



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Laketon Refining Corp.; Ashland Petroleum
Company

File: B-235977.2, B-235977.3

Date: January 4, 1990

DIGEST

1. Requirement that offerors under solicitation for bulk fuels designate as a source of supply a refinery operating at the time the offeror submits its best and final offer (BAFO) is met where agency observed refinery producing petroleum products in a test run 1 day after BAFO was submitted.
2. Where offeror does not meet specific letter of solicitation responsibility requirement but has exhibited a level of achievement which in the agency's reasonable view is equivalent to that required, offeror may be considered to have satisfied requirement.
3. Where solicitation explains how agency will apply evaluation preference for small disadvantaged businesses (SDBs) and agency applied preference as set out in solicitation, protest filed after award that evaluation preference is improper is untimely since it is based on the evaluation scheme as set out in solicitation and therefore should have been filed before closing date for receipt of proposals.

DECISION

Laketon Refining Corporation and Ashland Petroleum Company protest the award of a contract to Phoenix Petroleum Company under request for proposals (RFP) No. DLA600-89-R-0161, issued by the Defense Logistics Agency (DLA) for jet fuel. Both protesters complain that the refinery to be used by Phoenix to supply the fuel to DLA was not operating at the time best and final offers (BAFOs) were to be submitted as required by the RFP. The protesters also raise numerous objections concerning the awardee's designated refinery and

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DLA's implementation of the Small Disadvantaged Business (SDB) program.

We dismiss the protests in part and deny them in part.

Among other petroleum products, the solicitation called for offerors to provide 1,892,177,000 gallons of jet fuel known as JP-4. The solicitation indicated that a portion of the requirement was set aside for small business "with preferential consideration for SDB concerns."^{1/}

The solicitation also included Clause L2.09, "EVIDENCE OF RESPONSIBILITY-OPERATING CRITERIA," which stated:

"(a) To be determined responsible, an offeror must designate, as a source of supply for performance under any resulting contract, a refinery that is operating at the time the offeror submits its best and final offer. An operating refinery is a refinery that is producing petroleum products.

"(b) The evidence of responsibility required by this clause is in addition to the responsibility criteria set forth in FAR 9.104."

On or before April 25, 1989, DLA received 49 initial offers under the solicitation, including one from Phoenix. After negotiations, DLA requested and received BAFOs on June 20. Phoenix, which certified itself as an SDB, offered to supply 180 million gallons of JP-4 from a refinery in St. Marys, West Virginia.

During the period of negotiations, in response to a May 3 request from the contracting agency, the Defense Contract Administration Services Management Area (DCASMA), Philadelphia and Pittsburgh, performed a preaward survey on Phoenix, including a visit to the St. Marys refinery.

^{1/} The SDB preference was provided for in regulations issued by the Department of Defense (DOD) to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1207, 100 Stat. 3816 (1986), and section 806 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 806, 101 Stat. 1019 (1987), which established for DOD a goal of five percent for contracting with small business concerns owned and controlled by socially and economically disadvantaged individuals. See DOD Federal Acquisition Regulation Supplement (DFARS) Part 219.

Although DCASMA found Phoenix satisfactory in the areas of technical capability, quality assurance, financial capability and transportation, the survey report, which was dated June 27, nevertheless, recommended "no award." The negative recommendation was based on DCASMA's conclusion that inadequate production capability existed at the St. Marys refinery. Under this factor, the survey also noted that although Phoenix intended to use the St. Marys refinery, Phoenix Refining Co., an affiliate of Phoenix Petroleum, had not at the time of the survey finalized an agreement to purchase the refinery and it was not clear if the sale would occur because the current owner of the facility, Mid Atlantic Fuels, Inc., was in bankruptcy. Finally, the survey expressed doubt as to whether the St. Marys refinery, which was not in operation at the time of the site visit on May 23 and 24, could comply with Clause L2.09 by the due date for BAFOs.

Meanwhile, since DLA was concerned that it did not possess the in-house technical capability to make an accurate assessment of the St. Marys refinery, it hired Wright Killen & Co., a refinery engineering firm. Wright Killen was to assist the agency in determining whether the refinery was capable of performing as required and whether it could meet the standard set forth in Clause L2.09. Wright Killen met with Phoenix to review operating plans and refinery information, inspected the St. Marys refinery and reviewed production and sales data for the refinery. DLA reports that the data, which included product yield reports for 1988 and monthly reports to the Department of Energy for 1987 and 1988, showed that the St. Marys refinery last produced petroleum products and made sales in December 1988.

