DCCUMENT RESUME

03630 - [A2653820]

[Protest to Alleged Improprieties in Procurement under Civil Action]. B-188426. September 20, 1977. 22 pp. + enclosure (1 pp.).

Decision re: Union Carbide Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Air Products and Chemicals, Inc.; Department of the Air Force.
Authority: Freedom of Information Act (5 U.S.C. 552(a)). 10 U.S.C. 2304. 4 C.F.R. 20.10. 4 C.F.R. 20.2(b)(1). 4 C.F.R. 20.2(a). A.S.P.R. 1-305.2. A.S.P.R. 1-322.2(a). A.S.P.R. 1-109.3. A.S.P.R. 1-109.1. 54 Comp. Gen. 955. 56 Comp. Gen. 201. 55 Comp. Gen. 231. B-187504 (1976). B-187505 (1976). B-187696 (1976). B-186995 (1976). B-187543 (1977).

Protest to a contract award included allegations that: the date of the new contract was changed to favor competitor, quantities were incorrect, and the use of one-time ASPR deviations was improper. The protest to alleged improprieties was untimely. Extension of the commencement date of the contract was not shown to be unreasonable; default determination which was appealed to the Armed Services Board of Contract Appeals could not be considered; the price for purchase of products had no competitive impact; quantities were deemed reasonably accurate; and actions were not considered deviations of ASPR. (HTW)

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DECISION

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

FILE: B-188426 DATE: September 20, 1977

MATTER OF: Union Carbide Corporation

DIGEST:

1. Where Order of United States District Court denying protester's Motion for Preliminary Injunction requests protest be processed within time limits of Bid Protest Procedures, our Office will discuss all aspects of protest, whether or not timely under our Procedures.

2. Section 20.2(b)(1) of Bid Protest Procedures requires protests based upon alleged improprieties apparent from face of solicitation to be filed prior to bid opening. It is unnecessary to resolve dispute whether protester's telegram dated 1 day before bid opening was received by contracting officer before bid opening, or whether telegram is protest since (1) if it was not protest, then any subsequent protest to GAO is untimely under section 20.2(b) above; (2) if telegram is considered protest, and even if it was received before bid opening, protest filed with GAO more than 10 days after bid opening, initial adverse agency action, is untimely.

3. Protest against liberalization of specifications by extending commencement date for contract to permit entry of another firm into competition is denied since this type of complaint conflicts with objectives of bid protest function to insure attainment of full and free competition.

4. Length of time necessary to make Government-owned, contractor-operated facilities operational and impact upon selection of contract commencement date are judgmental decisions involving minimum needs of contracting activity that are accepted because protester has not shown decisions to be unreasonable or rendered in bad faith.

5. Where protester is defaulted under predecessor contract to one being protested due to dispute as to interpretation of contract ordering clause, which allegedly impacts upon protested evaluation and default termination has been appealed to Armed Services Board of Contract Appeals (ASBCA), GAO can consider issue since ASBCA ruling will have no effect on outcome of protest.

6. While protester alleges that Air Force interpretation of requirements ordering clause is erroneous and improperly affects its competitive position by causing incurrence of idle capacity and standby maintenance costs, there is no merit to contention since (1) if protester is incorrect in interpretation it would have been paid for products and there would be no such costs; and (2) if protester is correct, then it was not legally obligated to incur any such costs, and even if, as practical matter, UCC had to maintain its facilities to remain competitive Government is not required to compromise its needs to accommodate prospective competitors. Air Force's purchase of products at possibly higher commercial prices than contract price affects all bidders equally and has no competitive impact.

7. Failure to recompute best estimated quantities (BEQ) in 5-year requirements contract to reflect different usage rates of later program years due to amendment to IFB delaying contract commencement date by several months is not preferred procedure. In view of length of contract term, nature of products and fact that Air Force maintains BEQ's are 90 percent accurate, using protester's own calculations, BEQ's are deemed reasonably accurate and acceptable for evaluation purposes since cases relied on by protester involved much greater discrepancies between estimates and actual anticipated usage.

8. Contention that agency's alleged review of estimates as submitted by using activities and application of expertise to arrive at BEQ's was fictitious is rebutted by record showing pattern of active scrutiny and change to user's estimates which indicates that agency did apply knowledge and expertise to raw data from field.

9. Protester alleges that Air Force is improperly circumventing provisions of ASPR § 1-109.3 (1976 ed.), concerning advance approval to use multi-year contracts from Assistant Secretary of Defense for ASPR deviations affecting more than one contract, by seeking numerous one-time ASPR deviations from head of procuring activity pursuant to ASPR § 1-109.2 (1976 ed.). Air Force indicates protested procurement is first multi-year deviation in last 2 fiscal years. Moreover, since actions taken comport with ASPR § 1-322.2 (1976 ed.), concerning use of multi-year contract, actions are not considered deviation within definition of ASPR § 1-109.1.

10. Use of term "total market" in ASPR § 1-322.2 for purposes of determining propriety of using multi-year contract may mean, in appropriate circumstances, less than total country-wide market, but may, as here, refer to effective market in view of nature of product being procured.

The Union Carbide Corporation (UCC) protests the award of requirements contract No. F41608-77-D-0053 to Air Products and Chemicals, Inc. (Airco), to supply liquid oxygen and nitrogen to various locations in Southern California pursuant to invitation for bids (IFB) F41608-76-B-0613. UCC had been the incumbent contractor.

