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

Decision

Matter of: Premier Petro-Chemical, Inc.

File: B-244324

Date: August 27, 1991

Gregory Kellam Scott, Esq., for the protester.
Benjamin H. Thompson IV, for True North Energy Co., an interested party.
Howard M. Kaufer, Esq., Defense Logistics Agency, for the agency.
C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where reprocurement is for the account of a defaulted contractor, the statutes and regulations governing federal procurements are not strictly applicable, and agency is not required to set reprocurement aside for small disadvantaged business (SDB), despite its knowledge that there are SDBs capable of competing.

2. Solicitation requirement that small disadvantaged business (SDB) regular dealers provide fuel manufactured by small business and not engage in product exchanges with large business in order to obtain SDB evaluation preference is a reasonable implementation of Department of Defense's regulations governing the granting of such evaluation preferences.

3. Where agency advises General Accounting Office that it intends to hold discussions with offerors, in which they may submit product source information, protest against solicitation provision allowing agency to deny preference to offerors which do not provide such information with their initial proposals is dismissed as academic.

DECISION

Premier Petro-Chemical, Inc., a small disadvantaged business (SDB) regular dealer, protests the terms of solicitation No. DLA600-91-R-0168, issued by the Defense Fuel Supply Center for diesel fuel as discriminatory against SDBs. We deny the protest in part and dismiss it in part.

On May 8, 1991, the agency issued the solicitation on an unrestricted basis for a fixed-price requirements contract with economic price adjustment for supply of DF-2 diesel fuel to Fort Irwin, California, through October 31, 1992. The solicitation contained an estimated quantity of 10,815,000 gallons of fuel as a repurchase against the account of a contractor terminated for default in the previous month. The solicitation contained a 10 percent evaluation preference for SDBs pursuant to a standard clause generally required for unrestricted Department of Defense (DOD) procurements.

The solicitation incorporated by reference the agency's Manufacturing and Filling Points (Unrestricted) clause, applicable to unrestricted procurements, and requiring SDBs to agree to provide fuel manufactured or refined only by a small business manufacturer or refiner. The clause also required SDBs to provide information on the source of their products, identifying the manufacturer or refiner that the offeror planned to use, with copies of the applicable commitments and agreements. The agency advised offerors that it would not apply the SDB evaluation preference to any proposal that failed to supply this information. The agency also has advised offerors verbally that compliance with the clause precludes "product exchange" agreements with large businesses, whereby one contractor may agree with another to deliver fuel in satisfaction of each other's contractual obligations.

Shortly before the closing time for receipt of initial proposals on June 5, our Office received this protest, alleging that the agency should have set the procurement aside for SDBs and that, in any event, the provisions of the solicitation discriminate against SDBs.

Initially, the protester cites the DOD Federal Acquisition Regulation Supplement (DFARS) § 219.502-72 (DAC 88-13), which essentially requires the agency to set aside an acquisition for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation of receiving offers from at least two responsible SDB concerns and that the agency can make an award at a price no more than 10 percent higher than fair market price. Further, the protester argues, the regulation establishes a presumption that the agency will receive two offers from responsible SDB concerns where, as in the instant case, it has received at least one such offer within 10 percent of the award price on a previous procurement during the previous 12-month period,1/ and another SDB is

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1/ The defaulted contractor, Allied Petro, Inc., was an SDB. Allied has received awards since the termination and, the protester argues, is presumably responsible.

on the activity's solicitation mailing list or has responded to a presolicitation notice in the Commerce Business Daily.

While, as the protester argues, the regulations generally provide for setting a procurement aside for SDBs in such cases, where a reprocurement is for the account of a defaulted contractor, the statutes and regulations governing federal procurements are not strictly applicable. DCX, Inc., B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55. Accordingly, the DFARS provision that the protester cites does not apply since, in arranging for completion of deliveries under a defaulted contract, the Default clause authorizes the contracting officer to use any terms and acquisition method deemed appropriate for the repurchase. See Bud Mahas Constr., Inc., 68 Comp. Gen. 622 (1989), 89-2 CPD ¶ 160. The contracting officer was therefore not required to conduct a restricted procurement when reprocuring the defaulted quantities. See id. We find the agency's actions reasonable under the circumstances, consistent with its duty to mitigate damages, and in accordance with the applicable regulations.

Secondly, the protester argues that the solicitation discriminates against SDBs, based on the agency's advice that SDBs will not receive an evaluation preference if they propose to make use of "product exchanges" in accomplishing deliveries. The protester contends that the terms of the solicitation allow other firms to engage in product exchanges and act to restrict SDBs in this manner. The protester asserts that such agreements are customary in the industry and promote efficiency and that the decision to bar SDBs seeking the evaluation preference from using product exchanges discriminates against SDBs.

DFARS § 252.219-7007 (Alternate I) (DAC 88-14), which implements the SDB preference program and which requires SDB regular dealers such as the protester to furnish only end items manufactured or produced by small business concerns, constitutes a reasonable implementation of the DOD's statutory mandate to award 5 percent of the dollar value of its contracts to SDB concerns and is within the agency's authority to impose. Baszile Metals Serv., B-237925 et al., Apr. 10, 1990, 90-1 CPD ¶ 378. An agency may refuse to pay the premium resulting from the use of the evaluation preference for awards that benefit large business that sell to the government through SDB regular dealers, regardless of the fact that this precludes some SDBs from gaining the benefits of the SDB preference program. See id. As the agency notes, the solicitation does not bar SDBs from using product exchanges, although it does deny them a preference if they do so. We cannot find that the agency's actions in refusing the

preference to SDBs who propose product exchanges with large business to be an unreasonable implementation of the DOD program.

Finally, the protester contends that it is also discriminatory to require SDBs to provide product source information with their initial proposals, while other firms may supply such information at a later time. The agency states that it originally anticipated an early award, and therefore advised the protester that Premier would have to submit the information with its initial proposal; having decided to conduct negotiations, the agency now advises our Office that it has decided to allow SDBs to provide the information at a later date. We therefore dismiss this ground of protest as academic.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel