



## Decision

**Matter of:** Right Away Foods/Shelf Stable Foods;  
CINPAC, Inc.

**File:** B-259859.3; B-259859.4

**Date:** June 29, 1995

Paul Shnitzer, Esq., Jean-Pierre Swennen, Esq., and Christopher H. Wood, Esq., Crowell & Moring, for Right Away Foods/Shelf Stable Foods, and Richard O. Duvall, Esq., Richard L. Moorhouse, Esq., Dorn C. McGrath III, Esq., and Ross W. Dembling, Esq., Holland & Knight, for CINPAC, Inc., the protesters.

William W. Goodrich, Esq., and Craig S. King, Esq., Arent Fox, for SoPakCo, Inc., an interested party.  
Stanley Braverman, Defense Personnel Support Center, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest of agency's use of broad agency announcement (BAA) for the procurement of supplies in order to promote industrial mobilization is untimely where BAA provided for the delivery of an end-item of supply and advised that the objective was to maintain and/or expand the industrial base, but protest was not filed until after award; protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time.

2. Protest against award to third mobilization base producer on the basis that two current producers can meet any expected mobilization requirement, and that allegedly there is insufficient peacetime demand to support a third producer, is denied; given agency determination that the

\*The decision issued on June 29, 1995, contained proprietary and source selection sensitive information subject to a General Accounting Office protective order. Since Right Away Foods/Shelf Stable Foods, CINPAC, Inc., and SoPakCo, Inc. have waived any objection to its release, our Office determined that the entire text of the decision could be removed from the protective order, and the decision therefore appears in full.

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failure of either of the current producers would be "catastrophic" in the event of an emergency, agency's desire to support an alternative source was not an abuse of discretion.

3. Protest against award to third mobilization base producer on the basis that award is inconsistent with representations made by agency during prior competition that only two contracts would be awarded concerns a matter of contract administration, which is not for review under General Accounting Office's bid protest function.

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### DECISION

Right Away Foods/Shelf Stable Foods (RAFCO)<sup>1</sup> and CINPAC, Inc. protest the award of contract No. SP0300-95-C-Z102 to SoPakCo, Inc., under a broad agency announcement (BAA) issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center (DPSC), for testing innovative commercial and manufacturing concepts through the assembly of "Meals, Ready-to-Eat" (MRE).<sup>2</sup> RAFCO and CINPAC allege that DPSC has misused the BAA process and challenge the agency's evaluation of proposals.

We deny the protests in part and dismiss them in part.

On September 27 and November 30, 1993 and March 21, 1994, DPSC announced in the Commerce Business Daily its interest in receiving proposals for a demonstration of:

". . . unique and innovative approaches to maintaining and/or expanding a viable industrial base with sufficient surge capability to meet [Department of Defense] requirements for certain planned items during mobilization or contingencies short of a declared national emergency. The objectives are to develop new strategies utilizing

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<sup>1</sup>Right Away Foods and Shelf Stable Foods are related companies. They will be collectively referred to as RAFCO except where necessary to differentiate the firms.

<sup>2</sup>MREs are shelf stable complete meals that consist of various entree items, desert items and accessories--utensils, hot sauce, chewing gum, and drink mix; the individual entree portions are heat processed in airtight pouches by retorters and, with the other items, are placed by MRE assemblers into individual MRE bags, which are then packaged in boxes of 12 meals. MREs can be stored on the shelf, without refrigeration, for extended periods of time and have been designated as a mobilization essential, "war stopper" item.

advanced manufacturing and inventory management techniques to improve the ability of the industrial base to respond to changes in customer demand and to effectively reduce the overall cost to the Government to maintain capability for defense items."