PROCEDURAL MATTERS

Subsequent to filing the protest with our Office, UCC filed Civil Action No. 77-329 in the United States District Court for the District of Columbia seeking injunctive relief to restrain performance under the contract and to determine the validity of the award made in this case. On March 18, 1977, the court ordered that UCC's Motion for Preliminary Injunction be denied stating:

> "Upon consideration of plaintiff's Motion for Preliminary Injunction, the Points and Authorities in support thereof and in opposition thereto, the oral argument of counsel having been heard, and it appearing to the Court that plaintiff has failed 'to sustain its burden of demonstrating that it is entitled to a preliminary injunction, * * * by failing to show a likelihood of success on the merits, or that irreparable injury will be sustained, or that issuance of the injunction would be in the public interest, * * *'
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> * * * * *
>
> "The Court further requests that plaintiff's protest to the [General] * * * Accounting Office be processed not only within the time limits set forth in the Bid Protest Regulations (4 C.F.R. Part 20), but also as expeditiously as possible."

It is germane to note that the court's order was issued after consideration of briefs by counsel for the Air Force, Airco and UCC as to whether the protest before our Office is timely filed under our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures), and, consequently, entitled to consideration of its merits. Counsel for the parties submitted arguments on whether we were free to refuse to consider the merits of the protest assuming its untimeliness. In order to provide the

court with the benefit of our views, see 4 C.F.R. § 20.10 (1977), we will discuss all aspects of the protest, whether or not timely under our Procedures.

Our first consideration is the timeliness of the protest, which raises three main issues. First, the start date of the new contract was improperly delayed from the date originally contemplated to afford Airco a competitive advantage. Second, the evaluation factors erroneously excluded certain standby costs which UCC alleges it alone will incur as a result of the Air Force's interpretation of the existing requirements contract with UCC. Third, the best estimated quantities (BEQ) in the IFB upon which bids were formulated were erroneous and not the result of the best available information.

Section 20.2(b)(1) of our Procedures conditions the consideration of protests based upon alleged improprieties apparent in a solicitation prior to bid opening upon the filing of the protest prior to bid opening. If a protest is initially filed with the agency within the time constraints, any subsequent protest to our Office filed within 10 days of initial adverse agency action will be considered timely. 4 C.F.R. § 20.2(a) (1977). The salient date for the purposes of this issue is December 10, 1976, bid opening. By telegram dated December 9, 1976, UCC filed a telegram with the contracting officer as follows:

> "* * * Linde [UCC] is disturbed by the restructuring of the intent of the bid. Originally the new award could start as early as April 1, 1977. Now through a series of amendments the new award will probably not start until August 1, 1977.
>
> "We believe this restructuring has been done to accommodate a single supplier to the detriment of all other bidders and can possibly result in the Government paying an overall higher price.
>
> "It is the Linde position that our existing contract F41608-72-D-6710 ends on March 7, 1977. We believe any new contract should be based on an evaluation period starting from that date. To bid and evaluate

> a major procurement based on a starting date almost five months later can result in a serious distortion.
>
> "It is apparent that for some unknown reason your group insists that the evaluation of this interim period is unnecessary. * * * Under the circumstances we must re-evaluate the desirability of participating in any way in Government activities after March 7, 1977 in Southern California. We are today exploring and negotiating commercial opportunities for the use of our products and intend to finalize those arrangements as quickly as possible."

To be timely, this telegram must be considered a protest to the agency and must have been received before bid opening. The contracting officer states that he did not consider the telegram as a protest because it did not reasonably convey any specific exception to particular procedures, nor did it request any particular action on the part of the Air Force. Whether this telegram constituted a protest to the Air Force, UCC's protest to our Office is untimely. If the telegram is not considered a protest, any subsequent protest against the terms of the IFB would be untimely, bid opening having occurred. Even if the telegram is considered a protest, and even if the protest to the Air Force was considered timely, pursuant to section 20.2(a), the protest to our Office would have to have been filed within 10 working days of initial adverse agency action. In this instance, proceeding with bid opening without rectifying the alleged error must be considered the initial adverse agency action. Columbia Van Lines, Inc., 54 Comp. Gen. 955 (1975), 75-1 CPD 295. Therefore, even in the best light, the December 9 telegram would not provide a timely basis to consider the merits of any argument involving patent improprieties.

We have reviewed the cases cited by UCC for the proposition that where the protester does not request postponement of bid opening, the date upon which the basis for protest is known or should have been known is either the date of contract award or receipt of notification that the protest is denied. 4 C.F.R. § 20.2(b)(2) (1977); Pacific American Airlines, B-187504, B-187505, December 21, 1976, 76-2 CPD 514; Kulite Semiconductor Products, Inc., B-187696, November 4, 1976, 76-2 CPD 383;

Florida Filters, Inc., B-186995, October 6, 1976, 76-2 CPD 316. Since none of the cited cases concern protests against improprieties apparent in the solicitation, no reason existed to request postponement of bid opening. Moreover, a protester may not avoid the workings of section 20.2(b)(1) by the simple expedient of not requesting postponement of bid opening. Rather, if the protest concerns improprieties apparent on the face of the solicitation, the protest must be filed before bid opening to be considered timely.

