31902

DECISION

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

FILE: B-218441 **DATE:** August 8, 1985

MATTER OF: Monarch Water Systems, Inc.

DIGEST:

1. Under the Competition in Contracting Act of 1984 (CICA), GAO's bid protest authority extends to any "federal agency" as that term is used in the Federal Property and Administrative Services Act of 1949 (FPASA), including wholly owned government corporations. Notwithstanding provision of CICA which defines "protest" with reference to "executive agency," 31 U.S.C. § 3551(1), proper interpretation effectively substitutes the term "federal agency." Rules of statutory construction permit such a substitution where supported by legislative intent as evidenced in language of CICA protest provisions as a whole and in legislative history of CICA.

2. Tennessee Valley Authority (TVA) Act, 16 U.S.C. § 831 et seq. (1982), sets sufficient parameters for the collection and use of TVA power program funds so as to constitute a continuing appropriation; TVA's power program is not a nonappropriated fund activity beyond the protest jurisdiction of the General Accounting Office.

3. Protest is denied where protester fails to demonstrate that brand other than that specified in contracting agency's solicitation would satisfy agency's needs or that agency's brand name requirement is unreasonable.

Monarch Water Systems, Inc. (Monarch) protests invitation for bids (IFB) No. C3-958959 for the procurement of water conditioning compounds, issued by the Tennessee Valley Authority (TVA). Monarch contends that the IFB

requirements are unduly restrictive of competition. The TVA challenges our jurisdiction to decide the protest under the Competition in Contracting Act of 1984 (CICA) and our Bid Protest Regulations. Based on our review of the act and its legislative history, we conclude that CICA extends our bid protest authority to wholly owned government corporations, including TVA. We also find that TVA is using appropriated funds for this procurement. We find the protest, however, to be without merit.

Background

Prior to the implementation of the procurement protest system authorized by CICA (31 U.S.C. §§ 3551-3556, as added by § 2741(a) of Pub. L. No. 98-369), we decided bid protests based on our authority to adjust and settle government accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. § 3526 (1982) (formerly 31 U.S.C. §§ 71 and 74 (1976)). See Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1313 (D.C. Cir. 1971); 46 Comp. Gen. 441, 453 (1966); C.T. Bone, Inc., B-185084, Nov. 28, 1975, 75-2 CPD ¶ 364. In exercising that authority, we consistently declined to consider protests involving TVA. Our position was based on the following provision of the TVA Act of 1933 as amended, 16 U.S.C. § 831h(b) (1982):

> " . . . Provided, that, subject only to the provisions of this chapter, the Corporation is authorized to make such expenditures and to enter into such contracts, agreements and arrangements, upon such terms and conditions and in such manner as it may deem necessary including the final settlement of all claims which the Board shall determine to have been necessary to carry out the provisions of said chapter."

Since this provision gave TVA broad authority to enter into contracts as well as final claim settlement authority, we concluded that we could not take exception to a TVA contract award. We therefore declined to consider bid protests involving TVA. See General Crane and Hoist, Inc., B-208477, Aug. 8, 1982, 82-2 CPD ¶ 156.

Similarly, prior to the implementation of CICA, we generally declined to consider protests involving procurements by other government corporations and agencies endowed by statute with broad authority to determine the character

and manner of their expenditures. See, e.g., CompuServe, Inc., B-213015, Oct. 3, 1983, 83-2 CPD ¶ 411, regarding the Pension Benefit Guaranty Corporation; Ingersoll Rand Co., B-190275, Oct. 12, 1977, 77-2 CPD ¶ 289, regarding the St. Lawrence Seaway Development Corporation; Leon P. Brooks Real Estate Co., B-181550, Jan. 6, 1975, 75-1 CPD ¶ 7, regarding the authority of the Commissioner of the Federal Housing Administration as transferred to the Secretary of Housing and Urban Development.

