



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Talon Manufacturing Company, Inc.

File: B-261687; B-261687.2

Date: October 19, 1995

G. Lindsay Simmons, Esq., and James Eric Whytsell, Esq., Jackson & Kelly, for the protester.

Maj. Paul D. Hoburg, JAGC, and Gerald T. Williams, Esq., Department of the Army, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In procurement for production of ammunition, conducted under the authority of the Arsenal Statute, 10 U.S.C. § 4532(a) (1994), protest challenging cost evaluation of proposal from government-owned contractor-operated (GOCO) firm is denied where evaluation which finds GOCO's proposal of out-of-pocket costs to be low is reasonable, complete and consistent with historical pricing, and the only items identified by the protester as not considered were insufficient to eliminate GOCO's significant price advantage.

2. Protest alleging violation of internal agency policy is not for consideration by General Accounting Office where policy was not a part of the solicitation and is without legal effect.

DECISION

Talon Manufacturing Company, Inc. protests that it should have been awarded a contract under request for proposals (RFP) No. DAAE30-95-R-0012, issued by the U.S. Army Tank-Automotive and Armaments Command, Armament Research, Development and Engineering Center (ARDEC), for manufacture of .50 caliber blank ammunition. Talon contends that the solicitation and evaluation were flawed in a number of respects.

We deny the protest in part and dismiss it in part.

The RFP, issued on an unrestricted basis, sought proposals from government-owned contractor-operated (GOCO) and contractor-owned contractor-operated (COCO) firms to manufacture a basic quantity (5.3 million) with an option quantity

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(6.8 million) of .50 caliber blank rounds. Offerors could choose to manufacture the rounds based on the M1A1 design specification, in use for many years, the M928 performance specification, developed in 1993, or both. Those submitting an M928 configuration were required to submit samples and perform tests in order to demonstrate that their configuration met the requirements of the M928 specification. Offerors submitting price proposals using the M1A1 design were not required to submit to qualification testing.

Regardless of the configuration proposed, GOCO firms were required to submit two offers, one representing out-of-pocket costs against which the evaluation with COCO offers would be based, and one representing a fully funded offer on which an award would be based. For the out-of-pocket cost proposal, GOCOs were to include all direct labor and material costs, and other costs directly attributed to the performance of the contract work. The RFP advised that the costs of saved annual maintenance and storage costs, severance pay, and other potential costs to the government would also be considered. The fully funded offer was to contain overhead costs allocated in accordance with normal GOCO accounting practices and cost accounting standards. Commercial firms were required to submit only unit and total prices for their chosen configuration. To assist commercial offerors, the agency provided historical pricing information (fully funded) on GOCO production of the M1A1 round. According to this information, the latest GOCO cost per round was approximately \$0.95.¹

Award was to be made to the lowest-priced commercial or GOCO proposal on any acceptable M928 configuration, including the M1A1 design. If the GOCO out-of-pocket offer was lowest or equal to the lowest commercial offer, the RFP was to be canceled and award made by modification under the terms of the existing GOCO contract.

¹ Olin's out-of-pocket cost per round was approximately 40 percent lower than the historic fully funded cost. Talon contends that the agency misled it by providing it with only the historic fully funded information. Talon assumed that it could use the historic information, with a relatively small reduction for overhead costs to calculate the "price to beat." The RFP clearly identified the information as relating only to the fully funded costs of production. Talon's assumptions regarding how it would use that information do not provide a basis for protest. To the extent Talon is arguing that the agency should have provided out-of-pocket cost information, the protest is untimely. Solicitation improprieties, incorporated into the solicitation, must be protested not later than the next closing date for receipt of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1995).

Three offerors, including Talon and Olin Corporation, the GOCO firm (operating the Lake City Army Ammunition Plant (LCAAP)), submitted proposals by the April 17, 1995, closing date for receipt of offers. Olin submitted an offer based on the M1A1 specification while Talon based its proposal on production of the M928 performance specification. The various agency evaluations concluded that the Olin out-of-pocket cost, which was approximately \$880,000 lower than Talon's proposed price, was complete, reasonable, and consistent with historic pricing information. Accordingly, the agency did not conduct technical discussions with Talon and canceled the solicitation. Upon receiving notice of the agency's action, Talon filed this protest.²

As a preliminary matter, Talon contends that ARDEC's evaluation of Olin's pricing did not follow the Army Armament Munitions and Chemical Command (AMCCOM) acquisition instruction 17.2000. In Talon's view, section 204 of the instruction required ARDEC to forward the GOCO's fully funded and out-of-pocket offers to the government staff at Olin's GOCO facility for verification 45 to 60 days prior to the announced closing date. Once verification was completed, the offers were to be sent to the contracting officer at the procuring activity to be evaluated with the COCO offers. Here, Olin submitted its offer directly to the ARDEC contracting officer on or about the closing date.

ARDEC explains that AMCCOM has no command authority over it, and that it thus is not required to follow AMCCOM acquisition instructions. While ARDEC states that it did use AMCCOM 17.2000 for guidance in preparing the solicitation and the evaluation criteria, it did not incorporate the instruction into the RFP. Given this explanation we find no merit to Talon's argument. Moreover, we point out that this AMCCOM instruction appears to be internal agency guidance rather than a regulation having the force and effect of law, so that the alleged failure to comply with it in a particular instance involves a matter for consideration within the agency

²Although Talon filed its protest prior to modification of Olin's contract, the agency subsequently modified that contract to include the work covered by the protested solicitation. The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(c) and (d) (1988), requires an agency to withhold an award when a protest is filed with our Office where, as here, it is notified of the protest prior to making an award. An agency may subsequently make an award if it makes an appropriate determination that urgent and compelling circumstances significantly affecting the government's interests will not permit waiting for our decision. The Army apparently did not make that determination prior to modifying Olin's contract. However, to the extent that the modification here may be viewed as violating the CICA requirements, the protester was not prejudiced, since the agency issued a stop-work order on the modification work pending our resolution of the protests.

itself, rather than through the bid protest process. Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114.

