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DECISION

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

FILE: B-203607 DATE: December 9, 1981

MATTER OF: Atlantic Richfield Company

DIGEST:

1. Statutory requirement that all interested persons be afforded a full and equal opportunity to acquire petroleum products is not satisfied when two subsidiaries of the same parent corporation participate separately in a lottery sale.

2. Recommendation is made that DOE conduct a new lottery, which includes the prior unsuccessful bidders, who are still interested in obtaining an award under the solicitation, but only one of the two subsidiaries of parent corporation which participated in the previous lottery. If the previously successful subsidiary is not selected, its contract should be terminated for the convenience of the Government.

The Department of Energy (DOE) issued invitation for bids (IFB) No. DE-FB01-81RA32124 for the sale of natural gas from Naval Petroleum Reserve No. 1, Elk Hills, California, for 1 year. The sale was divided into two line items. Under line item No. 1, the maximum number of awards was seven; for line item No. 2 the maximum number was two. The IFB permitted bidders to bid discounts from a price control ceiling, i.e., the "maximum legal price," set by the Federal Energy Regulatory Commission. Award was to be to the highest bidder. In the event of a tie involving more than seven bidders for line item No. 1, or two bidders for line item No. 2, awardees were to be determined by lottery. Ten bids were received for line item No. 1 and nine for line item No. 2. Each

bid, under the respective line items, was for the maximum price and a lottery was conducted.

Atlantic Richfield Company (ARCO) has protested the DOE's award of two contracts--one from each line item--to Southern California Gas Company (Southern).

For the reasons which follow, the protest is sustained.

DOE issued the IFB under the Naval Petroleum Reserves Production Act (Reserves Act), 10 U.S.C. §§ 7420, et seq. (1976). Subsection 7430(b) of the Reserves Act requires such sales to be made "at public sale to the highest qualified bidder." Subsection 7430(d) adds that sales made under the authority of the Reserves Act must be "so structured as to give full and equal opportunity for the acquisition of petroleum by all interested persons, including major and independent oil producers and refiners alike." The IFB stated that sales made under the Reserves Act were subject to the Federal price controls created by the Natural Gas Policy Act.

At bid opening, ARCO a bidder for line item Nos. 1 and 2, informed DOE's contract specialist who supervised the opening that two of the bidders, Southern and Pacific Lighting Gas Supply Company (Gas Supply), were commonly owned and controlled by Pacific Lighting Corporation (Pacific). (Pacific owns 100 percent of Gas Supply's voting stock and 93 percent of Southern's.) ARCO requested that, for the purposes of the lottery, both Gas Supply's bid and Southern's bid be treated as one bid. The contract specialist denied ARCO's request and included both of the companies as separate bidders in the drawing.

ARCO submits that DOE's decision gave Pacific an unfair advantage since it allowed it to submit two bids through its subsidiaries. ARCO believes that the practical effect of permitting both subsidiaries to participate in the lottery as independent bidders was to provide the parent company with two chances out of 10 in the drawing for line item 1 and two chances out of nine for line item 2, as compared with the other bidders' one chance. ARCO asserts that DOE's action unfairly prejudiced the other bidders.

This prejudice could only be remedied, in ARCO's view, by conducting a new lottery in which "each bidder has the correct (and equal) mathematical probabilities for success." ARCO argues that Pacific, Southern and Gas Supply are clearly a single "person," and the activities and basic business policies of the latter two companies are controlled by the former. It is ARCO's position that:

> "[i]t cannot be seriously maintained that permitting one bidder in a lottery twice as many chances as any other constitutes the giving of all parties a 'full and equal opportunity' to purchase the gas."

ARCO emphasizes that it does not object to the filing of bids by affiliated companies in a truly competitive sale.

In this regard, DOE argues it did conduct a competitive sale, not a lottery, because any bidder could have bid a discount from the maximum legal price. Thus DOE contends that the sale was competitive.

DOE's argument, that this should be viewed strictly as a competitive sale is simply not persuasive. All 10 bidders for line item 1 and all 9 bidders for line item 2 bid the maximum legal price. This result was predictable since potential bidders need not speculate as to how high opponents might bid--the IFB tells them. Nor can we conceive of any rational reason to bid less than the maximum legal price, in the context of this sale to the highest bidder. The participants of this sale reached similar conclusions. For example, Mobil Oil Corporation, a successful bidder, described this procurement as a:

> "* * * situation where the product being offered for sale [wa]s not sold in a free market to the highest bidder. Here, every bidder knew all it had to do was bid the maximum

> lawful price for the maximum volume being offered to insura being a participant in the drawing process."

