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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gulf Gas Utilities Co.; Krystal Gas Marketing Company; Commercial Energies, Inc.

File: B-242650; B-242650.2; B-242650.3

Date: May 20, 1991

Laurie Heasley for the protester, Gulf Gas Utilities Co., J. Abel Godines for the protester, Krystal Gas Marketing Company, Gregory Kellam Scott for the protester, Commercial Energies, Inc.
Millard F. Pippin, Department of the Air Force, for the agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency's justification for proposed sole-source award under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not based on evidence that establishes the reasonableness of its determination that only one known source can meet the government's needs.

DECISION

Gulf Gas Utilities Co. (GGU), Krystal Gas Marketing Company, and Commercial Energies, Inc. protest the issuance on October 31, 1990, of request for proposals (RFP) No. F41689-91-R-0005, by Randolph Air Force Base, Texas, for the sole-source award of an indefinite-term, fixed-price (with an economic price adjustment) requirements contract for public utility service to Valero Transmission Company, L.P. (Valero).1/ The contract is to cover the transportation and delivery of natural gas to six Texas Air Force bases and one Naval Air Station; the installation (where necessary),

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1/ The Federal Property and Administrative Services Act, 40 U.S.C. § 481(a) (1988), grants the General Services Administration (GSA) the authority to manage procure, and supply public utility services to the government. The Act also provides that the Department of Defense (DOD) may procure its own utility services where it is in the best interest of national security. Pursuant to this authority, GSA and DOD agreed that DOD would procure its own utility services.

operation, and maintenance of meters for measuring the amounts of delivered gas and of the gas distribution system; and backup and administrative services. The protesters contend that sufficient competition exists to permit the procurement to be competed among small and small-disadvantaged businesses (SDBs) and that the agency is attempting to circumvent the requirement for full and open competition.

We sustain the protests.

Initially, the agency decided to compete the procurement. In November 1989, the contracting officer requested a draft statement of work for a competitive spot market natural gas acquisition to replace its natural gas contract with Valero Industrial Gas, L.P., an affiliate of Valero. Under that contract, Valero's affiliate provided spot market gas for 70 percent of the agency's needs and Valero, in addition to transportation, provided regulated gas for the remaining 30 percent of the agency's needs.

After determining that City Public Service (CPS), the San Antonio public utility owning the San Antonio pipelines needed for the delivery of gas to the three bases located in that city, which represented 75 percent of the total needs, "would consider another transportation agreement with other suppliers so long as it did not adversely impact on other ratepayers," the contracting officer determined to proceed with the competitive acquisition. The contracting officer also determined that the procurement would not be restricted to small businesses or SDBs because no reasonable expectation existed that at least two such businesses would submit reasonably priced offers. The proposed procurement was synopsized in the Commerce Business Daily (CBD) on March 20, 1990. The synopsis required an offeror to provide with its proposal "firm transportation agreements signed with Valero and CPS." (In addition to owning a pipeline which connected to the CPS San Antonio pipelines, Valero owns the pipelines which deliver the natural gas to the four non-San Antonio military bases also covered by the proposed procurement.) Copies of the solicitation were requested by 22 firms.

On April 5, the Air Force utilities advisor requested that the proposed competitive solicitation be canceled and that the procurement be awarded to Valero on a sole-source basis. It was his view that the agency requirements for uninterrupted gas flow could only be met by a natural gas utility such as Valero. He also requested that a market survey and economic analysis for the procurement be conducted by a private firm. On June 14, a meeting between the utility advisor, the private firm hired to conduct the survey and analysis, and agency procurement personnel was held to discuss the reasoning behind a sole-source award for public utility service rather than a competitive procurement of spot market natural gas with transportation agreements to ensure pipeline delivery. A "formal market survey" was conducted on June 21, by the private firm to determine what companies could provide the agency's needs. Only Valero and agency personnel were contacted during this survey. The survey firm concluded based on these discussions that Valero was the "only responsible source for natural gas utility service" which could guarantee an uninterrupted "secure, long-term access to spot market natural gas supplies" which would meet the agency's needs. The survey was based on the assumption that no means existed for the delivery of alternative supplier gas.

