PL 2

26891

DECISION

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

FILE: B-211891; .2; .3; .4 **DATE:** November 18, 1983

MATTER OF: Pioneer Tool & Die Company; Ramal Industries, Inc.; Risdon Corporation

DIGEST:

1. Agency could reasonably decide to negotiate mobilization base agreements with the only current producers of a mobilization base item and later expand the base competitively as the need arose, especially where its then current needs were not sufficient to support additional producers. Determinations of this type are primarily the responsibility of the procuring agency and will not be disturbed absent convincing evidence of abuse of administrative discretion.

2. Firm that is not a mobilization producer is not an interested party to protest that a procurement restricted to such producers resulted in a disproportionate award to a large business, since the firm would be ineligible for award even if the protest on this issue were sustained.

3. GAO will not object to an agency's decision to accept bids from the current mobilization base producers on a competitive solicitation for expansion of the base. Although the current producers may enjoy a competitive advantage because of their prior contracts, this would be improper only if it resulted from unfair government action, which is not the case here.

4. Allegation that a firm should be suspended from contracting because it pleaded nolo contendere in a suit brought against it for violation of anti-trust laws is dismissed. This is a matter for consideration by the contracting agency, not GAO.

5. The quantity of a given mobilization item to be awarded to a particular mobilization base producer is a matter within the discretion of

the procuring agency, which GAO will not disturb absent convincing evidence of abuse of discretion. The fact that the agency made an error in calculating the quantity to award to the protester is not considered sufficient evidence to find an abuse of discretion here.

6. There is no prohibition against expansion of the existing mobilization base where the current producer or producers are not being utilized to their full capacity.

Pioneer Tool & Die Company, Ramal Industries, Inc., and Risdon Corporation protest the Department of the Army's issuance of delivery order Nos. DAAA09-82-G-7827/0001 and DAAA09-83-G-3001/0001 for copper cones to be used in 155 mm projectiles. Both Pioneer and Risdon protest the awards because they were not designated as mobilization base producers. Ramal on the other hand seeks to have the production quantity award to it increased to meet its actual production capacity. We deny the protests in part, and dismiss them in part.

The delivery orders were issued under basic ordering agreements (BOA) negotiated with Ramal and Revere Copper and Brass Incorporated pursuant to the authority contained in 10 U.S.C. § 2304(a)(16) (1982). That statute permits negotiation when an agency head determines that it would be in the best interest of national defense to have a producer available in case of a national emergency, or that the interest of industrial mobilization in case of such an emergency would otherwise be served.

Pioneer and Risdon Protests

Pioneer and Risdon both protest the Army's refusal to include them among those firms designated as mobilization base producers. Risdon emphasizes the Army has informed it that it can only become a mobilization base producer through a competitive solicitation, but notes that Ramal and Revere were not required to participate in a competition. Pioneer also argues that a disproportionate share of the production

quantities awarded to Revere and Ramal were made to a large business (Revere).

The record shows that at the time the copper cones were designated as mobilization base items, Ramal and Revere were the only two current producers of the cones. The Army therefore automatically included them in the mobilization base and determined that any needed additional producers would be competitively solicited. A competitive solicitation for the purpose of expanding the mobilization base was in fact issued by the Army after Pioneer and Risdon filed their protests here. No award has been made under the competitive solicitation yet.

The determination of the needs of the government with respect to industrial mobilization and the method of accommodating such needs is primarily the responsibility of the procuring agency. 53 Comp. Gen. 348 (1973). Except in situations where convincing evidence has been produced indicating that the administrative discretion was abused, our Office will not challenge that determination. Id.

Here, we find no basis to question the Army's approach to meeting its industrial mobilization needs. Since Revere and Ramal were the only current producers of the copper cone at the time it became a mobilization base item, we believe the Army could reasonably determine to negotiate mobilization base agreements with them first, and then expand the base competitively as the need arose. See Saft America, Inc., B-193759, July 12, 1979, 79-2 CPD 28. In this connection, the record indicates that the Army's then current needs were not sufficient to support any additional producers. Consequently, Pioneer and Risdon's protests on this issue are denied.

Further, we dismiss Pioneer's argument that a disproportionate share of the quantities awarded to Revere and Ramal were made to Revere, which is a large business. (Ramal is a small business.) In general, we will not consider a party's interest sufficient to protest an issue where that party would not be eligible for award, even if the issue were resolved in its favor. Radix II Incorporated, B-208557.2, September 30, 1982, 82-2 CPD 302.

