



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wyandotte Tribal Petroleum, Inc.

File: B-251073

Date: March 9, 1993

Ron R. Hutchinson, Esq., Doyle & Bachman, for the protester. Pamela J. Mazza, Esq., and Brian N. Garcia, Esq., Piliero, Mazza & Pargament, for Big Bear Oil Company, Inc., an interested party.

Howard Phifer, Esq., Defense Logistics Agency, and John Klein, Esq., Small Business Administration, for the agencies.

David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is denied where record does not demonstrate that Small Business Administration (SBA) officials violated applicable regulations or engaged in fraud or bad faith in determining not to award contract offered under section 8(a) of the Small Business Act on the basis of a competition; record indicates that SBA reasonably determined on the basis of the information available to it prior to issuance of the solicitation that there was no reasonable expectation that at least two 8(a) firms would submit offers for any particular 8(a) quantity offered under a national bulk fuels procurement.

DECISION

Wyandotte Tribal Petroleum, Inc. protests its exclusion from competition for the portion of the requirement under request for proposals (RFP) No. DLA600-93-R-0061, reserved for socially and economically-disadvantaged businesses under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 and Supp. III 1991). The solicitation was issued by the Defense Logistics Agency, Defense Fuel Supply Center (DFSC), to satisfy the Department of Defense's overall domestic bulk fuels requirement, which includes a requirement for JP-4 jet fuel for a number of installations and locations throughout the United States. Wyandotte, a certified 8(a) firm, asserts that the Small Business Administration (SBA) improperly designated a portion of the reserved quantity, for which Wyandotte had expressed

interest, for sole-source award to other 8(a) firms nominated by SBA instead of competing the reserved portion among eligible 8(a) firms, including Wyandotte.

We deny the protest.

On July 14, 1992, DFSC notified SBA that it was preparing to solicit offers for its domestic bulk fuels requirements for delivery beginning April 1, 1993. DFSC offered a portion of the overall requirement for reservation under the 8(a) program; it specified, however, that in order to avoid problems previously encountered with late reservation requests and untimely submissions of required data, reservation requests must be received within 30 days.

On July 22, 1992, SBA's Division of Program Development in Washington, D.C., issued an advance copy of the SBA notice of the DFSC bulk fuel procurement to every 8(a) firm approved as a regular dealer for fuel oil, including Wyandotte, one of three 8(a) dealers listed for SBA's Region VI. SBA's notice of the procurement, which was subsequently formally issued to SBA's 10 regional offices on August 4, requested SBA's Assistant Regional Administrators for Minority Small Business and Capital Ownership Development to submit reservation requests for 8(a) firms to the Division of Program Development. The notice explained that it was "necessary to start the reservation process immediately" so as to avoid problems previously encountered in the past with late reservation requests; it noted that DFSC had advised that requests for reservations received after issuance of the solicitation would not be considered. Accordingly, the notice advised the assistant regional administrators that 8(a) reservation requests, and the specific data required for each interested 8(a) firm, must be submitted to SBA's Division of Program Development no later than August 12, "to allow time for SBA review and DFSC evaluation of the agency requests prior to issuance of the competitive solicitation." The cover letter to the notice, which was addressed to the 8(a) participants, requested firms interested in the procurement to contact their Business Opportunity Specialist (BOS) at SBA.

On July 31, before Wyandotte could contact its BOS, the BOS, who was located in SBA's Oklahoma City district office, Oklahoma, contacted Wyandotte to inquire if it was interested in participating in a different DFSC procurement, for ground fuels. However, the BOS and the Wyandotte official with whom he spoke, Wyandotte's president, understood the resulting conversation to concern different procurements. As established at the hearing on this matter, Wyandotte was unaware of the DFSC ground fuels procurement; it had only been notified of the bulk fuels requirement. Thus, when asked about his interest in participating in an

upcoming DFSC fuel procurement, Wyandotte's president, believing the BOS to be referring to the bulk fuels procurement, expressed an interest in participating. Video Transcript (VT) 13:04-13:08, 13:11, 13:29-13:30. The BOS, on the other hand, at the time he contacted Wyandotte, was unaware of the DFSC bulk fuels procurement; SBA's July 22 advance notice of the bulk fuels procurement had not been sent to the Oklahoma City district office, and the district office was unaware of the bulk fuels requirement. Instead, the only DFSC fuel requirement with which the district office was familiar was the ground fuels requirement, notice of which had been sent by DFSC directly to applicable SBA regional offices, which in turn had contacted the district offices. The BOS, therefore, unaware of the DFSC bulk fuels procurement, understood Wyandotte to be expressing an interest in the ground fuels requirement. VT 11:13-11:14, 11:27, 11:33, 11:52, 11:55, 12:52, 16:08, 16:36, 17:46.¹