Clearly, the practical objective of the serious bidder was to participate in the drawing process.

DOE argues that in any event Pacific, Southern and Gas Supply are separate "juridical persons," each of which is entitled to bid and receive an award under the provisions of the IFB. DOE points out that section 7430(d) of the Reserves Act speaks only in terms of "interested persons" and argues that each of these three corporations must be treated as a separate and distinct corporate entity. DOE submits that although Pacific owns 93 percent and 100 percent of the voting stock of each subsidiary, the parent corporation is a "mere holding company" and the subsidiaries are independent, regulated utilities. In this regard, DOE argues that our decisions stand for the proposition that bids submitted by two commonly owned companies need not be rejected by reason of that circumstance alone.

We agree. Bids submitted by commonly owned companies should not be rejected unless an unfair advantage may be gained by permitting such bids.

For example, in 39 Comp. Gen. 892, 894 (1960), while we found no objection to the submission of multiple bids, we stated:

> "Of course, a contracting officer would be justified in rejecting more than one bid submitted by a person, or by two or more affiliated companies, where such bidding was resorted to for the purpose of circumventing the requirements of a statute * * *; where an unfair advantage may be gained in cases of an award through the drawing of lots; or in any other instance where multiple bidding is prejudicial either to the United States or to other bidders."

The language of 39 Comp. Gen., supra, clearly applies to this case.

Similar opinions have been reached in cases involving the Mineral Leasing Act, 30 U.S.C. § 181, et seq. (1976), which authorizes the sale of oil and gas leases on public lands on the basis of lottery drawing. Schermerhorn Oil Corporation, 72 I.D. 486 (1965); June Oil & Gas, Inc. v. Andrus, 506 F. Supp. 1204 (1981). In Schermerhorn, one offeror in the lottery owned 29 percent of another offeror's stock; in June Oil, offers for the same drawing were received from a husband and wife and also from a trust established by them for the benefit of their children. In both cases it was held that the relationship between the offerors created an unfair advantage.

DOE attempts to distinguish these Mineral Leasing Act cases on the basis that the lottery was the sole criterion for selection; that, unlike the instant case, a regulation prohibited related applicants from applying for a single lease of land, and that in this case the only relationship between the two bidders was their common owner, who did not even submit a bid.

We are not persuaded by DOE's arguments. As stated above, we think that the award selections in this case primarily were decided by lottery drawings. The regulation governing the leasing cases (43 C.F.R. 3123.3, now 43 C.F.R. § 3112.6-1 (1981)) prohibits relationships between participants in a lottery which would give either, or both, a greater probability of successfully obtaining a lease in the public drawing. DOE's statutory duty under section 7430(d) of the Reserves Act to give interested parties an equal opportunity to acquire petroleum imposes a similar standard.

As to DOE's final distinction, while it is true that Southern and Gas Supply are only related because of their common ownership, we think this relationship gave both of them an unfair advantage in the drawing. In fact, we note that DOE will no longer permit bidders such as Southern and Gas Supply to participate in DOE

drawings without regard to their common ownership. On August 26,1981, DOE issued another IFB (No. DE-FB01-81RA32162) for the sale of natural gas pursuant to the Reserves Act. This IFB provided that only one bid of affiliated bidders will be eligible for inclusion in the lottery conducted to break tie bids, and that a preliminary lottery to select the representative for the affiliated bidders will be conducted. The term "affiliate" is defined in the IFB as "a person who directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with another specified person." Under this IFB, Southern and Gas Supply would not have been allowed to participate in the lottery because of their common ownership. In our opinion DOE's August 26 solicitation correctly implements the requirement of the Reserves Act that sales be structured to provide a full and free opportunity to all interested parties.

We recommend that DOE, with regard to each of the contracts awarded to Southern, conduct a new lottery among those bidders who were unsuccessful in the first solicitation and are still interested in obtaining an award under this solicitation, including a single representative of the interests of Pacific. If Southern is not selected, in either lottery, the remainder of the respective contract with Southern should be terminated for the convenience of the Government, pursuant to clause L-4 of the contract. Given the nature of the performance required by this IFB, i.e., a sale, we anticipate that termination costs to the Government will be minimal. The other awards would be left undisturbed, even though those companies were not given a full and equal opportunity, since they were not prejudiced by DOE's actions.

Since our decision contains a recommendation for corrective action, we are furnishing copies of it to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations, in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by

the agency to those committees concerning action taken with regard to our recommendations.

Protest sustained.

for Milton J. Socolar
Comptroller General
of the United States