



Comptroller General
of the United States

Washington, D.C. 20548

B-227839.6

February 16, 1988

The Honorable James R. Ambrose
Under Secretary of the Army

Dear Mr. Ambrose:

This responds to your letter of December 4, 1987, concerning our decision in ILC Dover, Inc., B-227839.2, Nov. 9, 1987, 87-2 C.P.D. ¶ 464. In that decision, we recommended that the Army terminate for the convenience of the government a contract with Scott Aviation Company for chemical/biological protective masks awarded under request for proposals (RFP) No. DAAA15-87-R-0035. The Army has not requested reconsideration of our decision, but you indicate that the Army does not intend to terminate Scott's contract. Basically, you contend that our recommendation was unrelated to the central issue raised by the protest and that procurement of the masks using full and open competition is not possible at this time.

We sustained the protest based on our conclusion that the Army did not evaluate proposals in accordance with the evaluation scheme set forth in the RFP. The Army invited the offerors to compete under an evaluation scheme in which technical merit, production capability, and cost were to be considered equal. The agency later decided, however, that it wanted only what it determined was the best design and therefore selected Scott's proposal for award even though ILC Dover's mask met the performance criteria of the RFP and ILC Dover's price was much lower than Scott's. In our view, the central issue in the case concerned the Army's conduct of a competition that only Scott could win. We therefore recommended termination of Scott's contract followed by a full and open competition based on the Scott design.

We recommended that the Army conduct a competitive procurement for the initial production quantity of masks because (as we stated in footnote 2) we were unaware of any reason why production by Scott, as opposed to any other competent manufacturer, was necessary to validate the technical data package (TDP). In believing competition to

be possible, we relied on the preliminary findings of a related, but separate, audit review of the Army's earlier determination to limit competition for the initial production contract to Scott and ILC Dover. That review has now been completed and, as indicated in the enclosed report, Army Procurement: Unnecessary Restriction on Competition for New Chemical Protective Masks (GAO/NSIAD-88-66), we still think that full and open competition should be obtained for the first production contract.

We recognize that in Mine Safety Appliances Co. v. United States, No. 87-3569 (E.D. Va. May 4, 1987), a potential competitor for the first production contract challenged unsuccessfully the Army's decision to restrict the competition to Scott and ILC Dover. The court concluded that at an earlier stage of the procurement the Army had engaged in a rational decision-making process and properly had invoked the public interest exception to the requirement for full and open competition. We also recognize that the policy of this Office is not to consider a protest where the matter involved has been decided on the merits by a court of competent jurisdiction. Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1987). In fact, subsequent to the court's ruling in Mine Safety Appliances, we dismissed two protests that challenged the Army's decision to restrict the competition to Scott and ILC Dover. Mine Safety Appliances Co., B-227839, July 8, 1987, 87-2 CPD ¶ 24; Ames-Avon Industries, B-227839.3, July 20, 1987, 87-2 CPD ¶ 71, aff'd, B-227839.4, Aug. 11, 1987, 87-2 CPD ¶ 150.

We find nothing in the court's decision, however, that would preclude a determination, at this time, that there should be full and open competition for the first production contract. Given the significant savings that could be realized--ILC Dover's price was almost \$17 million lower than Scott's for the basic quantity alone--we think the Army should take a fresh look at this issue, particularly in light of the findings stated in the enclosed audit report. In this regard, we note that you propose to accelerate to the second quarter of fiscal year 1988 the competition to establish a second-source mask producer. We assume, therefore, that in the Army's view the TDP either is now or soon will be adequate for competition, thereby eliminating whatever barrier to full and open competition may have existed previously.

Since we are required under 31 U.S.C. § 3554(e)(2) (Supp. III 1985) to report to Congress each instance in which a federal agency does not fully implement a recommendation of this Office contained in a decision on a protest, we ask

that you again advise us of the action taken on our recommendation.

Sincerely yours,

Milton D. Eisenhower

for

Comptroller General
of the United States

Enclosure