

**DECISION**



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

*[Protest of IFB Cancellation] 13856*

FILE: B-194614

DATE: May 28, 1980

MATTER OF: OKC Dredging, Inc.

**DIGEST:**

1. Under Industry Capability Program, where Government dredge is available, statute requires hired labor estimate to be based on cost of doing work by Government and not on cost of "well-equipped contractor" doing dredging work.
2. Government hired labor estimate and component factors are not evaluation criteria which agency need disclose in invitation for bids for dredging work under Industry Capability Program.
3. Prohibited profit is not included in Government estimate when estimate is periodically adjusted to reflect actual cost of Government dredging by incorporating previous surplus or deficit.
4. Where record shows agency thoroughly considered protester's objections to hired labor estimate and protester has failed to clearly demonstrate estimate is erroneous to extent necessary to entitle protester to award, protest concerning cancellation of Industry Capability Program IFB and conducting dredging work in-house is denied.

OKC Dredging, Inc. (OKC) protests the cancellation of invitation for bids (IFB) No. DACW01-79-B-0081, issued by the Mobile District, Army Corps of Engineers (Corps), under which the Corps had sought bids for rental of a hydraulic cutterhead pipeline dredge and attendant plant

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(with operators) for maintenance dredging of the Chattahoochee River. After the initiation of this protest, Williams-McWilliams Co., Inc., became the successor-in-interest of OKC. For purposes of this decision, however, we will continue to refer to the protester as OKC.

The IFB was issued under the Corps Industry Capability Program (ICP), 33 C.F.R. § 209.147 (1979). Under the program, where a Corps dredge is available and capable of performing the advertised work, it is used as the basis for computing a "hired labor" estimate, which represents the cost of doing the work with the Corps dredge. This estimate is prepared in accordance with Engineering Regulation (ER) 1180-1-1 and is used to evaluate the reasonableness of industry bids received. If the low industry bid is more than 25 percent in excess of the Government estimate, 33 U.S.C. § 624 (1976) prohibits appropriated funds from being used to pay for the work. ER 1180-1-1, 1-372(g) provides that in such circumstances the contracting officer will reject all bids and either readvertise the work or recommend to Corps Headquarters that the work be performed by the Government dredge.

In the present case, the Government's hired labor estimate of \$312,791.58 was prepared based on the Corps dredge "Guthrie" which was available to perform the work. The Corps also calculated an estimate of \$26,550 for "attendant costs" which represented costs of Corps surveys, supervision, inspection and overhead. This cost was included in the IFB and was added to the industry bids and the Corps "hired labor" estimate to evaluate the industry bids. OKC's low industry bid of \$453,318.95, plus "attendant costs," exceeded the Government's hired labor estimate, plus the "attendant costs," by 41.4 percent. As a result, the solicitation was canceled.

During the pendency of this protest, the Corps determined, pursuant to Defense Acquisition Regulation (DAR) § 2-407.8(b)(3) (1976), that the dredging was urgently needed and authorized performance by the Government dredge Guthrie.

OKC protests the "legality, propriety and fairness of the Government's procurement procedure under the Industrial Capability Program." OKC contends that the ICP is a hybrid procurement procedure which, by its mandate to the Government to compete, is a competitive bidding procurement, and not a hired labor program. "In other words," notes OKC, "once the Government stepped into its own market place as a competitor, any action in the procurement procedure \* \* \* which applied special rules to the Government which were not comparable to accounting practices in industry would be a restriction of competition in that market place."

Basically, OKC is arguing that the provisions of 33 U.S.C. § 624 in conjunction with the Engineering Regulations have not been properly applied in the Industry Capability Program. OKC essentially contends that the statutory language expresses a clear congressional intent that the Government's hired labor estimate must be based on comparable costing standards used by private industry. OKC concludes that had such industry costing standards been used in determining the Government estimate its bid would have been well within the statutory limitation.

While the basic factors which comprise the cost of doing the work by a Government dredge are essentially the same as those cost factors of a well-equipped contractor doing the same work, we believe the variance between Government and industry estimates in any given ICP procurement is often attributable to the accounting method prescribed by regulation by which the Government estimate is determined. Thus, the predetermined rates which make up the Government estimate for use of a particular dredge are periodically adjusted upward or downward to incorporate any previous operating deficit or surplus in relation to actual Government dredge operating costs during a fiscal year. See ER 37-2-10. In other words, the Government estimate of actual cost represents the actual cost over a period of time as opposed to the industry estimate which represents the cost of a well-equipped contractor at a given point in time.