GAO's Procurement Protest System under CICA

The enactment of CICA both strengthened and, for the first time, expressly defined our bid protest authority. Under the new protest system, we are to decide protests concerning alleged violations of procurement statutes or regulations. 31 U.S.C. § 3552. This bid protest authority is not related to account or claim settlement authority over the contracting agency involved.

TVA's Position

TVA argues that its procurements are not subject to our protest jurisdiction for two reasons: (1) it is not an "executive agency" under the protest system authorized by CICA, and (2) 98 percent of its purchases are made with nonappropriated funds.

TVA first points out that a protest to be decided by our Office under CICA is defined as:

> ". . . a written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract . . . ." (Emphasis added.) 31 U.S.C. § 3551(1).

TVA submits that because the protest provisions were enacted as a new subchapter V to chapter 35 of title 31 of the United States Code, they are subject to the definition of "executive agency" contained therein which provides:

> "In this chapter, 'executive agency' does not include . . . a corporation, agency, or instrumentality subject to chapter 91 of this title." 31 U.S.C. § 3501 (1982).

Chapter 91 of title 31 contains the codified provisions of the Government Corporation Control Act, which lists TVA as a wholly owned government corporation. 31 U.S.C. § 9101(3)(M) (1982). Thus, TVA concludes that we are authorized to decide only protests involving procurements by executive agencies, as defined in 31 U.S.C. § 3501 and that as a government corporation, TVA is not included in that definition.

TVA also refers to the following colloquy which took place between Senators Howard Baker, then majority leader of the Senate and from the state in which TVA is headquartered, William Cohen, principal sponsor of the measure, and William Roth, chairman of the conference committee dealing with CICA, during the Senate consideration of technical corrections to CICA.

> "Mr. BAKER. I do, however, want to clarify one point. Under subtitle D, section 2741 of this title, which provides a statutory base for the General Accounting Office's bid protest system, the term 'Federal agency' is defined as having the same meaning as that term has under the Federal Property and Administrative Services Act of 1949.
>
> "It is my understanding that, in choosing the particular definition, the conferees do not intend to increase the GAO's bid protest authority over the Tennessee Valley Authority beyond the extent that GAO currently has such authority. Am I correct in my understanding of the conferees' intent?
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> "Mr. COHEN. Yes you are correct. The conferees, do not intend to expand the current scope of GAO's bid protest authority with regard to the TVA.
>
> "Mr. ROTH. As chairman of the subconference which considered this title, I agree with the Senator from Maine that your understanding of the GAO's bid protest authority, as it applies to the TVA, is consistent with the conferees' intent.

> "Mr. BAKER. I thank the Senators for that clarification." 130 Cong. Rec. S8886 (daily ed. June 29, 1984).

TVA's second contention is that 98 percent of its purchases, including the instant procurement, are made with nonappropriated funds, and that under our Bid Protest Regulations such procurements are beyond our bid protest authority.

Jurisdiction

As explained below, based on our review of CICA and its legislative history, we conclude that our bid protest authority extends to "federal agencies," as that term is used in the Federal Property and Administrative Services Act of 1949 (FPASA), including wholly owned government corporations such as TVA. Furthermore, we do not agree that TVA is a nonappropriated fund activity beyond our bid protest authority.

Although the term "executive agency" is used in the definition of "protest" at 31 U.S.C. § 3551(1), supra, we do not think this term alone is dispositive of our jurisdiction. The other protest provisions of CICA must also be considered, and they indicate that we are to decide protests of procurements involving any "federal agency," including wholly owned government corporations such as TVA.

First, virtually every other reference in the statute dealing with the new bid protest system uses the term "federal agency." For example, 31 U.S.C. § 3553(b)(1) provides:

> "Within one working day of the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest." (Emphasis added.)

See also 31 U.S.C. §§ 3554(b),(c),(d),(e). Second, the CICA protest provisions do not define the term "executive agency"; they do, however, expressly define the term "federal agency." According to CICA, "federal agency" has the same meaning as that given by section 3 of the FPASA (40 U.S.C. § 472 (1982)). 31 U.S.C. § 3551(3). That

definition includes wholly owned government corporations.1/ Although the term "wholly owned government corporation" is not itself defined in the FPASA, we read it to include the corporations so designated in the Government Corporation Control Act. TVA is so designated. 31 U.S.C. § 9101, supra.

