an acquisition strategy which is divided into two phases. Phase I includes requirements for clothing & textile items such as coats and trousers. The program states that the "strategy for Phase I is to immediately test the feasibility of the Program goals and gain sufficient experience to enable the development of firm requirements and evaluation criteria for competitive proposals in Phase II."

The first BAA was published in the Commerce Business Daily (CBD) on March 3, 1992. The BAA stated that the agency was interested in unique and innovative approaches to maintaining and/or expanding a viable industrial base with sufficient surge capacity to meet mobilization requirements and described the concepts of electronic commerce and shared production agreements. It stated that DPSC "is seeking new and creative concepts which have the potential for further development" and required that concept papers be submitted by May 21, 1992.

The BAA stated that "[c]oncept papers will be individually evaluated as they are submitted" based on evaluation criteria set forth in the BAA. It provided that "[a]wards will be made to the offeror(s) who demonstrates various probabilities of successfully demonstrating the targeted objectives of the Demonstration Program," and that "[d]emonstrations conducted under this Program will include the delivery of an end item of supply." Finally, the BAA

stated that "[c]ompetition will be restricted consistent with the authority of 10 U.S.C. § 2304(c)(3) to solicit on an other than full and open competition basis to enhance, maintain, expand or stabilize the industrial base."

American submitted a concept paper dated May 15, 1992, offering to provide field coats and battle dress uniform (BDU) coats using electronic commerce, by establishing and maintaining an on-line computer hook-up between the manufacturer and the ultimate government customer, and shared production agreements. Golden did not submit a concept paper in response to the March BAA. On August 7, 1992, the agency published a second BAA in the CBD containing the same information as the initial BAA and including a closing date of November 5, 1992. On December 29, the agency published a third BAA, again with the same information, and an April 2, 1993, closing date. Golden did not submit a concept paper in response to either of these BAAs.

In February 1993, American was awarded a contract for BDU coats. That contract included requirements for American to develop an electronic data interchange capability in order to provide a quick response to agency customer needs. In a March 3 letter, American requested that the agency consider awarding it a contract for the field coats, which it had also proposed in its May 15, 1992, concept paper. On April 5, 1993, the agency published a fourth BAA in the CBD again including the same information as the previous BAAs. By letter dated May 25, 1993, American supplemented its earlier concept paper by setting forth its "concept of how the addition of the field jacket can accomplish [program] goals in ways not currently being demonstrated. . . ."

On June 7, 1993, Golden for the first time submitted a concept paper proposing to provide field coats under the program. The paper stated that Golden currently holds a contract for 822,000 field coats and is producing 8,000 field coats per week. With respect to the quantities of coats proposed, the paper stated as follows:

> "Our minimum sustaining rate to ensure maximum cost efficiency and production is 7,000 Field Coats weekly. Of the 7,000 Field Coats produced weekly, a minimum of 1,500 coats will be Commercial coats. That means we will require a Government Contract that calls for an average production rate of approximately 5,500 weekly."

On July 20, 1993, representatives of Golden met with the contracting officer to discuss Golden's concept paper. The protester states that the contracting officer and another DPSC employee "told us they did not have an interest in

field coats." According to the protester, the contracting officer stated that the program announced in the BAA "is no longer the program that they are really interested in" and they "stated categorically that they were not interested in discussing field coats with us. They asked us if there is some other item that we may be interested in submitting a concept paper on . . . ." While the agency's account of the meeting varies in many respects from the protester's, the agency agrees that Golden was advised that the government had no need for field coats under the program.

After this meeting, Golden and the agency did not communicate about the concept paper for more than 2 months. On September 28, a Golden representative called the agency; the contracting officer declined to discuss the firm's concept paper. On October 1, the protester was advised that an award had been made to American for up to 95,000 field coats. Golden was also shown a signed DPSC "Justification for other than full and open competition" which cited 10 U.S.C. § 2304(c)(3) as authority to conduct this acquisition on an other than full and open competition basis.[1] The justification included a discussion of the electronic commerce and shared production agreement concepts. It stated further that:

> "Use of the authority cited above is necessary to develop new business strategies to utilize advanced manufacturing and inventory management techniques in an effort to improve the ability of maintaining and/or expanding a viable industrial base with sufficient mobilization capability to meet DOD requirements for certain planned defense items."

