



GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: OSRAM SYLVANIA Products, Inc.

File: B-287468

Date: July 2, 2001

E. Sanderson Hoe, Esq., and Suzanne L. Karbarz, Esq., McKenna & Cuneo, for the protester.

Judith A. Miller, Esq., Kathleen L. Beggs, Esq., and Lisa M. Duggan, Esq., Williams & Connolly, for COMSUP Commodities, Inc., an intervenor.

Michelle S. Pavlak, Esq., Defense Logistics Agency, for the agency.

Paul I. Lieberman, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined to award a contract for the sale of excess stockpiled tungsten to the offeror whose evaluated price was high under every reasonable price evaluation under a solicitation where all the award criteria were effectively structured to provide for award to the technically acceptable offeror that proposed the highest total evaluated price.

2. Agency award of the entire sale quantity offered by the government to a single commodities broker offeror is unobjectionable where it is permissible under the solicitation and the agency properly performed the requisite statutory market analysis to support its determination that the sale would not cause undue market disruption.

DECISION

OSRAM SYLVANIA Products, Inc. protests the award of contract No. SP0833-01-S-12055 to COMSUP Commodities, Inc., by the Defense National Stockpile Center (DNSC), Defense Logistics Agency, for the sale of certain excess stockpiled

tungsten.¹ OSRAM asserts that the agency evaluation is unreasonable and improperly failed to credit benefits contained in OSRAM's offer, and that award of the entire quantity of sale tungsten to COMSUP, a commodities broker, violates the agency's obligation under the Strategic and Critical Materials Stock Piling Act ("Stockpiling Act" or "Act"), 50 U.S.C. § 98 et seq. (1994), to avoid undue market disruption by this sale of surplus strategic material.

We deny the protest.

BACKGROUND

DNSC issued the instant solicitation of offers (SOO) for stockpile tungsten, entitled "DLA-Tungsten Ores & Concentrates-002," on December 7, 2000, with a January 11, 2001 due date for receipt of initial offers. The solicitation offered for sale 4 million pounds of contained tungsten during the base year and in each of four 1-year option periods, for a potential total sale quantity of 20 million pounds of material, upon which DNSC's total price evaluation was based.

The SOO contains a shopping list of all of DNSC's currently analyzed 13.2 million pounds of contained tungsten (SOO § I.2), permits offers for a minimum of one lot and a maximum of 4 million pounds per year (SOO § B.3), and allows DNSC to make either a single award or multiple awards (SOO § B.7(a)). Section B.4(a) provides that offerors should express their unit prices as a percentage of the monthly average of either the London Metal Bulletin (LMB) ore price or the LMB APT² price, plus a premium or discount to the respective reference price expressed as a percentage. The actual contract price is to be determined by calculating the unit price for material released to the contractor during each month based on the previous calendar month's average applicable LMB reference price multiplied by the percentage figure plus or minus the discount contained in the contract. SOO § B.4(b). Section B.8, entitled "Evaluation of Offers," provides that the evaluation factors are, in descending order of importance, unit price, payment terms, and removal schedule, and notes that all evaluation factors other than unit price, when combined, are significantly less important than unit price.

¹ Pursuant to GAO's Bid Protest Regulations, 4 C.F.R. § 21.13(a) (2001), our Office has jurisdiction of this nonstatutory sale protest because DNSC has requested such jurisdiction in writing, as is indicated in the solicitation at § G.5(d). While there are no published regulations governing DNSC stockpile sales, the agency states that its procurement procedures here "follow the intent of the [Federal Acquisition Regulation]." Agency Report at 2. There has been no stay of contract performance during the pendency of the protest.

² APT stands for Ammonium Paratungstate, which the protester explains is chemically processed from tungsten ore concentrates and is the primary tungsten commodity traded in the market. Protest at 6 n.8.

The agency received nine offers by the initial due date. OSRAM's initial offer contained a complex pricing scheme based on using as a reference price the [deleted] LMB [deleted] index. Agency Report at 6-7. Both OSRAM and COMSUP offered to purchase the entire sale quantity available and both offers were included in the competitive range. After conducting discussions, during which OSRAM was advised by the agency regarding pricing that it should consider "keeping it simple," DNSC called for the submission of best and final offers (BAFOs) by February 21. Agency Report at 7. Both offerors timely submitted BAFOs with 30-day payment terms, for the full 20-million pound quantity available in the base and all option years.

