Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sun Company, Inc.

File: B-275193

Date: January 29, 1997

Ronald H. Uscher, Esq., and Nick R. Hoogstraten, Esq., Bastianelli, Brown, Touhey & Kelley, for the protester.
J. Keith Burt, Esq., McKenna & Cuneo, for MAPCO Alaska Petroleum, Inc., an intervenor.
Karen E. Schools, Esq., Defense Logistics Agency, for the agency.
Wm. David Hasfurther, Esq., John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that in procurement for fuel, agency should be required to include in bid evaluation all costs associated with government controlled facilities which play a role in the transportation of FOB origin offers is denied where the costs at issue are uncertain and speculative and are largely fixed, in other words, would exist regardless of which firms are awarded contracts.

DECISION

Sun Company, Inc. protests the method proposed by the Defense Fuel Supply Center (DFSC) to evaluate prices under request for proposals (RFP) No. SPO600-97-R-0061, issued for DFSC's annual purchase of bulk fuel for the gulf and east coasts.

We deny the protest.

DFSC makes two major bulk petroleum purchases each year to cover fuel requirements for approximately 400 locations. The agency uses a computer program in its evaluation under those procurements to determine the combination of contract awards that will result in the lowest overall cost to the government. This computer program, or bid evaluation model, calculates evaluated prices based on consideration of numerous factors including: (1) locations requiring fuel; (2) the volume of fuel to be procured for each location; (3) acceptable methods of delivery for each location; (4) identity of each offeror; (5) quantities offered, (6) methods of delivery offered; (7) contingencies in offers, such as all-or-none offers, or maximum and minimum quantities; and (8) transportation costs.

DFSC issued the RFP for the purchase of approximately 1.7 billion gallons of jet fuel, marine fuel, and gasoline for numerous government facilities in the east and gulf coast regions of the United States. Under the RFP, offerors are to propose products for each facility on an FOB destination basis, including delivery to the destination called for by each line item, or FOB origin basis, not including delivery. For FOB origin offers, the RFP indicates that DFSC will calculate the cost of transporting the fuel to the line item destination at government expense and add that cost to the offeror's price. The agency then compares the FOB origin, plus government expense prices, with prices in FOB destination offers (where delivery is at the offeror's expense) to determine the lowest "laid-down," or delivered, price for each facility.

In response to a question asked by Sun, DFSC informed the firm that the costs of using government controlled terminal facilities called Defense Fuel Support Points (DFSP) during transportation of fuel offered FOB origin will not be evaluated when determining the lowest laid-down price. These costs are incurred when the in-transit fuel passes through the DFSPs, such as, for example, when fuel is transferred from a pipeline to a truck or barge.

The protester notes that Federal Acquisition Regulation (FAR) § 47.306 requires the use of "transportation and transportation-related costs" when evaluating offers and that the RFP states that "[t]ransportation rates and related costs shall be used in the evaluation of FOB origin . . . proposals." According to Sun, by refusing to evaluate DFSP costs, the agency is not considering all relevant transportation-related costs in violation of the FAR and the RFP. The protester also maintains that the failure to consider DFSP costs is contrary to the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1) (1994), which requires full and open competition and requires that the agency accept the offer that is most advantageous to the government.

In addition, the protester argues that the failure to evaluate those costs unfairly favors some firms over others. Sun notes that it offers Philadelphia-origin fuel which "in many cases [does] not require the use of a DFSP to reach government line item destinations." Sun states that its offers are competing against FOB origin offers, often from other parts of the country, which the agency will deliver to line item destinations via DFSP terminals. Sun argues that, because the agency refuses to include DFSP costs along with other transportation-related costs in the evaluation, these FOB origin offers receive the benefit of free DFSP transit. According to the protester, in effect, the taxpayers are subsidizing those FOB origin offers to the prejudice of offerors such as Sun which have permissible geographical advantages that allow them to use no DFSPs or fewer DFSPs than gulf coast firms.

Sun also argues that the costs related to DFSPs can be determined, or at least estimated, with reasonable accuracy so this is not a case where the exclusion of particular costs from the evaluation is justified because those costs are speculative. Sun notes that internal agency records show that some DFSC officials believe that DFSC's bid evaluation model is capable of accurately including DFSP costs in the evaluation.

