

01564

Richard Martin
Proc. II

DECISION



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

FILE: B-187532

DATE: February 25, 1977

MATTER OF: Etamco Industries

DIGEST:

1. Contention that procurement from contractor in Government-owned plant was subject to provisions of Arsenal Statute (10 U. S. C. § 4532(a)) is denied since procurement was authorized under 10 U. S. C. § 2304(a)(16) in interest of maintaining industrial mobilization base and Arsenal Statute provisions were not applicable.
2. Protest that award was not justified because protester could perform at lower price is denied since procurement was negotiated pursuant to 10 U. S. C. § 2304(a)(16) which authorizes awards in appropriate situations without regard to prices from other sources in order to maintain industrial mobilization base.
3. Protest that procurement does not comply with small business policy of Department of Defense is denied since issue is not for resolution by GAO and neither the Small Business Act (15 U. S. C. § 631 et seq.) nor ASPR § 1-701 requires that any particular procurement be set-aside for small business.

Etamco Industries (Etamco) protests the procurement by the U. S. Army Armament Command (ARMCOM) of a grenade production facility at the Riverbank Army Ammunition Plant (Riverbank) which is operated under contract by Norris Industries, Inc. (Norris) a large business concern. Etamco contends that an unsolicited proposal which it submitted to ARMCOM in connection with this procurement proposed prices which were lower than those proposed by Norris and that therefore the award to Norris is contrary to the "Arsenal Statute," 10 U. S. C. § 4532(a). Etamco's position is that the procurement was controlled by the Arsenal Statute (10 U. S. C. § 4532(a)) which directs that procurement of supplies be made in Government-owned factories or arsenals so far as those factories and arsenals can make those supplies on an economical basis.

B-187532

Because no competition was conducted, Etamco argues that no valid cost comparisons were made to determine if the award was made on the most economical basis. Finally, Etamco contends that the procurement does not comply with the policy of the Department of Defense to place a fair portion of its total contracts with small business concerns and is contrary to previous assurances of ARMCOM that Etamco would be included in any further solicitation for expansion of the mobilization base for the grenades.

The record indicates that on December 17, 1975, ARMCOM issued a request for proposals (RFP) to design, procure and install production equipment for the manufacture of metal parts for grenades. The RFP stated its objective to be the award of one or more mobilization base production line contracts; proposals were invited to establish facilities capable of manufacturing 3,000,000 and/or 1,500,000 production units a month. Etamco states that because it was led to believe that ARMCOM's intent was to make more than one award, it made an offer only for the 1,500,000 capability. On July 13, 1976, ARMCOM awarded a contract to Kisco Company, Inc. for the entire 3,000,000 production units per month capability. The offer submitted by Norris was the second lowest. When Etamco complained, it was told that based on planned requirements (but contingent on funding allocations) the Army believed that there would be an additional solicitation and that Etamco would be included in such solicitation.

By teletype, dated June 23, 1976, the procuring contracting officer suggested to the Department of the Army that the funds remaining in the grenade facility program be used to establish an additional production line at Riverbank under the authority of the Arsenal Statute, 10 U.S.C. § 4532(a). The Army rejected this suggestion on July 27, 1976 and directed that the work force at Riverbank be reduced. However, after a reexamination, the Army reversed itself on August 30, 1976 and requested that the contracting officer initiate a Secretarial Determination and Findings (D&F) to direct procurement of a grenade production facility and the subsequent procurement of grenades at Riverbank. Further, the Army directed that, in anticipation of the projected grenade production, the necessary actions be taken with regard to the work force at Riverbank. The contracting officer then pointed out that an existing D&F, dated January 6, 1976, which approved approximately 229 procurement actions under 10 U.S.C. § 2304(a)(16), already authorized the procurement. Among other things, the January 6 D&F related to production and production equipment requirements for manufacturing grenades and stated

B-187532

that procurement by negotiation was justified to maintain "ready availability of GOCO [Government-owned - Contractor-operated] Army Ammunition Plants and a selected group of COCO [Contractor-owned - Contractor-operated] plants in the interest of industrial mobilization." It further stated that because qualified contractors are selected to operate the GOCO plants, negotiation with the contractor selected to operate the plant involved was necessary to achieve current production. It also stated that the plants and contractors listed on an attachment, which included Riverbank and Norris, must be kept available in the interest of industrial mobilization and that procurement by negotiation was necessary to that end.

While negotiations with Norris were proceeding, Etamco submitted an unsolicited proposal on September 29, 1976 to ARMCOM proposing to establish the grenade production facility in an Etamco plant. On the same date it submitted a protest to this Office. The Army originally postponed the award to Norris pending a decision on this protest. On December 7, 1976, however, ARMCOM awarded a cost-plus contract to Norris due to the urgency involved. In addition to establishing a facility capable of producing 3,000,000 grenades a month, the contract required for acceptance test purposes, a demonstration production run of 1,000,000 grenades within a 60 day period if funds for such production were added to the contract.

