



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kilgore Corporation
File: B-253672; B-253685; B-253686
Date: October 13, 1993

Judith Bartnoff, Esq., Patton, Boggs & Blow, for the protester.
Vera Meza, Esq., Department of the Army, for the agency.
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The sole-source award of a contract to operate and maintain an ammunition plant was unobjectionable where the record shows the agency's action was based on its industrial mobilization needs and only one contractor had the requisite experience with the facility to assure a prompt production response.
2. Protest that agency improperly accepted awardee's calculation of use-evaluation factor, added to bid price to reflect rent-free use of government-furnished property, is denied; record shows the factor was derived in accord with solicitation and with Federal Acquisition Regulation.

DECISION

Kilgore Corporation protests the Department of the Army's award of contract No. DAAA09-93-E-0004 to Thiokol Corporation. Kilgore asserts that the contract, which provides for the maintenance and use of government-furnished property at Longhorn Army Ammunition Plant in Texas, was improperly awarded on a sole-source basis. Kilgore also protests the Army's award of two contracts to Thiokol under invitation for bids (IFB) Nos. DAAA09-93-B-0258 and DAAA09-93-B-0140, for the production of flares. Kilgore asserts that the Army miscalculated Thiokol's bid price under the two solicitations.

We deny the protests.

Contract No. DAAA09-93-E-0004

The Longhorn contract was awarded to Thiokol on May 20, 1993, without prior issuance of a formal solicitation, by the Army's Armament, Munitions and Chemical Command. It is

a consolidated facilities contract for the maintenance, surveillance, accountability, and use of property at Longhorn for the period October 1, 1993 to September 30, 1998. The purpose of the contract was to maintain critical capabilities in the industrial base for purposes of emergency preparedness. Kilgore was advised of the award at a meeting on May 25; this protest followed.

Kilgore asserts that, as a potential responsible source for any supplies and services to be provided under the contract, it should have been solicited by the Army; instead, by considering only Thiokol, the agency improperly contravened the requirements of the Competition in Contracting Act of 1984 (CICA) for full and open competition. Kilgore specifically argues that while it may have been necessary to maintain the Longhorn plant itself for purposes of industrial mobilization, it was not necessary to restrict competition to the current operator of the plant, Thiokol, in order to achieve that end, since Kilgore and other companies also were capable of maintaining the facilities.¹

Under CICA, 10 U.S.C. § 2304(c)(3) (1988), military agencies may use other than competitive procedures in awarding contracts to a particular source or sources where such action is necessary to maintain a facility, producer, or other supplier available for furnishing property in case of a national emergency or to achieve industrial mobilization. Greenbrier Indus., Inc., B-248177, Aug. 5, 1992, 92-2 CPD ¶ 74. An agency's decision as to which particular producer or producers will be awarded a contract will not be questioned by our Office so long as the agency can demonstrate that its determination is related to its industrial mobilization needs. Id. Our Office will question such a determination only if the record convincingly establishes that the agency abused its discretion. Id.; Minowitz Mfg. Co., B-228502, Jan. 4, 1988, 88-1 CPD ¶ 1. We limit our standard of review in such cases because the normal concern of maximizing competition, as the protester here urges, is secondary to the needs of industrial mobilization. Id.

We conclude that the Army's determination was properly based on its industrial mobilization needs. Prior to award, the Army executed a justification and approval (J&A) which, among other things, stated that only Thiokol, the incumbent operator since 1952, had the requisite experience in operating the Longhorn facilities to assure a prompt production response to a military emergency. The J&A further noted that Longhorn would retain its mobilization mission even if

¹Kilgore also made certain procedural objections to the agency's action which were abandoned after receipt of a supplemental report from the Army addressing those matters.

deactivated as scheduled in September 1993, since a deactivated plant still must be maintained in a state of readiness. (In that regard, in a separate action not protested by Kilgore, Thiokol was granted authority to use the facilities on a rent-free basis if awarded competitive production contracts of the type discussed below.) In responding to the protest, the Army adds that, at such time as Longhorn's mobilization mission (and with it the requirement to maintain a specific contractor in complete readiness) should be eliminated, a contract to maintain the plant in caretaker status would be competed, since an operator with Thiokol's specific skills and experience would not be needed.