Since the procurement here was restricted to mobilization base producers and Pioneer is not such a producer, it would be ineligible for award even if we sustained its protest on this issue. Only Ramal would have a direct interest in the outcome of this basis of protest, and Ramal has not raised the issue here. Thus, we will not consider the matter further.

In its comments on the agency report, Pioneer for the first time argued that the Army's decision to make the copper cone a mobilization base item was improper. Bases of protest which are raised after an initial protest is filed must independently satisfy our timeliness requirements. Transiac Corporation, B-210168, May 23, 1983, 83-1 CPD 554.

Under our Bid Protest Procedures, at 4 C.F.R. § 21.2(b)(2) (1983), protests such as this must be filed within 10 working days after the basis of protest is known or should have been known. Pioneer clearly knew of this ground for protest at the time it filed its original protest against the Army's refusal to designate it as a mobilization base producer. Pioneer, however, did not raise the issue until nearly 2 months later. Therefore, we consider the matter to be untimely raised, and this part of Pioneer's protest is dismissed.

Risdon also protests the Army's decision to allow the current mobilization base producers, Revere and Ramal, to bid on the competitive solicitation for expansion of the base. Risdon argues that Revere and Ramal have an unfair advantage because of their existing contracts, which were awarded without competition. We find no merit to Risdon's position.

The government is not required to equalize competition on a particular procurement by considering the competitive advantage accruing to firms due to their particular circumstances, including the award of other contracts. DCG Construction, Ltd., B-205574, May 6, 1982, 82-1 CPD 431. Although a competitive advantage may well exist, it is not improper unless it is the result of unfair government action. See Communications Corps Incorporated, B-195778, February 20, 1980, 80-1 CPD 143.

Although Revere and Ramal were awarded contracts non-competitively, we have no basis to conclude that this resulted from unfair government action. The awards are supported by a Determination & Findings (D&F) signed by an Assistant Secretary of the Army. The findings contained in the D&F state that procurement from the qualified selected mobilization base producers is necessary to make vital suppliers available in case of national emergency. We are precluded from disturbing these findings since they are made final by statute. Norton Company, Safety Products Division, 60 Comp. Gen. 341 (1981), 81-1 CPD 250; 10 U.S.C. § 2310(b).

Moreover, we have recognized that in a procurement negotiated under 10 U.S.C. § 2304(a)(16), the normal concern with insuring maximum competition is secondary to the needs of industrial mobilization. National Presto Industries, Inc., B-195679, December 19, 1979, 79-2 CPD 418. Thus, contracts may be awarded to a predetermined contractor or contractors in order to create or maintain their readiness to produce essential military supplies in the future. Id. Consequently, any advantage Revere and Ramal may enjoy because of their prior contracts was gained properly, and is not the result of unfair government action.

Ramal Protest

Ramal contends that Revere should be suspended from future contracting with the Army because the firm recently pleaded nolo contendere in a suit brought against it for violation of anti-trust laws. The existence of an anti-trust conviction does not necessarily require that a firm be suspended. See National Mediation Board, 59 Comp. Gen. 761 (1980), 80-2 CPD 230; Defense Acquisition Regulation (DAR) § 1-605.1 (Defense Acquisition Circular 76-41, December 27, 1982). Rather, the decision to debar or suspend for an anti-trust violation is in the discretion of the agency. National Mediation Board, supra.

While Ramal argues that we should at least insure that the Army consider the fact that Revere was indicted and pleaded nolo contendere, we think that as a result of this protest the Army is aware of this fact. Further, the degree to which it is given consideration by the Army as a cause for debarment or suspension is a matter for the agency, not this Office, to decide. Accordingly, this aspect of Ramal's protest is dismissed.

Ramal also contends that the Army did not award it a sufficient production quantity to equal its production capacity, and that this is unfair because the Army awarded a sufficient quantity for this purpose to Revere. Revere argues that this issue is untimely because it was not filed within 10 working days after the delivery orders to Revere and Ramal were issued, but instead was filed nearly 2 months later.

Ramal states that it did raise this issue with the contracting officer during the negotiation of the delivery order. Ramal says it received no definite reply, although it was led to believe the Army would study the matter and make up any shortfall found. We have held that where a protester timely protests initially with the agency and after pursuing the protest with the agency for approximately 2 months files a protest with GAO without having received a denial of its protest to the agency, the protest filed with GAO is timely. ARVCO Containers, B-208785, January 18, 1983, 83-1 CPD 63.

Revere argues that since Ramal has produced no evidence to show that it protested to the agency, the protest should nevertheless be considered untimely. It also contends that if Ramal protested the shortfall during negotiation of the delivery order, the actual award of a lesser quantity constituted initial adverse agency action on the protest. See 4 C.F.R. § 21.2(a). We disagree.