Under this test, UCC's contentions concerning the starting date of the contract and the evaluation formula would both be untimely, having been filed on February 18, 1977, or more than 10 days after the initial adverse agency action (December 10, 1976), bid opening. As for the BEQ's, the alleged miscompilation was not apparent from the face of the solicitation and did not surface until UCC obtained certain documents from the Air Force under the Freedom of Information Act, 5 U.S.C. § 522(a) (1970), on March 1, 1977. As will be discussed, infra, a portion of this issue is timely filed.

Notwithstanding the untimeliness of the allegations, UCC maintains that they should be considered on their merits under section 20.2(c) of our Procedures as raising issues significant to procurement practices and procedures. UCC notes that by the Air Force's own calculations "dozens, if not hundreds" of future requirements contracts will be interpreted in the same manner that gives rise to the instant controversy. Additionally, UCC states that the Comptroller General has repeatedly considered untimely protests where it is alleged that the procurement agency structured the solicitation so as to put one contractor at a competitive disadvantage.

On the other hand, the Air Force and Airco resist any consideration of the merits of the protest as significant on the basis that the issues are basically contract administration problems, which the Comptroller General should refuse to consider. Additionally, UCC was defaulted under its contract for refusing to deliver products after March 7, 1977. The matter has been appealed to the Armed Services Board of Contract Appeals (ASBCA) and raises substantially similar issues to those before our Office.

The fact that an agency may persist in its interpretation of a particular contract clause is not of itself indicative of an issue significant to procurement practices. Nor is the mere allegation that a procurement was structured so as to favor

one competitor, per se, a significant issue. The same could be said for every untimely protest of this nature and we find no basis to treat the issues raised here as significant under our Procedures.

FACTUAL BACKGROUND

UCC won a competitive procurement for the predecessor contract, No. F41608-72-D-6710, to furnish liquid oxygen, and liquid nitrogen to various locations determined by the Air Force. The contract was a multi-year, requirements contract.

The planning phase for the protested procurement commenced in June 1976. Initially, it is reported that the instant procurement was intended as a follow-on to UCC's contract -6710. As a result of experience under contract -6710, inventory managers and procurement personnel of the Air Force decided to offer the use of Government-owned, contractor-operated (GOCO) plants as a means to enhance competition. This was necessitated, the Air Force states, by its belief that only UCC possessed sufficient commercial facilities to supply the entire requirements.

One of the pertinent features contained in the procurement plan as early as July 21, 1976, included the offer of the GOCO plants for operational use or maintenance of them in standby condition. The Air Force estimated that approximately 6 months would be necessary to make the GOCO plants operational. Bidders were advised that the contract ordering period was anticipated to begin on April 1, 1977, but in no event later than July 1, 1977, the window period. However, a procurement plan dated August 1, 1976, indicated that the use of an evaluation factor for Government-furnished equipment would be excluded because it was felt that the contractor obligation to maintain or use the facilities was the same for all bidders.

The IFB ultimately was issued on October 1, 1976, with an expected bid opening of November 4, 1976. A prebid conference and walk-through of the GOCO plants were held on October 19 and 21, as scheduled. Four firms attended, including the two principals in this case. As a result of questions generated at the prebid conference, the Air Force indefinitely postponed bid opening on October 26. On November 4, the Air Force notified prospective bidders that the new bid opening date was November 15. This information was confirmed by amendment 0001, dated November 5.

A second indefinite postponement of bid opening was announced on November 9. Amendment 0002 was thereafter issued on November 12, establishing November 29 as the new bid opening date. This amendment permitted cannibalization of one of the two GOCO plants to support the other and inserted permission for the commercial sale of GOCO products in excess of the Government's needs.

On November 23, the Air Force telegraphed bidders that amendment 0003 would be issued shortly, postponing bid opening, rescheduling it for December 10, and revising the BEQ's to correct an error discovered in transposition of the figures from the raw data sheets. Also, bids were required to be based upon an August 1, 1977, effective date. Bidders would be permitted to propose an effective start date as early as March 15, 1977, but evaluation would be based upon the August 1 effective date. Amendment 0003 was issued on November 26 memorializing the foregoing.

On December 9, 1976, UCC sent the telegram quoted earlier to the contracting officer. The only two bids received were from the parties involved in this protest. Both bids were predicated upon an August 1 start date. UCC proposed to utilize the GOCO plants, while Airco elected to use its own facilities and maintain the GOCO plants in standby status. Based upon the BEQ's in the IFB, Airco was found to be the low bidder by $52,625. It is reported that the preaward clearance process took until February 11, 1977, at which time award was made to Airco for an estimated amount of $10,854,292.10.

COMPETITIVE IMPACT OF CHANGE IN EFFECTIVE DATE OF CONTRACT

Our first inquiry concerns the allegation that the effective date of the new contract was changed from April to August solely to favor Airco to UCC's detriment. UCC claims that the Air Force exceeded its authority when the IFB was restructured to generate competition since the Air Force was allegedly aware that the restructuring would hinder the competitive position of UCC. UCC maintains that competition existed among commercial suppliers, notwithstanding the Air Force's belief to the contrary. In part, UCC infers the existence of a deliberate attempt to favor Airco from the fact that the change in the effective date occurred after a series of conversations between the Air Force and Airco, which were reflective of a telegram dated November 5, 1976, received by the Air Force November 8, 1976. UCC notes that the change in effective date from April to August was communicated by the Air Force on November 9. The text of the Airco telegram reads:

> "Section C-6 of 'Contract Ordering Period' of subject solicitation specifies a contract start date of 1 April 1977 or 1 July 1977. Air Products and Chemicals, Inc. requests this be definitized to reflect a 1 July 1977 start date. A start date prior to 1 July 1977 will prevent Air Products from submitting a competitive bid."

