Comptroller General of the United States

Washington, D.C. 20548

Decision

Matter of: HAP Construction, Inc.

File: B-280044.2

Date: September 21, 1998

Johnathan M. Bailey, Esq., Law Offices of Theodore M. Bailey, for the protester.
Lloyd D. Pike, Esq., Department of the Army, for the agency.
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DIGEST

Protest that solicitation terms do not adequately implement statutory requirement to provide preference for local firms, to the extent feasible and practicable, when awarding disaster relief contracts is denied where solicitation does provide for evaluation credit to local firms and the agency process for determining how to provide an appropriate preference is consistent with the statute and implementing regulations and is not otherwise objectionable.

DECISION

HAP Construction, Inc. protests the terms of request for proposals (RFP) No. DACW17-98-R-0008, issued by the Department of the Army, Corps of Engineers, for removing, reducing the volume of, and disposing of debris generated by storms or other natural disasters in the U.S. Virgin Islands (USVI) and Puerto Rico. HAP contends that the RFP fails to conform to the requirements of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5150 (1994) (Stafford Act), which calls for a preference for local businesses in awarding certain disaster relief contracts, to the extent feasible and practicable.

We deny the protest.

The RFP, issued on March 31, 1998, contemplated the award of two indefinite-delivery, indefinite-quantity contracts for debris removal and related services, one of which will cover services in Puerto Rico, the other of which will cover the USVI. Award is to be made on the basis of a best value assessment of

technical factors and price which are to be considered equal in weight. RFP § M.2. The technical factors, listed in descending order of importance are:

(1) Management Plan
(2) Past Performance
(3) Extent of subcontracting with small and small disadvantaged businesses
(4) Location of the offeror's primary place of business

RFP § M.3B.

Section M.3B(3)(b) of the RFP specifically states that the contracts will be subject to the Stafford Act, which provides that:

> In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency. This section shall not be considered to restrict the use of Department of Defense resources in the provision of major disaster assistance under this chapter.

42 U.S.C. § 5150.

Under factor 3, offerors are required to submit a subcontracting plan which "must include provisions for awarding subcontracts to firms that primarily do business in the disaster area," RFP § M.3B(3)(b), and the RFP further provides that the plans would be evaluated, inter alia, to determine the "extent of subcontracting with firms primarily doing business in the disaster area." RFP § M.3D(3).

Under factor 4, offerors are required to provide the "street address of [their] primary place of business," RFP § M.3B(4), and the RFP further provides that those offerors "whose primary place of business is outside the serviced area (either Puerto Rico or the Virgin Islands) should provide a synopsis of the total amount of business they have done in the serviced area in the last 3 years." Id. Additionally, the RFP provides:

> The offeror will be awarded the maximum points if its primary place of business is located in the area where services will be provided; i.e., for services to be performed in Puerto Rico, maximum points will be awarded to Puerto Rican firms; and for services to be performed in the Virgin Islands, maximum points will be awarded to Virgin Islands

> firms. Offerors whose primary place of business is outside the serviced area will be awarded points based on the amount of business they have done in the serviced area in the last 3 years.

RFP § M.3D(4).

Proposals were received on June 12 and are being held, unopened, pending our resolution of the protest in which HAP basically asserts that the "preference" accorded local firms by the RFP falls short of what the Stafford Act, as implemented by Federal Acquisition Regulation (FAR) § 6.302-5, requires.

FAR § 6.302-5 states in pertinent part:

> Full and open competition need not be provided for when . . . [a] statute authorizes or requires that the acquisition be made through another agency or from a specified source.
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> . . . . .
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> This authority may be used when statutes, such as the following, expressly authorize or require that acquisition be made from a specified source or through another agency:
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> (1) Federal Prison Industries (UNICOR)--18 U.S.C. 4124 (see Subpart 8.6).
> (2) Qualified Nonprofit Agencies for the Blind or other Severely Handicapped--41 U.S.C. 46-48c (see Subpart 8.7).
> (3) Government Printing and Binding--44 U.S.C. 501-504, 1121 (see Subpart 8.8).
> (4) Sole source awards under the 8(a) Program[--]15 U.S.C. 637 (see Subpart 19.8).
> (5) The Robert T. Stafford Disaster Relief and Emergency Assistance Act--42 U.S.C. 5150 (see Subpart 26.2).