The BAA advised that the program covered subsistence planned items and would focus on two main areas: (1) electronic commerce, and (2) shared production agreements. The BAA defined electronic commerce as paperless procurement operations using a combination of bar coding and an electronic data interchange capability (for the computer transmission of business data in a standardized format) to achieve a quick response environment where "the supplier's rate of production is determined by actual customer demand." The BAA described the desired shared production agreements as agreements under which the contractor would establish "a long-term business relationship with one or more of their major commercial or other non-DLA Government customers," in which the third party would share the production facility with DLA during peacetime, thereby reducing any one customer's--i.e., DLA's--share of allocated overhead costs, and would agree to relinquish production lines and capability during mobilization or contingencies short of a declared national emergency. The BAA noted that "[d]emonstrations conducted under this program will include the delivery of an end-item of supply."

The BAA provided for the evaluation of proposals based on the following five criteria (in descending order of importance): (1) production capability; (2) corporate experience; (3) financial commitment; (4) commitment to the "Industrial Base Program," noting that "the program objective is to maintain/expand the DLA Industrial Base"; and (5) commercial revenue base, noting that the government's objective was "to integrate its contingency requirements in the contractor's existing commercial base," but that contractors may also "propose realistic plans to expand their base in the interest of improving their Industrial Preparedness Capability and Commitment." The BAA cautioned that "[c]ompetition may 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 or in some cases under Full and Open Competition."

DPSC received responses to the BAA from: Right Away Foods and CINPAC, the two firms which had received awards when the last contracts for MRE assembly were awarded in 1993; SoPakCo, which previously had been an MRE assembler, but did not receive an assembly contract in 1993 (although it continued to be one of six MRE retorters of entree items);

and all of the other MRE retorters, including Shelf Stable Foods. SoPakCo proposed to introduce advanced manufacturing concepts and reduce its dependance on government contracts, while maintaining crisis production capability at a reduced cost to DLA by: (1) integrating SoPakCo's military and commercial production of MREs through an agreement with DLA for shared production on dual-use machinery; (2) significantly increasing SoPakCo's commercial sales of commercial MREs and developing an humanitarian ration which it can market; (3) utilizing horizontal-form-fill-seal (HFFS) equipment (instead of preformed bags) to increase the reliability of the packaging process; and (4) utilizing bar coding and an electronic data interchange.

DPSC decided to test the concepts proposed by SoPakCo by awarding it a contract for the assembly of MREs.<sup>3</sup> Having determined that there would exist a shortfall of approximately 752,000 cases of MREs by the end of 1996 unless more MREs were procured, the agency awarded a contract for the assembly of 300,000 cases in 1995, with an option for an additional 250,000 cases in 1996. In a justification and approval (J&A) for award to SoPakCo on the basis of other than full and open competition,<sup>4</sup> DPSC cited the authority in section 2304 of Title 10 of the United States Code for military agencies to conduct procurements in a manner that enables them to establish or maintain mobilization base sources of supply for a particular item in the interest of national defense. See 10 U.S.C. §§ 2304(b)(1)(B) and 2304(c)(3) (1994). DPSC explained in the J&A that:

"[t]he use of the authority cited is based on the continuing demand for MREs and related operational rations, to maintain properly balanced sources of supply, and to facilitate defense conversion which is a key element of DLA's effort to reduce the operational rations industrial base's dependency on Government contracts."

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<sup>3</sup>DPSC also selected Shelf Stable Foods's proposal for application of the shared production approach to the retort of MRE entree items.

<sup>4</sup>DPSC explained in the J&A that its requirement for an additional 752,000 cases resulted from consumption during the missions to Haiti and Kuwait, migrant feeding at Guantanamo Bay, Cuba, a foreign military sale to Kuwait, and restocking of stores in the Pacific Theater.

According to DPSC:

"[w]hile at the present time all MRE assembly needs can be met by two firms, acceptance of the concept paper [submitted by SoPakCo] is a good investment for the Government since the failure of either of the two firms would be catastrophic in a military emergency. SoPakCo is a key part of the Operational Rations industrial base producing tray packs . . . entrees, and assembled MREs. The Government derives direct benefits from testing SoPakCo's concept, furthering defense conversion goals and technological transfer, enhancing and diversifying the industrial base, obtaining needed product and potentially reducing the cost of the product."

