

15-4331



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Battery Assemblers, Inc.
File: B-260043
Date: May 23, 1995

Robert Mainzer for the protester.
Vera Meza, Esq., and Cruz J. Febres-Ferrer, Esq., Department of the Army, for the agency.
Ira B. Kirschbaum, Esq., for Federal Prison Industries, Inc.
Adam Vodraška, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Procuring agency reasonably determined that price for batteries listed on the schedule of items produced by Federal Prison Industries did not exceed the current market price and thus properly purchased the batteries from Federal Prison Industries rather than from a lower-priced vendor.

DECISION

Battery Assemblers, Inc. protests the award by the Army Materiel Command of contract No. DAAB07-95-F-0027 for 225,400 BA-1574/U batteries¹ to Federal Prison Industries, Inc., a wholly-owned government corporation doing business under the trade name UNICOR. Battery Assemblers contends that the award price exceeds the current market price for the battery.

We deny the protest.

Under the contract awarded to UNICOR on December 22, 1994, the agency agreed to pay UNICOR \$4.45 per unit for 225,400 batteries, with a 100-percent quantity option at the same price.² Battery Assemblers argues that the award

¹The battery is the power source for the SDU/5E strobe light, which is used by the military in search and rescue operations. The agency informs us that the specifications allow batteries with a nominal voltage of 5.6 volts maximum to 6.1 volts maximum to be offered.

²Because UNICOR had not previously produced this specific battery, the contract also provided for first article testing at a cost of \$8,483.66.

price to UNICOR exceeded the current market price for the battery because Battery Assemblers is supplying 100,000 of the identical batteries to the Army at a \$4.21 unit price under sole-source contract No. DAAB07-95-C-G306, dated December 20, 1994, to meet the agency's urgent near-term supply needs.³ Battery Assemblers also complains that it was not given the opportunity to offer a quotation for the supply of the 225,400 batteries, which would have been even less than \$4.21 per battery.

Generally, government agencies are required to purchase from UNICOR their needs for designated products identified in a schedule prepared by UNICOR, provided that the products offered meet the agency's required level of quality and the prices charged do not exceed "current market prices," or to obtain clearance from UNICOR to obtain the product from another source. 18 U.S.C. § 4124 (1988); Federal Acquisition Regulation (FAR) § 8.602(a); Hiltronics Corp., B-241450 et al., Jan. 18, 1991, 91-1 CPD ¶ 57. Where the agency is required to purchase from UNICOR, it need not solicit any private vendor. See 62 Comp. Gen. 617 (1983). Nor is UNICOR--a wholly-owned government corporation which only sells items to government agencies--required to enter into competition with private manufacturers in bidding for the business of other government agencies, inasmuch as this would be inconsistent with the language and purpose of 18 U.S.C. § 4124. See 18 Comp. Gen. 391 (1938), citing 33 Op. Atty. Gen. 327, 329 (1922).

The battery in question is included in the battery equipment listed in UNICOR's Schedule of Products made in Federal Penal and Correctional Institutions. Thus, once the agency determined that it was required to purchase the batteries from UNICOR, there was no requirement that Battery Assemblers be solicited. See 62 Comp. Gen. supra.

Battery Assemblers nevertheless contends that the UNICOR price exceeds the current market price. See FAR § 8.602(a), which authorizes purchases from UNICOR only "at prices not to exceed current market prices." Neither UNICOR's authorizing legislation nor FAR subpart 8.6 or any other regulation defines "current market price" or indicates how such a price is to be determined. See Application of the FAR to Procurement from Fed. Prison Indus., Op. Off. Legal Counsel (Sept. 13, 1993). Both our Office and the Attorney General have recognized that the requirement for furnishing goods at current market prices in UNICOR's enabling statute is a mere bookkeeping arrangement to enable Congress to

³As Battery Assemblers previously produced the battery within the last 3 years, the agency waived first article testing, which allowed early delivery.

determine whether UNICOR, receiving approximately the same prices as other manufacturers, is a paying proposition.⁴ 18 Comp. Gen. supra; 33 Op. Atty. Gen. at 330, citing 56 Cong. Rec. 6374-6376 (May 11, 1918).