UCC disputes the validity of the Air Force assertion that the change was necessary to permit possible start-up of the GOCO plants. UCC states that the 6-month preparation period estimated by the Air Force was unnecessarily long.

The Air Force takes the position that the change in delivery schedule was not motivated by any desire to unfairly favor Airco. Rather, the change was considered in discharge of its duty to obtain supplies on the maximum competitive basis feasible, citing 10 U.S.C. §§ 2304(a) and (g) (1970). The Air Force cites Armed Services Procurement Regulation (ASPR) § 1-305.2 (1976 ed.) which requires the contracting officer to consider every aspect of the time of delivery or performance in the interest of promoting more effective competition. Additionally, the Air Force maintains that since there was no intent on its part to preclude any bidder from competing, the award should not be disturbed. See Air Products and Chemicals, Inc., B-187543, January 12, 1977, 77-1 CPD 23.

Our inquiry on this issue is to ascertain whether the Air Force acted reasonably in extending the effective date of the contract in light of the circumstances as they existed. Clearly, if the Air Force unfairly placed one competitor in a wholly superior competitive position, such action would be considered unreasonable. Where bad faith is alleged as the motivator of the Government's action, that bad faith will not be imputed from a mere allegation, inference or supposition. Datawest Corporation, B-180919, January 13, 1975, 75-1 CPD 14. An allegation of bad faith must be affirmatively demonstrated on the record by the proponement of that proposition. A.R.F. Products, Inc., 56 Comp. Gen. 201 (1976), 76-2 CPD 541.

UCC has not met the requisite level of proof in this regard. It is the cornerstone of Federal procurement that the maximum competition feasible is required. The procuring activities of the Government are charged to take affirmative steps to insure competition. ASPR § 1-305.2 (1976 ed.) requires that "* * * the contracting officer shall question any delivery requirement which appears unrealistic, and, if necessary, initiate action to make appropriate adjustments, with due attention to relevant factors such as* * *:

"(ii) production time (quantity, complexity of design, etc.);

"(iii) market conditions;

* * * * *

"(v) industry practices;

* * * * *

"(viii) time for contractors to comply with any conditions precedent to contract performance * * *"

With this direction the contracting officer states that he was aware of the limited amount of competition available in the industry to supply the Air Force's needs. While UCC maintains that the commercial facilities were adequate to generate competition without the introduction of the GOCO plant, we note that only Airco's bid was on the basis of utilizing its own facilities solely, which would only be completed in time to start performance. Further, while UCC disputes the judgment of the contracting officer as to the availability of competition, the exercise of that discretion on the contracting officer's part has not been shown to be unreasonable. To the contrary, the events that transpired after the contracting officer's decision to include the GOCO's and extend the time for commencement of the contract performance tend to support the contracting officer's assessment.

As a result of the questions generated at the prebid conference, it was necessary to amend the IFB. Amendments 0001 and 0002 altered the terms of the IFB so as to permit more flexibility in the use of the GOCO facilities. It appears to us that this action could reasonably have been expected to present a more favorable environment to possible competitors. As for the length of time estimated to make the GOCO facilities operational, UCC maintains that 6 months was unreasonably long. The Air Force maintains that it was not. Of particular significance, we note that the Air Force formulated that estimate as early as July 1976, well before the Airco telegram of November 5 and amendment 0003.

At the heart of this disagreement is a complex, technical decision as to the extent of work necessary to rehabilitate the GOCO plants. Moreover, this decision was the basis for the later commencement date and had a direct impact upon the formulation of the IFB specification. In both the areas of specification formulation

and technical determinations, it is the policy of our Office to accept such judgments of the contracting activity, unless they are demonstrated to be unreasonable, or rendered in bad faith. Watkins-Johnson Company, B-186762, October 19, 1976, 76-2 CPD 346; Communication Products Company, B-186333, December 21, 1976, 76-2 CPD 508. Since no such showing has been made, we cannot disagree with the Air Force's assessment that 6 months would be necessary to refurbish the plants.

As we compute the pertinent dates, the original IFB contemplated a November 4 bid opening. As a result of amendments, this date was changed to December 10, or approximately a 1-month delay. The original delivery schedule was between April 1 and July 1. The amended schedule was between March 15 and August 1. Thus, the latest start date (and the one used for evaluation purposes) was postponed 1 month, which coincides with the delay in bid opening. (We appreciate UCC's contention that the delay was, in effect, 4 months for it and will deal with this contention in the context of the Air Force's interpretation of the ordering clause of the requirements contract.) There is no bad faith apparent in these time figures since they represent almost a day-for-day extension.

Furthermore, since the Air Force interpreted UCC's contract as affording coverage through the window period, it is reasonable from a "minimum needs" point of view for us to conclude that the Air Force could tolerate the possible delay entailed by the window period.

We note here that even on the basis of the original window period (April 1 to July 1), Airco was not precluded from bidding, utilizing a commencement date of July 1. The contract ordering clause, formulated well in advance of knowledge of Airco's situation, gave the Government the discretion to state an effective date for the commencement of ordering at any time during the window period.

Even if the last change of commencement date was intended to accommodate Airco, we do not believe it affects this procurement because, in effect, UCC complains of a liberalization of specifications to permit the entry of another firm into the competition. This type of complaint "conflicts with the objective of our bid protest function, that is, to insure attainment of full and free competition." See Miltope Corporation--Reconsideration, B-188342, June 9, 1977, 77-1 CPD 417.