In our view, the Army's objective in maintaining in readiness a specific contractor that was familiar with the facility was directly related to the agency's need for a prompt production capability at the plant for mobilization purposes. While Kilgore believes that it also could have operated the plant and therefore was entitled to compete for the contract, an agency is not legally obligated to conduct a competitive procurement when its industrial mobilization needs dictate otherwise. Greenbrier Indus., Inc., supra. Based on the Army's need to have a contractor in place with experience in operating this particular plant--experience that Kilgore does not allege it has--the sole-source award to Thiokol was unobjectionable.

Contract Nos. DAAA09-93-B-0258; DAAA09-93-B-0140

IFB Nos. DAAA09-93-B-0258 and DAAA09-93-B-0140 were issued on March 31 and February 12, 1993, to provide 333,600 MJU-7A/B flares and 41,160 MJU-8A/B flares, respectively, for the Army's Armament, Munitions and Chemical Command. In each case, competition was restricted to planned users under the Army's industrial base preparedness program. Under both solicitations, a bidder that intended to use government-furnished property in performing the contract was required to calculate and include with its bid a use-evaluation factor to account for the imputed rental value of such property. The calculation was to be made in accordance with instructions contained in the solicitations and with Federal Acquisition Regulation (FAR) clause 52.245-9, "Use and Charges," based on (1) the total acquisition cost of the government-furnished property (including costs expended by the government on enhancements and improvements); (2) the rental rate; (3) the production period; and (4) the pro rata share of property attributable to the particular contract, if applicable.

The solicitations, referring to FAR § 52.245-9, listed the rental rate (as a percentage of acquisition cost) to be used for machine tools and secondary metal forming and cutting machines, depending on the age of such equipment, as

follows: 0 to 2 years, 3 percent; over 2 to 3 years, 2 percent; over 3 to 6 years, 1.5 percent; over 6 to 10 years, 1 percent; and over 10 years, 0.75 percent. (The age was to be based on the year the equipment was manufactured.) The solicitations further provided that, for property other than that specified in the preceding section, "a fair and reasonable rental shall be established, based on sound commercial practice," and that the production period would be computed on the basis of the number of months set forth by the offeror, for which a blank space was provided. The resulting use-evaluation factor would be added to the bidder's unit price to produce a total evaluated price.

IFB No. DAAA09-93-B-0140 provided for split awards and requested bids for contract line items (CLIN) representing 65 percent, 35 percent, and 100 percent of the total quantity of flares. Of the three bids that were submitted, Thiokol's was low and Kilgore's was second low for CLIN No. 1 (representing 65 percent of the total quantity), even after the addition to Thiokol's bid of the use-evaluation factor it submitted to reflect its planned rent-free use of the Longhorn plant. Specifically, for the 65-percent quantity, Thiokol's bid price was \$15.51, to which its use-evaluation factor of \$0.2998 was added for a total evaluated price of \$15.81, compared to Kilgore's bid of \$17.50. For CLIN No. 3 (35 percent of the quantity), Thiokol's price was \$19.613, plus a use-evaluation factor of \$0.4637, for an evaluated price of \$20.08, compared to Kilgore's bid of \$17.92. On May 28, the Army awarded a contract to Thiokol for 65 percent of the quantity and a contract to Kilgore for the remaining 35 percent. Under IFB No DAAA09-93-B-0258, the only bidders were Thiokol and Kilgore. Thiokol's unit price was \$36, plus its calculated \$0.921 use-evaluation factor to account for its use of the Longhorn plant, for a total price of \$36.921; Kilgore's price was \$38.18. Based on its lower bid price, the Army awarded the contract to Thiokol.

Kilgore objects that the Army improperly accepted at face value Thiokol's use-evaluation factors for the Longhorn facility which, it maintains, were too low due to improper calculations. The result, according to the protester, was that Thiokol's evaluated prices (bid price plus use-evaluation factor) were artificially low and provided an improper basis for selection of Thiokol as the low bidder.

Production Period

Kilgore first asserts that, although the bidding schedule in the solicitation for the larger quantity of flares reflected a minimum 5-month delivery period, Thiokol indicated only a 3-month production period for purposes of computing its

use-evaluation factor, resulting in an understatement of its price.²

While procuring agencies have broad discretion in determining the evaluation plan they will use, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation. NI Indus., Inc., B-218019, Apr. 2, 1985, 85-1 CPD ¶ 383. Rather, an agency may not depart in any material way from the evaluation plan described in the solicitation without informing the offerors and giving them an opportunity to structure their proposals with the new evaluation scheme in mind. Id. (protest sustained where agency employed a use-evaluation formula for government property to be used on rent-free basis which differed materially from formula stated in the solicitation, thereby causing protester's low offer to be displaced).

