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

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B-175703

July 23, 1973

Olin Corporation
Energy Systems Division
East Alton, Illinois 62024

Attention: Mr. K. B. Zimmerman
Vice President and
General Manager

Gentlemen:

Further reference is made to your letter of April 21, 1972, and subsequent correspondence, protesting against the cancellation of RFP DAAA25-72-R-0178 (RFP -0178), issued at Frankford Arsenal, Philadelphia, Pennsylvania, and the subsequent allocation to Lake City Army Ammunition Plant (LCAAP) of the requirement represented by that solicitation.

The above-referenced solicitation, as amended, requested proposals from contractor-owned and -operated (COCO) plants for load-assemble-pack of 15,000,000 cartridges, 20mm, TP, M55A2 and 5 million cartridges, 20mm, HEI, M56A3. As we observed in our decision B-175703(1), July 25, 1972, in regard to the same procurement:

The contracting officer informed prospective offerors of the forthcoming RFP by message of October 18, 1971, which stated in part:

Award will be made to private industry or COCO
/Government-owned contractor-operated/ facility
on the basis of lowest out-of-pocket cost.

The RFP was issued under cover of a sheet entitled "Information to Offerors," which specifically advised offerors to "See note under Section D-7 regarding evaluation." The note provided:

This is to inform all offerors that the procurement against which this solicitation has been issued will be awarded on the basis of the lowest out of pocket cost to the Government.

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This determination will be made by comparing the lowest prices received under this solicitation with the lowest out of pocket cost available at GOCO facilities.

Amendment 0001 to the solicitation deleted the above-quoted provision and replaced it with the following statement:

Prices submitted will be compared for reasonableness with GOCO out-of-pocket costs. Evaluation factors will include first article, discounts, transportation (GFH inbound and end item destination), abnormal maintenance at GOCO plant, support services, and annual maintenance of facilities laid away or to be laid away as a result of this procurement.

Such a comparison was made, and on the basis thereof the instant RFP was canceled and the requirement was allocated to LCAAP, /a GOCO facility/.

You have identified no specific statutory or regulatory provision which was violated by the cancellation of the instant RFP and the allocation of the requirement to LCAAP. Your principal argument is that the Army Ammunition Procurement Policy provides an inequitable basis for determining whether to make award to a GOCO plant which has submitted a firm-fixed price offer rather than to a GOCO plant which is operated under a cost-reimbursement type contract. You contend that the inequities contained in the Army Ammunition Procurement Procedure, together with certain procurement practices under RFP -0178, prejudiced the evaluation of your offer.

The Army furnished us an internal memorandum, with attached procedures, as the expression of its ammunition procurement policy. This material is substantially reproduced in Part 3, "General Policies," of the Army Munitions Command Procurement Instruction, June 1972 edition (MUCMPI). Therefore, we shall refer to the appropriate MUCMPI paragraph in discussing the Army Ammunition Procurement Policy.

The Army's policy is stated in MUCMPI 1-300.91(a) as follows:

Ammunition items susceptible to procurement both from GOCO and COCO plants will be procured on the basis of the lowest out-of-pocket cost to the Government, consistent with protected base and mobilization base requirements and minimizing sudden shifts in procurement approaches.

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Where, as in the instant case, the GOCO plant is operated under a cost reimbursement type contract, the MUCOM GOCO Contracting Branch obtains validated estimated costs and fees for the GOCO plant. The validation of the GOCO cost estimate is then coordinated with the MUCOM Price Analysis Branch, which utilizes "DCAA services, validated historical data, and other information as available and required, prior to forwarding cost estimate data to the contracting officer," MUCOMPI 1-300.92(f)(11)(B)(III).

A solicitation is then issued to GOCO contractors, and evaluated offers received thereunder are economically compared with GOCO cost estimates on an out-of-pocket basis. If private industry is low, an award is made under the solicitation. However, if the GOCO contractor is low, the solicitation is cancelled and a negotiated award to the GOCO contractor is processed. MUCOMPI 1-300.92(g).

In R-143232, December 15, 1960, to the Chairman, Subcommittee for Special Investigations, House Committee on Armed Services and to the Secretary of Defense, we examined the "Arsenal Statute," 10 U.S.C. 4532(a), which now 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.

We advised the House Committee on Armed Services:

First, it is our opinion that the word "shall" was intended to make it mandatory upon the War Department to use Government arsenals and Government-owned factories to manufacture or produce all of its needs which could be so manufactured or produced on an economical basis.

Second, in the absence of a contrary expression of intention in the legislative history, it is our opinion that the words "Government-owned factories" must be interpreted to include both Government-owned Government-operated, and Government-owned contractor-operated, industrial facilities.

Third, the basic concept of the statute would appear to be a requirement that Government-owned industrial facilities should not be permitted to lie idle if it would be possible to use such facilities to produce the needs of the War Department at a cost to the Government no greater than the cost of procuring such needs from private industry.

Fourth, it is our opinion that the words "economical basis" were intended to require a comparison of all costs incurred by the Government as a result of producing an article in Government-owned facilities, with the price at which the article could be purchased from a private manufacturer.

Consequently, it is our further opinion that, in determining under this statute whether an article could have been produced in a Government-owned facility on an "economical basis," it would have been improper to include in the evaluation of such cost any amount which did not represent an actual expenditure by, or loss of savings to, the Government which was directly attributable to such production.

