DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60029 97847

FILE: B-183713 DATE: October 9, 1975

MATTER OF: Paul R. Jackson Construction Company, Inc., and Swindell-Dressler Company, a Division of Pullman, Incorporated, A Joint Venture

DIGEST:

1. Geographic restrictions constitute legitimate restriction on competition where contracting agency properly determines that particular restriction is required. Determination of proper scope of restriction is matter of judgment and discretion involving consideration of services being procured, past experience, market conditions, etc. Moreover, use of geographic limitation creates possibility that one or more potential bidders beyond limit could meet Government's needs, therefore, procurement officials should consider extending geographic limit to broadest scope consistent with Government's needs.

2. Use of geographic restriction for procurement of "furnish" asphalt (that asphalt which is picked up, transported, and applied by DC) which limits procurement to those suppliers having facilities located within District of Columbia is not subject to objection, as geographic restriction serves useful purpose of eliminating those suppliers who appear unable to render acceptable "furnish" service to DC due to their decentralized location outside of District of Columbia.

3. Application of geographic restriction to "furnish" asphalt as opposed to "repair" asphalt is proper exercise of procurement discretion, as "furnish" asphalt is picked up, transported, and applied by DC workers whereas repair asphalt is both directly transported and applied by contractor and DC has sought to eliminate added expense of maintaining necessary asphalt temperature which would be required if "furnish" asphalt was procured from suppliers not centrally located within District.

4. Combination by procuring activity of two items in one solicitation (formerly two solicitations had been utilized) is proper exercise of procurement discretion since preparation and establishment of specifications to reflect needs of Government are matters primarily within jurisdiction of procurement

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55 Comp. Gen. .....

agency and record substantiates fact that combination of items results in lower overall cost. Moreover, award can still be on item basis if doing so is in best interests of District of Columbia.

5. Contention that award under instant IFB can only operate to financial detriment of District is without merit, as instant IFB resulted in lower cost to District than prior uncombined procurements for similar items.

6. Allegation that District's policy of affirmatively promoting minority-owned business is thwarted by award under instant IFB is unsubstantiated in record presented.

Invitation for bids (IFB) No. 0050-AA-02-0-6-KA, FY-75 First Asphalt Repair Contract was issued by the Department of Highways and Traffic, Government of the District of Columbia (DC). Bids submitted in response to the IFB were opened on April 28, 1975, the apparent low bidder being Asphalt Construction, Inc.

Prior to bid opening, however, our Office received a letter of protest from counsel on behalf of Paul R. Jackson Construction Company, Inc., and Swindell-Dressler Company, a Division of Pullman, Incorporated, A Joint Venture (J/SD) requesting cancellation or correction of the IFB. The protest arises mainly by reason of § 605.01 of the District of Columbia, Department of Highways and Traffic, Standard Specifications for Highways and Structures (1974) manual, incorporated by reference in the IFB, which states in pertinent part,

> "This work shall consist of furnishing and delivering to District trucks at the contractor's or subcontractor's plant within the District, bituminous mixtures, * * *." (Emphasis supplied.)

The types of asphalt involved in this procurement, "furnish" and "repair," are defined as follows:

"'Furnish' asphalt is that asphalt which is furnished on D.C. trucks and placed by asphalt workers employed by the City.

"'Repair' asphalt is that asphalt which is furnished complete in place by the contractor in conjunction with concrete repairs to utility openings and repairs to defective roadway and alley areas."

Specifically, counsel has raised the following four arguments for cancellation or correction of the IFB:

1. The geographic restriction imposed by the IFB illegally restricts full and free competition.

2. The IFB gives an unfair competitive advantage to certain bidders.

3. The IFB does not serve the best interests of the District of Columbia.

4. Award of the contract, as it is presently drafted, would violate important policies of the District of Columbia.

USE OF GEOGRAPHIC RESTRICTION

Counsel for J/SD recognizes, and we agree, that geographic restrictions may constitute a legitimate restriction on competition where the contracting agency has properly determined, after careful consideration of the relevant factors involved, that a particular restriction is required. See Descomp, Inc., 53 Comp. Gen. 522 (1974), 74-1 CPD 44; Plattsburgh Laundry and Dry Cleaning Corp., B-180380, July 15, 1974, 74-2 CPD 27. But, argues counsel,

"By contrast, the facts of the instant procurement reveal neither 'required' geographic restrictions nor a reasonable basis for such restrictions. Instead of procuring specialized services for which close personal contact is

required, the instant IFB solicits asphalt which, regardless of the source, can be supplied to District trucks as needed, * * *"

DC, on the other hand, contends that,

"The nature of the work under Items 605 002, 605 006, 605 010, 605 014 and 605 016 for furnishing Asphalt on D.C. Trucks has in the past required, and still requires the procurement of this asphalt from plants within the boundaries of the District in order to maintain maximum in-place productivity at minimum in-place costs. The use of asphalt plants outside the District would adversely affect the rate of on-street production and in-place cost for the following reasons.