We conclude that the production period component of Thiokol's use-evaluation factor was evaluated in accordance with the solicitation. As indicated above, the section of the IFB relating to the use-evaluation factor provided that "the months that will be used for the purpose of this evaluation will be the period computed in months set forth by the offeror: ___ months."³ In its bid, Thiokol entered the number "3" in the blank space provided. Given the terms of the solicitation, the Army's acceptance of the bidder's stated 3-month production period for evaluation purposes was proper. NI Indus., Inc., supra. Our conclusion is consistent with our decision NI Indus., Inc., supra. There, as in this case, the solicitation stated that the months to be used for purposes of computing the use-evaluation factor would be the months set forth by the bidder. Although we ultimately found that the bidder was not bound by the 5-month production period it had entered in this portion of its bid, we concluded that the agency could not ignore the fact that the bidder had proposed to use the government-furnished property rent-free for only 5 months; as required by the solicitation's clear language, the bid had to be evaluated on the basis of a 5-month period. Here, as in

²Kilgore does not question Thiokol's production period calculation with respect to the IFB for the smaller quantity of flares.

³The clause further provided that if the bidder failed to specify the number of months in the blank provided, the solicitation's delivery schedule would be used to determine the number of months of rent-free use for evaluation purposes. The clause also stated that the contractor would be liable for rent for any use of the government-furnished property in excess of the time specified.

NI Indus., since the solicitation clearly stated that the production period entered by the bidder would be used for use-evaluation purposes, the Army properly used the 3-month period entered by Thiokol in evaluating its bid.⁴

Acquisition Cost

Kilgore argues (under both solicitations), that (1) the agency should have used the replacement cost of property in calculating the appropriate use-evaluation factor, since using the lower acquisition cost necessarily places other bidders at a disadvantage; and (2) Thiokol improperly calculated the rental equivalent for real property at Longhorn by using only the original acquisition cost, while FAR § 52.245-9 requires that the increase in value represented by government improvements be added to the acquisition cost.

Kilgore's argument that replacement cost should have been used is untimely. As noted above, the solicitation incorporated by reference FAR § 52.245-9, Use and Charges.⁵ That clause provides, at § 52.245-9(c):

"(2) The acquisition cost of the facilities shall be the total cost to the Government, as determined by the Contracting Officer. . . .

"(i) When Government-owned special tooling or accessories are rented with any of the facilities, the acquisition cost of the facilities shall be increased by the total cost to the Government of such tooling or accessories, as determined by the Contracting Officer.

"(ii) When any of the facilities are substantially improved at Government expense, the acquisition cost of the facilities shall be increased by the increase in value that the improvement represents, as determined by the Contracting Officer.

⁴Kilgore does not allege, and there is nothing in the record to indicate, that Thiokol could not meet the solicitation's delivery schedule based on use of the government facilities for only 3 months.

⁵Although the clause itself is to be used without modification only where rent is to be charged, FAR § 45.202-1 provides that "if a rental equivalent evaluation factor is used, it shall be equal to the rent allocable to the proposed contract that would otherwise have been charged for the property, as computed in accordance with the clause at 52.245-9, Use and Charges."

"(iii) The determinations of the Contracting Officer under this subparagraph (c) (2) shall be final."

In addition to referring to the FAR clause, the IFB itself explicitly provided that, in computing the use-evaluation factor, the bidder was to use "total acquisition cost." Consequently, the solicitation clearly indicated that acquisition cost as determined by the contracting officer, not replacement cost, would be used in computing the rental equivalent factor. If Kilgore believed that replacement cost should have been used instead, it was required to protest the matter prior to submitting its bid. See 4 C.F.R. § 21.2(a) (1) (1993). Kilgore's post-award objection to the use of acquisition cost therefore is untimely and will not be considered.⁶

As for Kilgore's claim that Thiokol (and subsequently the agency) failed to add the cost of improvements to the original acquisition cost of government-furnished property, as required by the FAR, the agency explains in a supplemental report that Thiokol (and the agency) in fact included in its calculations the book value of such property, which included the cost of all improvements as of the time the bid was prepared and evaluated.

In supplemental comments, Kilgore has not claimed (and there is nothing in the record to indicate) that the agency's use of book value did not adequately reflect the cost of improvements or was otherwise improper. In view of the lack of more specific guidance in the FAR concerning these matters, we think the agency's use of current book value, including improvements, met the requirement of the FAR that the cost of improvements be considered as well as original acquisition cost.