On August 6, a Justification and Approval (J&A) was issued in accordance with Federal Acquisition Regulation (FAR) § 6.303-2 to provide the justification for purchasing, pursuant to 10 U.S.C. § 2304(c)(1) (1988), public utility service for the seven bases from Valero as the only existing responsible source that could provide uninterrupted gas supplies and energy security/reliability. The J&A met all procedural requirements. The award was to be for an indefinite term since no change in the competitive situation was anticipated in the foreseeable future.

The J&A stated that it was necessary to award to a contractor providing public utility service since a public utility service contractor provides service, regardless of changes in the customer's usage requirements or the general nature of the natural gas market, until the service responsibility is formally abandoned. The J&A also stated that Valero--as a public utility--was the only company that could provide the necessary supplies and services because Valero's contract with CPS limited to Valero or its affiliates the use of the leased CPS pipeline to the three bases located in San Antonio. Although the J&A acknowledged that CPS had stated that it would consider a transportation agreement with an alternate supplier, no such agreement or the rates it would incorporate existed. The record also shows that the Air Force utility advisor did not want to lose the very low rates that CPS was charging Valero for transportation over its pipelines.

Regarding the remaining 25 percent of the agency's gas needs (the other four bases), the J&A stated that award of a sole-source contract to Valero was necessary to ensure reliable gas flow. The options of purchasing all or part of the agency's gas needs from an alternate supplier were determined unacceptable. First, the agency would not have Valero's utility service obligation in the case of nonperformance by the alternate supplier. Second, alternate suppliers realistically could not compete with Valero or its affiliate because they would have to transport their gas over Valero pipelines and the terms and conditions that Valero would require would make competition impossible. Third, the agency did not have the metering equipment and personnel necessary to support alternate suppliers using Valero's pipelines.

The J&A also stated that a market survey had been conducted and also that knowledgeable experts had concluded that Valero represented the only "responsible" source for natural gas utility service and for secure, long-term access to spot market gas supplies. Further, an analysis of natural gas prices based, in part, on prices for Valero's gas under previous contracts projected significant savings from this new contract. Finally, the J&A reported that no sources expressed an interest in supplying total service as required in the proposed sole-source acquisition from Valero.

The three protesters question the validity of the agency's sole-source decision. They note that a sufficient number of firms expressed an interest in the March 20 synopsis. GGU claims that it is one of three small business natural gas utility service companies that could perform this contract.2/ The protesters state that they and others could contract with a utility company, other than Valero, such as CPS, to lease pipeline usage, contract to have a parallel pipeline constructed to the bases, or the Air Force could obtain the necessary transportation agreements itself--the latter approach apparently is used by the Defense Logistics Agency. GGU notes that a recent state agency agreement with Valero to transport gas does not contain the onerous requirements Valero allegedly seeks to impose here on alternate suppliers. Further, the protesters argue that the survey of Valero, but none of its competitors, biased the facts in favor of a sole-source award to Valero. Additionally, in the protesters' view, the J&A creates a misleading impression in stating that no sources expressed an interest in supplying the total service involved in the proposed sole-source award since none of Valero's competitors were ever surveyed regarding these needs.