Etamco contends that authority under 10 U.S.C. § 2304(a)(16) to procure by negotiation does not include authority to make a sole or directed source procurement. It points out that Armed Services Procurement Regulation (ASPR) § 3-101(d), provides that "negotiated procurements shall be on a competitive basis to the maximum extent possible." Etamco further contends that no basis existed for the procurement inasmuch as on the previous procurement sixteen proposals were considered to be technically acceptable and nine were determined to be within the competitive range. Etamco states that Riverbank is not a planned mobilization base facility for the grenades and that Riverbank had been selected for inactive status. In support of this, the protester had submitted a copy of a letter of July 24, 1975, from the Army which indicates that Riverbank had been selected for inactive status, and an Army message of August 28, 1975 directing that the previous requirement be procured with industry wide competition including GOCO and COCO producers.

We note, however, that pursuant to 10 U.S.C. § 2304(a)(16), contracts may be negotiated as an exception to the rules of formal advertising in those instances where the Secretary (or his designee) determines the following:

B-187532

"* * * (A) it is in the interest of national defense to have a plant, mine, or other facility, or producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved."

It is well established that where the setting up of an additional producer is in the interest of national defense, a contract may be negotiated under 10 U.S.C. § 2304(a)(16) and, under that authority, any additional costs involved properly may be assumed by the Government without regard to prices available from other sources. 49 Comp. Gen. 840 (1970); 42 id. 717 (1963). The legislative history of this authority clearly indicates that the price to the Government need not be controlling since Congress expected that the Government would be required to pay more for contracts awarded under 10 U.S.C. § 2304(a)(16).

The issue here is whether the authorization to procure by negotiation under 10 U.S.C. § 2304(a)(16) was, in this case, an authorization to procure from Norris. By referring in the singular to "a plant, mine, or other facility, or a producer, manufacturer, or other supplier," the language of 10 U.S.C. § 2304(a)(16) clearly authorizes an award to a producer when such an award is found to be in the interest of national defense. In 48 Comp. Gen. 199 (1968), this Office stated as follows:

"We agree that the usual case justifying negotiation under 10 U.S.C. 2304(a)(16) may well require contracting with a predetermined contractor or contractors. However, we do not agree that the authority granted by the section is limited to such a situation. It permits negotiation when it is determined to be in the interest of national defense to have a supplier available for furnishing services in case of a national emergency but not necessarily a particular supplier."

Logic also dictates the conclusion, however, that award for a particular plant is authorized under 10 U.S.C. § 2304(a)(16) when there is no other way to insure the continued availability of that plant. Although the protester has submitted evidence indicating that in 1975 Riverbank was scheduled for inactive status, it is clear from the D&F of January 8, 1976 that in fact the facility

B-187532

was not made inactive. Furthermore, while Etamco maintains that this procurement was controlled by the Arsenal Statute, it is also clear from the record that the procurement to Norris was authorized by the Army under 10 U.S.C. § 2304(a)(16). In its comments to this Office, the Army stated that although it is developing and using the grenade production expertise of private industry, it feels that it must also maintain such expertise in its own plants. In connection with the applicability of 10 U.S.C. § 2304(a)(16) and 10 U.S.C. § 4532(a), we note that in B-143232, December 15, 1960, which is cited by the protester, we stated as follows:

"While the words 'Except as otherwise prescribed by law' were omitted from the codification in 10 U.S.C. 4532(a), we believe that such words represented a substantive provision of the law and that their omission may not properly be interpreted as indicative of an intention to make that section controlling over inconsistent provisions of 10 U.S.C. 2304(a). As indicated at pages 8-9 of House Report No. 970 and pages 19-21 of Senate Report No. 2484, to accompany H. R. 7049, 84th Congress, the language changes incorporated into the codification of Title 10 are not intended, and may not be interpreted, to change the substantive law being codified. It is therefore our opinion that 10 U.S.C. 4532(a) must be read, interpreted, and applied in the same manner as though it were still preceded by the phrase 'Except as otherwise prescribed by law.' Even without that language, it would still be necessary to construe sections 4532(a) and 2304(a) together in such a way as to harmonize their provisions and to give effect to both so far as possible."

In our opinion, therefore, the award to Norris was authorized.

The question as to whether this procurement complies with the small business policy of the Department of Defense is not for resolution by this Office. Neither the provisions of the Small Business Act (15 U.S.C. § 631 et seq.) nor of the Armed Services Procurement Regulation (ASPR) § 1-701 (1975 ed.) make it mandatory that any particular procurement be set-aside for small business. Groton Piping Corporation, B-185755, April 12, 1976, 76-1 CPD 247.

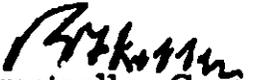
B-187532

With regard to Etamco's allegation that it had assurances from ARMCOM that Etamco would be included in any future solicitation for the expansion of the industrial mobilization base, we have reviewed ARMCOM's letter of August 16, 1976 upon which Etamco relies. We do not regard this letter as anything other than a commitment to include Etamco in any future competitive solicitation. It cannot be reasonably interpreted as a commitment by ARMCOM to issue such a solicitation regardless of subsequent events or changes in plans. There is no indication in the record that the ARMCOM letter did not honestly reflect the situation as ARMCOM understood it to be at the time it was written.

Finally, while ARMCOM concedes that it did not publicize the procurement in accordance with ASPR § 1-1003, we believe that such failure is not of such significance as to warrant disturbing the award.

Accordingly, this protest is denied.

Acting


Comptroller General
of the United States