Upon learning of the resulting award to SoPakCo, RAFCO, and CINPAC filed these protests with our Office.

#### QUANTITY

RAFCO and CINPAC maintain that use of a BAA here was improper because the quantity awarded to SoPakCo--assembly of 300,000 cases of MREs, with an option for an additional 250,000 cases--exceeded the minimum amount required to test SoPakCo's proposed advanced manufacturing techniques and approach to shared production. The protesters note that the Federal Acquisition Regulation (FAR) generally defines a BAA as "a general announcement of an agency's research interest," FAR § 35.001, and that section 35.016 of the FAR prescribes procedures for the use of a BAA "for the acquisition of basic and applied research and that part of development not related to the development of a specific system or hardware procurement." The protesters argue that use of a BAA for the acquisition of a significant quantity of supplies or for the procurement of supplies in order to promote industrial mobilization is inconsistent with the FAR definition of a BAA as a method for the acquisition of research.

This allegation is untimely in part. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (1995); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. Here, as noted above, the BAA provided that "[d]emonstrations conducted under this program will include the delivery of an end-item of supply." Further, the BAA stated that "the program objective is to maintain and/or expand the DLA Industrial Base"; the BAA cautioned in this regard that "[c]ompetition may be restricted . . . to enhance, maintain, expand or

stabilize the Industrial Base. . . ." Thus, any objections to the acquisition of supplies under the BAA or to the use of the BAA for the procurement of supplies in order to promote industrial mobilization had to be raised prior to the closing date for receipt of initial proposals--that is, as extended in the third synopsis of the procurement, by April 24, 1994. See Centre Mfg. Co., Inc., B-255347.2, Mar. 2, 1994, 94-1 CPD ¶ 162; Golden Mfg. Co., Inc., B-255347, Feb. 24, 1994, 94-1 CPD ¶ 183, recon. denied, B-255347.3, July 18, 1994, 94-2 CPD ¶ 28.

As for the contention that the quantity awarded SoPakCo exceeded that which could reasonably be expected under the BAA, the protesters' position in this regard amounts to little more than disagreement with the agency determination that the quantity was the minimum necessary to meaningfully test SoPakCo's proposal to reengineer its manufacturing process. In this regard, DPSC reports that the base quantity of 300,000 cases is considered a small production run. (Indeed, we note that RAFCO's most recent, 1993 contract award was for a base quantity of 1,179,000 cases for 1994, with an option for 2,276,780 cases over 2 years (1995 and 1996); CINPAC's contract was for a base quantity of 621,000 cases and an option quantity of 1,199,220 cases over 2 years.) As for the 1996 option quantity (250,000 cases), the agency notes that many aspects of the demonstration will likely take more than 1 year to evaluate.

The protesters' challenge to the quantity awarded as exceeding the minimum amount necessary to test SoPakCo's proposed approach also fails to take into account the mobilization base rationale for award to SoPakCo. Military agencies need not obtain full and open competition where the 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. Magnavox Elec. Sys. Co.; Ferranti Technologies, Inc., B-247316.2; B-247316.3, May 28, 1992, 92-1 CPD ¶ 475; Propper Int'l, Inc., B-229888; B-229889, Mar. 22, 1988, 88-1 CPD ¶ 296. Therefore, although we closely scrutinize procurement actions using other than competitive procedures, since the normal concern of maximizing competition is secondary to the needs of industrial mobilization, decisions as to which and how many producers are in the mobilization base involve complex judgements which must be left to the discretion of the military agencies. Minowitz Mfg. Co., B-228502, Jan. 4, 1988, 88-1 CPD ¶ 1. We will question an agency's decisions as to which particular producer or producers will be awarded a contract only if the record convincingly establishes that the agency abused its discretion. Magnavox Elec. Sys. Co.; Ferranti Technologies, Inc., supra; Minowitz Mfg. Co., supra.