DLA also reports that, on June 21, prior to the "no award" recommendation from DCASMA, Wright Killen, the contracting officer and other agency officials visited the St. Marys refinery and saw it "charge" its distillation tower "with 3,000 barrels of crude oil" and, over the next 24 hours, refine the crude oil into various petroleum products. DLA explains that this test run could have occurred a day earlier, when Phoenix submitted its BAFO, but agency personnel were not available to make the visit at that time. According to DLA, since the refinery produced petroleum products over a 24-hour period, it met the requirement of Clause L2.09.

On July 6, Wright Killen provided its final report to the contracting officer. That report concluded, in contrast to the DCASMA finding, that the St. Marys refinery could be modified to produce 180 million gallons of JP-4 in time to meet the RFP delivery requirements.

Notwithstanding the positive findings by Wright Killen, the contracting officer still determined that Phoenix was nonresponsible. The contracting officer's July 6 written determination concluded, based on documents provided by Phoenix, the Wright Killen report and the June 21st test run of the St. Marys refinery, that contrary to the view of DCASMA, Phoenix did in fact meet the requirements of Clause L2.09 and, that with modifications, its refinery could produce the quantity of fuel proposed by the firm. According to the contracting officer, the sticking point was the fact that as of July 6 Phoenix did not own the St. Marys refinery or possess a lease agreement to use the facility during the term of the contract. Since Phoenix is a small business, the contracting officer referred the nonresponsibility determination to the Small Business Administration (SBA) for review under the certificate of competency (COC) procedures in accordance with the Small Business Act, 15 U.S.C. § 637(b)(7) (1988).

Subsequently, DLA reopened negotiations with all the offerors under the solicitation including Phoenix and requested second BAFOs. In its second BAFO, submitted on July 27, Phoenix reduced its offer of JP-4 fuel to 120 million gallons. On July 31, Phoenix furnished to the contracting officer a copy of Phoenix Refining Company's lease/purchase agreement with Mid Atlantic's bankruptcy trustee for the St. Marys refinery. That agreement removed the only reason for the initial nonresponsibility determination since the contracting officer had previously concluded that Phoenix complied with Clause L2.09 and that the refinery could produce the quantity of fuel proposed by the firm. Therefore, on August 3, the contracting officer determined Phoenix to be responsible and withdrew the COC request.

On August 25, Laketon protested to this Office. On September 8, DLA determined in accordance with 31 U.S.C. § 3553(c)(2)(A) (Supp. IV 1986) that urgent and compelling circumstances significantly affecting the interests of the United States did not permit withholding the award to Phoenix and awarded the contract on that date. Ashland protested on September 26.

Laketon and Ashland argue that the St. Marys refinery was not operating when Phoenix submitted its BAFOs on June 20 and July 27 as required by Clause L2.09 and, for that reason, Phoenix could not be considered a responsible offeror. To support this argument, the protesters refer to a June 22 letter prepared by Mid Atlantic for its creditors and other documents prepared for the bankruptcy proceeding

in which Mid Atlantic stated that the St. Marys refinery was not operating in June 1989. Further, Laketon submitted an affidavit of an individual who says that he visited the refinery on July 26 and observed no evidence of crude oil being processed and was told by a security guard at the refinery that there were no plans to process crude oil until August or September 1989.

The protesters also argue that the June 21 test run of the St. Marys refinery did not meet the operating requirement in Clause L2.09. On this issue, the protesters rely on a DLA June 8 letter to Phoenix and two other offerors and agency letters, memorandums and records of telephone conversations in which agency officials took the position that a test run on the BAFO due date was not sufficient under Clause L2.09.^{2/} Further, according to the protesters, even if a test run could be said to meet Clause L2.09, the test run at the St. Marys refinery did not occur on the date of either Phoenix BAFO, so that the test could not demonstrate that the awardee met the requirement of Clause L2.09 that its refinery be operating by the BAFO date.

Further, the protesters argue that the contracting officer could not reasonably find that Phoenix met Clause L2.09, because the St. Marys refinery had not previously produced jet fuel, such as JP-4, the refinery does not have the JP-4 production capacity required for the contract and the refinery did not have the permits and licenses required to produce the fuel. Finally, the protesters contend that Phoenix could not satisfy the clause since on June 20 and July 27, when the firm submitted its BAFOs, Phoenix Refining Company had not yet signed the lease/purchase agreement with Mid Atlantic for the St. Marys refinery.