Property Usage Rates

Kilgore does not challenge the usage rates that Thiokol applied to the categories of equipment specifically included in FAR § 52.245-9, for which percentage factors were prescribed in the solicitation. However, the protester does question the 1-percent monthly usage rate that Thiokol applied generally to buildings, and asserts it was not fair and reasonable based on sound commercial practice.

⁶As a practical matter, the agency adds, calculating replacement cost would be highly speculative, since it is unlikely that equipment at Longhorn purchased 20-45 years ago could be duplicated.

The record shows that the Army relied on its internal Plant Utilization Policy (PUP) in confirming that Thiokol's 1-percent rate was appropriate. The PUP sets forth the rental rates that the government would charge Thiokol to use the Longhorn facilities to manufacture items for third parties--which the Army considered to be the closest thing to a commercial use of the facilities. PUP chapter 14, which contains procedures for estimating a fair market rental rate for real property, provides that, "for buildings use 12 percent of the acquisition cost." Dividing that rate by 12 months, the Army determined that a monthly rental rate of 1 percent--the rate actually charged to third-party contractors--was appropriate.

Since the FAR provided only general guidance, we think the agency's approach of using the PUP to establish a fair rental rate was reasonable. In particular, we think that the rate actually charged for the use of a facility provides a reasonable indication of what rental equivalent rate should be used; Kilgore has not suggested that any other specific approach should have been used instead. We conclude that the rate used by Thiokol and accepted by the agency was based on sound commercial practice.

Other Allegations

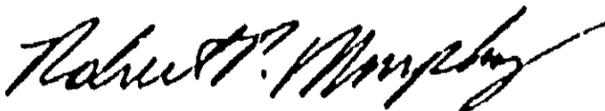
Kilgore raises other objections as well. The protester asserts, for example, that in connection with IFB No. DAAA09-93-B-0140, under which Thiokol was awarded a contract for 65 percent of the flares, Thiokol failed to account for the cost of the land component of its listed real property. The agency responds that the PUP recognizes the difficulty of establishing a fair rental value for land, particularly where, as under this solicitation, only parts of a plant are to be utilized; accordingly, the PUP provides for such allocation only when an entire production line or major portion thereof is involved--generally not the case here. In any case, the Army points out, the acquisition cost of the land was low, since it was purchased at extremely low prices in the 1940s. (For the other solicitation, IFB No. DAAA09-93-B-0258, the relatively low cost of land was reflected in the valuation of the land at 10 percent of the cost of the buildings.) In light of the relatively low land acquisition cost and the wide difference in bid prices, the Army concludes that its treatment of the cost of land did not prejudice Kilgore.

While we agree that inclusion of the land acquisition cost is contemplated by the solicitation and regulations (notwithstanding the requirements under the PUP), we agree with the Army that the failure to do so did not affect the award decision. Thiokol's bid price was \$15.51, nearly \$2 lower than Kilgore's bid of \$17.50. Thiokol's use-

evaluation factor (\$0.2998, raising its evaluated bid price to \$15.81) thus would have to increase nearly sevenfold before Thiokol's evaluated bid price would be higher than Kilgore's. There is no basis for concluding that addition of the land value would have such an effect. In this regard, as indicated above, under the other solicitation the agency considered the land to represent no more than 10 percent of the total value of the plant complex; while there is nothing objective in the record indicating what specific ratio was appropriate, we think the agency's position that the production facilities themselves and other improvements were of significantly greater value than the land is reasonable. Kilgore generally attacks the specific value the Army used for land under the other solicitation, but has provided no calculations or other evidence that some specific alternative approach should have been used or that such an alternative approach would have resulted in a significantly greater land value such that it would have made a difference in the standing of the bidders in the competition. We conclude that Kilgore was not prejudiced by the omission of the land value from the use-evaluation factor calculation. IDG Architects, 68 Comp. Gen. 683 (1989), 89-2 ¶ 236.

Kilgore alleges that the agency improperly engaged in negotiations with Thiokol subsequent to bid opening, which were improper in the context of these sealed-bid procurements. The record shows, however, that the Army merely verified the elements of the use-evaluation factor calculation for purposes of responding to agency-level protests. This verification had no effect on Thiokol's obligation under its bid and therefore was unobjectionable.

The protests are denied.


for James F. Hinchman
General Counsel