Applying the well established principle of statutory construction that individual parts of a statute should be construed so as to produce a harmonious whole, 2A Sutherland Statutory Construction, § 46.05 (4th Ed., 1973), we believe CICA must be read as providing our Office with protest authority over federal agencies, not only over executive agencies. If, as TVA argues, Congress intended to limit our protest authority to an "executive agency" as that term is used in 31 U.S.C. § 3501, then the use of the term "federal agency" contained throughout CICA's protest provisions would conflict with that intent, as "federal agency" under the FPASA encompasses a larger domain than "executive agency" under 31 U.S.C. § 3501. Given that, except for 31 U.S.C. § 3551(1), it is the term "federal agency" that is used throughout the protest provisions of CICA, and further given that it is the term "federal agency" and not "executive agency" that CICA defines for purposes of the subchapter dealing with the new protest system, we think the clear intent of Congress was to

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1/ The FPASA contains the following definitions:

"§ 472. Definitions

As used in titles I through VI of this Act -

(a) The term 'executive agency' means any department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

(b) The term 'Federal agency' means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction)." 40 U.S.C. § 472.

establish a protest system that applied to federal agencies. Consequently, the intent of Congress can be given effect if the term "federal agency" is substituted for the term "executive agency" in 31 U.S.C. § 3551(1).

Such a substitution of words or phrases is generally permissible as a method of statutory construction so long as it is consistent with legislative intent. As the Supreme Court has observed, "the canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language." United States v. Brown, 333 U.S. 18, 25-26 (1947). See also Symons v. Chrysler Corp. Loan Guarantee Bd., 670 F.2d. 238, 242 (D.C. Cir. 1981); 2A Sutherland, supra, §§ 46.06 and 47.36.

Our conclusion regarding the congressional intent is borne out by CICA's legislative history. The conference committee report on CICA states:

> "Any actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award a procurement contract by an executive agency may challenge the agency's solicitation, award or proposed award by filing a protest with the Comptroller General. Final agency determinations under section 307 of the Federal Property and Administrative Services Act and section 2310 of title 10, United States Code, may be the subjects of protests to GAO, the courts, and where appropriate, the GSA board." (Emphasis added.) H.R. Rep. No. 98-861, 98th Cong., 2nd Sess. 1435.

Final agency determinations under section 307 of the FPASA refers to procurement decisions by "agency heads." FPASA § 307, 63 Stat. 377, 396 (not codified). The FPASA defines "agency head" to include the head of an "executive agency," 41 U.S.C. § 259 (1982), which in turn is defined in FPASA § 3, discussed earlier, and which includes wholly owned

government corporations. Thus, this report language strongly suggests that the conferees intended that procurements involving an executive agency, as defined by the FPASA, and therefore including wholly owned corporations, were to be subject to the new protest system.

In light of the above, we find the aforementioned Senate colloquy to be unpersuasive. While the remarks in question evidence the Senators' belief that CICA does not grant us bid protest jurisdiction over TVA, all other evidence indicates the contrary.

Next, we consider whether the instant procurement is beyond our bid protest jurisdiction because TVA is allegedly using nonappropriated funds. Our regulations state that nonappropriated fund activities are beyond the scope of our bid protest jurisdiction. 4 C.F.R. 21.3(f)(8) (1985). According to TVA, the instant procurement does not involve appropriated funds because it is funded by power system revenues and bonds.

While the power program funds appear to be self-generated rather than the result of an annual appropriation by Congress, we do not consider them to be nonappropriated. Where Congress has authorized the collection or receipt of certain funds by an agency and has specified or limited the purposes of those funds, the authorization constitutes a "continuing appropriation" regardless of the fund's private origin. Fortec Constructors-Reconsideration, 57 Comp. Gen. 311, 313-314 (1978), 78-1 CPD ¶ 153. This rule applies to government corporations. See, e.g., 60 Comp. Gen. 323 (1981) (involving Federal Prison Industries, Inc.); 43 Comp. Gen. 759 (1964) (Federal Savings and Loan Insurance Corporation); B-193573, Dec. 19, 1979 (St. Lawrence Seaway Development Corporation).