In sum, the protesters disagree with the agency's ultimate conclusion that Phoenix is a responsible offeror under the standard set out in Clause L2.09 of the RFP.

When a solicitation sets forth a specific requirement that an offeror must meet as a prerequisite to a finding that the offeror is responsible and a protester alleges that the requirement has not been satisfied, we will review the

^{2/} The June 8 letter, which explained that the purpose of Clause L2.09 was to reduce the risk of performance delays due to the use of nonoperating refineries, stated that under the clause "the refinery must on an ongoing basis be refining petroleum products in economic quantities in the ordinary course of business on the date set for receipt of best and final offers."

record to ascertain whether sufficient evidence of compliance has been submitted such that the contracting officer reasonably could conclude that the requirement has been met. Calculus, Inc., B-228377.2, Dec. 7, 1987, 87-2 CPD ¶ 558. In this regard, an offeror who does not meet the specific letter of the requirement, but has clearly exhibited a level of achievement either equivalent to or in excess of it, may properly be considered to have satisfied it. See Unison Transformer Servs., Inc., 68 Comp. Gen. 74 (1988), 88-2 CPD ¶ 471.

In determining that Phoenix met the requirements of Clause L2.09 and was a responsible offeror, the contracting officer relied on the June 21 test run of the refinery, past production and sales reports for the refinery and the independent report from Wright Killen. It is true, as the protesters point out, that some DLA officials interpreted Clause L2.09 as precluding the use of a test run to demonstrate compliance and that officials explained this to Phoenix and two other offerors. Nevertheless, the agency finally rejected this approach because of concerns that it would unduly restrict competition. In our view, there is nothing in the language of Clause L2.09 itself that precludes the use of a test run to show compliance. Nor does the clause state that the refinery must, at the time of qualification, be producing jet fuel of the type to be purchased; it states only that the refinery must be producing "petroleum products." We have no reason to interfere with the judgment of the DLA officials who ultimately concluded after much debate that a 24-hour demonstration was sufficient to show that St. Marys was an operating refinery under Clause L2.09. The wording of the clause did not require a more restrictive interpretation and, in our view, a responsibility requirement should be no more restrictively drawn or applied than necessary to meet the agency's minimum needs. See Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398.3/ Therefore, we reject the protesters' arguments that the clause should be restrictively interpreted so as to prohibit the use of a test run or the production of other than JP-4 jet fuel to show compliance.

Next, as to whether the refinery qualified under DLA's interpretation of its clause, we again have no legal basis

3/ Also, the fact that on June 8 DLA informed Phoenix and two other firms, not including the protesters, that it would use the more restrictive interpretation, did not prejudice the protesters since there is no evidence that they were informed of that interpretation.

upon which to disagree with the agency's conclusion that, while Phoenix may not have met the specific letter of Clause L2.09, based on the test run and the independent judgment of Wright Killen, Phoenix exhibited a level of achievement equivalent to that specified. In this respect, DLA and Wright Killen observed the St. Marys refinery producing petroleum products on the day after submitting its first BAFO. Under the circumstances, it would have been unreasonable to reject Phoenix because the test run did not occur until 1 day after the firm submitted its BAFO since the delay was in fact caused by agency personnel. Finally, contrary to the protesters' view, Clause L2.09 did not specify that the offeror show ownership or evidence of a lease of a refinery at any particular time. Thus, there was nothing to prevent DLA from finding that Phoenix met the Clause even though the lease/purchase agreement for the St. Marys refinery was not signed until after the second BAFO.

The protesters further argue that even if a one-time test could be used to satisfy Clause L2.09, Phoenix does not qualify for award under the RFP since neither Phoenix or the St. Marys refinery had previously produced JP-4 fuel and the refinery is not capable of producing the type or quantity of fuel required under the contract. The protesters also argue that the St. Marys refinery does not have the licenses and permits necessary to operate.