INTERPRETATION OF ORDERING CLAUSE OF REQUIREMENTS CONTRACT AND IMPACT ON EVALUATION OF BIDS

We note that matters of interpretation of contract provisions are normally decided under the "Disputes" clause of the contract if they cannot be resolved between the contractor and the agency. Eventually, as mentioned above, the appropriateness of the default of UCC by the Air Force will be decided by the ASBCA. UCC takes exception to the Air Force default action for failing to deliver products after March 7, 1977, pursuant to an Air Force delivery order placed before the end of the ordering period. As will be evident below, whatever the ASBCA rules will have no effect on the outcome of this protest.

Essentially, UCC argues that since it was not obligated to deliver products after March 7 (to be decided by the ASBCA), then the Air Force should have considered and eliminated the competitive unfairness resulting from standby costs UCC would have had to incur in maintaining its production facilities from March 15 through August 1, as well as the cost of the Government's procuring commercial products during that interim period. Also, UCC feels that it was penalized by having interim idle capacity to factor into its bid.

Although UCC has submitted, in great detail, material to support the above, we find no merit to this portion of the protest. Assuming the correctness of UCC's position that it was not contractually required to deliver any products after March 7, UCC would have no legal obligation to maintain any facilities after March 7, and thereby incur standby maintenance costs or idle capacity costs. While as a practical matter, UCC may have to maintain its facilities to remain in a competitive posture, the needs of the Government are paramount and the Government is not required to compromise its own needs in order to accommodate prospective competitors. If UCC is incorrect and was required to deliver products after March 7, the firm would be paid for its products delivered and there would be no standby maintenance costs or idle capacity costs. That the Government would have to purchase needed products at possibly higher commercial prices impacts equally on all competitors and is of no consequence here.

BEST ESTIMATED QUANTITIES

The next issue is whether the BEQ's were compiled on the basis of the best available information and were reasonably accurate so that award would result in the lowest ultimate cost to the Government.

According to UCC the BEQ's were not reformulated to cover the period between March and August, as necessitated by amendment 0003. Second, some of the quantities were incorrect apparently as a result of clerical errors in transcribing the quantities from the user estimates for the purpose of compiling the total quantities. Had these mistakes been corrected, UCC maintains that it would have been the low evaluated bidder.

We note that the first part of UCC's argument is untimely under section 20.2(b) of our Procedures. The fact that the estimated quantities from preamendment 0003 to post-amendment 0003 were the same was apparent from the face of the IFB, as was the change in time-frame. As such, it should have been but was not protested prior to bid opening.

Generally, when the Government solicits bids on the basis of estimated quantities to be utilized over a given period, those quantities must be compiled from the best information available. Central Brace Company, B-179788, January 29, 1974, 74-1 CPD 38. If the procedures used to obtain the data necessary to make quantity projections include the sources of information and types of factors normally relevant, then the estimates are considered to have been based on the best available information. Trataros Painting and Construction Corp., B-186655, January 18, 1977, 77-1 CPD 37. If the estimates are not reasonably accurate, the evaluation based upon those estimates is likewise suspect and may not result in the lowest cost to the Government. Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164. Ultimately, the estimated quantities must be a reasonably accurate representation of actual anticipated needs. Michael O'Connor, Inc., B-183381, July 6, 1976, 76-2 CPD 8. If the estimates were not compiled in accordance with foregoing principles, the fact that the errors were committed inadvertently--in good faith--does not cure their invalidity. Input Data, B-179809, February 21, 1974, 74-1 CPD 87. Where there is an error in the estimates regarding use of the best available information, implying that the estimates are not reasonably accurate, thereby raising doubt that the award is the most advantageous to the Government, the proper procedure is to cancel the solicitation and readvertise. Kleen-Rite Corporation, B-182266, April 1, 1975, 75-1 CPD 190.

While the estimates must be based upon the best available information, there is no requirement that the estimates be absolutely correct. BEQ's compiled without regard for any of the factors that might affect the estimates may still be reasonably accurate by sheer chance. The requirement that the best available information be used is a tool intended to produce reasonably accurate estimates and is not per se determinative of whether the solicitation is defective.

An ancillary consideration is the problem of unbalanced bidding. That is the practice of bidding high on an item of suspected frequent need and low on items expected to be used relatively little, notwithstanding the Government's projected usage. In this bidding pattern, each item does not carry its fair share of the total burden. If the BEQ's are not reasonably accurate, unbalanced bidding may occur. See Edward B. Friel, Inc., supra. However,

in the present case, we do not perceive unbalanced bidding at the heart of the problem. There is nothing from an inspection of either Airco's or UCC's bid which indicates that the price for either LOX or LIN does not carry its fair share. That being the case, our concern is the integrity of the estimates.