OSRAM's BAFO offered [deleted] unit price stated in dollars per STU (short ton unit) [deleted] using a [deleted] formula referencing the average monthly LMB [deleted] index price, which is expressed in MTUs (metric ton units). OSRAM's offer was: if the [deleted] index is [deleted] then OSRAM's unit price is [deleted]. OSRAM noted that for conversion of MTU to STU, \$/STU equals (\$/MTU times 0.9072). In addition, OSRAM offered a floor price of \$[deleted], and agreed to remove at least [deleted] per [deleted] up to a maximum of [deleted] per [deleted]. Agency Report, Tab 13, OSRAM BAFO, at 2-3.

COMSUP's BAFO contained [deleted]. For the [deleted], listed by the SOO shopping list line items for approximately [deleted] of the total, COMSUP offered as its unit price the average monthly LMB [deleted] price [deleted] per MTU, and for the remaining [deleted], COMSUP offered as its unit price the LMB [deleted] price [deleted] per MTU. For the [deleted], COMSUP offered as its unit price the average monthly LMB [deleted] price [deleted] per MTU. COMSUP also offered [deleted] \$ [deleted] per MTU for [deleted]. COMSUP agreed to remove all material within 12 months of the award. Agency Report, Tab 12, COMSUP BAFO, at 2.

The agency has provided two different explanations of its evaluations of the total value of the offerors' unit prices, both based on a "snapshot in time" consisting of the average [deleted] LMB prices. Agency Report at 8; Revised Agency Report, May 7, 2001, at 8. The original agency report indicates that DNSC determined that the LMB ore price is 75 percent of the LMB APT price, based on the LMB ore price average of \$[deleted] per MTU divided by the LMB APT price average of \$[deleted] per MTU. Therefore, DNSC converted the APT price per MTU to an ore equivalent price by multiplying the APT price by 75 percent. Agency Report at 8. This methodology and the resulting calculations are supported to some extent by an underlying document entitled: "Recommendation for Awards under Solicitation DLA-Tungsten-Ores & Concentrates-002." Agency Report, Tab 19.

These calculations evaluate COMSUP's unit prices at \$[deleted]. DNSC states that it calculated a total evaluated price of \$76,030,208 for COMSUP. Agency Report at 8; Agency Report, Tab 19, at 5-6. OSRAM's price was evaluated at [deleted] a total

evaluated price stated to be \$72,154,345. Agency Report at 8. OSRAM was not given any dollar credit for its floor price of \$[deleted]. Agency Report at 12-13.

Subsequently, DNSC issued a “revised agency report” in which it offered a correction, explaining that it had actually reduced each offer to an absolute dollar value per MTU, without using any APT to ore conversion factor, and then compared the prices to each other using average [deleted] LMB ore and APT prices. Revised Agency Report, May 7, 2001, at 8. COMSUP’s price was calculated using the [deleted] LMB [deleted] price of \$[deleted] per MTU. After converting to STUs, DNSC calculated [deleted] COMSUP’s overall total evaluated price as \$76,030,381.61. Id. at 8-9. For OSRAM’s offer, DNSC used direct calculations at \$[deleted] to arrive at an overall total evaluated price of \$69,253,618.85. Again, nothing was added for the floor price. Id. The revised report calculations are supported to some extent by material contained in the original agency report at Tab 14, entitled: “Tungsten Ores & Concentrates Award Presentation.”

In making its award determination, the agency concluded that the total evaluated value of COMSUP’s BAFO based on its unit prices was so much higher than OSRAM’s that there was no need to consider the other evaluation factors in order to determine that COMSUP’s offer represented the best value to the government. Agency Report at 9. The agency explained that if OSRAM’s offer had been closer in price to COMSUP’s, DNSC would have assigned numerical dollar values to the payment and removal terms based on the cost of money to the government in order to determine which offer represented the best value. Here, OSRAM’s and COMSUP’s payment terms were identical, and the removal terms were not considered sufficiently different to make a difference. Id. Accordingly, the agency determined to award to COMSUP without assigning numerical values to these factors. Id. On March 1, DNSC determined to make one award to COMSUP for the entire quantity available under the solicitation and, after receiving a debriefing, OSRAM timely filed this protest with our Office on March 23.