The agency has outlined below exactly how this deficit/surplus average accounting method has been applied in determining the Government estimate in the case of the dredge Guthrie since the inception of its use in the ICP until the present:

"During the year 1977, the Dredge GUTHRIE was bid under the ICP at a daily rate of \$5,196 per day. This rate was based on the GUTHRIE working ten days followed by a four day lay period. The GUTHRIE was actually required to work around the clock, seven days per week. Because the GUTHRIE was not crewed for this operation, considerable overtime was paid the crew. Labor costs increased substantially. The requirement for continuous operation resulted in a considerable increase in the daily operating cost so that the \$5,196 daily rate was not sufficient to cover costs. The GUTHRIE ended the Fiscal Year with a \$232,995.82 deficit. On 1 October 1977, the daily rate was adjusted to \$5,814 per day. The GUTHRIE worked 66 days at that rate prior to seasonal layup on 11 December 1977. The GUTHRIE usually comes from the Apalachicola River to the White City Repair Facility with the beginning of high water on the Apalachicola River. The usual practice is for the GUTHRIE to layup from late November or early December until about mid-January at which time it would proceed to Apalachicola Bay and begin work. In 1978 the Apalachicola Bay work was bid under the ICP. The GUTHRIE was unsuccessful in this bidding, thus resulting in a longer than usual layup. As a result of this layup and repairs made to the GUTHRIE during the layup season, the deficit continued to increase. At the time of preparation of the Government Estimate in early February 1978, the deficit had reached \$438,328.73. The GUTHRIE's daily rate was reviewed and adjusted to \$9,431 per day on 1 April 1978. The GUTHRIE's Hired Labor Estimate for Apalachicola Bay and all subsequent ICP work for

1978 was based on this rate. Other jobs bid in 1978 were East Pass, Florida and the Apalachicola, Chattahoochee and Flint Rivers, Alabama and Georgia. However, the GUTHRIE was not successful in this bidding. Thereafter, the dredge was assigned to the Apalachicola River and began work at the \$9,431 per day rate. This rate recouped the deficit faster than expected. Because of unusually low water on the Apalachicola River, the dredge worked two months longer than expected. By 28 February 1979, the dredge actually had a surplus of \$189,503.93. A new daily rate was similarly computed as \$6,239 per day effective 16 February 1979 in accordance with ER-37-2-10, paragraph 7-18 which states that the daily rate will be adjusted during the year as necessary to meet operational or cost changes from the previous estimate. Recent Hired Labor Estimates prepared for ICP procurements [including the protested procurement] have been based on that daily rate."

In this connection, the Corps points out that the ICP was established to determine whether the dredging industry could perform dredging work which has historically been undertaken by the Corps with its own dredging plant. Thus, the Corps argues that it is not required by statute to readjust its methodology to develop an estimate different from that which reflects the actual cost of performance with a specified piece of Government-owned dredging equipment. Rather, the industry must show by its bid that it can reach the standard of cost set by the Government for performing the work with Government-owned plant and equipment plus 25 percent of such costs. Moreover, the Corps submits that Congress did not intend under the ICP to put the Government into competition with industry as a private bidder, as suggested by OKC, but only to invite industry to submit bids to show how much it would cost to contract the work out as opposed to performing the work at the actual costs of using the Government dredge. The Corps concludes that there

is no requirement in the ICP legislation that the Corps establish hired labor estimates which reflect the costs of performing work as if the Government dredge was "a well-equipped contractor." We agree with the Corps position in this matter.

The pertinent portions of 33 U.S.C. § 624 provide that:

"(a) No works of river and harbor improvement shall be done by private contract-

(1) if the Secretary of the Army, acting through the Chief of Engineers, determines that Government plant is reasonably available to perform the subject work and the contract price for doing the work is more than 25 percentum in excess of the estimated comparable cost of doing the work by Government plant; or

(2) in ~~any~~ other circumstances where the Secretary of the Army, acting through the Chief of Engineers, determines that the contract price is more than 25 percentum in excess of what he determines to be a fair and reasonable estimated cost of a well-equipped contractor doing the work." (Emphasis added.)

The determining factor as to whether (a)(1) or (a)(2) above is applicable is the availability of the Government dredge. When the dredge is available, (a)(1) applies and the Government's estimate is to be based on the "cost of doing the work by the Government." Only when a Government dredge is unavailable is (a)(2) applicable and the estimate to be based on the "cost of a well-equipped contractor doing the work."