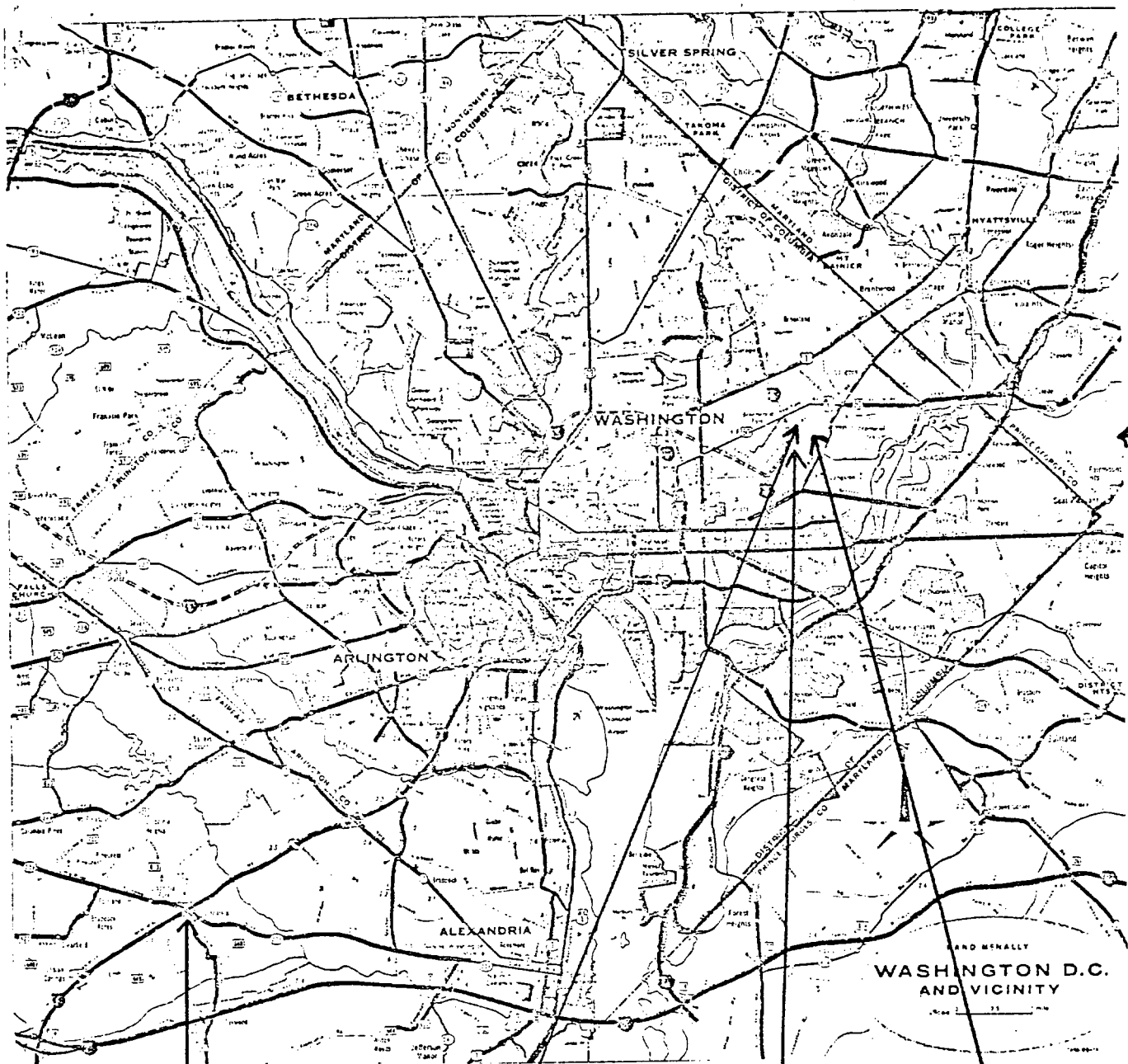
"1. The time of the availability of asphalt at job sites would be reduced due to increased travel time of District trucks to and from the more distant plants. To maintain standard jobsite production would therefore require the employment of additional personnel and equipment, and/or the working of overtime hours, in order to compensate for this increased travel time.