PROTEST CONTENTIONS

OSRAM’s initial protest contained four allegations. First, OSRAM alleged that it had been misled during discussions by DNSC’s instructions to “keep its offer simple,” which OSRAM interpreted as indicating the agency’s disapproval of OSRAM’s initial pricing approach, as a result of which OSRAM changed its BAFO pricing approach, allegedly to its detriment. Protest at 5-6. Second, OSRAM asserted that the price conversion between LMB APT and ore reference pricing may have been prejudicial to OSRAM because the agency failed to show that it properly converted the prices based on the different references permitted by the SOO in a manner that allowed a fair price comparison. In addition, OSRAM asserted that pricing based on noncompliant references had been offered and was improperly considered by DNSC. Protest at 6-7. Third, OSRAM asserted that the evaluation was irrational and inconsistent with the SOO evaluation scheme because the stated payment and

removal evaluation factors were not weighted or assessed in any specific manner (e.g., color, points or adjectival) which would allow DNSC to perform a tradeoff and rationally determine best value to the government. Protest at 8. In addition, OSRAM objected that DNSC did not give OSRAM any evaluation credit for the floor price which it offered, and which COMSUP did not offer. Protest at 8-9. Fourth, OSRAM asserted that the award violated DNSC's mandate under the Stockpile Act to dispose of stockpiled materials in a manner that would avoid undue market disruption. 50 U.S.C. § 98e(b)(2). Specifically, OSRAM asserted that DNSC failed to consider the allegedly prohibited market disruption that would result from the award of the entire quantity offered to a single broker. Protest at 9-11.

In response to the agency report, OSRAM withdrew the first two allegations concerning misleading discussions and improper price references and conversions. Protester's Comments at 5. OSRAM focused its evaluation objections on the agency's use of only the [deleted] LMB reference price for calculation over the entire 5 years, and amplified its removal schedule argument by presenting calculations purporting to show that an evaluation applying a present value analysis would result in its BAFO actually having a higher total dollar value to the government than COMSUP's. Protester's Comments at 9. OSRAM also questioned the manner in which COMSUP's [deleted] had been calculated, claiming that the award is inconsistent in this regard with the agency's evaluation calculations. Protester's Comments at 3. In addition, OSRAM expanded its statutory argument and suggested that award to a commodities broker, such as COMSUP, was a particular violation of DNSC's statutory obligation not to cause undue market disruption. Protester's Comments at 16-17.

EVALUATION OF OFFERS

Basis of Review

In reviewing protests challenging an agency's evaluation of offers, we will not substitute our judgment for that of the agency regarding the merits of offers; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's evaluation criteria and applicable statutes and regulations. Coastal Drilling, Inc., B-285085.3, July 20, 2000, 2000 CPD ¶ 130 at 4. A protester's mere disagreement with the agency's evaluation does not render it unreasonable. CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454 at 5. Here, the solicitation does specify payment and removal terms as significantly less important criteria relative to unit price. However, neither of these other factors reflects a technical or other non-price consideration that would give rise to the need for the agency to make a price/technical tradeoff. Rather, both of these factors provide for possible price adjustments. Each represents the possibility that the government will receive money earlier or later in time, which can be quantified by considering the timing differences in terms of an appropriate interest rate. That is, early removal will result in early payment of money to the government (assuming

identical payment terms), and vice versa. The same is true for shorter payment terms versus longer payment terms. The specific dollar value of these differences can be calculated by application of a present value analysis.

Indeed, the protester recognizes this by virtue of the fact that its arguments in this regard are made only on the basis of the specific dollar impact on price of the non-unit price considerations, using a present value analysis. OSRAM does not assert that its removal schedule provides any other benefits besides the value of money that will be received relatively early. OSRAM's allegation is that the respective total prices were misevaluated, and that a reasonable evaluation would have led to the conclusion that OSRAM's offer had a greater present dollar value to the government. Thus, the protester's own argument reflects its understanding that, in effect, the solicitation provides for award on the basis of the highest priced offer from a technically acceptable offeror, taking into consideration the possible price impact of differing removal and payment terms. No cost/technical tradeoff is contemplated or required by the SOO.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F. 3d 1577, 1581 (Fed. Cir. 1996). Here, with respect to the alleged evaluation improprieties, in order to show prejudice, there must be a showing that if the total dollar values of the BAFOs had been properly calculated, there is a substantial likelihood that COMSUP's total BAFO price would not have been evaluated as higher than OSRAM's.