Furthermore, nothing in the ensuing dealings between the two parties during the next several days corrected the misunderstanding as to the procurement being discussed. Although on July 31 the BOS telefaxed Wyandotte a list of information Wyandotte was required to furnish in order to be nominated, this list generally conformed to the informational requirements identified for both the DFSC bulk fuels procurement and the DFSC ground fuels procurement, and neither the SBA list, nor Wyandotte's subsequent responses on August 3 and 5, specifically identified the DFSC fuel requirement in question. VT 11:38. In this regard, we note that while Wyandotte's responses indicated it was capable of furnishing jet fuel, which was covered under the bulk fuels procurement, they also listed other fuels, which were covered under the ground fuels procurements. As a result of

¹This misunderstanding between the BOS and Wyandotte's president appears to have resulted in part from two factors. First, and most significantly, while Wyandotte's president testified that he had mentioned jet fuels during the conversation, and the BOS testified that he had mentioned ground fuels at least once, according to the BOS, all other references to the requirement in question were to the "DFSC requirement" and not to a specific fuel or class of fuels. VT 11:55, 13:08, 13:11, 12:40-12:43. Moreover, the record indicates that, at the time of the July 31 conversation, and for some time thereafter, the BOS was unaware that ground fuels (as defined by DFSC) did not include jet fuel. VT 11:14. Accordingly, it appears that if Wyandotte's president did refer to jet fuels, this alone would not have alerted the BOS to the fact that Wyandotte was expressing an interest in a procurement other than the ground fuels procurement.

this continuing misunderstanding, on August 13, SBA's Oklahoma City district office nominated Wyandotte for the ground fuels procurement. VT 15:40, 15:47.

Wyandotte, which apparently was not notified of its nomination for the ground fuels procurement, continued to believe that it would be nominated for the bulk fuels procurement. VT 14:14. SBA Region VI, however, instead nominated for 8(a) consideration under the bulk fuels procurement the remaining two 8(a) firms (besides Wyandotte)--Shadrock Petroleum Products, Inc. and Big Bear Oil Company, Inc.--approved as 8(a) fuel oil dealers for the region. According to SBA, Shadrock and Big Bear were the only 8(a) firms in the nation that expressed an interest in the bulk fuels procurement and each expressed an interest in different locations. VT 17:48. SBA concluded that since only one 8(a) firm had expressed an interest in any particular location, there was no reasonable expectation that at least two 8(a) firms would submit offers for the same location, and therefore there was no need to conduct a competition.

On September 25, DFSC issued RFP-0061 for its bulk fuels requirement, with proposals due by October 26. A copy of the solicitation was sent to Wyandotte. In the course of preparing its proposal, Wyandotte contacted DFSC small business specialists on October 9 and 15; they advised Wyandotte that it had not been nominated by SBA for 8(a) participation in the bulk fuels procurement and, moreover, that it was too late to be considered for an 8(a) reservation. VT 13:18-13:21, 14:14. As a result of its first conversation with DFSC, Wyandotte, on October 13, requested a meeting with SBA.

Wyandotte's representatives met with Wyandotte's BOS and his supervisor on October 16 at SBA's Oklahoma City district office to discuss why Wyandotte was not considered for 8(a) participation in the recent DFSC fuels procurement. VT 13:22. SBA officials understood Wyandotte to be referring both to DFSC's ground fuels procurement and to another procurement with which they were unfamiliar. VT 15:53-15:59, 16:03. Wyandotte, however, furnished the SBA officials at the meeting with several pages from the bulk fuels solicitation. It is clear, therefore, that SBA, no later than October 16, was on notice of Wyandotte's interest in participating as an 8(a) firm in the DFSC bulk fuels procurement. On October 23, Wyandotte filed this protest with our Office.

Wyandotte first argues that SBA's sole-source nomination of Shadrock and Big Bear for the bulk fuels procurement was improper because, notwithstanding the "apparent misunderstanding on SBA's part," Wyandotte's expression of

interest in participating in the procurement in fact created a reasonable expectation that two or more 8(a) firms would submit offers for the same 8(a) quantities. In addition, as discussed below, Wyandotte contends that SBA was required by its regulations, 13 C.F.R. § 124.311(e)(1) (1992), to compete the reserved quantities even if there was no expectation that two or more 8(a) firms would submit offers because the procurement was a national buy.

As amended, the Small Business Act now provides that a contract opportunity offered for award to 8(a) firms:

"[S]hall be awarded on the basis of competition restricted to eligible [8(a)] Program Participants if--

(I) there is a reasonable expectation that at least two eligible Program Participants will submit offers and that award can be made at a fair market price, and

(II) the anticipated award price of the contract (including options) will exceed \$5,000,000 in the case of a contract opportunity . . . for manufacturing and \$3,000,000 (including options) in the case of all other contract opportunities." 15 U.S.C. § 637(a)(1)(D)(i).

Similarly, SBA's implementing regulations provide that a contract opportunity offered to the 8(a) program shall be awarded on the basis of a competition if the anticipated award price will exceed the applicable dollar threshold and "[t]here is a reasonable expectation that at least two eligible program participants will submit offers and that award can be made at a fair market price." 13 C.F.R. § 124.311.