UCC points out that the original BEQ's were compiled on the basis of a March 8, 1977, start date and were not revised to reflect the August 1, 1977, commencement date. To UCC, this does not reflect the best available information. To rectify this and demonstrate its impact, UCC calculates, on the basis of projected usage rates, that the liquid oxygen (LOX) requirement decreases substantially during the 5-year term, while the liquid nitrogen (LIN) remains relatively constant. As an example, UCC indicates that the overall BEQ for LOX is 116,000 tons. But when the period covering March through July 1977 is broken out and reinserted at the projected 1981 usage rate, the BEQ should have decreased to 107,380 tons. Also, the BEQ for LIN stated in the IFB as 140,112 tons would have been reduced to 123,292 tons. For LOX, UCC bid $45.48, as compared to $31.40 for Airco. For LIN, the respective bids were $37.75 and $49.48. Also, aviator's oxygen in the aggregate amount of 7,500 tons was bid at $45.48 by UCC and $33.40 by Airco. Applying these prices to the amounts in UCC's recalculation reduces the difference between the two bids to $8,400.

The question is whether, even if the information is compiled in a manner calculated to include all of the relevant factors, the failure to recompute the estimated quantities to reflect a new commencement date takes the Air Force's action outside of what might otherwise be based on the best available information. The Air Force's position is that the change of the possible start date did not require recomputation of the estimates in view of its minimal impact over a 60-month period. The Air Force points out that the difference between the UCC estimate and the Air Force's is only about 8 percent for LOX and 13.5 percent for LIN. The Air Force states that this assessment was confirmed by the inventory manager after bid opening, but before award. Since the estimates were considered at least 90 percent accurate, we believe that the best available information means as up-to-the-date information as possible. It would have been preferable had the Air Force considered this issue when it changed the possible start date. However, that the standard to be satisfied here does not require perfection is inherent in the concept of reasonable accuracy.

As we stated in Edward B. Friel, Inc., supra,

> "* * * it must be noted that whatever estimated quantities are used in evaluating the bids are, of course, precisely that--estimates of what may be ordered in the future under the contract. There are no 'actual requirements' on which to evaluate bids, and the substitution of one estimate for another merely reflects the agency's best judgment, at a given point in time, of what may transpire in the future and what ultimate costs the Government may incur."

UCC cites a number of cases for the proposition that the contract presently awarded should be terminated due to the possible impact of the BEQ's. In Input Data, supra, the estimates were 88 percent higher than the actual amount of work required and not compiled from the best information available. In Michael O'Connor, Inc., supra, there were outlined serious errors in the quantity estimates for 21 or more of the 50 items. In Kleen-Rite Corporation, supra, the estimated quantity for janitorial cleanings was 1,716, while a proper computation indicated that 11,732 was the correct estimate, for an underestimate of approximately 685 percent. Next, UCC cites Edward B. Friel, Inc., supra, as indicating that where the BEQ's are inaccurate, the IFB is per se defective and no bid can properly be evaluated. Lastly, UCC points to Trataros Painting & Construction Corp., supra, in which the variation between the estimated amount of area to be painted and that reasonably anticipated was from 75,000 square feet to 5,500 square feet. In the cited cases, the discrepancy between solicitation estimates and reasonably anticipated use was clearly of a magnitude not found here, even using UCC's own calculations as to the impact of failing to reflect the window period in the estimates. In this light, the estimates may still be viewed as reasonably accurate.

Further, when the efficacy of estimated quantities is questioned the agency should reexamine the estimates. If the agency is convinced of the reasonable accuracy of the estimates, it may then accept the bid. Edward B. Friel, Inc., supra. Here, the Air Force conducted a recompilation and examination of its estimates after the institution of this protest. The results, in the Air Force's opinion, confirm the overall validity of the estimates to within 90 percent accuracy, which closely approximates UCC's figures. Considering the length of time (5 years), the number

of user locations and quantitites involved, we cannot say that the magnitude of the error is great enough to upset the reasonableness of the overall amount. It is significant that all bids were evaluated on the same basis as stated in the IFB.

Concerning the second allegation that the BEQ's were erroneous due to obvious computational errors, the Air Force maintains that the BEQ's are reasonably accurate and based on the best available information, as follows:

> "Every effort was made to accurately and reasonably forecast estimates of the requirements that would generate during the five-year period. Raw data is gathered from the using activities and refined by the inventory managers based on all available information tempered with their expertise and judgment. While these estimates are the best attainable, it is recognized that with the current 13 different installations being supplied there are conditions and circumstances that are unknown and beyond the control of the persons making the estimates such as budget changes, changes in Research and Development programs and function transfers. The decision to use a requirements contract rather than a fixed quantity contract was made based on recognizing these uncertainties; as an illustration, following is a comparison between the Five-year BEQ's of Contract F41608-72-D-6710 and the quantities actually ordered:

	BEQ	Ordered
Oxygen	205,970 Tons	136,517 Tons
Nitrogen	133,784 Tons	179,993 Tons

> These figures further confirm that the usage of nitrogen has been relatively larger than oxygen. Based on this historical usage the validity of the correction to the BEQs of Modification 0003 to the IFB is reinforced."

By way of further explanation of the process used to compile the BEQ's, the Air Force states:

> "* * * The inventory manager must also consider how valid the estimates received for each user have been in the past and use his knowledge and expertise of historic usage and program changes of which the users may not be aware. They are in fact estimates made based on judgment by competent qualified individuals and those estimates are reviewed and approved by higher management. A substantial part of the work performed by inventory manager is to make such judgments and estimates which have, in respect to the individuals involved in this instance, been reasonably accurate and correct. * * *"

UCC maintains that the Air Force did not make any review of the estimates submitted by the using activities. UCC infers this from two facts. First, UCC reviewed the Air Force's files pertaining to the procurement under the Freedom of Information Act, 5 U.S.C. § 552(a) (1970), and was "* * * unable to find any evidence whatsoever that the data submitted by users was ever reverified or adjusted." Second, UCC claims that except in the case of "almost certain mistakes (i.e., where '4800' became '480')," the estimates were either rounded off or simply copied into the IFB. UCC then notes that only four of the 14 user estimates were changed substantively. From this UCC concludes that the "knowledge and expertise" which the Air Force maintains that it applied to the users' estimates to arrive at the BEQ's was "largely fictitious."