"Snapshot in Time" Unit Price Evaluation

We first consider OSRAM's objection that the [deleted] snapshot in time used by DNSC for all unit price evaluations was inappropriate. Under the SOO terms, DNSC had to use some LMB reference price in order to perform a relative price evaluation of the respective offers. DNSC determined that the [deleted] reference point was most equitable because it represented [deleted]. Agency Report at 8. Because the contract can extend for 5 years in a volatile market and offers are sensitive to the LMB reference price that is used, OSRAM argues that a single monthly price is inadequate, and posits that "[h]ad DNSC employed an appropriate reference price for evaluation purposes, OSRAM's proposal would have been evaluated higher." Protester's Comments at 12. However, OSRAM has provided no evidence with respect to price fluctuations which shows or even suggests that it was prejudiced relative to COMSUP by virtue of this "snapshot" price evaluation methodology.

Both COMSUP's and OSRAM's reference prices will fluctuate, and OSRAM has not made any showing that these fluctuations have occurred in the past or are likely to occur over the future course of the contract in a pattern which suggests that a

“snapshot” calculation is relatively adverse to OSRAM’s price evaluation or favorable to COMSUP’s. That is, while the actual price received by the agency will change as a result of market fluctuations, nothing in the record suggests that this will have any prejudicially disproportionate effect on the relative prices of COMSUP and OSRAM. OSRAM’s mere pronouncement that an improved “appropriate reference” would have caused its evaluated price to be higher, Protester’s Comments at 12, has no probative effect; it merely reflects OSRAM’s view that the tungsten market price will rise over the life of the contract. However, this would also cause COMSUP’s evaluated price to become comparably higher under a similar more “appropriate reference.” OSRAM effectively concedes that any price fluctuations are likely to affect the two offers comparably when it cites with approval DNSC’s analysis showing that movements in [deleted] prices have closely tracked each other over the past [deleted] years. Protester’s Comments on Revised Agency Report, May 14, 2001, at 4. OSRAM does not suggest any other specific approach which it believes would have been more accurate. OSRAM’s argument here merely reflects the protester’s disagreement with the agency’s evaluation methodology, but does not show that DNSC’s “snapshot in time” unit price evaluation was unreasonable in any way that was prejudicial to OSRAM.

Floor Price

Next, we consider the agency’s decision not to evaluate OSRAM’s floor price. DNSC correctly points out that a floor price was not included in the SOO as a possible evaluation factor. Agency Report at 13. Accordingly, the solicitation provided no basis to consider the floor in the unit price evaluation. DNSC also notes that the present market price is substantially above the \$[deleted] floor price offered by OSRAM, that the market has been in a steady upswing, and that indicators suggest that the market will continue to be reasonably strong. Therefore, DNSC determined that the floor price had no actual value. Id. at 12-13.

OSRAM points out that the LMB index price has fluctuated substantially over the past 3 years, and notes out that it has previously honored floor prices under other contract awards. Protester’s Comments at 11-12. However, OSRAM has also pointed out that the world market supply of tungsten is diminishing and will continue to diminish over the contract term because suppliers other than DNSC are decreasing their output. Protester’s Comments at 14-16. As COMSUP correctly points out, this analysis by OSRAM supports the likelihood of rising market prices over the contract life, COMSUP’s Comments at 6, in which case the agency properly determined that OSRAM’s proposed floor price would have no applicability or value. OSRAM has not provided any basis to conclude that the agency erroneously declined to consider and add evaluated dollar value for OSRAM’s below-market floor price, in a rising market, under a solicitation in which the evaluation criteria did not contemplate the evaluation of a floor price.

Unit Price Evaluation

In order to consider OSRAM's contention regarding the evaluation of its removal schedule, we must first address DNSC's underlying extended unit price evaluations. The statement in the initial agency report that the evaluated extended total value of OSRAM's offered unit price was \$72,154,345 appears to be simply erroneous. OSRAM states that it can find no basis for the \$72,154,345 total, which the agency now indicates is incorrect, and OSRAM calculates its actual extended unit price total as \$69,256,949.76. Protester's Comments, exh. 2, at 4. This amount appears correct to our Office, and is substantially equivalent to the \$69,253,618.85 total for OSRAM's offer that, as noted above, is presented in the revised agency report. There is no dispute regarding the underlying unit pricing, and the minimal discrepancy in these totals (amounting to less than \$3,400) may simply reflect rounding differences in making various unit conversions.