We find that SBA undertook reasonable efforts to ascertain the interest of eligible 8(a) firms, including Wyandotte, in the bulk fuels procurement, and that the agency reasonably determined that there was no reasonable expectation of competition for the reserved 8(a) quantities. In its notice of July 22, SBA specifically solicited expressions of interest in the DFSC bulk fuels procurement from Wyandotte and all other 8(a) firms listed as fuel oil dealers. Although Wyandotte attempted to express an interest in the bulk fuels procurement during the July 31 conversation with the BOS and immediately thereafter, its attempt was frustrated by a good faith misunderstanding between the parties. While SBA's failure to furnish the BOS with a copy of SBA's notice of the bulk fuels procurement may have

contributed to this misunderstanding, as alleged by Wyandotte, we believe that Wyandotte likewise contributed to the misunderstanding. Had Wyandotte characterized its interest as directed towards participating in the "bulk fuels" procurement rather than in furnishing jet fuel, Wyandotte might have alerted SBA to the misunderstanding. Certainly, Wyandotte's failure to specifically identify the procurement in which it was interested in the informational responses it submitted on August 3 and 5 foreclosed the possibility that someone at SBA's regional office might have noticed the discrepancy.

As for Wyandotte's expressions of interest in the bulk fuels procurement during its conversations with SBA and DFSC in October, these occurred well after both the August 14 deadline established by DFSC to avoid delaying the procurement process and after issuance of the solicitation on September 25. Information that first becomes available after issuance of a solicitation does not demonstrate the unreasonableness of a prior determination that there is no reasonable expectation that at least two eligible firms would submit offers. See McGhee Constr., Inc., B-249235, Nov. 3, 1992, 92-2 CPD ¶ 318; A.W. & Assocs., Inc., B-243289, July 10, 1991, 91-2 CPD ¶ 40. In our view, therefore, SBA reasonably determined, based on the information available to it, that there was no reasonable expectation that at least two 8(a) firms would submit offers for any particular 8(a) quantity under the bulk fuels procurement.

As indicated above, however, Wyandotte also argues that, notwithstanding the fact that no more than one 8(a) firm had expressed an interest in any particular location, SBA was required by its regulations, 13 C.F.R. § 124.311(e)(1), to conduct a competition because the agency considered the procurement to be a national buy and there was more than one firm capable of performing the requirement.² 13 C.F.R. § 124.311(e) provides, in relevant part, that:

"Where a contract opportunity exceeds the applicable threshold dollar figure and there is not a reasonable expectation that at least two eligible Program Participants will submit offers at a fair price, SBA may accept the requirement for a sole source 8(a) award if SBA determines that an eligible participant in the 8(a) portfolio

²A national buy procurement is one where procurement responsibility is assigned to a central procuring activity to support the needs of one or more users of the item to be purchased. 13 C.F.R. § 124.100.

is capable of performing the requirement at a fair price.

(1) For purposes of national buy procurements, SBA will accept a contract opportunity above the applicable threshold as a sole-source contract only if there are not two eligible offerors in the United States capable of performing the requirements at a fair price." (Emphasis supplied.)

Section 8(a) of the Small Business Act authorizes SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically-disadvantaged small business concerns. Because of the broad discretion afforded to SBA and the contracting agencies under the applicable statute and regulations, our review of actions under the section 8(a) program is generally limited to determining whether government officials have violated applicable regulations or engaged in fraud or bad faith. Industrial Data Link Corp., B-246682, Mar. 19, 1992, 92-1 CPD ¶ 296.

SBA reads the applicable statutory and regulatory provisions, including subsection 124.311(e) (1), as prohibiting a sole-source contract and requiring a competition only where there is a reasonable expectation that there are at least two 8(a) firms in the United States which are both capable of performing the requirement at a fair price and likely to submit offers for the same requirement. SBA's interpretation of 13 C.F.R. § 124.311(e) (1), read in the context of the overall statutory and regulatory scheme, is reasonable. The relevant statutory language (15 U.S.C. § 637(a) (1) (D) (i)), the general provisions of subsection 124.311(a), and the introductory language in subsection 124.311(e) all state that the applicable test for requiring a competition is whether there is "a reasonable expectation that at least two eligible [8(a) firms] will submit offers." No useful purpose would be served by requiring a competition for the 8(a) portion of a requirement where, irrespective of the existence of a number of 8(a) firms capable of performing, there is no reasonable expectation that at least two such firms would actually submit offers for the same supplies or services. Subsection 124.311(e) (1) can most reasonably be read as simply extending the field of consideration in the case of a national buy to firms anywhere in the United States which are both capable and likely to submit offers. Since no such expectation of competition existed here, we

find no basis to question SBA's actions.
Accordingly, the protest is denied.



for James F. Hinchman
General Counsel