Here, the provisions of the TVA Act both authorize the collection and specify the application of the power program funds. For example, 16 U.S.C. § 831h-1 provides for the generation and sale of electric energy by the TVA Board; §§ 831i and 831j provide for the sale of power and that it be equitably distributed among states and municipalities; § 831k requires that the price of the power sold be fair and reasonable, and § 831n et seq., provide for terms and conditions for the sale of bonds and use of bond funds by the Board. Thus, we think the TVA Act sets sufficient parameters for the collection and use of TVA power program funds so as to constitute a continuing appropriation. We

therefore find that TVA's power program is supported by appropriated funds and is not beyond the scope of our bid protest jurisdiction.

Monarch's Protest

Monarch protests TVA's solicitation for the procurement of ion-exchange compounds (resins) as unduly restricted to vendors supplying resins manufactured by only one firm, Rohm and Haas. Monarch contends that this is an unnecessary brand name requirement, which improperly excludes dealers of other manufacturers' resins. While acknowledging TVA received 24 bids under the solicitation, Monarch asserts that the government is being denied one of the essential benefits of competition--low price--as the bids of dealers offering Rohm and Haas resins are all higher than those of dealers of other manufacturers' products.

The issue, however, is not whether a product can be obtained at a lower price, but whether TVA's brand name requirement reasonably reflects its actual minimum needs. The Federal Acquisition Regulation (FAR) requires contracting agencies to avoid using unnecessarily restrictive specifications or requirements which might unduly limit the number of bidders unless the requirements are essential to meet an agency's minimum needs. 48 C.F.R. § 10.002(b)(3) (1984).

Although TVA has broad statutory authority regarding its contracts and expenditures, absent a determination to the contrary by the TVA Board, it is subject to the procurement procedures set forth in the FPASA and the FAR. See 39 Comp. Gen. 426 (1959). TVA has not informed us that the Board has determined not to follow the FAR; therefore we apply its provisions to the instant procurement.

Regarding the use of brand name requirements, we have traditionally upheld an agency's decision to procure products on a brand name only basis where the agency offers a rational basis for its decision and the protester does not prove the decision to be clearly unreasonable. Wang Laboratories, Inc., B-215589, Sept. 17, 1984, 84-2 CPD § 300. In this case, TVA points out that the resins to be purchased are to be mixed with those already in use. TVA states that the industry practice for the specific application--"condensate polishing"--does not permit mixing of different brands which may have different characteristics and capabilities. TVA states, and Monarch does not refute,

that this application is so critical that even one or two parts per billion of contaminants could result in equipment failure and plant shutdowns. TVA also notes that by using the same brand of resin as is currently in use, it will be able to identify and correct problems more readily. Finally, TVA maintains that less restrictive specifications are in fact used for less demanding applications, and that the agency's purchases as a whole are not confined to Rohm and Haas products.

Monarch has provided a comparison of the properties of a Rohm and Haas product and of another manufacturer's product which shows comparable characteristics; however, even by Monarch's comparison, the two are clearly not identical. In this regard, TVA reports that resins from different manufacturers which are "comparable" do not have identical physical properties; it further states that it cannot mix different brands that are not identical because of the "substantial probability" that technical operational problems will result. The protester has not refuted TVA's position.

Accordingly, given the protester's failure to demonstrate that resins of a brand other than that specified in TVA's solicitation would meet TVA's needs, and given TVA's reasonable explanation for its insistence on requiring a particular brand name resin, we find no basis to conclude that TVA has unreasonably excluded the protester from competing for the contract. Therefore, Monarch's protest is denied.

Milton J. Socolar

for Comptroller General
of the United States