

**DECISION**



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

60630

FILE: B-184333

DATE: March 11, 1976

MATTER OF: Gulf Oil Trading Company

98494

**DIGEST:**

1. Catalog or market price exemption from requirement of Cost Accounting Standards (CAS) Act is mandatory exemption rather than discretionary with contracting agency. Therefore CAS requirements should not be imposed on contractor whenever catalog or market price exemption is determined to exist.
2. It is the offeror's responsibility to request and to provide justification for a catalog or market price exemption from CAS requirements. However, the contracting agency must make the determination whether the exemption applies in the particular case.
3. A negotiated price may be based on adequate price competition and at same time be qualified for exemption from CAS requirements as catalog or market price.
4. Where low offeror claimed exemption from CAS on ground that its offered prices were based upon its established catalog or market prices, exemption should not have been denied solely because adequate price competition was obtained by agency. Recommendation is made that agency review claim and if basis for exemption existed then consideration be given to termination for convenience of contract awarded to second low offeror and award of terminated quantities to low offeror.

Gulf Oil Trading Company has protested the determination that its offer in response to request for proposals DSA600-75-R-0292, issued by the Defense Supply Agency, was unacceptable because Gulf refused to be subject to the cost accounting standards (CAS) provision contained in the solicitation. Gulf contends that it was exempt from the CAS provision because its prices were based upon its established catalog or market prices.

This procurement contemplated indefinite quantity contracts for the supply of 28 line items representing an estimated 3,211,000 barrels of distillate and residual bunkers (ship's fuel) for certain ports in the continental United States and the Canal Zone. Under protest are awards for two of these items which together comprise the delivery of an estimate 900,000 barrels of ship's bunkers (No. 6 Fuel Oil) for Balboa and Cristobal, C.Z. The protested items were the only ones for which competitive offers were received and the low offeror (Gulf) refused to accept the CAS clause.

The requirement for the CAS provision stems from 50 U.S.C. App. 2168 (1970), P.L. 91-379, through which was created the Cost Accounting Standards Board, which board was authorized to promulgate cost accounting standards for:

"\* \* \* all negotiated prime contract and subcontract national defense procurements with the United States in excess of \$100,000, other than contracts or subcontracts where the price negotiated is based on (1) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (2) prices set by law or regulation."

Throughout the negotiating phase of this procurement, Gulf offered prices which were somewhat lower than the prices posted in its "International Marine Fuel Oil Price Schedule," but with economic price adjustment provisions tied to the fluctuations in its posted prices. Gulf contended that although its prices were not identical with its posted prices, they were still based on the posted prices, and therefore it was entitled to a statutory exemption from the CAS requirement. Gulf submitted to DSA documentation to justify the exemption.

The DSA contracting officer noted, however, that while the CAS act contains the catalog or market price exemption, the act does not provide for an exemption where the price is based on adequate price competition. Since the DSA contracting officer considered that the prices offered by Gulf and by the one other offeror (Exxon International Company) had been obtained through competition, he sought guidance from higher authority within the agency whether Gulf was entitled to the catalog or market price exemption. He was advised that "the CAS will apply if the price negotiated is based on adequate price competition regardless of

the possible existence of an established catalog or market price for the item." In view of Gulf's refusal to accept CAS, the contracting officer by letter of June 23, 1975, notified Gulf of the determination to award the items to Exxon. A protest to this Office followed. Thereafter, on July 8, 1975, DSA awarded the items to Exxon pursuant to ASPR 2-407.8(b)(3), because of urgency.

In its initial submission of September 2, 1975, to this Office, DSA argued the position that "if adequate price competition exists and is relied on by the contracting officer to determine the award price, the resulting contract award is based on competition even though the low offeror may have based its offer on its catalog price or on a market price." In addition, DSA argued that "even if the contracting officer could have found, on the basis of facts in this case, that the award price was based on an established catalog or market price, he was not required to do so and his decision was not an abuse of discretion."

Subsequently, however, in a report dated October 24, 1975, DSA "summarize[d]" the issues raised in the Gulf protest to be as follows:

"a. Who initiates an exemption from P.L. 91-379? We believe that the Government should normally apply the cost accounting standards as a matter of policy to implement the statute. If an exemption is requested, it should be initiated and justified by the offeror. Certainly this must be the case when an exemption is claimed on the basis of catalog or market price and only the offeror possesses the information necessary to demonstrate that the item or service has an established catalog or market price at which it is sold in substantial quantities to the general public.

"b. Who makes the determination whether the price negotiated is based on an established catalog or market price? We believe the Government makes this decision - not the offeror.

"c. Related to b. above, is this a permissive or mandatory exemption if the price negotiated is based on a catalog or market price? We note that the exemption language in P.L. 91-379 is worded differently from the parallel exemptions in P.L. 87-653. [Truth in Negotiations Act, 10 U.S.C. 2306(b) (1970 Ed.)] This may indicate a congressional intent to treat the P.L. 91-379 exemption as a matter of right rather than discretion of the Government."

