



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Sun Refining and Marketing Company; Barrett Refining Corporation

File: B-239973; B-239973.2

Date: October 17, 1990

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Howard M. Kaufer, Esq., Defense Logistics Agency, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency issued a competitive solicitation for jet fuel, but record shows that only one source currently is capable of delivering jet fuel by pipeline to two Air Force bases, agency in essence is conducting a noncompetitive procurement which must be justified in accordance with statutory requirements.

DECISION

Sun Refining and Marketing Company and Barrett Refining Corporation protest, as restrictive of competition, delivery terms for JP-4 jet fuel under request for proposals (RFP) No. DLA600-90-R-0161, issued by the Defense Fuel Supply Center, Defense Logistics Agency (DLA). Sun and Barrett argue that the delivery terms which restrict tank truck deliveries of JP-4 at Tinker Air Force Base in Oklahoma and McConnell Air Force Base in Kansas result in a de facto sole-source procurement.

We sustain the protests.

BACKGROUND

On March 22, 1990, DLA issued the solicitation for a total JP-4 requirement of 1,803,914,000 gallons to be supplied to 163 user activities and Defense Fuel Support Point locations during the October 1, 1990 through September 30, 1991 delivery period. The solicitation contained a separate line item for

each user activity which set forth the estimated gallons of JP-4, acceptable methods of delivery, and applicable delivery restrictions for each user activity. The solicitation also included set-aside portions for small business participation with preferential consideration given to small disadvantaged business (SDB) concerns. The solicitation provided that awards would be made to the responsible offerors whose offers are most advantageous to the government, cost or price and other factors considered.

Line item 0101 of the solicitation listed a requirement of 58,000,000 gallons of JP-4 for Tinker. Pipeline and/or tank truck delivery methods were listed as acceptable delivery modes for the entire quantity of JP-4 for Tinker. Eighty percent of Tinker's requirement (46,400,000 gallons) was set aside for small businesses.

Line item 0108 of the solicitation listed a requirement of 40,000,000 gallons of JP-4 for McConnell. Pipeline was listed as an acceptable delivery mode for the entire quantity of JP-4 for McConnell and tank truck was listed as an acceptable delivery mode for a maximum of 10 percent (4,000,000 gallons) of JP-4 for McConnell. Ninety percent of McConnell's requirement (36,000,000 gallons) was set aside for small businesses.

Both Sun, a large business, and Barrett, an SDB, submitted initial offers by April 24 for delivery of JP-4 by tank truck. On May 14, subsequent to the submission of initial offers, DLA issued amendment No. 0002 to the solicitation. Amendment No. 0002 reduced the total JP-4 requirement to 1,779,446,100 gallons, and with respect to Tinker and McConnell, changed the quantities of JP-4 which could be delivered by tank truck.

For Tinker, amendment No. 0002 imposed a 25 percent tank truck delivery limitation on JP-4 deliveries, thereby reducing from 100 percent (58,000,000 gallons) to 25 percent (14,500,000 gallons) the amount of JP-4 which could be delivered by tank truck to Tinker. Amendment No. 0002 also reduced the small business set-aside amount from 80 percent (46,400,000 gallons) to 25 percent (14,500,000 gallons).

For McConnell, amendment No. 0002 relaxed the 10 percent tank truck delivery limitation on JP-4 deliveries, thereby increasing from 10 percent (4,000,000 gallons) to 30 percent (12,000,000 gallons) the amount of JP-4 which could be delivered by tank truck to McConnell. Amendment No. 0002 also reduced the small business set-aside amount from 90 percent (36,000,000 gallons) to 30 percent (12,000,000 gallons).

Prior to the closing date for receipt of best and final offers (BAFOs) on June 15, Sun, on June 8, and Barrett, on June 14, filed protests regarding the amended delivery terms for Tinker and McConnell. Sun and Barrett argue that the amended tank truck delivery limitations at Tinker and McConnell result in a de facto sole-source procurement in favor of Continental Oil Company, Inc. (Conoco), the only firm with pipeline access into Tinker and McConnell for delivery of JP-4. Sun and Barrett maintain that under the terms of the amended solicitation, which limit JP-4 tank truck deliveries to 25 percent at Tinker and 30 percent at McConnell, Conoco has no competition for 75 percent of the JP-4 delivered to Tinker and 70 percent of the JP-4 delivered to McConnell.

PROCEDURAL MATTERS

DLA argues that Sun's protest against the amended delivery terms at McConnell is untimely pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990), which provide that protests based upon alleged solicitation improprieties apparent on the face of the solicitation must be filed prior to the closing date for receipt of proposals. DLA argues that the 10 percent tank truck limitation was apparent from the face of the initial solicitation, and because Sun did not protest this 10 percent limitation prior to the closing date for receipt of initial proposals, Sun now cannot protest, prior to the closing date for receipt of BAFOs on June 15, the relaxed 30 percent tank truck limitation at McConnell as imposed by amendment No. 0002. We disagree. While Sun did not protest the 10 percent tank truck limitation under the initial solicitation, we believe that the overall restrictive effect of amendment No. 0002 (which significantly reduced the total quantity of JP-4 available for Sun to offer at both McConnell and Tinker, two of its market areas) reasonably provided Sun with an independent basis of protest. Accordingly, we find that Sun timely protested the 30 percent tank truck limitation at McConnell prior to the closing date for receipt of BAFOs.

