



United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-265884

November 7, 1995

The Honorable Dan Burton
House of Representatives

Dear Mr. Burton:

This responds to your August 4, 1995, letter requesting that our Office review the Army's planned procurement of metal parts for M-795 high fragmentation artillery projectiles. On July 20, 1995, the Deputy Assistant Secretary of the Army for Procurement signed a Justification and Approval (J&A) to authorize limited competition for this procurement. The J&A establishes a mobilization base for the item consisting of two government-owned, contractor-operated Army ammunition plants, the Scranton and Louisiana Army Ammunition Plants (SAAP and LAAP, respectively).

You ask several specific questions about the validity of the J&A prepared in this case. First, you ask whether the Army violated the Competition in Contracting Act of 1984 (CICA). You also ask about the accuracy of the J&A's reference to a prior contract for M-795 metal parts, and whether incorrect information about a prior procurement would invalidate the J&A. Finally, you request additional information on procurement of high fragmentation projectiles and ask whether costs are affected by restricted competition in artillery projectile procurements.

CICA permits restricted competition when supported by a properly prepared J&A. We note that the Army's J&A includes extensive discussion of the need to "prove out" the new and "vital flex-line manufacturing process," but does not discuss mobilization concerns in the same depth. As a result, it is not clear from the J&A as written that it fully documents the need for a mobilization base. Your staff has advised us that your constituent, ERI Babcock & Wilcox, Inc. of Indianapolis (ERI), intends to file a bid protest contesting the Army's mobilization base determination. Receipt of a timely bid protest will permit us to exercise our statutory function to gather all information and render a decision on the validity of the Army's justification for excluding ERI.

In response to your second question, SAAP apparently produced a small quantity of M-795 metal parts in 1978. This was in connection with the development of a Technical Data Package for the M-795. However, the prior contract has no apparent bearing on the validity of the present J&A. As to procurement costs, it is generally agreed that limiting competition increases costs. Although cost savings are certainly desirable, the mobilization base exception in CICA also takes account of the need to preserve production capacity for a national emergency.

Statutory Background

The Competition in Contracting Act, at 10 U.S.C. § 2304, requires the Department of Defense to obtain full and open competition in its procurements. Subparagraph (c)(3)(A) of section 2304, authorizes an exception when:

"it is necessary to award the contract to a particular source or sources in order . . . to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization. . . ."

Before using this CICA exception, the procuring agency must prepare a written J&A. A properly prepared and approved J&A permits the agency to restrict competition consistent with the law. Along with other procedural requirements, the statute and the Federal Acquisition Regulation (FAR) provide that a J&A must identify the exception sought, and include:

"a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception"

10 U.S.C. § 2304(f). See also, 48 C.F.R. §§ 6.303 and 6.303-2.

The FAR also lists the proper purposes for restricting competition to a mobilization base. They include: "[k]eep[ing] vital facilities or suppliers in business," and "[m]aintain[ing] properly balanced sources of supply for meeting the requirements of acquisition programs in the interest of industrial mobilization." 48 C.F.R. § 6.302-3(b)(i) and (iii).

By executing a J&A, military agencies may limit competition in order to create or preserve a mobilization base. Use of the mobilization base exception authorizes preselection of an appropriately limited number of sources for a specific critical item. These suppliers comprise the mobilization base. Once the mobilization base is established, the procuring entity may award future contracts exclusively to the

suppliers in the base. The goal of this procurement strategy is to provide those suppliers with sufficient work on a continuing basis to allow them to maintain the production capability that would be needed immediately in time of war.¹

Ammunition Plant Closure and Congressional Response

In April 1991 the Army issued its Ammunition Production Base Planning and Restructuring Study.² Recognizing that reduced threat in the post-cold war era would continue to diminish the need for new production of ammunition, the Army formulated a plan for downsizing the existing ammunition industrial base. As part of that plan, the Army articulated a policy to rely on the commercial sector to produce metal parts. Consistent with the policy, it listed several GOCO plants producing metal parts for closure. SAAP and LAAP were both scheduled to be closed in 1995.

In fiscal year 1993, despite the announced closure, Congress began allocating funds specifically for upgrading SAAP and LAAP to "flexible manufacturing centers." Since 1993, almost \$50 million has been designated for improvements at these two plants. Meanwhile, both plants remained on the closure list, and over time their active workload was reduced. Then, the conferees on the fiscal year (FY) 1995 Defense Appropriations Act directed that M-795 metal parts be procured from the "existing government-owned production base." H.R. Rep. No. 103-747, reprinted in 140 Cong. Rec. H9632 (daily ed. Sept. 26, 1994). The same conference report directed that \$25 million in FY 1994 funds be transferred from other uses to the M-795 procurement and used for a "prove-out of the flexible manufacturing capabilities at the Louisiana and Scranton Army Ammunition Plants."³ According to

¹In the field of ammunition production, some of the manufacturers are government-owned, government-operated (GOGO) or government-owned, contractor-operated (GOCO) plants. Like other potential participants in the mobilization base, the GOGOs and GOCOs need continuous work if they are to remain active and retain their production skills and capabilities.

²The study was updated in 1993. Army officials advised us informally that there is no 1995 update.

³In an attempt to counteract the FY 95 conference instructions, the Senate Armed Services Committee reporting S. 1087, the FY 1996 National Defense Authorization bill, directed the Army to consider public-private competition for the parts. S. Rep. No. 112, 104th Cong., 1st Sess. 32. The Senate Appropriations Committee also recommended increasing the amount allocated for the M-795 procurement by \$20 million for FY 1996. S. Rep. No. 124, 104th Cong., 1st Sess. 62. As of

the J&A, without the opportunity to demonstrate flex-line manufacturing techniques on the M-795 procurement, SAAP and LAAP would apparently have little or no other work.