We disagree. Our review of the record evidences that more adjustments to the users' estimates occurred than the four instances which UCC mentions. We recognize that UCC is concerned with "substantive" changes and we believe that the following examples are substantive within the parameters which UCC itself uses.

The four examples cited by UCC are: (1) reduction of LIN estimates at Edwards Air Force Base (AFB) from a requested 5,500 tons/year to 3,000 tons/year; (2) the TRW facility at Capistrano requested 4,800 tons/year of LIN for the last 3 program years, but was only allotted 480 tons/year while the estimate for LOX of 800 tons/year was reduced to 100 tons/year; (3) the LIN requirements at the General Dynamics Facility at San Diego were reduced from a requested 1,000 tons/year to 900 tons/year; and (4) Wyle Laboratory estimates of no requirements were changed to 240 tons/year for both LOX and LIN.

There are other adjustments to the estimated amounts that were made by the Air Force. While UCC only noted that the Edwards AFB LIN request was reduced, its request for LOX was also reduced from 2,500 to 1,000 tons/year. At the Rockwell International Facility at Canoga Park, the total request for 100,200 tons of LOX was reduced to 98,000 tons while the estimate of 48,400 tons of LIN was revised to 48,000 tons. Thus, substantive changes were made to at least five of the users' estimates, and six if the changes to both LOX and LIN at Edwards AFB are separately considered. This equates to an adjustment rate of either 36 or 43 percent. It is incongruous to characterize such active involvement with the estimates of the using activities on the part of the Air Force prior to use in a solicitation as a "largely fictitious" application of "knowledge and expertise." In our view, such a pattern of scrutiny and change to the users' estimates strongly indicates that the user estimates were not simply accepted and inserted into the IFB as UCC asserts. This activity is more aptly supportive of the Air Force's assertion that it did apply "knowledge and expertise" to the raw data submitted from the field.

While UCC emphasizes the absence of contemporaneous documents indicative of the methodology used to adjust the estimates, the Air Force's actions speak for themselves. The record shows the actual amounts of LOX and LIN requested by each user. The record also contains the purchase request prepared after the receipt of those user estimates which differ from the estimates used in the IFB. All of the changes from the estimates and the purchase request discussed above are themselves adequate, contemporaneous documentation of the changes.

Clearly, the changes were the result of an application of many factors to the user estimates. For instance, the user estimate for the TRW facility at Capistrano contained the reasoning for reductions of both LIN and LOX. The estimate was submitted by the Project Manager, High Energy Lasers, Naval Sea Systems Command, and explained "[I]t should be noted, however, that the Navy is planning to shift operations to a site at the White Sands Missile Range (WSRM) in the 1979 timeframe." The 1979 timeframe is the third program year, which is also the year in which the BEQ was reduced from 4,800 to 480 tons/year of LIN and from 800 to 100 tons/year of LOX. It is significant that both LIN and LOX were substantially reduced in the same program year since that tends to rebut any inference that the reduction from 4,800 to 480 was simply the result of a transcription error in dropping an "0."

Similarly, the action taken with respect to the user estimates at Edwards AFB supports the conclusion that it was not taken without regard to other factors that impacted upon the actual anticipated usage. Thus, the Air Force explanation is credible in light of other action. The Air Force has explained in a document prepared after bid opening that the reduction was effected because it was aware that all programs except the Space Shuttle were declining at Edwards AFB and a major portion of the Space Shuttle research was to be performed at another facility.

When reviewing the totality of the Air Force's actions, we are convinced that the BEQ's were a result of the application of judgment and reason to the initial estimates submitted from the users. As such, and in light of the Air Force's assertion that the estimates are 90 percent accurate for the 5-year period, we believe the BEQ's represent a reasonably accurate estimate of actual anticipated usage. Therefore, UCC's protest on this point is denied.

PROPRIETY OF ONE-TIME ASPR DEVIATION TO USE MULTI-YEAR CONTRACT

ASPR § 1-322.2(a) (1976 ed.) sets forth the conditions precedent to the use of multi-year contracting. Of the five necessary conditions, we are concerned with the one found at section 1-322.2(a)(v):

> "the items being procured are not regularly manufactured and offered for sale in substantial quantities in the commercial market. However, the Head of a Procuring Activity may authorize procurement of commercial items on a multi-year basis when the criteria in (i) through (iv) are met, significant benefits or cost savings would result, and either (A) the quantities to be procured by the Government represent a substantial portion of the total market and would require special manufacturing runs for all or substantially all of the Government's requirements * * *."

On August 30, 1976, permission to contract on a multi-year basis in accordance with ASPR § 1-322.2(a)(v) was requested of Air Force Headquarters, Air Force Logistics Command (AFLC). By message dated September 21, 1976, AFLC replied, as pertinent:

"* * * * * * You are hereby authorized to proceed with the multi-year requirements procurement of liquid oxygen/nitrogen under the provisions of AFLCR 70-4, Chapter 4. This authority is granted as a one-time deviation to the requirement of ASPR 1-322.2(a)(V)(A) inasmuch as the total market cannot be effectively determined."

