



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Centre Manufacturing Co., Inc.

File: B-255347.2

Date: March 2, 1994

Fredric T. Rekstis, Esq., Kostos and Lamer, 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 agency's proposed use of industrial mobilization exception to requirement for full and open competition is untimely where agency's use of the exception was explained in detail in four broad agency announcements published in the Commerce Business Daily, including ones to which the protester responded.
2. Protest alleging that agency's written justification for other than full and open competition did not comply with regulations specifying the required content of such justifications is denied where agency substantially complied with the requirements and agency's failure to list interested sources did not prejudice the protester.

DECISION

Centre 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, Defense Personnel Support Center (DPSC), to acquire clothing and textile items including field coats. 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. Centre

primarily argues that the contract was awarded without full and open competition and that the agency did not properly justify a non-competitive 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. In addition, 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 Federal Acquisition Regulation (FAR) § 35.016.

The contract award to American Apparel was one of several awards resulting from four BAAs which were issued by DPSC between March 1992 and April 1993.¹ 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 in support of 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 focused on two main areas: electronic commerce and shared production agreements. Electronic commerce, as contemplated under the program, entails the "rapid

¹This is our second decision concerning awards resulting from the BAAs. See Golden Mfg. Co., Inc., B-255347, Feb. 24, 1994, 94-1 CPD ¶ ____.

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 the DPSC "is seeking new and creative concepts which have the potential for further development" and required that concept papers may 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 Apparel 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. Centre submitted a concept paper dated May 21, 1992, proposing to provide field coats and all-weather coats under the demonstration program. By letter dated June 23, the agency advised Centre that its submission did not meet the criteria for corporate experience and did not "clearly detail an approach which would demonstrate an ability" to meet the agency's "immediate contract/program goals." The agency published additional BAAs in the CBD on August 7 and December 29, 1992.

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 also awarding it a contract for 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 [coats] can accomplish [program] goals in ways not currently being demonstrated. . . ."

Centre submitted a second concept paper on April 1, 1993 proposing to provide all-weather coats. The agency subsequently advised Centre that its concept paper was found "acceptable in terms of the program" but that there was no current requirement for the all-weather coat. The letter suggested that Centre consider proposing the utility jacket as a substitute. Centre responded by letter dated June 14 that it was capable of providing utility jackets and field coats under the program. By letter dated June 15, Centre reiterated that "we at Centre stand ready to participate in the program to manufacture Field Coats." By letter dated July 26, the agency advised Centre that more than 80,000 utility jackets were reserved for the program but that current requirements for the field coats were "either reserved for other demonstration projects already under development or for competitive acquisition." The DPSC letter invited further discussions on "integrating your proposed concepts with our program objectives for the Utility Jacket." No further discussions were held regarding the field coats, and by letter dated July 30, Centre modified its concept paper to substitute the utility jacket for the all-weather coat.

The field coat contract was awarded to American on September 30, 1993. Prior to awarding the contract, the agency prepared a "Justification for other than full and open competition" stating that 10 U.S.C. § 2304(c)(3) authorizes the acquisition on an other than full and open

competition basis.² 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."

On October 15, Centre filed this protest against the award of the field coat contract. Centre's primary argument is that "this was not an appropriate acquisition for the use of other than full and open competition." The protester notes that the statutory exception for full and open competition cited in the justification, 10 U.S.C. § 2304(c)(3), 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 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). The protester argues that "regardless" of which provision of 10 U.S.C. § 2304(c)(3) the agency relied on, the agency could not properly use the exception to award this demonstration contract.

This argument is untimely. Each of the four BAAs, including the one to which Centre responded, stated that the agency intended to award contracts to demonstrate program objectives. Contrary to the protester's assertion that the BAAs did not indicate "to what end the Agency proposed to conduct" the evaluation of concept papers, the BAAs specifically provided that after evaluations, negotiations would be held with those firms offering "an immediate opportunity to gain experience in one or more of the areas of the overall Program objective," and that contracts contemplating the delivery of end items would be awarded to

²Under the FAR, a BAA is considered a competitive procedure and meets the requirements 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.

firms that demonstrate the probability of successfully demonstrating program objectives. In addition, each of the BAAs stated that competition would 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." Since in June, based on the BAA, Centre was aware of the agency's view that the statute provides authority for entering into contracts to demonstrate "unique and innovative approaches," the firm's protest against the agency's asserted reliance on either subsection (A) or (B) of 10 U.S.C. § 2304(c)(3) should have been filed prior to the closing date for submission of concept papers 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 submission of concept papers. 4 C.F.R. § 21.2(a)(1) (1993); ABB Lummus Crest Inc., B-244440, Sept. 16, 1991, 91-1 CPD ¶ 252. Since Centre did not protest until after award, its argument that the agency lacked authority to award contracts based on less than full and open competitive procedures is untimely and will not be considered.³ See Golden Mfg. Co., Inc., supra.

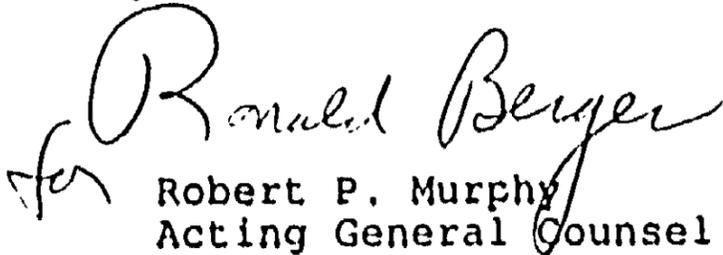
Centre also raises several other concerns regarding the agency's written justification. The protester argues that the justification does not comply with the general requirement in FAR § 6.303-2(a) that justifications contain "sufficient facts and rationale to justify the use of the specific authority cited." 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 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 describing the appropriate circumstances for its use.

Centre also makes arguments concerning the adequacy of the justification on various procedural grounds. For example, it contends that the justification does not state that a

³The protester also argues that the justification is defective because it 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, based on the BAAs, that this FAR section would be cited in the justification, the statutory authority for the award remains as stated in the BAA, which the protester has not timely challenged. In any event, the agency concedes that the citation was in error.

market survey had been conducted and does not contain a listing of the sources that expressed interest in the procurement as required by FAR §§ 6.303-2(a)(8) and 6.303-2(a)(10), respectively. First, with respect to the allegation that the justification does not state that a market survey was conducted, the justification explains that the agency published four BAAs in the CBD. In our view, these publications satisfied the market survey requirement. See Kollsman, A Div. of Sequa Corp., Applied Data Technology, Inc., B-243113; B-243113.2, July 3, 1991, 91-2 CPD ¶ 18. Second, while the protester is correct that the justification does not list the sources expressing interest, given Centre's full participation in the BAA process, we fail to see how Centre was prejudiced by the omission. See Mine Safety Appliances Co., B-233052, Feb. 8, 1989, 89-1 CPD ¶ 127. Centre's only concept paper for field coats had been rejected more than a year before the preparation of the justification and Centre had not submitted a revised concept paper for the field coats by the closing dates specified in the BAAs. Under the circumstances, the agency's failure to list Centre had no impact on that firm's ability to compete, the rejection of its proposal, or the decision to award a contract to American. Id. Since the record shows that the agency has substantially complied with the relevant procedural requirements, we deny Centre's protest that the justification was procedurally defective. See Environmental Tectonics Corp., B-248611, Sept. 8, 1992, 92-2 CPD ¶ 160.

The protest is dismissed in part and denied in part.


for Robert P. Murphy
Acting General Counsel