COMSUP's aggregate price is reported by the agency as \$76,030,208 in the original report and as \$76,030,381.61 in the revised report, numbers which are essentially identical, the difference in which, as OSRAM agrees, is insignificant. Protester's Comments on Revised Agency Report, May 14, 2001, at 6 n.6. While OSRAM questions whether the actual award terms concerning COMSUP's volume-based premiums are consistent with this evaluated total price, which will be addressed below, the protester concedes that the properly calculated total value of COMSUP's BAFO unit prices is slightly in excess of the agency's revised report total, under OSRAM's own calculations. *Id.* at 6; Protester's Comments, Tab 2, at 5-6. Thus, OSRAM and DNSC agree that a properly calculated snapshot in time evaluation of the respective extended unit price totals under the BAFOs results in a calculation that COMSUP's BAFO price is more than \$6.7 million higher than OSRAM's.

Removal Schedule

OSRAM explains that its commitment to remove (that is, take delivery and pay for) [deleted] of the yearly award amount by [deleted] provides DNSC with a stream of money earlier than would COMSUP's offer, which commits only to remove and pay for the full contract amount at the end of the year. Protester's Comments at 8. OSRAM points out that DNSC did not evaluate the greater relative value that an earlier stream of money provides to the agency, and in this regard, OSRAM submitted a present value analysis using various evaluation scenarios, applying interest rates of 5 percent, 6.75 percent and 8 percent, which purports to show that OSRAM's BAFO total would have been evaluated as more than \$5 million higher than COMSUP's if a present value analysis had been performed by the agency. Protester's Comments at 9.

In response, the agency pointed out that it appears that OSRAM's calculation erroneously "divides the annual rate by 12 twice in order to generate a monthly discount rate. That is effectively dividing by 144 and constitutes a significant error." Agency Comments, May 14, 2001, exh. 2, Affidavit of Thomas L. Rasmussen, at 3.

The agency provides a corrected present value analysis using a 6.75 percent Treasury interest rate. OSRAM agrees (notwithstanding its having provided calculations at other interest rates) that 6.75 percent is the appropriate rate for this present value analysis. Protester's Comments at 9. DNSC's calculation shows that an accurate present value analysis results in COMSUP's total BAFO value remaining \$3,686,554.56 greater than OSRAM's. Agency Comments, exh. 2, supra, at 2. In response, OSRAM states that it contacted the publisher of the software that OSRAM had used to perform its present value analysis, and asked the publisher to run the same calculations at its location. As OSRAM explains, "unexpectedly, the publisher produced the numbers reported by the DNSC." Protester's Final Comments, May 22, 2001, at 2. Thereafter, OSRAM itself recalculated present value using different software, and itself produced the same results as DNSC; accordingly, OSRAM concedes that it is "unable to dispute the DNSC results." Id. at 2-3. In short, even under the present value analysis urged by OSRAM, the protester concedes that its properly evaluated BAFO total would remain more than \$3.68 million below COMSUP's.

Award Amount versus Evaluation Amount

Finally, OSRAM asserts that COMSUP's BAFO value is overstated because the award document (Agency Report, Tab 15) reflects a different application of COMSUP's [deleted] than that which DNSC used to evaluate COMSUP's BAFO, which OSRAM asserts decreases the total value under the evaluation. Specifically, OSRAM argues that the actual [deleted] value under COMSUP's award terms is \$[deleted] rather than the [deleted] amount of \$[deleted] that was used by the agency in its evaluation. Protester's Comments on Revised Agency Report, May 14, 2001, at 6. Adding in the evaluated [deleted] amount, on which OSRAM and DNSC substantially agree, OSRAM contends that COMSUP's BAFO total should have been evaluated as \$74,688,046.81 rather than the \$76,030,381.61 amount used by the agency. Id. We need not resolve this argument since, even if OSRAM were correct, the resulting \$1,342,335 reduction in COMSUP's evaluated BAFO price would not come close to eliminating the margin by which COMSUP's BAFO price is higher than OSRAM's. Using DNSC's present value calculation, which OSRAM no longer disputes and which provides the most favorable possible scenario from OSRAM's perspective, COMSUP's total price is higher than OSRAM's by a margin of more than \$3.68 million

and would remain higher by substantially more than \$2 million if this reduction were taken.³ Thus, OSRAM simply has not shown that it could have been prejudiced by this alleged discrepancy.