In response to the protest, DFSC explains that DFSPs serve multiple purposes, some of which Sun has ignored, and that it is not feasible to isolate the costs Sun has in mind. First, DFSC states, some DFSPs hold bulk petroleum reserve stock, or war reserves, positioned to reduce reaction time and to ensure adequate support of military forces during the early stages of war until stocks can be replenished. These war reserves cannot be used except in an emergency. Second, according to the agency, some DFSP's hold substantial volumes of operating stock, or inventory required to sustain peacetime operations. The agency reports that military bases typically do not have sufficient storage to satisfy long-term fuel requirements, and need to be resupplied on a regular basis and that the government has carefully positioned its network of DFSPs to meet this need. The agency also notes that regulations require that fuel stocks be positioned as near to the point of intended use as economical and practical to minimize transportation requirements and the impact of hostile disruption of supply lines.

Third, the agency explains that the DFSPs also serve as a means of rotating war reserves and peacetime operating stocks in order to prevent deterioration of the fuel. Finally, according to the agency, it takes advantage of these facilities to store fuel purchased on an FOB origin basis in transit between the origin shipment point and the ultimate destination.

The agency reports that there are three types of DFSP facilities: 1) government-owned government-operated (GOGO), which are operated and paid for by the military services; 2) government-owned contractor-operated (GOCO) which are operated and maintained under contracts of 3- to 5-years duration; and 3) contractor-owned contractor-operated (COCO), which operate under services contracts of 3- to 5-years duration. The agency explains that decisions concerning where DFSP terminals are placed, the amount of storage required, and how those terminals are operated and maintained are long-term strategic choices which are entirely separate from the annual petroleum procurement process. The agency reports that, among other factors, decisions concerning the location and operation of DFSPs are based on war reserve requirements; peacetime inventory requirements; inventory holding costs; receipt capabilities of both the storage facilities and the customers they support, transportation costs, and the effect of the current and alternative systems on competition.

Thus, according to the agency, for purposes of the bid evaluation for bulk petroleum purchases, DFSP costs are fixed, not variable, because the government must operate and maintain the DFSPs regardless of which offerors receive supply contracts and regardless of whether the DFSPs are used for anything other than holding war reserves and peacetime operating stocks. According to the agency, in contrast to DFSP costs, which are fixed and exist regardless of whether the DFSPs play a role in the transit of fuel, the costs associated with commercial pipelines and commercial terminals are included in the bid evaluation model because they are variable transportation costs.

The agency acknowledges that there are some costs associated with using DFSPs for the transit of fuel, but argues that most of the costs of DFSPs are attributable to storage of war reserves and peacetime operating stocks. Moreover, according to the agency, the portion of DFSP costs that can be attributed to the acceptance of any particular offer would be speculative. The agency explains that in order to allocate DFSP costs to particular offers the agency would have to consider that each terminal has different storage capacities and tanks, different levels of war reserves, peacetime operating stocks, and fuel in transit, and for privately-owned and operated facilities, that each contract with an owner-operator is priced differently. As a result of these factors, the agency maintains that the amount of DFSP costs that could be attributed to transit of fuel is uncertain and speculative and, for that reason, the agency should not be required to consider those costs in the bid evaluation.

DFSC notes there is debate within the agency concerning these issues and acknowledges that, as Sun points out, some agency officials believe DFSC could identify the transit costs of DFSPs and include those costs in the bid evaluation. The position of the agency, nonetheless, is that the costs could not be adequately identified. Moreover, DFSC argues that the more important question is whether such costs are fixed or variable, that is, whether they would continue to exist regardless of which firms are awarded petroleum supply contracts.

In a related point, DFSC concedes that, to the extent there are variable costs associated with DFSPs, these costs should be included in the bid evaluation. As an example, the agency agrees with Sun that the New York state spill tax should be included in the bid evaluation, where fuel passes through a New York facility from out of state. The agency also allows that, to the extent DFSC expends any funds at GOGO facilities for incremental throughput charges, the agency will identify and include these costs in the bid evaluation. While conceding that these costs are variable, not fixed, the agency nonetheless argues that the majority of costs associated with DFSPs are not variable costs, but remain constant across all of DFSC's supply options and are no more attributable to other offerors than they are to Sun and therefore should not be included in the bid evaluation.