UCC maintains that the use of the one-time deviation is impermissible for two reasons. First, the purported justification--inability to effectively determine the total market--is erroneous because appropriate information is readily available. Additionally, LOX and LIN are commercially available products sold in substantial quantities and the Government's portion of the total market is far from substantial. Second, the Air Force issues about 20 LOX/LIN, multi-year requirements contracts a year. Since the instant IFB was conducted pursuant to a one-time deviation from ASPR, UCC infers that all of the others are similarly exempted on one-time deviations. UCC characterizes the practice of obtaining multiple, one-time deviations as an impermissible circumvention of the requirements of ASPR § 1-109.3 (1976 ed.) concerning ASPR deviations affecting more than one contract. Pursuant to this provision, advance approval of such a deviation needs to come from the Assistant Secretary of Defense (Installation and Logistics) (Assistant Secretary), or via unanimous approval of the ASPR Committee.

The Air Force states that this point is untimely raised under our Procedures since the documents which UCC references were in UCC's possession in March 1977 pursuant to a Freedom of Information Act request. Since that was a matter between UCC and the Air Force, we do not know exactly which documents were transmitted to UCC and will not rule on timeliness.

The Air Force has responded to these allegations by denying that it seeks or receives multiple, one-time deviations: "In the last two fiscal years, this is the first multi-year deviation that AFLC has granted for LOX/LIN requirements contracts." Alternatively, the Air Force takes the position that the deviation granted was neither requested nor necessary. That is, the requests were forwarded to AFLC pursuant to ASPR § 1-322.2(a)(v), supra, and as such there was nothing from which to deviate. AFLC, as head of the procuring activity, was being asked to exercise its authority within the purview of the ASPR provision upon the determination that the procurement represented a substantial portion of the total market. The Air Force maintains that the total market must be interpreted as the "effective" total market due to the volatile nature of LOX and LIN. Therefore, this procurement is deemed to represent a substantial portion of the effective total market--Southern California. The deviation granted by AFLC was premised upon its interpretation that the total market was all of the United States, a position now rejected by the Air Force.

ASPR § 1-109.1 (1976 ed.) sets forth eight procurement actions which are deemed "deviations." In each instance, ASPR § 1-109.1, supra, is concerned with a course of action which differs or is inconsistent with the provisions of the applicable ASPR. It follows that if a procurement action is taken within the meaning of the ASPR, then no deviation, as such, has occurred. ASPR § 1-322.2 contains the procedure for using a multi-year contract both when regularly manufactured products are and are not regularly manufactured and offered for sale in substantial quantities in the commercial market. However, even when the product is not available, the head of the procuring activity is empowered to approve the use of multi-year contracting upon a determination that the quantities represent a substantial portion of the total market and would require special manufacturing runs for substantially all of the Government's requirements. Thus, if the provisions of ASPR § 1-322.2(a), supra, are complied with, the action taken is deemed by definition to be in accordance with the ASPR, rather than a deviation from it.

However, this raises the question whether AFLC's response to the request to use a multi-year contract comported with ASPR § 1-322.2(a), supra. Since AFLC's response was couched in terms of a deviation, may it be deemed tantamount to a determination pursuant to the ASPR? We think so. Clearly, AFLC considered the request in light of ASPR § 1-322.2(a)(v)(A), id., by the reference to the provision and the allusion to the total market consideration. Also, we agree with the Air Force's assessment that the "total market" concept must, in certain instances, be interpreted as meaning less than country-wide. In view of the need for deliveries within certain timeframes and the nature of the product, consideration of the commercial market for LOX and LIN in extremely distant areas would preclude ASPR § 1-322.2(a)(v)(A), supra, from having any practical meaning or application. The exception to the norm of contracting on a multi-year basis when the product is not regularly manufactured is intended to permit the Government to achieve economies of procurement and avoid serious disruption of the normal civilian marketplace. As UCC points out, the total marketplace for Southern California is readily determinable, and this procurement does represent a substantial portion of it.

The "deviation" issued by AFLC mentions the inability to determine effectively the total market. However, as a procedural matter, that would not satisfy the conditions of ASPR § 1-322.2(a)(v)(A), supra, which require a specific finding that the procurement represents a substantial portion of the total market. However, if AFLC's

granting of the "deviation" may be viewed as its willingness to permit multi-year contracting in a situation other than specifically outlined in ASPR, it may also be safely assumed that AFLC would have extended permission for a situation within the terms of ASPR. Thus, while the "deviation" may not have complied literally with the terms of ASPR, we do not view this deficiency as having prejudiced any competitor. UCC's protest on this point is denied.

Deputy Comptroller General
of the United States

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

B-188426

The Honorable John Lewis Smith, Jr.
United States District Judge
United States District Court
for the District of Columbia

Dear Judge Smith:

By Order filed March 18, 1977, in connection with Union Carbide Corporation v. Thomas C. Reed, et al., Civil Action No. 77-329, you denied plaintiff's Motion for Preliminary Injunction and requested our Office to process Union Carbide Corporation's protest within the time limits set forth in our Bid Protest Procedures, 4 C.F.R. part 20 (1977).

Enclosed is our decision Union Carbide Corporation wherein we deny the protest. We trust this is responsive to your request.

Sincerely yours,

R.F. KELLER

Deputy

Comptroller General
of the United States

Enclosure