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA does permit noncompetitive acquisitions in specified circumstances such as

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2/ GGU has submitted a letter from the Railroad Commission of Texas stating that GGU "has been classified as a gas utility." The agency argues that GGU has possibly "mischaracterized" its status and that it is a gas production utility rather than a transmission utility as is Valero. GGU states that it currently is providing public utility services to the Federal Bureau of Prisons.

when the supplies needed are available from only one responsible source. 10 U.S.C. § 2304(c)(1). Elbit Computers, Ltd., B-239038, July 11, 1990, 90-2 CPD ¶ 26. Where the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), we will not object to a sole-source award based on a determination that only one known source can meet the government's needs unless it is shown that there is no reasonable basis for the award. Astron, B-236922.2, May 2, 1990, 90-1 CPD ¶ 441; Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299. To justify a sole-source award, an agency must reasonably establish that there is only one possible contractor that can do the work. See Daniel H Wagner, Assoc., Inc., 65 Comp. Gen. 305, 86-1 CPD ¶ 166.

In order to justify a sole-source in this case, the agency was required to ascertain whether other qualified sources capable of satisfying the government's requirements exist. This is commonly accomplished by a market survey. FAR §§ 6.303-1, 6.303-2(a)(8); See, e.g., Union Natural Gas Co., 66 Comp. Gen. 116 (1986), 86-2 CPD ¶ 648. We find that support for the decision to issue a sole-source contract is lacking. The record fails to establish that only Valero and its affiliates can meet the agency's needs.

First, the survey by the private contractor relied on in the J&A was incomplete because it was based only on discussions with the sole-source contractor and the Air Force. The contractor did not independently determine if a sole-source was justified, but adopted the results of meetings with the Air Force and Valero. The contractor concluded that "due to the lack of transportation access for [non-Valero] suppliers and the unacceptable energy security risk . . . of terminating [Valero's] utility service contract, the Air Force decided to pursue the sole-source contract option." The report then stated the contractor's purpose was to prepare a price analysis of procurement options. The survey thus did not address the capabilities of the firms which responded to the original synopsis or CPS's willingness to enter into transportation agreements with natural gas suppliers.

Second, the Air Force determination is not reasonably based because it omitted a major consideration--CPS's willingness to enter into transportation agreements with other natural gas suppliers to supply the three San Antonio Bases. No mention is made in the survey or the J&A as to why a company could not transport its gas through the CPS system. The record shows that CPS already has a contract with GSA to furnish gas to federal facilities in the San Antonio area and submitted a transportation agreement to permit gas suppliers to use its pipelines in a proposal it submitted to the agency in 1988. The record also contains correspondence showing CPS's continued willingness to enter transportation agreements and to consider proposals received from suppliers to the Air Force which apparently led to the initial decision to compete the requirement. The agency responds that CPS's statement that it would be willing to transport gas for an alternate supplier is meaningless since no agreement exists. In our view, the fact that no alternate supplier has provided the agency with a transportation agreement with CPS does not make the possibility of such an agreement "meaningless." We see no reason why an alternate supplier should be required to enter into such an agreement in the absence of a competitive procurement requiring one. Also, while the agency states that it could not provide the gas metering needed to regulate alternate suppliers, the record shows that for 75 percent of the agency's needs the metering is already being provided by CPS, not Valero.

As regards the four non-CPS area military installations, the record does not show that consideration was given to the possibility that an alternate supplier could construct pipelines and the necessary metering for these installations or lease facilities from Valero if Valero's sole-source is withdrawn. In sum, the record before us fails to show that other sources beside Valero could not perform the necessary services. We think a more comprehensive survey of alternate sources would have established whether GGU or other sources could possibly meet the agency needs. The price analysis conducted by the survey firm, which allegedly shows significant savings resulting from a sole-source award to Valero, does not, standing alone, serve as a reasonable basis for limiting competition. Lea Chemicals, Inc., 67 Comp. Gen. 149 (1987), 87-2 CPD ¶ 622.

Accordingly, we recommend that, unless the agency is able to reasonably justify a sole-source procurement based on a market survey that shows only Valero can meet its needs, the Air Force should conduct a competitive acquisition.3/ We also find that each of the protesters is entitled to the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protests are sustained.

Milton J. Socolar

Acting Comptroller General
of the United States

3/ The agency has authorized award to Valero based on urgent and compelling circumstances.