Similarly, we stated to the Secretary of Defense:

*** The words economical basis, as used in 10 U.S.C. 4532(a), are to be construed to mean 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 it is our opinion that this statute requires the cost of production in Government plant to be computed on the basis of actual out-of-pocket cost to the Government.

Thus, the general policy expressed in HUCOMPI 1-300.91(a), of procuring from GOCO or COCO plants on the basis of lowest out-of-pocket cost to the Government, is consistent in our view with 10 U.S.C. 4532(a).

The initial issue raised by your protest is whether the determination of lowest out-of-pocket costs is properly accomplished through a comparison of COCO fixed-price offers with GOCO cost estimates. You state that:

*** the Government cannot be certain of "out-of-pocket" costs until GOCO production of similar quantities has been completed, whereas the Olin prices are firm and independent of our future cost experience.

With respect to this contention, we agree with the contracting officer's observation that:

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The essential point is that a comparison must be made and a judgment exercised as to the placement of an award in a Government-owned plant or a privately-owned plant, a decision which must be predicated upon the exercise of a sound discretion.

Army policy is to obtain direct fixed-price competition among GOCO and COCO sources which are operated on that basis. However, where GOCO plants are operated under cost reimbursement type contracts, precluding such competition, cost comparisons are, in our view, necessarily utilized.

You next maintain that certain evaluation factors applied to COCO prices and GOCO cost estimates were inappropriate, or were erroneously omitted from or not adequately set forth in RFP -0178. The first of these factors was "transportation (GFM inbound * * *)," which represents the cost to the Government of transporting Government-furnished materials (GFM) to the load-assemble-pack contractor. You state that the omission of Government-furnished cartridge cases from this data in the RFP was improper. In this regard, it is administratively reported that the "GFM cartridge cases were currently being solicited and it was not known to whom the award would be made or the general geographical area of the awardee." Under these circumstances, we consider the speculative nature of the cost attributable to this item to have properly led to its exclusion from the solicitation.

You further contend that a "redistribution of overhead" evaluation factor was improperly included; that data relating to the "transportation (* * * end item destination)" factor was omitted even though it was made available a week after the award to LCAAP; and that the solicitation failed to inform offerors that "packaging costs" were an evaluation factor. The application of these factors was unfavorable to Olin. However, the record shows that even in the absence of these factors, Olin's price still would not be low out-of-pocket when compared to the GOCO cost estimate. Thus, as the contracting officer stated, "* * * there would have been no substantial difference in the economic analysis upon which the decision to allocate the requirement to LCAAP was based." In view thereof, we consider this portion of your protest as moot.

Olin also requested of the contracting officer historical cost data for LCAAP concerning the items being procured under RFP -0178. This request was denied by the head of the procuring activity (HPA) on the basis that the requested data were the internal records of a private company (the GOCO operating contractor) and therefore exempt from the disclosure requirements of 5 U.S.C. 552. You protest the denial of this information. It is the position of our Office however that we have no authority under 5 U.S.C. 552 to determine

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what information must be disclosed by other Government agencies.
B-165617, March 6, 1969.

In your initial protest to our Office, you also stated with respect to RFP -0178:

It is significant to point out that this list of evaluation factors applied to GOCO costs does not include all the real costs which are incurred by GOCO and, therefore, places industry at an unfair competitive disadvantage. To our knowledge many of the factors which are included in the Bureau of the Budget Circular A-76, 3 March 1966 have not been applied to the GOCO out-of-pocket costs, nor have they necessarily been considered in the Army "Procedures to Implement Current Ammunition Procurement Policies."

Such additional industry cost factors as depreciation of existing facilities, interest, insurance, and local, state and federal taxes are totally devoid of cost consideration at a GOCO facility whereas industry must bear these costs.

Circular A-76, as revised August 30, 1967, provides for the recognition of these factors in calculating the cost of obtaining products or services from Government commercial or industrial activities. However, paragraph 3.b. of the Circular states that the term "Government commercial or industrial activity" does "not include a Government-owned contractor-operated activity." Additionally, the summary of changes which accompanied the 1967 revision of Circular A-76 explains:

3.b. The definition of a Government commercial or industrial activity has been clarified. The earlier Circular, by definition, excluded a Government-owned-contractor-operated activity but the wording was not entirely clear. The change made clarifies the fact that a Government-owned-contractor-operated activity is not to be regarded as a Government commercial or industrial activity for purposes of the Circular.

Since Circular A-76 is expressly made inapplicable to GOCO plants, we do not believe that we may legally object to the procuring activity's failure to apply the criteria contained therein to the GOCO cost estimates.

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We are of the same opinion with respect to the Army's failure to apply to the GOCO cost estimates evaluation factors for Federal taxes, depreciation, insurance and interest, as prescribed by Department of Defense Instruction 4100.33, July 16, 1971 (DODI 4100.33). As you recognize, DODI 4100.33 implements the policies established by Circular A-76 and therefore expressly excludes from its provisions GOCO manufacturing and production plants.

In view of the foregoing, your protest is denied.

Sincerely yours,

E. H. Morse, Jr.

For the Comptroller General
of the United States