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ECO

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Digest

In connection with a review of federal agencies' compliance with the Competition in Contracting Act of 1984 (CICA) by GAO's interdivisional task force on CICA, group managing attorney advises the National Security and International Affairs Division that he has no objections to proposed conclusions that (1) the use of a brand name only solicitation is inconsistent with the statutory requirement for full and open competition and therefore must be certified, justified, and approved in accordance with the Act's provisions for the use of other than competitive procedures, and (2) the Federal Acquisition Regulation should be revised accordingly.

Memorandum

May 30, 1986

TO : Group Director, NSIAD/RDAP - Kevin M. Tansey

FROM : Group Managing Attorney, OGC - John Brosnan SUBJECT: Review of Agencies' Compliance with the Competition
in Contracting Act of 1984 (000085) (B-208159.5)

In a memorandum dated May 7, 1986, you asked whether we would object to either of two conclusions you propose to include in a report on compliance by selected federal agencies with the Competition in Contracting Act of 1984 (CICA). The two conclusions are: (1) any procurement using a brand name only specification must be certified, justified and approved as using other than competitive procedures, and (2) the Federal Acquisition Regulation (FAR) should be revised to state this requirement clearly. We do not object to either conclusion.

Under CICA, a sole-source or other than competitive procurement is permissible only under limited circumstances, and must be justified and approved at specified levels within the contracting agency. It is necessary to decide first, however, whether a procurement is in fact other than competitive in order to determine whether the statutory requirements apply and have been met.

In our prior report on CICA implementation, Federal Regulations Need To Be Revised To Fully Realize The Purposes Of The Competition In Contracting Act of 1984 (GAO/OGC-85-14, Aug. 21, 1985), we concluded that the use of a brand name only solicitation is inconsistent with the requirement for full and open competition and constitutes the use of other than competitive procedures. We reached this conclusion in the context of evaluating the regulation covering procurements of automatic data processing (ADP) resources. We reviewed again our prior cases on this issue, however, and, while most of our brand name only cases involved ADP, we see no reason for having a different rule in the non-ADP area. The CICA requirement for full and open competition applies equally to ADP and non-ADP procurements.

We acknowledge that in some situations an agency may be able to obtain competition even when it specifies the product of only one manufacturer. Our cases have recognized that an active third-party market--i.e., dealers, licensees, or sellers of used equipment--may exist for some products. Le Prix Electrical Distributors, Ltd., B-212078, Nov. 15, 1983, 83-2 CPD ¶ 562; Comdisco, Inc., B-181956, Feb. 13, 1975, 75-1 CPD ¶ 96, aff'd, May 13, 1975, 75-1 CPD ¶ 289. We believe, however, that whenever an agency restricts a procurement to the product of one manufacturer, that manufacturer is the ultimate beneficiary of such a restriction regardless of who actually sells the product to the government. Therefore, the procurement should be considered as other than fully competitive.

We also recognize that CICA defines full and open competition as meaning that all responsible sources are permitted to compete, and that therefore an agency could argue it has used full and open competition even when it specifies a brand name product, if it allowed all responsible sources of that product to compete. Again, we think that because there is only one ultimate source for the product, a brand name only procurement is not consistent with what Congress intended when it required that full and open competition be used.

CONTRACTS

- Negotiation
- Sole-source basis
- Authority

FEDERAL ACQUISITION REGULATION

- Proposed revision

BIDS

- Invitation for bids
- Specifications
- Brand name
- Reasonableness