Golden filed this protest on October 8. Golden's primary argument is that 10 U.S.C. § 2304(c)(3) does not provide the agency with authority to conduct this acquisition on an other than full and open competition basis. Golden notes that this statutory exception to the requirement for competition can be used only: (1) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national

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[1]Under the Federal Acquisition Regulation (FAR), a BAA is considered a competitive procedure and meets the requirement for full and open competition if it is general in nature, identifying areas of research interest including criteria for selecting proposals; solicits the participation of offerors capable of satisfying the government's needs; and provides for peer or scientific review. FAR § 6.102(d)(2). Here, the agency obviously did not view its use of the BAAs as providing full and open competition.

emergency or to achieve industrial mobilization, 10 U.S.C. § 2304(c)(3)(A); or (2) to establish or maintain a development capability to be provided by an educational or other nonprofit institution. 10 U.S.C. § 2304(c)(3)(B). While Golden primarily contends that 10 U.S.C. § 2304(c)(3)(B) cannot provide authority for the award because American is not an educational or nonprofit institution, the protester also argues that 10 U.S.C. § 2304(c)(3)(A) cannot be used to authorize the award to American using less than full and open competitive procedures because, in the protester's view, the purpose of the contract is not to respond to a national emergency or to achieve industrial mobilization. Thus, Golden's argument is that 10 U.S.C. § 2304(c)(3) cannot authorize an award based on other than competitive procedures under any circumstances.

This argument is untimely. Each of the BAAs, including the one to which Golden responded, stated that competition was to be restricted consistent with 10 U.S.C. § 2304(c)(3) "to solicit on an other than full and open competition basis to enhance, maintain or stabilize the industrial base." The BAAs also stated that awards would be made to firms that demonstrate the probability of successfully demonstrating the objectives of the program and that the demonstration contracts would include the delivery of end items. As explained, Golden argues that neither of the two provisions of the cited statute can justify the use of other than competitive procedures under the circumstances here. Since in June, based on the BAA, Golden was aware of the agency's view that this statute provides authority for contracts "demonstrating unique and innovative approaches," and since the firm disagreed with that view, Golden should have protested the agency's asserted reliance on 10 U.S.C. § 2304(c)(3) based on the BAA. In this respect, a protest of the terms of a BAA, like a protest concerning the terms of a request for proposals, must be filed prior to the closing date for submissions of concept papers. Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1993); ABB Lummus Crest Inc., B-244440, Sept. 16, 1991, 91-2 CPD ¶ 252. Since Golden did not protest until after award, its argument that 10 U.S.C. § 2304(c)(3) does not provide authority for the award based on less than full and open competitive procedures is untimely and will not be considered.

Golden also raises several concerns regarding the agency's written justification. Golden argues that the written justification does not contain "sufficient facts and rationale to justify the use of the specific authority cited," as required by FAR § 6.303-2. This argument is essentially a restatement of the protester's untimely argument that 10 U.S.C. § 2304(c)(3) could not be used to authorize the "sole-source" award to American, since the

alleged absence of "facts and rationale" is nothing more than a further challenge to the use of the cited statutory authority.[2]

Golden also objects to the scope of the justification, arguing that it authorizes the removal of a significant number of coats from competition and deprives it of an opportunity to supply those coats. It asserts that the agency will purchase as many as 95,000 field coats in the first year of the contract with American and that there has been no showing that the agency is required to purchase so many coats in order to demonstrate the acquisition strategy. This argument also is untimely since the record demonstrates that Golden knew in July 1993 that the agency intended to purchase a significant volume of coats through a contract awarded pursuant to the BAAs. Indeed, the protester in its concept paper proposed delivery of more than twice the maximum number of coats that can be purchased under American's contract. Thus, since the protester knew that the contract awarded would require the delivery of a significant number of coats, if the protester believed that was improper, it should have filed a protest prior to submitting its concept paper. ABB Lummus Crest Inc., supra.

The protester also makes arguments concerning the adequacy of the justification on various procedural grounds. We find that the agency has substantially complied with the relevant procedural requirements, and we find no basis upon which to disturb the award. See Environmental Tectonics Corp., B-248611, Sept. 8, 1992, 92-2 CPD ¶ 160. For example, the protester complains that the justification does not state that the required market survey was conducted. The justification explains that the agency published four BAAs in the CBD. In our view, these publications in essence satisfied the market survey requirements. See Kollsman, A Div. of Sequa Corp.; Applied Data Tech., Inc., B-243113; B-243113.2, July 3, 1991, 91-2 CPD ¶ 18.

Golden also alleges that its concept paper was not treated fairly under the terms of the BAA because, when it submitted that paper, the decision to award to American essentially

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[2]For example, the protester argues that the justification contained a citation to FAR § 6.302-3(a)(2)(ii) which is applicable only to work provided by an educational or other nonprofit institution or a federally-funded research and development center. While the protester could not have been aware that this FAR section would be cited in the justification, the statutory authority for the award remains as stated in the BAA. In any event, the agency concedes that the citation was in error.

had already been made. We see no unfairness here. Concept papers submitted were not to be evaluated against each other and were not submitted in accordance with a common work statement; the agency also was not required to award a contract in response to any particular concept paper submitted. See FAR § 35.016. Here, Golden submitted its concept paper before the closing date stated in the fourth BAA, while American had submitted its concept paper following the first BAA. Although the agency, by issuing successive BAAs, indicated it was continuing to seek electronic commerce approaches in connection with clothing items, the later published BAA contained no indication that the agency was specifically seeking such approaches in connection with any specific type of clothing. Moreover, contrary to the protester's suggestion, the agency was not required to wait until the closing date of the last BAA to review concept papers submitted in response to the earlier BAAs and make awards based on the earlier submitted concept papers. Accordingly, the fact that the agency had essentially decided upon American's approach by the time the protester submitted its concept paper for field coats does not reflect "unfairness" to Golden and was not the result of any improper government action.