While it is true Ramal has produced no evidence to show that it did protest to the contracting officer, Revere has produced no evidence to the contrary. In addition, the agency has not suggested that the protest is untimely. We will therefore treat the protest as timely in accordance with our policy of resolving doubt as to a protest's timeliness in favor of the protester. In addition, we do not believe that the award of a lesser quantity constituted adverse agency action since Ramal apparently believed the contracting officer would be conducting a study into the matter.

The record shows that the Army determined to award both Ramal and Revere a sufficient production quantity to equal their respective production capacities on a one shift, 8-hour, 5-day per week basis. It calculated the award quantity for Ramal on that basis to be 1.138 million

cones per month. Ramal contends that the correct quantity should actually be 1.3 million cones.

Ramal recognizes in a letter to the contracting officer, dated August 31, 1983, that the reason for this shortfall is a typographical error made by the government when it calculated the award quantity. Consequently, it is clear that there was no intention on the part of the Army to treat Ramal unfairly. Whether the Army corrects the error and awards the additional quantity to Ramal, or whether the Army now determines in good faith that its mobilization base needs do not require the award of that additional quantity to Ramal, is a matter for the Army. Although Ramal also argues that the Army should not be permitted to expand the mobilization base until it has been awarded what it considers an adequate production quantity, we are aware of nothing which prohibits the expansion of the mobilization base where the current producers or a current producer are not being utilized to their full capacity. See Norton Company, Safety Products Division, supra. Consequently, we find this contention without merit.

Ramal asserts that Revere's BOA is invalid and illegal and that any delivery orders placed under it are therefore also invalid and illegal. The basis for this contention is DAR § 3-410.2(a)(1), which describes a BOA by stating that "it is an agreement . . . similar to a basic agreement . . . except that it also includes a description, as specific as practicable, of the supplies to be furnished . . . ." (emphasis added). Ramal contends that the description in Revere's agreement is not specific enough because it describes the covered items only as "Ammunition and Ammunition Items," while Ramal's own agreement describes the items to be ordered as "Copper Cones F/M483/M509 Projectile."

While Revere contends that the BOA covers more than the copper cones, the Army has not explained its reason for describing the items more specifically in Ramal's agreement than in Revere's agreement. Whatever the reason, however, we do not conclude that the less specific description in Revere's BOA renders it, or the orders issued under it, invalid. A BOA itself is not a binding contract--the contract arises pursuant to the orders issued under it; that is, the order is the contract, not the underlying BOA.

DAR § 3-410.2. The order in question here is specific and as executed, is binding on both parties and is thus a valid contractual commitment. Thus, we find no merit to this basis of protest.

In addition, Ramal contends that Revere is using two rented foreign-owned machines in producing its copper cones and argues that this is contrary to the mobilization base concept. Ramal states that the purpose of establishing mobilization base producers is to insure that producers will be available in case of national emergency. It asserts that there is no guarantee that Revere's rented equipment would be available in case of national emergency.

As Revere points out, this likelihood is rather remote since the machines are actually in the United States and in Revere's possession. Moreover, as previously indicated, the primary responsibility for determining the needs of the government with respect to industrial mobilization and the method of accommodating them rests with the procuring agency. See 53 Comp. Gen. 348, supra. We are not persuaded that the Army abused its discretion by awarding the contract to Revere for copper cones which will be produced using foreign-owned equipment located in the United States, and deny Ramal's protest on this issue.

Ramal argues that the Army is biased against it because it conducted an extensive pre-award survey of Ramal, but did not conduct any pre-award survey of Revere. There is no requirement that a pre-award survey be conducted in all cases, and there are valid reasons why a contracting officer may decide not to conduct one. See Decision Sciences Corporation, B-205582, January 19, 1982, 82-1 CPD 45. We cannot conclude that the Army's actions here necessarily demonstrate any bias on its part. Nor do we believe that Ramal has demonstrated any competitive harm as a result of the Army's action. This basis of protest is therefore denied.

Ramal also has raised a number of issues which we consider untimely. These include allegations that the Army issued a BOA to Revere approximately 9 months before issuing one to Ramal, and that a number of actions taken by the Army

in connection with prior copper cone procurements demonstrate that it is biased against Ramal. These bases of protest were clearly known to Ramal months, or even years, before it protested them here. Therefore they clearly are untimely raised, and are dismissed.

Conclusion

The protests are denied in part and dismissed in part.

for Harry D. Van Cleve
Comptroller General
of the United States