FAR Subpart 26.2 basically reflects the provision of the Stafford Act quoted above and limits the application of the preference to acquisitions that are conducted during the term of a major disaster or emergency declaration made by the President under the authority of the Stafford Act.

PROTEST, RESPONSE AND ANALYSIS

In its final comments, HAP summarizes its grounds of protest as follows:

> [T]he plain language of the Stafford Act and its inclusion in FAR 6.302-5(b) as a member of a select group of statutory programs

> for which the requirement of full and open competition has been waived, demonstrate that contracts for disaster relief services, such as the instant one, must be awarded to local contractors, where it is feasible to do so. The proper implementation of this requirement should consist of either a set aside for local competition, or an evaluation scheme [where locality is on a virtual par with price] which will produce award to a local contractor, unless all bids from local contractors are so highly priced as to not be feasible for award.

Protester's August 4, 1998 Comments at 3-4.

The agency maintains that the plain language of the Stafford Act gives considerable discretion to the contracting officer in deciding how to structure a preference for local firms. Further, the agency submits that based on recent procurement histories for disaster relief services in Puerto Rico and the USVI, there is no basis for concluding that there will be competition among local firms which will assure reasonable prices; from this, the agency asserts that, for this procurement, a set-aside of the type sought by HAP is not "feasible" within the meaning of the Stafford Act. As for the inclusion of the reference to the Stafford Act in FAR § 6.302-5, the agency argues that, since each of the other statutes listed in that section involve discretion on the part of contracting officers and since the language of the section itself is permissive, the regulatory provision does not automatically compel the absolute preference asserted by HAP. Finally, the agency maintains that an appropriate local firm preference is accorded in the RFP by virtue of technical factor 3--for subcontracting with local firms--and factor 4--for being located in or doing business in Puerto Rico or the USVI.

The following analysis considers the three principal issue areas addressed by the parties: (1) the language of the Stafford Act itself; (2) the effect of the reference to the Stafford Act in FAR § 6.302-5; and (3) the reasonableness of the agency's specific manner of according a preference for local firms in the RFP.

Our Office will not question an agency's implementation of statutory procurement requirements unless the record shows that the implementation was unreasonable or inconsistent with congressional intent. See Harris Corp. Broadcast Div., B-255302, Feb. 10, 1994, 94-1 CPD ¶ 107 at 6. Where a statute requires that a preference be given to a class of potential contractors, but does not specify a particular evaluation formula, agency acquisition officials have broad discretion in selecting evaluation factors that should apply to an acquisition to effectuate the statutory mandate, and the relative importance of those factors. U.S. Defense Sys., Inc., B-251544 et al., Mar. 30, 1993, 93-1 CPD ¶ 279 at 4-5. Further, the determination of the agency's needs and the best methods 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. Id. at 5.

Notwithstanding the language that "preference shall be given" to local firms, both parties recognize that the Stafford Act limits this statement with the phrase "to the extent feasible and practicable." Neither the language of the statute nor, as the parties agree and our research confirms, the legislative history of the Stafford Act, defines the terms "preference," "feasible," and "practicable."

HAP cites a definition of "feasible" in Black's Law Dictionary 609 (6th ed. 1990)--"[c]apable of being done"--in support of its argument to the effect that the plain statutory language of the Stafford Act requires that local firms be preferred whenever it is possible to do so. From this premise, HAP concludes that this procurement must, in effect, be set aside for local firms because it is possible to do so.

This argument ignores the second definition of the term in Black's indicating that for a course of action to be "feasible" it must present a "[r]easonable assurance of success." Id. Further, the protester fails to consider the other limiting term in the Stafford Act--"practicable"--which clearly indicates more than simply being possible. Whether a course of action is "practicable" or not involves a value judgment as to its likely cost and benefit. See GMI, Inc., B-239064, July 3, 1990, 90-2 CPD ¶ 8 at 3 (excessively expensive corrective action is not practicable). In our view, the agency's conclusion that limiting competition to local firms was not feasible because the procurement history did not provide a basis for concluding that there would be adequate competition which would ensure reasonable prices is consistent with an appropriate definition of both the terms "feasible" and "practicable."

Our Office gives deference to the interpretation given a statutory provision by an agency charged with the administration of a statute[1], see Israel Aircraft Indus., Ltd.--Recon., B-258229.2, July 26, 1995, 95-2 CPD ¶ 46 at 5, and we have no basis for questioning the broader definition of "feasible" inherent in the agency's position in this case. Likewise, the language of the Stafford Act does not itself provide any basis to question the agency's interpretation of the undefined term "preference." The record simply does not show that the agency's interpretations are unreasonable or inconsistent with congressional intent.