In light of this clear distinction on the face of the statute, OKC's argument that both the (a)(1) and (a)(2) estimates should be based on what is essentially

the (a)(2), or industry standard, is not persuasive. Moreover, we find nothing in the legislative history of these statutory provisions which would support OKC's contention. On the contrary, the very fact that a recent amendment divided 33 U.S.C. § 624(a) into (a)(1) and (a)(2) sections is further indication of a clear congressional intent to distinguish the type of estimate to be prepared when a Government dredge is available and when one is not. See S. Rep. No. 95-722, 95th Cong., 2d Sess. (1978), reprinted in [1978] U.S. Code Cong. & Ad. News 652.

Consequently, in this case, where the dredge Guthrie was available, the Corps hired labor estimate properly reflected the Government's cost as opposed to that of "a well-equipped contractor."

As another basis for protest, OKC alleges that certain controlling elements in the Government's estimate became "undisclosed bid evaluation criteria." OKC contends that industry bidders should have been made aware of the fact that the Corps daily rate estimate for the dredge Guthrie would be relatively lower than its previous rates because a surplus from previous Guthrie activity was being absorbed into the instant daily rate figure.

This contention is without merit. While it is a basic requirement of the competitive bidding system that bidders be made aware of all bid evaluation criteria to be applied to their offers (see 36 Comp. Gen. 380, 385 (1956)), we know of no similar requirement for the pre-bid disclosure of a Government estimate, or the components of that estimate. Here the Corps followed its own regulations in properly establishing a pre-determined daily rate for the Guthrie which incorporated a previous surplus. Compare DAR 18-108.1.

OKC also argues that the incorporation of a previous surplus into the Government's hired labor estimate, while sanctioned by the Engineering Regulations, is in violation of statutory provisions prohibiting inclusion of profit as a factor when preparing the Government's estimate under the ICP. OKC characterizes this surplus as

an "increment to restore equity" which is a "disguise for prohibited profit." In response to this argument, the agency submits that no profit is included because a Government estimate which has been adjusted for a previous surplus or deficit only reflects the actual cost over a period of time of performing the work with a Government dredge.

We are not persuaded by OKC's contention. In basic terms, profit is defined as "the excess of returns over expenditures in a transaction or series of transactions." Webster's Third New International Dictionary 1811 (1971). In other words, profit equals any amount over actual cost. We view the Engineering Regulations' procedure of periodically adjusting the Government estimate by incorporating a surplus or deficit as a method of bringing the Government's hired labor estimate more closely into line with actual dredge operating costs during a given fiscal year. As such, we believe the incorporation of a surplus in the instant case did not include profit in the Government estimate, but rather actually guarded against the inclusion of any amounts which could be considered profit by reducing the Government estimate to a figure representing only the actual cost to the Government over a period of time.

The protester also challenges several specific aspects of the estimate in the present case (cost of the dredge tender, assignment of non-pay time, cost per daily dredge operation in comparison with past similar dredging operations utilizing the dredge Guthrie).

The record shows that all of these specific objections were thoroughly considered by the agency after OKC protested.

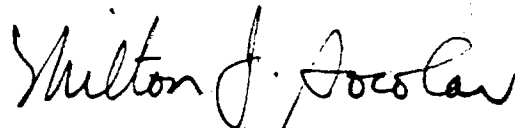
For example, the agency has provided a detailed justification of its hired labor estimate in this case along with the above described history of the daily hired labor estimate rate for the dredge Guthrie during its use under the ICP. The Corps has answered the specific OKC objections to the estimate by showing that the



disputed figures were correctly derived by following the applicable portions of the Engineering Regulations which guide the Corps in the preparation of such estimates. In this regard, the burden is on the protester to clearly show that the Government's hired labor estimate is erroneous, and the fact that all bids submitted are higher than the estimate is not sufficient to constitute such a showing. Durocher Dock & Dredge, Inc., B-189704, March 29, 1978, 78-1 CPD 241, affirmed, B-189704, August 7, 1978, 78-2 CPD 92. In our opinion, OKC has not overcome its burden of proving the estimate to be erroneous.

In supplemental protest submissions and at a GAO bid protest conference, OKC emphasized that higher fuel rates were used in the preparation of a hired labor estimate for another Corps ICP dredging solicitation issued shortly after the IFB protested here. As a result of discussions during the conference, the Corps once again reviewed its estimate in the instant case and made an upward adjustment in the cost of fuel and a downward adjustment in another area, creating an overall upward adjustment to the total Government hired labor estimate. However, the protester's bid still exceeds the adjusted estimate by 33 percent, and thus the protester is not otherwise entitled to an award of a contract.

The protest is denied.



For The Comptroller General  
of the United States