In any case, the burden of ensuring that UNICOR's price for an item does not exceed current market prices rests on both UNICOR and the agency, and any method that reliably estimates current market prices may be used. See Op. Off. Legal Counsel, supra. The current market price is subject to further negotiation or dispute by potential agency customers, who may refer the matter to the cognizant product division identified in UNICOR's schedule or to UNICOR's Washington office for resolution under FAR § 8,604(c), or for arbitration pursuant to 18 U.S.C. § 4124(b) under FAR § 8.605(c).⁵ If the current market price cannot be agreed upon and UNICOR declines to issue a clearance, the agency is still required to purchase the item from UNICOR subject to arbitration under 18 U.S.C. § 4124. See Op. Off. Legal Counsel, supra; 11 Comp. Gen. 75 (1931).

Here, after receiving UNICOR's initial quotation of a unit price of \$5.09 for the basic quantity and \$5.24 for the option quantity, the contracting officer conducted further negotiations with UNICOR. As a result, UNICOR lowered its

⁴The use of the language "current market prices" to describe the sale of prison-made goods to the federal government is derived from earlier language giving the Attorney General or his representative the authority to determine current market price. Pub. L. No. 194, § 2, 65th Cong. 2d Sess., 40 Stat. 896-897 (1918). This language was later replaced with the arbitration provision described in footnote 5, Pub. L. No. 271, 71st Cong. 2d Sess., Stat. 391-392 (1930); 72 Cong. Rec. 8576-8577 (May 8, 1930); 72 Cong. Rec. 9296 (May 21, 1930). The 1918 legislation established a working capital fund for the prison manufacturing operation, which was intended to be self-sustaining, and consequently, established a need to charge current market prices to at least cover the expenses of producing the items. See 56 Cong. Rec. at 6375, 6376. All moneys received by Federal Prison Industries from the sale of its products are deposited into this fund. 18 U.S.C. § 4126.

⁵18 U.S.C. § 4124(b) provides that the arbitration shall be conducted by a board consisting of the Comptroller General of the United States, the Administrator of General Services, and the President, or their representatives. The decisions of the board are final and binding on all parties. UNICOR advises that it has an internal process for considering requests for clearances and has an ombudsman for considering appeals of denials of clearance requests.

price to \$4.45 per battery for both the initial and option quantities. The government estimate was \$4.48 per battery and the agency noted that the market price should range between \$4.10 and \$4.50 per unit. UNICOR stated that it could not provide the solicited battery for less than \$4.45 per unit, and offered to supply the batteries at that price, "or to issue a clearance," which, as indicated above, would allow the agency to procure the battery from a private vendor. The agency decided to accept UNICOR's price and placed the order with UNICOR.

We think the agency's determination that UNICOR's price did not exceed the current market price was reasonable. The agency's \$4.48 per unit estimate of current market price was based on a 1991 Battery Assemblers's contract price, adjusted for inflation, differences in quantity, and learning curve. While the protester takes issue with the rate of inflation and the learning curve used by the agency in estimating current market price, the protester has not shown that the agency's estimate was unreasonable. We also note that the agency's estimates of current market price, and UNICOR's quotations, fell within the range of prices at which previous Army contracts for these batteries were awarded--\$3.38 to \$5.47 per battery.

The fact that an item can be obtained from a private source at a price less than offered by UNICOR does not mean the UNICOR price exceeds the "current market price." FAR, § 8.605(b); 18 Comp. Gen. supra; 11 Comp. Gen. supra. Here, the agency states that it did not consider Battery Assemblers's most recent \$4.21 quote in determining the current market price, primarily because Battery Assemblers had a recent negative pre-award survey based on unsatisfactory production, planning, and performance on a recent contract, which had to be considered and overridden internally by the agency before it made the sole-source award to satisfy its urgent requirements. In any event, Battery Assemblers noted in its sole-source offer that if it supplies a battery with a nominal voltage of 5.6 volts maximum instead of the 6.1 volt maximum battery it was offering at \$4.21 per unit, there would be a unit price increase of \$.20 to \$4.41 per battery. This price exceeds the amount Battery Assemblers itself claims is the current market price, based on its application of what it considers the correct inflation rate and learning curve.

We therefore conclude that the agency decision to make an award to UNICOR was reasonable and in accordance with applicable statute and regulation.

The protest is denied.

Ronald Berger
for Robert P. Murphy
General Counsel