In sum, OSRAM has not provided anything which suggests that its BAFO was erroneously evaluated as lower in total value than COMSUP's; therefore, we have no basis to question the evaluation and the resulting award determination.

MARKET DISRUPTION

OSRAM asserts that the market supply of tungsten is decreasing because of the depletion of reserves and resulting cutbacks in output by domestic and foreign sources, and as a result, the tungsten released by DNSC will constitute a significant and increasingly high percentage of the tungsten available to Western consumers. Protester's Comments at 14-16. OSRAM concludes from this that DNSC was required by the Stockpile Act not to make a total award to a commodity broker, such as COMSUP, which would then be in a position to disrupt market prices and supply and make it difficult for a major user of tungsten, such as OSRAM, to obtain tungsten at a reasonable price. Id. The protester does not dispute that the SOO itself permits a total award to a single offeror, nor does it contend that the SOO in any way restricts possible awards to brokers. OSRAM relies entirely on a provision in the Stockpile Act which provides that disposal of stockpile materials should be made using competitive negotiation procedures, and that:

efforts shall be made in the . . . disposal of such materials to avoid undue disruption of the usual markets of producers, processors, and consumers of such materials and to protect the United States against avoidable loss.

50 U.S.C. § 98e(b)(2).

The agency's position concerning this requirement, for which it cites as authority Associated Metals and Minerals Corp. v. Carmen, 704 F.2d 629 (D.C. Cir. 1983), is that the Stockpile Act imposes no obligation on the agency to perform the kind of award impact assessment and to impose the kind of award allocation limitations that OSRAM urges is required. Agency Report at 14-15. We agree with the agency.

In Associated Metals, in rejecting a challenge to the selling agency's assessment that there would not be undue market disruption by a particular sale under the Stockpile

³ Using a present value calculation substantially similar to DNSC's, COMSUP has calculated that the full effect of this claimed reduction under a proper present value analysis shows its total BAFO evaluation remains \$2,623,000 higher than OSRAM's BAFO evaluation. COMSUP's Supplemental Comments, May 14, 2001, at 7.

Act, the court concluded on the basis of the language of the Act and the legislative history that the provision in question was designed to “protect producers and traders against sudden disposals of strategic materials no longer needed in such quantities as might break the market,” and that Congress was concerned only with “significant disruptions in commodity markets caused by dumping of surplus materials.” 704 F.2d at 635. OSRAM does not question that DNSC determined that the quantity of material being sold is not so great as to disrupt the market. Rather, OSRAM seeks to read the Act as imposing an additional obligation on DNSC to structure award allocation among competitors on the basis of consideration of the possible increase in cost or decrease in supply to major tungsten users such as OSRAM, which is clearly beyond the contemplation of the Act.⁴ Accordingly, OSRAM’s assertion in this regard is without merit.

In sum, OSRAM has provided no credible basis to question the propriety of DNSC’s determination to award to COMSUP.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ OSRAM provides no legal authority to support its interpretation of the Stockpile Act. In questioning the holding in Associated Metals, OSRAM refers to an earlier decision by our Office, Philipp Bros., Div. of Engelhard Minerals & Chems. Corp., B -197060, June 12, 1980, 80-1 CPD ¶ 412, which actually concerns the selling agency’s efforts to meet its obligation under the Act to protect the government from avoidable loss and does not support OSRAM’s interpretation of the Act. OSRAM also asserts that “Congress has recognized through various anti-trust law[s] that disruption of the market can be achieved through other means than dumping. See e.g. The Sherman Act, 15 U.S.C. §§ 1-7.” Protester Comments at 15 n.10. Neither reference has any bearing on the court’s analysis in Associated Metals regarding the appropriate applicability of the Stockpile Act in assessing undue market disruption. Incidentally, DNSC has also stated that there are additional supplies of tungsten in its inventory, beyond the sale quantities, that could be made available for release through sale in the event that there was a market shortage of tungsten. Agency Report at 16.