These allegations concern the general standards of responsibility, such as adequate resources and capability to perform the contract, which are prescribed in Federal Acquisition Regulation § 9.104-1. We generally will not review a contracting officer's affirmative determination of responsibility, based on such standards, unless there is a showing of possible fraud or bad faith on the part of procurement officials. Servrite International Limited, B-229697, Apr. 5, 1988, 88-1 CPD ¶ 339. There is no evidence in the record to indicate possible fraud or bad faith on the part of procurement officials. Thus, this ground of protest is dismissed.4/

4/ According to the protesters, since Clause L2.09 required offerors to designate a refinery "as a source of supply for performance under any resulting contract," and the solicitation required a particular quantity of JP-4, Clause L2.09 should be read to encompass such general responsibility concerns as capability to produce the quantity of JP-4 required under the contract and, therefore, we should review this issue. On the contrary, as we concluded earlier, the wording of the clause does not require that the refinery

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In sum, it is clear from the record that the agency went through a significant effort before it finally arrived at its conclusion that Phoenix was a responsible offeror and that its St. Marys refinery qualified under Clause L2.09, even going so far as to employ an independent consultant to assist it in making the required technical judgment. While the protesters strongly disagree with the agency's judgment in this regard, we think that both the agency's interpretation of its own clause and its conclusion that Phoenix can do the job can be supported by the record. Thus, we deny the challenge to Phoenix's responsibility.

The protesters also maintain that Phoenix is purchasing kerosene and raffinate from non-SDBs in order to "blend" JP-4 fuel rather than refine the fuel itself and thus will not comply with Clause L63.13 of the solicitation which requires that "SDB concerns must supply petroleum product from an SDB manufacturer to be eligible for the evaluation preference." In response, DLA reports that although it was aware that Phoenix planned to purchase kerosene and raffinate, those purchases are not inconsistent with Phoenix's proposal to refine JP-4 fuel using those components. Further, since there was no requirement in the solicitation that an offeror, to be eligible for an SDB evaluation preference, propose to refine JP-4 using only fuel components from SDBs, Phoenix's purchases of kerosene and raffinate from non-SDBs did not affect the agency's determination of Phoenix's eligibility. DLA also reports that some blending is permitted under the contract and that Phoenix is currently delivering JP-4 fuel and meeting its obligations under the contract.

Laketon also argues that DLA's implementation of the SDB preference under this solicitation is contrary to Congressional guidance on the SDB program. In this respect, Laketon refers to section 806(b)(7) of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019 (1987), which requires that DOD implement the SDB program in a manner that assures that current levels in number and dollar value of nondisadvantaged small business awards be maintained by the implementation of the SDB program and that efforts be made "to provide new opportunities for contract awards" to SDBs.

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have in the past produced the fuel to be purchased and there is no reason to construe the clause to encompass the full range of responsibility issues under the contract. See Topley Realty Co., Inc., 65 Comp. Gen. 510, supra.

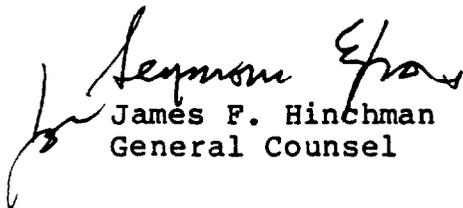
Laketon, a nondisadvantaged small business, argues that DLA's application of the SDB preference here improperly diverted contracts for JP-4 fuel to SDBs from small businesses, including Laketon, rather than from large businesses.

Laketon's protest on the SDB issue essentially challenges DLA's implementation of the SDB program as set out in the solicitation which explained, in clauses L63.13, L63.14 and L63.15, how the SDB program was to be implemented for the small business set-aside portion of the solicitation. Based on our review of the record, and Laketon does not argue otherwise, it appears that DLA applied these provisions in evaluating proposals and making the award to Phoenix.

Our Bid Protest Regulations provide that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing date for receipt of proposals must be filed prior to that date. 4 C.F.R. § 21.2(a)(1). Here, the agency's intent to apply a preference for SDBs and the means of implementing that preference were clearly stated in the solicitation. To the extent Laketon contends that DLA's implementation of the SDB preference was improper, the protest is untimely. See Geo Marine Resources, B-233776.3, Jan. 24, 1989, 89-1 CPD ¶ 72.

Laketon requests that if we find its protest untimely, we consider it pursuant to the exception in our timeliness rules for a protest that raises a significant issue. See 4 C.F.R. § 21.2(b). We will invoke this exception only if the subject of the protest concerns a matter of widespread interest to the procurement community or involves a matter that has not been considered on the merits in a prior decision. 120 Church Street Assocs., B-232139.3, Mar. 7, 1989, 89-1 CPD ¶ 246. Laketon's protest regarding the SDB provisions of the solicitation does not fall within this exception.

The protests are dismissed in part and denied in part.


James F. Hinchman
General Counsel