

10/24/85

DECISION



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

FILE: B-220013

DATE: November 12, 1985

MATTER OF: Action Manufacturing Company

DIGEST:

Cost evaluation of proposals conducted by an agency under the authority of the Arsenal Statute, 10 U.S.C. § 4532(a) (1982), for the purpose of determining whether supplies can be obtained from government-owned, contractor-operated (GOCO) factories on an economical basis may be made by comparing cost proposals of contractor-owned and -operated plants with out-of-pocket cost proposals of GOCO contractors which exclude those costs that would be incurred by the GOCO contractors whether or not a particular contract is awarded to a GOCO plant.

Action Manufacturing Company protests the terms of request for proposals (RFP) No. DAAA21-85-R-0276, issued by the Army Armament, Munitions and Chemical Command, Dover, New Jersey. The solicitation, as amended, permitted the participation as offerors of operating contractors of GOCO (government-owned, contractor-operated) facilities, as well as private COCO (contractor-owned, contractor-operated) firms. Action maintains that the basis on which offers from GOCO plant operators are to be evaluated by the Army under the amended solicitation is unfair, contrary to the requirement for full and open competition in the Competition in Contracting Act of 1984 (CICA), 10 U.S.C.A. § 2304(a)(1)(A) (West Supp. 1985), and results in unequal competition.

We deny the protest.

The solicitation requested proposals for full scale engineering development, fabrication, and delivery of a quantity of rocket propellant grains and ignition delay assemblies for use in a military projectile propulsion system. The RFP contemplated the award of a cost-plus-incentive-fee contract. As amended, the solicitation

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required GOCO offerors to submit two cost proposals, one on a "fully funded" basis and the other on an "out-of-pocket" cost basis. However, the RFP provided that cost evaluation of GOCO operator proposals would be based solely on the "out-of-pocket" cost proposal. Further, the solicitation defined "out-of-pocket" costs as follows:

"Out-of-Pocket Cost. At a minimum, all direct labor and direct material costs shall be considered as out-of-pocket. Also included would be any other cost directly attributed to the performance of the work order for products or services and which would not be incurred except for such work order. It should not include any amounts which do not represent actual expenditures by, or loss of savings to, the Government which are directly attributed to production for such products or services in the Government plant. Loss of savings is defined as only those savings that would result in actual accrual to the Government. Allocations of overhead, fixed costs, etc., which do not represent a change in actual expenditures are not savings to the Government."

The Army has received proposals from both GOCO and COCO offerors.

As noted above, Action, a potential COCO contractor, objects to the Army's basis for evaluating GOCO cost proposals solely on an "out-of-pocket" basis because Action believes that this evaluation scheme results in preferential treatment of GOCO contractors and places COCO contractors at a severe economic disadvantage. Specifically, Action argues that COCO contractors must include in their proposals all economic burdens and overhead, including utilities, sewage disposal, telephone service, and rental or depreciation of physical facilities; GOCO contractors do not. Consequently, according to Action, the solicitation creates three classes of offerors: 1) GOCO offerors that will be evaluated solely on the basis of direct material and labor costs; 2) COCO offerors that are given credit for evaluation purposes under other provisions of the solicitation for voluntary, partial use of government equipment; and 3) COCO offerors that will not use any government facilities or equipment and that will therefore be evaluated on the basis of a "total cost bid." Action contends that this unequal competition violates

the "full and open" competition requirements of CICA, since true economic cost to the government as a whole, including depreciation of facilities and equipment, ought to be evaluated by the Army in selecting a successful proposal.

In response, the Army states that this evaluation scheme is sanctioned by the provisions of the Arsenal Statute, 10 U.S.C. § 4532(a) (1982), as consistently interpreted by our Office. We agree. The statute provides that:

"The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis."

In our report, B-143232, December 15, 1960, to the Chairman, Subcommittee for Special Investigations, House Committee on Armed Services and to the Secretary of Defense, we stated that the Arsenal Statute makes it mandatory to use government arsenals and government-owned factories to manufacture or produce all of its needs which could be so manufactured or produced on an economical basis. We also stated that the words "Government-owned factories" include both government-owned government-operated, and government-owned contractor-operated, industrial facilities, and that the words "economical basis" were intended to require a comparison of all costs incurred by the government as a result of producing an article in government-owned facilities with the price at which the article could be purchased from a private manufacturer. In addition, we said that in determining under this statute whether an article could have been produced on an "economical basis," it would have been improper to include in the evaluation of such cost any amount which did not represent an actual expenditure by, or loss of savings to, the government which was directly attributable to such production. In our view, the basic concept of the statute was a requirement that government-owned industrial facilities should not be permitted to lie idle if it would be possible to use such facilities at a cost to the government no greater than the cost of procuring such needs from private industry.

Similarly, we stated to the Secretary of Defense:

" . . . The words economical basis, as used in 10 U.S.C. 4532(a), are to be construed to mean a cost to the Government which is equal

to or less than the cost of such supplies to the Government if produced in privately owned facilities, and it is our opinion that this statute requires the cost of production in Government plant to be computed on the basis of actual out-of-pocket cost to the Government."

See also Olin Corp., 57 Comp. Gen. 209 (1978), 78-1 CPD ¶ 45; 53 Comp. Gen. 40 (1973).

It has thus been our long-standing interpretation that GOCO contractors must be evaluated on the basis of "out-of-pocket" costs, that is, excluding those costs which would be incurred by the GOCO contractor whether or not a particular contract was awarded to the GOCO plant. See 57 Comp. Gen., supra. The Army's position here is consistent with that interpretation.

Further, we think that the general CICA requirement for full and open competition has been met where competitive offers have been solicited and received from COCO and GOCO contractors even though GOCO contractors may have a competitive advantage. In this regard, we have stated that the government is not obliged to compensate for the competitive advantage a firm may enjoy in a procurement, such as by incumbency, unless such advantage results from a preference or unfair action by the contracting agency. See, e.g., Systems Engineering Associates Corp., B-208439, Jan. 31, 1983, 83-1 CPD ¶ 97. Here, the alleged unfair action by the contracting agency, evaluation of GOCO proposals on an "out-of-pocket" cost basis, is required by the Arsenal Statute. Thus, the competitive advantage enjoyed by GOCO firms are explicitly sanctioned by law. Moreover, we see nothing in CICA which alters this evaluation scheme in procurements conducted by an agency under the authority of the Arsenal Statute.

Finally, the protester relies upon and cites, as the only regulatory support for its position, the Federal Acquisition Regulation, 48 C.F.R. §§ 45.205, 52.245-9 (1984), which, according to the protester, requires this solicitation to contain a "Use and Charges Clause" (generally requiring evaluation of costs of government furnished equipment in the possession of an offeror). We merely note that this clause is only required for consolidated facilities contracts, facilities use contracts, fixed price contracts, or when government

production and research property is provided on other than a rent-free basis. See 48 C.F.R. § 45.302-6(c). These circumstances are not present here.

The protest is denied.

for Seymour Efron
Harry R. Van Cleave
General Counsel