M-795 Procurement

The J&A for the M-795 procurement states that the acquisition strategy is to limit competition for producing metal parts to SAAP and LAAP, "which recently have been facilitated with unique flex-line manufacturing capabilities so as to prove-out the flex-line concept and to keep those vital facilities/suppliers in business." The J&A explains that the flexible manufacturing concept "integrates a development and production capability into a single facility [and] creates a unique capability . . . that will allow the Army to obtain similar manufacturing technology production efforts of various items from" the GOCOs.

The J&A then lists a number of specific benefits to be derived from flexible manufacturing centers, and suggests that, if shown to be successful, the concept will be extended throughout the ammunition industrial base. The J&A goes on to state that restricting the M-795 program to SAAP and LAAP will ensure that the plants have sufficient workload to retain the expertise needed for the demonstration project. Referring to the \$50 million investment directed by Congress, the J&A concludes that if SAAP's and LAAP's "vital expertise is lost, then the Army's considerable investment in the vital flexible manufacturing center concept will, effectively, also be lost." Specifically with respect to ERI, the J&A concludes that although the firm is capable of the contract performance requirements, "the contractor's facility has not been deemed vital for this acquisition as it does not have a flex-line manufacturing capability."

Case Law

Over the years, our Office has decided a number of bid protests involving the establishment of a mobilization base, and the inclusion or exclusion of particular suppliers from the base. Consistently, we have recognized that such determinations involve complex judgments and the exercise of discretion by agency officials. We limit our standard of review in such cases because the normal concern of maximizing competition is secondary to the ends of industrial mobilization. However, if a firm convincingly demonstrates an abuse of discretion, we will sustain a protest of the need for or the composition of a mobilization base. See NI Industries, Inc., Vernon Division, B-223941, Dec. 15, 1986, 86-2 CPD ¶ 674.

October 31, 1995, there has been no final Conference action on either act.

Your letter includes a June 21 letter from counsel for ERI Babcock & Wilcox of Indianapolis (ERI). ERI had initially expressed interest in participating in the mobilization base, but the firm ultimately was excluded because it lacks flex-line manufacturing capability. That letter, however, was written without benefit of the J&A, which was not executed until July 20. The bid protest process will afford ERI the opportunity to examine and comment on the Army's specific reasons for limiting the acquisition to the two GOCO's, and will result in creation of a full record for purposes of a decision by our Office under our bid protest authority.

Army officials advised us that a request for proposals for M-795 metal parts was issued in mid-September 1995, with evaluations scheduled for November 1995, and award contemplated in February of 1996. If we find in the bid protest that the exclusion of ERI was improper, we are authorized to recommend that the firm be permitted to compete. See 31 U.S.C. § 3554(b).

Other Concerns

You asked whether a previous contract for M-795 parts mentioned in the J&A was actually performed at SAAP. According to the J&A, a contract was awarded to SAAP in 1978 to produce a few M-795 projectiles for testing, and it also resulted in the delivery of a Level III Technical Data Package. We have no information that would disprove the statement in the J&A that the metal parts work was done at SAAP. In any case, the J&A does not suggest that the Army selected SAAP for the mobilization base on the basis of expertise acquired under the 1978 contract. Therefore, the prior procurement history does not appear to be related to the decision to limit competition.

You also asked whether full and open competition has been secured in the procurement of other high fragmentation artillery projectiles. To the best of our knowledge, in recent years all or nearly all procurements of large ammunition items, such as grenades and artillery shells, have been accomplished using established mobilization bases appropriate to the item procured and the quantity needed. In fact, ERI is a participant in the mobilization base for Navy 105mm projectiles, and has been since at least 1990.

Your last question is whether the procurement methods have had any impact on cost. In general, restricted procurements cause higher costs. However, in the case of mobilization base contracting, the government receives the benefit of the contractors' continuing availability to produce quickly the large quantities of specialized items needed in time of war. The mobilization base exception in CICA reflects the Congress' determination that this advantage is worth a premium. See Bulova Technologies, Inc., B-252660, July 15, 1993, 93-2 CPD ¶ 23, at 6.

Contract awards in procurements restricted to a mobilization base may be made on the basis of factors other than cost. In Lance Ordnance Co. Inc., et al., B-246849, et al., Mar. 31, 1992, 92-2 CPD ¶ 29, for example, a mobilization base supplier was selected for award of additional quantities because its existing contract was near completion. However, cost may be a primary factor as well. In Honeywell, Inc., B-236357, Nov. 22, 1989, 89-2 CPD ¶ 490, the contract properly was awarded to the lowest offeror among several in the mobilization base.

Finally, the decision to utilize a mobilization base to procure a critical item does not always signal the end of further competition for the item. In some cases, it may be necessary to enlarge the base. See Propper International, Inc., B-229888, et al., Mar. 22, 1988, 88-1 CPD ¶ 296. In addition, if procurement needs for an item exceed the amount necessary to sustain the mobilization base, all responsive and responsible offerors must be permitted to participate in the acquisition of the excess amounts.

We are enclosing for your information a copy of our new Bid Protest Regulations, which are effective as of October 1, and a recent report on artillery projectile inventories that also discusses future procurement needs. We trust the foregoing is helpful to you.

Sincerely yours,

Robert P. Murphy
General Counsel

Enclosures

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DIGEST

The Competition in Contracting Act, 10 U.S.C. § 2304, permits restriction of competition to insure suppliers of critical items constantly maintain the production capacity that would be needed in the event of a national emergency. GAO's standard of review recognizes substantial agency discretion in the establishment and composition of a mobilization base.