"2. Asphalt, to be usable, must be placed on the streets before its temperature drops below specified limits. The relative short hauls from District plants to job sites on standard body District trucks has allowed asphalt to be placed within specified temperature ranges. The use of plants outside the District would probably result in excessive heat loss to the asphalt with the probable need to expend additional funds to insulate or add heating units to truck bodies to maintain specified asphalt temperatures."

In view of the above, it is DC's position that the geographic restrictions are both necessary and justified for the "Furnish" asphalt, i.e., the asphalt "Furnished on D.C. Trucks."

As mentioned above, our Office has recognized the propriety of the use of geographic restrictions. We have stated that the determination of the proper scope of a restriction is a matter of judgment and discretion, involving consideration of the services being procured, past experience, market conditions, and other factors. See Descomp, Inc., supra, and decisions cited therein. Moreover, wherever a restriction of this type is used there exists the possibility that one or more potential bidders beyond the limit could meet the Government's needs. Procurement officials should, of course, give consideration to extending the geographic limit to the broadest scope consistent with their needs. It is apparent, however, that as the limit is extended, the probability increases that at some point a contract will be awarded, the performance of which entails the difficulties which have been envisioned.

DC has premised its use of a geographic restriction in the instant procurement on the bases of reduced costs, decreased travel time and minimal heat loss during the transport of the "furnish" asphalt. In rebuttal, counsel for the protester invites our attention to the locations of two known potential suppliers outside of Washington, D.C., and the fact that repair work may be necessary at any location in the District. From this, counsel states that one could easily posit several specific situations wherein "furnish" asphalt from either a Virginia or Maryland supplier would reach a specific destination within the District faster and with no less excessive heat loss than from the location of the present in-District awardee (see map below).


SILVER SPRING
BETHESDA
WASHINGTON
ARLINGTON
ALEXANDRIA
RAND MCNALLY
WASHINGTON D.C.
AND VICINITY
Potential Supplier
2nd & 3rd low bidders
D.C. Truck Garage
Current Awardee
Potential Supplier

In our opinion, however, the real issue is not which supplier, whether located in or outside of the District, can reach a specific location faster or with less heat loss, but rather are the suppliers within the established geographic restriction so located as to provide acceptable "furnish" service to any location in the District. Referring to the map above, an examination of the location of the in-District asphalt suppliers discloses that the current awardee, as well as the second and third low bidders, are so situated as to be able to reach any location within the District within a reasonable time. On the other hand, those suppliers located outside of the District, while presumably able to reach one particular area of the District with greater speed, are situated in such a manner so as to make acceptable "furnish" service to many locations within the District unfeasible.

AS noted in 53 Comp. Gen. 102 (1973), the use of a geographic restriction may be valid when doing so "serves a useful or necessary purpose." In the instant procurement, the elimination of those suppliers who appear unable to render acceptable "furnish" services to DC due to their location serves such a "useful or necessary purpose."

Moreover, our Office can understand the position taken by DC concerning the criticality of "heat loss" for "furnish" asphalt as opposed to "repair" asphalt. From the record before our Office, we note that "furnish" asphalt is to be picked up, transported, and applied by DC workers, whereas "repair" asphalt is to be directly transported and applied by the contractor. In our opinion, while a contractor may decide to incur the added expense of maintaining the necessary asphalt temperature DC, in an exercise of procurement discretion, has sought to avoid this added expense by requiring that the "furnish" asphalt be supplied from an asphalt plant within the District. Accordingly, we can find no basis to interpose an objection to this exercise of procurement discretion.

UNFAIR COMPETITIVE ADVANTAGE

Counsel for J/SD has contended that the combination of Class C "repair" asphalt with the Class C "furnish" asphalt creates an unfair competitive advantage for those bidders having asphalt plants within the District. The IFB requires that the "furnish" asphalt be supplied by an asphalt plant within the District. Therefore, counsel argues,

> "If any bidder, prior to its bid, solicits quotations from the existing [District] asphalt producers, the price will likely be sufficiently high to assure award of the contract to the incumbent suppliers. Similarly, if a bidder submits a low bid and then attempts to procure the asphalt after award, the price resulting from the noncompetitive market will undoubtedly be prohibitively high. To submit a bid under such circumstances would be irresponsible, if not foolhardy."