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"d. The fourth issue for your consideration is whether the Government can find that the price negotiated is based upon adequate price competition and still permit an exemption from the cost accounting standards because it may also be demonstrated, in some manner, that the price negotiated is, or is based upon, an established catalog or market price. First, it should be noted that when the criteria for pricing on the basis of price competition are present, the contracting officer would normally not seek a different basis (i. e., established catalog or market price) for pricing. Pricing would logically be conducted on the basis of adequate price competition. However, it is conceivable that the Government could view an award price as negotiated on the basis of adequate price competition (i. e., award is to the low offeror when two or more offers are submitted and the criteria of ASPR 3-807.1(b)(1) are satisfied) while the offeror could contend that his offer is based upon an established catalog or market price. Accordingly, in such a situation, in the absence of an objection by your Office, this agency will, in appropriate circumstances, grant a catalog or market price exemption from the requirements of P.L. 91-379, provided:

"(1) The offeror identifies in his proposal, including any changes in his offered price, that his offered price is based upon an established catalog or market price rather than from the stimulus of competition which may be present in the particular procurement;

"(2) The offeror completes a DD Form 633-7 (Claim for Exemption from Submission of Certified Cost or Pricing Data) or otherwise furnishes necessary information in accordance with ASPR 3-807.3(j); and

"(3) The criteria set forth in ASPR 3-807.1(b)(2) can be satisfied." (Underscoring supplied)

Nevertheless, DSA reaffirmed its position that, had the award been made to Gulf, the price negotiated would have been considered to have been based on adequate price competition \* \* \* " and therefore "this protest should be denied."

In paragraph c. above, of its October 24, 1975, report, DSA suggests that the catalog or market price exemption from the CAS requirements may be mandatory rather than permissive. We agree with this DSA position. Unlike the wording of Public Law 87-653, which provides that the requirements of that act

need not be applied in certain cases, see 10 U.S.C. 2306(f) (1970), the language of 50 U.S.C. App. 2168 (1970) gives no indication of a congressional intent to allow for agency discretion as to whether to grant the exemption where the basis for an exemption exists. In the "Detailed Explanation" included in the Statement of the Managers on the Part of the House, H.R. Rep. No. 91-13861, 91st Cong., 2d Sess. 6 (1970), it is stated that cost accounting

"\* \* \* standards would not be applied to

\* \* \* \* \*

- (2) negotiated contracts where prices are established by catalog or market price of commercial items sold in substantial quantities to the general public;"

Furthermore, upon submitting the conference report to the House of Representatives, Representative Patman observed:

"\* \* \* it is important to point out that, while the conference report would permit the newly created Cost Accounting Standards Board to develop and promulgate cost accounting standards designed to achieve uniformity and consistency in cost accounting for defense contractors and subcontractors in connection with negotiated contracts, two important safeguards are provided against arbitrary and overly cumbersome administration of these provisions.

One is that certain types of contracts, such [as] a contract of \$100,000 or less, contracts where prices are established on the basis of catalog or market price for standard commercial items sold in substantial quantities to the general public and contracts for utility services the rates of which are established by law or regulation, are exempted from coverage of the act." (Emphasis added.)  
116 Cong. Rec. 28799 (1970).

Therefore, we believe that the CAS requirements should not be imposed whenever the basis for a catalog or market price exemption is determined to exist.

We also agree with DSA that it is the offeror's responsibility to initiate and justify the catalog or market price exemption. As DSA points out, only the offeror possesses the information necessary to demonstrate that the item has an established catalog or market price at which it is sold in substantial quantities to the general public. Furthermore, the contracting agency, not the offeror, must make the determination whether the exemption applies in the particular case.

Finally, we believe that a price may be based on adequate price competition and at the same time be qualified for exemption from CAS as a catalog or market price. A review of the legislative history of the CAS Act indicates to us that the statutory exemption is to be applied regardless of whether the government uses competitive procedures to negotiate the award price. Indeed, DSA recognizes the possibility that the Government could view an award price as negotiated in the basis of adequate price competition, while the offeror might be able to demonstrate that the price is based upon an established catalog or market price. DSA also recognizes, however, that in such a situation the agency will be required to determine whether the offeror's price is based upon its catalog or market price rather than derived from the stimulus of competition which may be present in the particular case. In this connection, we have no objection to the standards DSA intends to use in the future in determining whether to grant the catalog or market price exemption. (See paragraph d. of DSA's October 24, 1975 letter, quoted above.)

In this case, however, we find no indication that DSA ever determined whether Gulf's prices for the disputed items were based on established catalog or market prices. The record does indicate that DSA questioned whether Gulf's final prices were based on its established catalog or market prices. However, due to DSA's belief that the presence of competition precluded the catalog or market price exemption, the contracting officer did not resolve whether Gulf's prices qualified for the exemption.

Therefore, we recommend that DSA should review Gulf's claim for an exemption, in accordance with the standards set out above, in order to determine if Gulf's final prices qualified for the statutory exemption. If DSA determines that the basis for an exemption existed, we recommend that a partial termination for convenience be considered consistent with the urgent needs and overall best interests of the Government and that award be made to Gulf of any quantities which remain after the termination. We

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request that DSA take immediate action to determine the feasibility of a partial termination and that it report to us its findings and any actions taken pursuant to this decision as soon as possible.

*R. F. Killeen*  
Deputy Comptroller General  
of the United States