This procurement is governed by the Arsenal Statute, 10 U.S.C. § 4532(a) (1994), which provides:

"The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis."

"Economical basis" means a cost to the government which is equal to or less than the cost of such supplies to the government if produced in privately-owned facilities, and government plant production costs are to be computed on the basis of actual out-of-pocket cost to the government. Olin Corp., 57 Comp. Gen. 209 (1978), 78-1 CPD ¶ 45; Action Mfg. Co., B-220013, Nov. 12, 1985, 85-2 CPD ¶ 537. "Out-of-pocket" costs for a GOCO include all costs incurred by the government directly as a result of producing an article at a GOCO plant and excludes those costs which would be incurred by the GOCO regardless of whether a particular contract were awarded to the GOCO firm. Id.

Talon challenges the evaluation of Olin's proposed out-of-pocket costs, arguing that the agency did not establish that Olin can produce the .50 caliber blanks on an "economical basis." Specifically, Talon notes that Olin's proposed material list did not include all necessary materials and that the agency failed to consider the cost of a materials change which represented a \$209,000 out-of-pocket cost increase to the government.³ Otherwise, Talon has not identified any cost or cost area which was not included in Olin's proposal. From our review of the record, we see no basis to object to the agency's evaluation.

The GOCO's offer, based on production of the M1A1 round, included a detailed breakdown of costs for materials, direct labor, and overhead, as well as explanations and rationales for the proposed costs. As part of the evaluation of Olin's pricing, the contracting officer had the administrative contracting officer at the LCAAP analyze Olin's out-of-pocket costs. The LCAAP analysis concluded that

³Talon also argues that the failure to specifically list these missing materials renders Olin's proposal technically unacceptable. This argument is without foundation. The materials list was submitted and evaluated solely to accurately determine Olin's out-of-pocket costs. The RFP did not call for a technical evaluation of proposals based on the M1A1 specification, and the Olin took no exception to any of the contract requirements. Thus, the agency reasonably concluded that its proposal was technically acceptable.

Olin's proposed out-of-pocket costs were reasonable and consistent with historic pricing information. This analysis was reviewed, without objection, by the resident Defense Contract Audit Agency (DCAA) representative. The contracting officer also had the Army Audit Agency (AAA) perform a price analysis of both Olin's out-of-pocket and fully funded costs.⁴ Included in this analysis was a comparison of Olin's list of raw materials with the known list of materials necessary to manufacture the .50 caliber rounds. The AAA concluded that the costs were reasonable and adequately supported.

The AAA materials evaluator did note several items which he could not immediately match with the known list. However, after detailed examination, he identified only three materials as "missing." According to the agency, these materials, associated with certain sealing and waterproofing processes, are common to all types of LCAAP ammunition and are all low value items. The evaluator concluded that the missing materials were not specifically listed because they were most likely included within direct overhead cost values. He recommended that the apparent deficiency be noted, but disregarded.⁵

Talon has not asserted or shown that the cost of these materials would have any significant impact on the more than \$800,000 difference between its offer and the Olin out-of-pocket offer. Similarly, with regard to the materials change, the contracting officer explains that he was aware of that change, but did not add it to the GOCO's out-of-pocket cost evaluation because its value did not exceed the cost difference between the Olin and the COCO proposals. Thus, even if there are certain minimal missing materials costs that should be included in the Olin proposal, those costs, along with the cost of the materials change, would not change the fact that Olin's out-of-pocket costs would remain significantly lower than

⁴After the protest was filed, the agency requested a DCAA audit of Olin's proposal. DCAA opined that the offeror had submitted adequate cost or pricing data, in accordance with applicable cost accounting standards and procurement regulations. DCAA was unaware of any out-of-pocket costs which were not included in the proposal, and it considered the proposal an acceptable basis for negotiation of a fair and reasonable price. While DCAA identified possible inadequacies in Olin's estimating system, it did not review them. The audit agency concluded that the impact of these matters on Olin's proposal "may be insignificant." While Talon argues that the matters may not be insignificant, this suggestion is contradicted by DCAA's overall finding, and the mere possibility of some impact provides no basis for concluding that ARDEC was unreasonable in relying on Olin's out-of-pocket cost proposal.

⁵In fact, the DCAA audit concluded that all materials were covered by the out-of-pocket cost proposal from Olin.

those proposed by Talon. Accordingly, any omissions from Olin's out-of-pocket cost did not prejudice Talon. In view of the various analyses which found Olin's costs reasonable, and in the absence of any identified error which would impact the analyses, we find the agency reasonably concluded that Olin could produce the ammunition on an economical basis.

Talon also argues that ARDEC should have issued the RFP as a small business set-aside since the agency was aware of at least two small businesses which were interested in the procurement. Protests based upon solicitation improprieties apparent on the face of a solicitation must be raised prior to the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Talon knew that the RFP had been issued on an unrestricted basis, but it did not protest until after the closing time. Accordingly, its protest on this ground is untimely and will not be considered.⁶

The protest is denied in part and dismissed in part.

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⁶In any event, awareness of the existence of two or more small businesses alone does not warrant setting a solicitation aside. See Specialized Contract Servs., Inc., B-257321, Sept. 2, 1994, 94-2 CPD ¶ 90.