DC, on the other hand, has taken the position that the combination of the asphalt items was a proper exercise of procurement discretion. Admittedly, the contract as now designed is identical in nature to previous contracts through the Spring of 1973, when it was considered to be in the best interest of the District to design and advertise a separate "Asphalt Furnishing Contract" and a separate "Asphalt Repair Contract." But, DC argues,

> "During FY-74 and 75, four (4) separate 'Furnishing' contracts were advertised and let. During this period of time, the price per ton for Class C asphalt on D. C. Trucks rose from $13.70/ton on the FY-74 Asphalt Furnishing Contract, D. C. Contract No. S-24693, to $22.60/ton on the FY-75 Asphalt Furnishing Contract, D. C. Contract No. 0532-AA-56-0-5-HB, or 65%.
>
> "During this same period of time, the price of Class C asphalt for repairs to utility openings, defective roadway and alley areas rose from $48.00/ton on the FY-74 First Asphalt Repair Contract, D. C. Contract No. 21092, to $80.00/ton on the FY-75 Second Asphalt Repair Contract, D. C. Contract No. 0516-AA-02-0-5-KA, or 67%.
>
> "On the present contract in question, the low bidder submitted bids of $17.00/ton for the furnishing of Class C asphalt on D. C. Trucks and $80.00/ton for Class C asphalt for repairs.

> The recombining of both asphalt items under this contract appears to have resulted in no increase in unit price for Class C 'repair' asphalt and a reduction in unit price for Class C 'furnish' asphalt when compared to the prior FY-75 split contracts, thereby resulting in a substantial anticipated savings to the District. (Underscoring supplied.)

As often times stated by our Office, the preparation and establishment of specifications to reflect the needs of the Government are matters primarily within the jurisdiction of the procurement agency, to be questioned by our Office only when not supported by substantial evidence. 38 Comp. Gen. 190 (1958); 37 id. 757 (1958); 17 id. 554 (1938); B-176420, January 4, 1973. We recognize that Government procurement officials, who are familiar with the market conditions under which similar materials have been procured in the past, are generally in the best position to know the Government's needs and best able to draft appropriate specifications. Thus, we have held that the Government cannot be placed in the position of allowing bidders to dictate specifications or minimum needs which would have the effect of creating solicitations otherwise than most advantageous to the Government. East Bay Auto Supply, Inc., 53 Comp. Gen. 772 (1974), 74-1 CPD 193.

Based on the record before us, we find that due consideration was given to the recombination of the asphalt items. Moreover, the record substantiates the fact that such a recombination results in a lower overall cost to DC. Additionally, Article 9 of the Instructions to Bidders has reserved to DC the right to award all or any of the items, according to its best interests. This provision, in our opinion, retains the competitive atmosphere for the "repair" asphalt between District and non-District suppliers, while still insuring that DC pays the lowest overall price for all of the items involved. Therefore, we believe that DC properly exercised its discretion in drafting the specifications reflecting its minimum needs and we will not question this determination.

THE IFB IS CONTRARY TO THE BEST INTERESTS OF THE DISTRICT OF COLUMBIA

Counsel next contends that award under the instant IFB can only operate to the financial detriment of the District. Citing 43 Comp. Gen. 643 (1964) for the proposition that undue restrictions hamper competition, counsel urges that this procurement should be resolicited in a genuinely competitive market.

However, as detailed above, the instant IFB resulted in a lower cost to the District than prior procurements for similar items. Also, in 43 Comp. Gen., supra, our Office held that the award under the protested solicitation was proper in spite of both the restrictions in the IFB and the possible loss of savings on the project.

THE IFB CONTRAVENES IMPORTANT POLICIES OF THE DISTRICT OF COLUMBIA

Counsel for J/SD further alleges that the emerging policy of the District of affirmatively promoting minority-owned businesses cannot be served by the instant IFB. Counsel states that,

> "The requirement that asphalt materials be obtained from the plants of District businesses no doubt reflects the well-intentioned desire to promote local business. Under other circumstances, this design could conceivably justify the imposition of narrow geographic restrictions. Nevertheless, regardless of its intention, this policy must defer to the more immediate policy of promoting minority-owned businesses such as Paul R. Jackson Construction Co., Inc., which in turn will ultimately contribute to the economic development of the District of Columbia."

DC has rebutted the above allegation by noting that the IFB brought bids from two minority-owned firms even without a bid from J/SD. Additionally, a minority-owned firm with an asphalt plant in the District has, for the first time, bid on a major repair contract.

In our opinion, based on the record before us, we cannot conclude that important policies of the District of Columbia Government were contravened under the instant IFB.

Finally, counsel questions the propriety of DC having made an award to Asphalt Construction, Incorporated in view of the fact that this protest was filed prior to the award. However, pursuant to our then applicable Interim Bid Protest Procedures and Standards, 4 C.F.R. § 20.4 (1974), an agency may make an award prior to a ruling on the protest by the Comptroller General by first informing our Office, through a written finding specifying the factors which will not permit further delay in the award. DC fully complied with the above by letter of June 20, 1975.

Moreover, because of this and our failure to object to the use of the geographic restriction, no further discussion on this point is necessary.

In view of the foregoing, the protest of J/SD is denied.

Acting Comptroller General
of the United States