HAP also argues that inclusion of Stafford Act coverage in FAR § 6.302-5--exceptions to full and open competition when authorized or required by statute--places it within a select group of procurements that are limited to specified sources

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[1]The Corps of Engineers is such an agency with respect to the Stafford Act. See FAR Case 93-303 (regulatory history of the Stafford Act coverage in FAR § 6.302-5) (1993-96) at 12.

and thus calls for award to local firms regardless of competition considerations or restraints. HAP contends that the agency has not met the requirements of the FAR on this basis because of its failure to limit the competition to local firms in this case. Protester's July 21, 1998 Comments at 2.

The language of the regulation is not, as HAP suggests, mandatory. FAR § 6.302-5 (a)(2) states that "[f]ull and open competition need not be provided for when . . . [a] statute expressly authorizes or requires that the acquisition be made . . . from a specified source." (Emphasis supplied.) FAR § 6.302-5 (b) contains an illustrative list of statutes which authorize less than full and open competition; prior to the list itself, the section begins by stating that the regulatory authority "may be used" when one of the listed statutes (or other, non-listed statutes) applies. (Emphasis supplied.) Thus, the plain terms of the FAR section at issue make clear the agency was not required to limit competition in the manner suggested by HAP if it properly concluded that it was not feasible to do so. In short, the statute, as implemented by the regulation provides that an agency may, but does not have to, conduct a set-aside for local firms when procuring disaster relief services.

In this instance, the agency determined that it would not get adequate competition to ensure reasonable prices if it used a local firm set-aside. July 8, 1998 Cover Letter to Agency Report at 8. In our view, this is an appropriate standard to use because, in order to limit full and open competition under the Stafford Act, FAR § 6.302-5(c)(2) requires a contracting agency to support its actions by a written justification and approval including a determination that limited competition will still result in fair and reasonable prices. FAR § 6.303-2(a)(7).

HAP also challenges whether the agency's procurement history supports its conclusions regarding the likely result of limiting competition to local firms. HAP's position is primarily supported by agency disaster relief competitions conducted in 1995; however, since then the more relevant recent procurement history supports the agency's position. For example, for three procurements conducted in 1996 for work in Puerto Rico, local competition consisted of one firm for each acquisition at prices which exceeded the lowest non-local prices by anywhere from 97 percent to 256 percent. Contracting Officer's July 8, 1998 Statement at 3. While HAP did receive a $1,052,199.50 contract in 1996 with local and non-local competition, that contract is now the subject of investigations concerning a request for equitable adjustment exceeding $7,000,000. Id. at 5. Further, in 1997, for an RFP similar to this one, HAP competed as a USVI firm and was not low for work in its area or in Puerto Rico. Finally, the agency reports that under the present RFP, six offers were received but only one was from Puerto Rico and one from the USVI. On this record, we have no basis to challenge the agency's determination that a set-aside would be inappropriate.

Although the procurement was not set aside, the agency did provide for an evaluation preference to be given to local firms. As indicated above, offerors were

to be given evaluation credit under two evaluation factors, for proposing to subcontract with local firms and for being local themselves. Since it does not appear that utilization of local contractors is otherwise related to any need of the agency, these preferences reflect, in effect, a form of limitation on full and open competition and thus appropriately implement FAR § 6.302-5.

Noting that factors 3 and 4 were the least significant technical factors and that price was equal with the entire technical evaluation, HAP argues that no meaningful preference under the Stafford Act is accorded by the present evaluation scheme. The statute does not specify the extent of the preference to be accorded to local firms. Accordingly, we must give deference to the agency's interpretation of the degree to which a preference should be accorded. Israel Aircraft Indus., Ltd.--Recon., supra, at 5. There is no showing that the RFP preference implementation is inconsistent with congressional intent, Harris Corp. Broadcasting Div., supra, at 6, and beyond HAP's mere disagreement, there is no showing that the agency's actions in developing the RFP as it did were unreasonable. See U.S. Defense Sys., Inc., supra, at 5. Accordingly, we have no basis to object to the terms of the solicitation providing a preference which benefits local contractors and subcontractors.

The protest is denied.

Comptroller General
of the United States