146292

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

# Decision

**Matter of:** Sunbelt Industries, Inc.

**File:** B-246850

**Date:** March 31, 1992

James J. Regan, Esq., and Bruce S. Binder, Esq., Crowell & Moring, for the protester.
Kurt D. Summers, Esq., and Stuart Young, Esq., General Services Administration, for the agency.
Daniel I. Gordon, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Protest that solicitation limiting bids for aluminum oxide abrasive grain to newly manufactured grain is unduly restrictive of competition is denied where the agency properly determined that the limitation is reasonably related to user safety and performance requirements.

**DECISION**

Sunbelt Industries, Inc. protests the terms of invitation for bids (IFB) No. 7FXI-K5-90-5329-R, issued by the General Services Administration (GSA) for aluminum oxide abrasive grain to be used with pressure blasting equipment to descale, clean, and finish metallic parts, including engine and aircraft components. Sunbelt contends that the specifications are unduly restrictive of competition because they require that the grain be newly manufactured, thereby excluding Sunbelt, a manufacturer of reprocessed grain, from competing.

We deny the protest.

The IFB sought bids for a requirements contract for abrasive materials to be purchased by user agencies, which have historically been primarily agencies of the Department of Defense. Of the two National Stock Numbers (NSN) included in the IFB, only one, that for aluminum oxide abrasive grain, is the subject of this protest. The IFB specifies that the grain must conform with Commercial Item Description (CID) A-A-001045A and, within that CID, must be Class 1 grain, which is defined as newly manufactured grain.

Sunbelt contends that the IFB is overly restrictive because it does not permit Sunbelt to offer its reprocessed grain. Sunbelt asserts that it has provided the government with reprocessed grain under an earlier GSA contract that contained an earlier military specification which did not distinguish between newly manufactured and reprocessed grain. Sunbelt insists its reprocessed grain satisfied user agency requirements. Sunbelt further contends that prohibiting bidders from offering reprocessed grain violates the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. (1988), which, the protester asserts, requires GSA to remove from specifications any language prohibiting the use of recovered materials.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, 41 U.S.C. § 253a(a)(1)(A) (1988), and may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. 41 U.S.C. § 253a(a)(2)(B). Where a protester alleges that a requirement is unduly restrictive, we review the record to determine whether the requirement has been justified as necessary to satisfy the agency's minimum needs. Admiral Towing and Barge Co., B-245600; B-245602, Jan. 16, 1992, 92-1 CPD ¶ 83.

Because the solicitation is for a GSA requirements contract designed to serve various agencies, the question is whether any of the agencies ordering grain through the contract can reasonably be expected to require newly manufactured, rather than reprocessed, grain. GSA conducted a survey of various Department of Defense agencies which had procured aluminum oxide abrasive grain in the past to inquire whether the agencies believed that a distinction should be made in procurements between newly manufactured and reprocessed grain. Several user agencies that responded to the survey indicated that for some uses no distinction was necessary between reprocessed and newly manufactured grain, but that certain applications required newly manufactured grain. A number of respondents stated that they required newly manufactured grain for reasons related to safety, performance, and health. For example, Tinker Air Force Base replied that, if reprocessed grain were delivered, it would be returned or sent to disposal, due to the risk that use of reprocessed material tainted with iron traces could lead to loss of government property and loss of life. The Naval Aviation Depot stated that, due to impurities detected in grain shipments received through a prior GSA contract (under which Sunbelt was apparently supplying reprocessed grain), the grain was unsuitable for use. Kelly Air Force Base stated that its experience was that, when blasting with aluminum oxide in preparation for either plasma spray or

plating operations, grit in reprocessed grain negatively affects the bond of both the plasma spray and plating with the base metal. Kelly also sent GSA a sample identified as Sunbelt reprocessed grain that had been received and rejected by the agency. That sample appeared to contain large pieces of light bulb glass, paint chips, rocks, metal shavings, and dirt.

On the basis of the user survey, GSA decided to establish two classes within the relevant CID, with Class 1, for which bids were solicited by the IFB at issue here, limited to newly manufactured grain. Sunbelt contends that the user survey does not provide a reasonable basis to limit the IFB to Class 1 grain and thus to exclude reprocessed abrasive grain. Sunbelt argues that the survey was tainted because the cover letter sent to the agencies indicated GSA's belief that reprocessed grain is not equal to newly manufactured grain. Sunbelt also questions GSA's decisions to initiate the survey at all and then to send the user survey only to some, rather than all, users. The concerns expressed by the survey respondents are also rejected by Sunbelt as meaningless, because none of the users indicated any actual instance of health or equipment problems caused by reprocessed grain, even though all had received substantial quantities of Sunbelt's reprocessed grain in the past. In any event, Sunbelt contends that contaminants can arise in newly manufactured grain, as well as in reprocessed grain, and that an accepted method exists to detect unacceptable levels of contaminants.

The determination of the agency's minimum needs and the best method of accommodating them are primarily within the agency's discretion and, therefore, we will not question such a determination unless the record clearly shows that it was without a reasonable basis. See CardioMetrix, B-234620, May 1, 1989, 89-1 CPD ¶ 415. Moreover, where, as here, a solicitation requirement relates to human safety or national defense, an agency has the discretion to set its minimum needs so as to achieve not just reasonable results but the highest possible reliability and effectiveness. United Terex, Inc., B-245606, Jan. 16, 1992, 92-1 CPD ¶ 84.

GSA's user survey revealed that user agencies have a legitimate need to insist on procuring newly manufactured grain for certain applications. We do not agree with Sunbelt that GSA was required to provide evidence of damage from reprocessed grain before it could determine that agencies should have the option of insisting on newly manufactured grain, where they believe Class 1 grain is required. See Herley Indus., Inc., B-246326, Feb. 28, 1992, 92-1 CPD ¶ ___. Neither GSA's having initiated the survey nor the language in GSA's survey letter calls into question the results. On the contrary, agencies were free to express

disagreement, if any, with GSA's assessment, and at least one agency did indicate that, for its use, no distinction was necessary between newly manufactured and reprocessed grain. The reasonableness of the user agencies' concerns about contaminants in reprocessed grain is not brought into question by Sunbelt's assertions that newly manufactured grain also may contain contaminants and that it is possible to test grain in order to detect the presence of unacceptable levels of contaminants. Moreover, the fact that some agencies expressed satisfaction with reprocessed grain does not controvert the need of other agencies in different circumstances for newly manufactured grain. Agencies able to use reprocessed grain will continue to be free to purchase such grain outside the framework of this procurement; indeed, GSA has encouraged them to do so.

Sunbelt's assertion that RCRA prohibits agencies from excluding recycled or reprocessed materials in solicitations is incorrect. Under RCRA, agencies may decide not to procure items composed of recovered materials if such items fail to meet the applicable performance standards, 42 U.S.C. § 6962(c)(1). Consistent with the latter provision, Federal Acquisition Regulation (FAR) § 23.404(b)(2) states that the contracting officer may waive requirements for using recovered materials after determining that the items containing recovered materials fail to meet applicable performance standards. Thus, the fact that a user agency elects to procure newly manufactured grain does not itself indicate a violation of law or regulation. See Sunbelt Indus., Inc.--Recon., B-245780.2, Oct. 29, 1991, 91-2 CPD ¶ 399. Neither RCRA nor the FAR prohibits GSA from offering user agencies the option to choose between reprocessed grain and, where its use is necessary, newly manufactured grain. Sunbelt has failed to show that the IFB requirement for newly manufactured grain is not reasonably related to the user agencies' minimum needs.

The protest is denied.

for James F. Hinchman
General Counsel