

Tzmaurice



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

25412

FILE: B-207458.2, B-207458.3 **DATE:** June 8, 1983

MATTER OF: Defense Logistics Agency;
Berlex Laboratories, Inc.--
Request for Reconsideration

DIGEST:

GAO reverses prior decision and withdraws the recommendation for possible corrective action because of information the contracting agency has presented subsequent to the issuance of the decision.

The Defense Logistics Agency (DLA) and Berlex Laboratories, Inc. (Berlex), request reconsideration of our decision in the matter of Bolar Pharmaceutical Co., Inc., B-207458, February 17, 1983, 83-1 CPD 163, where we sustained the protest of Bolar Pharmaceutical Co., Inc. (Bolar), and recommended corrective action.

Bolar protested the cancellation of request for proposals (RFP) No. DLA120-82-R-1194 (RFP -1194) and the award of a sole-source contract to Berlex under RFP No. DLA120-81-R-2463 (RFP -2463). Both solicitations were issued by the Defense Personnel Support Center, DLA. RFP -2463 was issued on a sole-source basis to Berlex for six different drugs, among them quinidine gluconate, to satisfy all DLA and Veterans Administration (VA) requirements for 1 year. Because delay in an award under RFP -2463 due to negotiation difficulties with Berlex created the possible exhaustion of the supply of quinidine gluconate, DLA issued RFP -1194 for about one-third of the requirement as a stopgap measure. Under RFP -1194, DLA had an offer from Berlex and an unexpected offer from Bolar, as follows:

	<u>Unit Price</u>	<u>Total Price</u>
Berlex	\$42.00	\$423,360
Bolar	33.40	336,672

Shortly thereafter, Berlex refused to grant an impending extension of its offer under RFP -2463. Because of this and the fact that Bolar could not be considered an approved

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source until the United States Food and Drug Administration (FDA) conducted a preaward survey of the firm, the contracting officer awarded Berlex a contract under RFP -2463 which included the total requirement for quinidine gluconate. Although it had already awarded a contract which made RFP -1194 unnecessary, DLA requested an FDA preaward survey of Bolar. Three weeks after award, FDA found Bolar a qualified manufacturer of quinidine gluconate. Then DLA canceled RFP -1194.

Bolar protested here, arguing that the sole-source award to Berlex for quinidine gluconate was unjustified in view of Bolar's availability as a second source, as well as Bolar's lower price, that DLA's cancellation of RFP -1194 was unjustified, and that the manner in which DLA had conducted the two procurements had been patently unfair to Bolar. After concluding that DLA's actions were improper, we recommended that DLA study the feasibility of reinstating RFP -1194 and awarding to Bolar for the amount solicited, provided that Bolar was willing to accept award at its offered price and DLA had a continuing requirement for quinidine gluconate. If all these factors were present, we stated that DLA should terminate for the convenience of the Government the contract awarded to Berlex as to the line item for quinidine gluconate only and make the award to Bolar. Finally, we held that DLA should conduct competitive procurements for the drug in the future because at least two qualified sources were available.

On reconsideration, DLA argues that our decision is incorrect and, in the alternative, that our recommendation is infeasible. Berlex also argues that our decision is incorrect. DLA argues that our decision incorrectly concluded that Berlex's proposal under RFP -2463 was not qualified as "all or none." DLA points out that the proposal was qualified "all or none" because during the negotiations Berlex told the contracting officer that all the quinidine gluconate line items were priced as a group and loss of the requirement under RFP -1194 would result in Berlex's withdrawal of its offer and necessitate purchase of the remaining items at much higher prices.

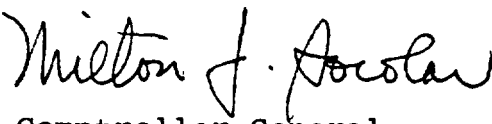
Our prior decision was based on the premise that the Berlex proposal was not "all or none." While DLA had stated to us that the three quinidine gluconate items had been priced as a "group," we did not find any indication in the Berlex proposal of an "all or none" qualification. We thus concluded that the contracting officer was free to award partially to Berlex under RFP -2463 and to award the

RFP -1194 requirement to Bolar. But, as DLA points out in the request for reconsideration, Berlex did not state its proposal was "all or none" simply because the qualification would have been unnecessary in a procurement believed by both DLA and Berlex to be sole source. Nevertheless, DLA states, both the DLA contracting officer and Berlex understood that the prices offered by Berlex were interrelated and "all or none." Given the situation facing the DLA contracting officer, we must now conclude that he was not free to withhold award of any item under the first solicitation.

Moreover, based on additional information DLA has supplied, we find that reinstatement of RFP -1194 is no longer feasible or warranted.

DLA reports that the Berlex contract under RFP -2463 has recently expired and all orders for quinidine gluconate under the contract, which contained the RFP -1194 requirement, have been delivered. In addition, DLA states that it has no present requirement for quinidine gluconate, the specification for quinidine gluconate has been changed, there now appear to be two additional sources for this drug, and it is now questionable whether Bolar's unit price of \$33.40 is reasonable since, under a recent competitive procurement, subsequently canceled, DLA received two offers (one of them from Bolar, \$28.65) lower than this.

We therefore reverse our prior decision and withdraw our recommendation for possible corrective action, and now conclude that the award to Berlex of item 0001 under RFP -2463 was justified.

for 
Comptroller General
of the United States