DLA also argues that Barrett is no longer an interested party to protest the tank truck delivery restrictions at Tinker and to intervene in Sun's protest against the delivery restrictions at McConnell because Barrett has received an award for 90,000,000 gallons (small business set-aside quantities) which the firm offered under this solicitation. This quantity will be delivered by tank truck, f.o.b. origin, to Tinker and McConnell. Where, as here, the relief requested effectively would require resolicitation, and the protester is capable of offering additional quantities under a resolicitation, the protester has a direct economic interest and is an interested

party to protest unduly restrictive solicitation provisions. See H.V. Allen Co., Inc., B-225326 et al., Mar. 6, 1987, 87-1 CPD ¶ 260.

ALLEGED RESTRICTIVENESS OF REVISED RFP

DLA argues that the amended tank truck delivery limitations at Tinker and McConnell reflect the government's minimum needs. The Air Force reports that due to growth and expansion, Tinker and McConnell have become physically congested and that the restrictions on tank truck deliveries are necessary for environmental and safety reasons. To remedy these problems at Tinker, the Air Force responds that it would require capital expenditures of \$135,000 to upgrade facilities to permit increased tank truck deliveries.

The record shows that Conoco is the only previous pipeline supplier of JP-4 to Tinker and McConnell via its company-owned, common-carrier pipeline. The Conoco pipeline is the only pipeline into Tinker and McConnell and the Conoco refinery is the only refinery connected to the Conoco pipeline in Oklahoma and Kansas. Although Conoco's pipeline is a "public access" pipeline, Conoco has no "public access" terminals connected to its pipeline to allow firms to transfer JP-4 from their tank trucks to the Conoco pipeline. Sun and Barrett report that they have unsuccessfully attempted to gain access to the Conoco pipeline and terminals. Because Conoco cannot receive tank trucks at its terminals in Oklahoma City or Wichita, other firms, including Sun and Barrett, cannot compete for pipeline deliveries to Tinker and McConnell. DLA reports that Conoco is willing to install the capability to receive tank trucks, but the estimated cost would be in excess of \$400,000 at each location. Barrett is willing to construct a terminal for delivery of JP-4 into the Conoco pipeline, but the estimated cost of construction is between \$400,000 and \$500,000.^{1/} The record also shows that on May 31, approximately 2 weeks after amendment No. 0002 was issued, Conoco increased by 50 percent (from \$.32 to \$.46 per barrel) its tariff charged to its competitors for use of its pipeline to transport JP-4. The effective date of this tariff increase was July 1, 1990. Even if terminal facilities were available, Conoco's increased tariff has an anti-competitive effect, and new firms could not be assured of even receiving space on the Conoco pipeline to transport JP-4 to Tinker and McConnell because pipeline space is prorated based on past usage.

^{1/} The record shows that due to the timing of amendment No. 0002, no offeror could construct the appropriate facility to permit use of Conoco's pipeline for this RFP.

Whatever DLA's initial expectation for competition for delivery of JP-4 to Tinker and McConnell, it is clear from the record that at this time Conoco continues to be the only pipeline source available for delivery of JP-4 by pipeline to Tinker and McConnell. DLA cannot obtain competition for pipeline deliveries of JP-4 to Tinker and McConnell until other firms gain access to Conoco's pipeline and terminals or construct their own terminals for delivery of JP-4 into Conoco's pipeline. While it appears that the protesters are exploring opportunities to obtain pipeline access, it is unclear whether they will be successful or not, and certainly, from this record, given the timing of the restriction on tank truck deliveries, these protesters could not obtain access on such relatively short notice. Thus, although DLA issued a competitive solicitation, there was no reasonable expectation of obtaining competition for pipeline deliveries of JP-4 to Tinker and McConnell. As a result, under the amended terms of this solicitation, the record shows a de facto sole-source procurement exists in favor of Conoco. Conoco has a "lock" on 75 percent of the JP-4 delivered to Tinker by pipeline and on 70 percent of the JP-4 delivered to McConnell by pipeline with no price competition. Further, the record shows Conoco knows that it is the only pipeline supplier and is free to submit prices on sole-source terms. See Ricoh Corp., 68 Comp. Gen. 531 (1989), 89-2 CPD ¶ 3.

The Competition in Contracting Act of 1984 (CICA) generally requires agencies to obtain full and open competition through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (1988). The use of other than competitive procedures, for example, sole-source procurements, are permitted only in limited circumstances and must be supported by written justification, higher-level approval of the contemplated sole-source action, and publication of the required public notice in the Commerce Business Daily. 10 U.S.C. §§ 2304(c)(1), (f). Here, DLA is conducting a competition in the sense that the agency issued an RFP soliciting offers. It knows in advance, however, that almost three-fourths of the procurement is limited to one firm. Where such a de facto sole-source procurement exists, agencies may not avoid the limitations on the use of other than competitive procedures. Ricoh Corp., 68 Comp. Gen. 531, supra. While DLA may have legitimate safety, environmental, and logistical reasons for limiting JP-4 deliveries by tank truck to Tinker and McConnell, these reasons do not obviate the need for DLA to comply with the justification, approval, and notification requirements of CICA for use of what in essence is a noncompetitive procurement for a significant quantity of JP-4.

We therefore recommend that DLA comply with the statutory and regulatory requirements for using noncompetitive procedures for 75 percent of Tinker's JP-4 requirement and 70 percent of

McConnell's JP-4 requirement by pipeline.^{2/} We are so advising the Director of DLA by separate letter of today. We also find that Sun and Barrett are entitled to recover their protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1).

Milton J. Fowler

Acting Comptroller General
of the United States

^{2/} Barrett has also alleged that the quantity reductions for tank truck deliveries at Tinker reflected an attempt by DLA to evade the Department of Defense SDB program and application of the 10 percent SDB evaluation preference. In view of our recommendation, we need not address this matter since the SDB portions are contingent upon how DLA implements our recommendation.