Here, as already discussed, the BAA cautioned that pursuant to the authority of 10 U.S.C. 2304(c)(3), competition could be restricted for "Industrial Base" purposes. Although the agency states in its administrative report responding to the protests that "DPSC's primary objective in using this BAA was to explore evolving business strategies, not to support a third MRE assembler," the contemporaneous record indicates that the selection of SoPakCo also reflected DPSC's evaluation of that firm's contribution to the industrial mobilization base, which is an independent justification for award, and not merely the merits of its proposal. Specifically, we note that: (1) the J&A for award to SoPakCo listed that firm as one of the three companies--with CINPAC and Right Away Foods--comprising "the MRE assembly industrial base"; (2) DPSC determined that acceptance of SoPakCo's proposal "is a good investment for the Government since the failure of either of the two firms would be catastrophic in a military emergency. SoPakCo is a key part of the Operational Rations industrial base"; (3) the J&A stated that it was "necessary to award a contract to a particular source in order to maintain the industrial base required to meet military requirements and to facilitate defense conversion"; and (4) award was made at SoPakCo's claimed minimum sustaining rate (MSR) for MRE assembly--that is, the production level required in peacetime to economically maintain the mobilization capability of the firm while remaining profitable. The protesters have made no showing that the quantity awarded SoPakCo exceeded that necessary to support SoPakCo's contribution to the industrial mobilization base.<sup>5</sup> The quantity of MREs awarded thus provides no basis to object to the award to SoPakCo.

#### EVALUATION OF PROPOSALS

The protesters challenge the evaluation of proposals on the grounds that SoPakCo's proposal did not offer the "unique and innovative approaches to maintaining a viable industrial base with surge capability" sought by the BAA, and that SoPakCo lacked existing commercial business at the production facility selected for the demonstration. Again, however, the contemporaneous documentation supporting the selection of SoPakCo indicates that DPSC relied in part on the firm's position in the mobilization base as an alternative to CINPAC and Right Away Foods; CINPAC's and

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<sup>5</sup>Indeed, we note that although SoPakCo claimed in 1994 that its MSR for supporting its claimed crisis production capacity for MRE assembly had been reduced to 300,000 cases per year, a significant reduction from prior levels, DPSC at that time determined that peacetime orders of 300,000 cases would not adequately support SoPakCo's claimed crisis production capacity.

RAFCO's evaluation arguments do not establish that the selection of SoPakCo cannot be justified on the basis of mobilization base considerations, as the BAA cautioned potential offerors might occur. Although the protesters also question the award to SoPakCo on the basis that they can meet any expected mobilization requirement and that allegedly there is insufficient peacetime demand for MREs to support a third MRE assembler, given DPSC's finding that the failure of either of the protesters would be "catastrophic" in the event of an emergency, there is no basis for concluding that DPSC's apparent desire to support an alternative source was an abuse of discretion.

#### 1993 MRE ASSEMBLY CONTRACTS

CINPAC and RAFCO argue that the award of an MRE assembly quantity to SoPakCo is inconsistent with representations made by DPSC during the 1993 competition for MRE assembly contracts that only two MRE assembly contracts would be awarded; according to the protesters, they based their pricing and investment strategies on the expectation that the MRE assembly industrial base would be reduced from three to two firms. However, according to the agency, the quantity awarded SoPakCo represented a new, additional requirement, in excess of the requirements under CINPAC's and Right Away Foods's MRE assembly contracts; the protesters have not established otherwise, and the record shows that the agency has already exercised the 1995 options on their contracts. In any case, the protesters' claim that the award to SoPakCo was inconsistent with their 1993 contracts concerns a matter contract administration, which is not for review under our bid protest function. 4 C.F.R. § 21.3(m)(1).

The protests are denied in part and dismissed in part.

Robert P. Murphy  
General Counsel