As a general rule, agencies are required to include cost or price as a significant factor in the evaluation of proposals, 10 U.S.C. § 2305(a)(3)(A)(ii); FAR § 15.605(b). While agencies have considerable discretion in determining the particular method to be used in evaluating cost or price, that method should, to the extent possible, accurately measure the cost to be incurred under competing proposals. BellSouth Telecommunications, Inc., B-258321, Jan. 6, 1995, 95-1 CPD ¶ 10.

The record shows that DFSC identifies and evaluates transportation costs, except most DFSP-related costs, for FOB origin offers and includes those costs in the evaluation. For example, the government includes in the bid evaluation the cost of transporting fuel by pipeline from the origin to a DFSP and of shipping the fuel from the DFSP to the ultimate destination, by truck or barge, for example. Thus, the only costs in question here are those that pertain to the DFSPs themselves. Therefore, this is not a case where the agency is failing to evaluate any transportation costs at all; rather, Sun's position is that CICA and the FAR require the agency to more precisely include in the evaluation all transportation-related costs.

We conclude that the method used by DFSC to evaluate and compare the prices of various offers, which does not include all DFSP facility costs, is a reasonably accurate measure of the actual costs to be incurred by the competing proposals. First, DFSP costs are largely only indirectly related to the transit of fuel. In this respect, DFSPs have functions, and costs, that relate to holding petroleum as war reserves and peacetime operating stocks. The agency represents that these uses of the DFSP facilities, which involve substantial amounts of fuel, would exist regardless of the need to process fuel in transit through those facilities. In this respect, the agency notes that, although the DFSP facilities are involved in processing fuel, some of those facilities are operated under long-term, fixed-price contracts that must remain in place regardless of which offerors receive annual supply contracts.

As explained above, the agency argues that transit costs related to DFSP facilities should not be considered in the evaluation because they are uncertain and speculative.[1] Among other factors, the agency explains that the difficulty of allocating DFSP costs to particular offers is related to the fact that the quantity of fuel that will be shipped to a storage facility in any given time period cannot be accurately predicted and there is no basis for estimating the volume of fuel that will

---

[1]On the other hand, as noted above, the agency concedes that DFSP costs should be considered in the bid evaluation when they can be determined accurately--for example, in the case of the New York state spill tax and GOGO costs for incremental throughput charges.

be shipped to a particular DFSP until after the evaluation has occurred. In addition, the agency asserts that the evaluation factors that would have to be considered would vary widely for each storage facility; each terminal has a different storage capacity and number and size of tanks, different levels of war reserves, peacetime operating stocks, and fuel in transit, and in the case of privately-owned and operated facilities, each contract with an owner-operator is priced differently. The agency also asserts that almost all offers, including FOB origin offers submitted by Sun, include the use of DFSP facilities to transport fuel to the end user.

Thus, in addition to the factors listed by the agency, it is clear that evaluating DFSP facility costs would not be simply a matter of assigning such costs to some offers and no costs to other offers. Rather, in many cases, the bid evaluation, in order to be accurate, would have to assign varying amounts of DFSP facility costs to most offers depending on the number of DFSP facilities involved in that offer.

Based on the development of the record in this protest, it is clear that the determination of the appropriate amount of DFSP related costs to assign to any particular offer would not be a simple matter. We also conclude that the record demonstrates that the costs that can be assigned to any particular offer are a matter of debate, even with the agency. While the particular method to be used by an agency to evaluate prices should, to the extent possible, accurately measure the costs to be incurred under competing proposals, BellSouth Telecommunications, Inc., supra., the evaluation of the most advantageous offer in any procurement should be confined to matters that are reasonably quantifiable. Comdisco, Inc., 64 Comp. Gen. 11 (1984) 84-2 CPD ¶ 416. Given the numerous factors involved in determining the costs for transit through DFSP facilities, and the variability of many of those factors, we have no basis to challenge the agency's view that most DFSP transit costs currently are not reasonably quantifiable.

The protest is denied.

Comptroller General
of the United States