Next, Golden alleges that when the agency evaluated American's concept paper, it improperly applied the evaluation criteria contained in the BAA. Specifically, Golden argues that the agency failed to reasonably evaluate American's proposal with regard to the "production capability" criterion in the BAA. According to Golden, American's poor performance under a similar coat contract showed that the firm "simply does not satisfy [that] criterion."

The BAA stated that "[a] vendor's capability to produce targeted item(s) as indicated by quality and performance history on Government and commercial contracts will be assessed to determine the vendor's ability to meet the program objective for immediate demonstration." The protester points to performance problems encountered by American on a previous DPSC contract, and essentially argues that the agency should have concluded that similar problems would occur under this contract.

Both the agency and American concede that problems in fact occurred early in that contract. Indeed, American has explained in detail the nature and reasons for the problems as well as its efforts to correct them. For example, American states that the agency's quality assurance representative (QAR) failed five of American's initial lots based on her interpretation of the specifications. According to the awardee, these defects were eliminated as the contract progressed. American states that after its

representatives met with the QAR and the DPSC product specialist to discuss the specifications, only one of the next 52 lots was failed American states that the one lot was failed for sewing defects caused by a mechanical problem which was repaired. The agency concurs that "all problems experienced by American" under that contract were "overcome" and that "American has been producing a quality item."

Our review of an agency's evaluation of an offeror's proposal and resources is limited to ensuring that the evaluation was reasonable, and we will not substitute our judgment for that of the evaluators. L.S. Womack, Inc., B-244245, Sept. 30, 1991, 91-2 CPD ¶ 309. We have no basis to conclude that the agency unreasonably determined that American possesses the production capability to perform the contract. The fact that American experienced performance problems in the past does not demonstrate that it is incapable of producing the item, especially given its recent successful performance record. While the protester would have the agency focus on the awardee's performance defects early in the contract, the argument in our view constitutes mere disagreement with the agency's consideration of American's later performance and its judgment that American is capable. Such disagreement does not demonstrate that the agency's evaluation was unreasonable. See Research Analysis and Maintenance, Inc., B-239223, Aug. 10, 1990, 90-2 CPD ¶ 129.[3]

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[3]In a related allegation, Golden argues that DPSC also failed to reasonably evaluate American's commitment to actually deliver on the electronic data interchange and shared production agreement concepts set forth in American's concept paper. According to Golden, American's obligations under the "concept" portion of its contract are illusory since American is not obligated to do anything under the contract except furnish field coats and make suggestions concerning the electronic data interchange and shared production concepts. Our Office does not make an independent determination of the merits of proposals; rather, we examine the agency's evaluation and selection to ensure that it was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114. While Golden believes that American's contract does not include a sufficient commitment to develop an electronic data interchange capability and shared production agreements, the protester has not demonstrated how this alleged lack of commitment was inconsistent with the evaluation criteria. In our view, Golden is simply disagreeing with the agency's judgment concerning the value of American's contract to the agency's program goals. That
(continued...)

Finally, Golden alleges that the agency did not determine price reasonableness. A determination concerning price reasonableness is a matter of agency discretion which we will not question absent a showing that the determination was unreasonable or made in bad faith. U. S. Elevator Corp., B-241772, Mar. 5, 1991, 91-1 CPD ¶ 245. An agency may properly base a determination of price reasonableness on comparisons with government estimates, past procurement history, current market conditions, or any other relevant factors, including any revealed by the competition received. See FAR §§ 14.407-2 and 15.805-2; Imperial Maintenance, Inc., B-247371; B-247372, May 22, 1992, 92-1 CPD ¶ 464.

Here, in addition to conducting his own price analysis, the contracting officer relied on a September 7, 1993, price analysis prepared by the agency's contract support division which found that American's price was slightly above the current range of market prices for the coats. The agency conducted price negotiations with American on September 23, and the firm reduced its price. While American's price was still $.05 above the market range, the contracting officer determined that the revised price was fair and reasonable. The contracting officer noted that the "terms and conditions of the subject acquisition would, if anything, justify an additional increase in price based on the uncertainty of quantity, size, delivery time, etc."

While the protester points out that previous contract prices for the item have been lower, the agency clearly was aware of the historical pricing. The protester has not shown that the agency unreasonably concluded that, notwithstanding the increase, American's price for performing this contract, including the electronic commerce and shared production components of the contract, was fair and reasonable. We point out, in this regard, that the previous contracts did not contain requirements for electronic commerce and shared production. On this record, we have no basis to object to the contracting officer s price reasonableness determination.

The protest is dismissed in part and denied in part.

Robert P. Murphy
Acting General Counsel

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[1](...continued)
disagreement does not demonstrate that the agency's judgment was unreasonable and provides no legal basis to object to the award to American.