Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: NFA, Inc.

File: B-236455.2

Date: December 11, 1989

DIGEST

1. Protest against award to the only firm offering domestic commodity is denied where the contracting agency properly applied the mandatory preference for domestic commodity clause contained in the solicitation.

2. Protester's allegation that the exception to the preference for domestic commodity clause is applicable to the instant procurement is without merit since the record shows that the domestic commodity is available as and when needed at United States market prices.

DECISION

NFA, Inc., protests the award of a contract to Kendall Healthcare Products Company under request for proposals (RFP) No. DLA 120-89-R-0035, issued by the Defense Personnel Support Center (DPSC) for disposable laparotomy sponges. The protester essentially contends that the mandatory Preference for Certain Domestic Commodities clause is inapplicable to this acquisition.

We deny the protest.

The RFP, as amended on April 27, 1989, required offerors to supply disposable laparotomy sponges in conformance with a commercial item description. The RFP indicated that these sponges are articles of cotton and, pursuant to Defense Federal Acquisition Regulation Supplement (DFARS) § 225.7002(b) (DAC 88-4), the "Preference for Certain Domestic Commodities" clause was included in the solicitation. This clause was authorized by section 8010 of the Department of Defense (DOD) Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-463 and establishes a preference for only such articles of cotton grown in the United States or its possessions. The regulation recognizes an exception to the application of this provision if the Secretary of DOD

determines that a satisfactory quality and sufficient quantity of such articles cannot be acquired as and when needed at United States (U.S.) market prices.

DPSC received four proposals by the May 11 amended closing date. The prices offered ranged from NFA's low offer as a small disadvantaged business of $28.88 per item to $56.53 per item. DPSC reviewed the source/origin of the cotton to be used in the manufacturing process and determined that three firms, including NFA, proposed to supply sponges using cotton grown and/or produced in a foreign country whereas Kendall proposed to furnish sponges made from domestic cotton. The contracting officer determined that Kendall proposed a fair and reasonable price and on August 18 awarded the contract to that firm as the sole offeror of domestic articles of cotton.

NFA contends that DPSC's application of the Preference for Domestic Commodities clause to this acquisition was incorrect. The protester argues that by accepting the only offer proposing to furnish a totally domestic product, the agency was improperly applying the preference for domestic commodities without regard to price. NFA interprets the preference clause to be applicable only when the items are available at U.S. market prices which, the protester maintains, can only be determined if more than one firm offering a domestic commodity responds to the solicitation. Therefore, NFA argues, that as the only firm offering a totally domestic product, Kendall's price is not reflective of U.S. market prices; thus, the exception to the preference for domestic commodity is applicable.

DPSC responds that NFA's interpretation of the preference for domestic commodies is inconsistent with the clear language of the regulation. More specifically, the agency notes that when articles of domestic cotton cannot be acquired as and when needed at U.S. market prices, the appropriate DOD official can grant an exception for the acquisition of foreign articles of cotton. DPSC reports that no such determination was made since a firm--Kendall--offered to meet the agency's needs when and as needed with domestic articles of cotton. DPSC maintains that any contrary reading of the regulation would defeat the intent of the Appropriations Act restriction which is designed to protect the domestic cotton industry by always giving preference to firms using domestic cotton. On that basis, the contracting officer concluded that a sufficient quantity and satisfactory quality of domestic articles of cotton is available and made award to that offeror.

We think DPSC's application of the restriction against foreign cotton was reasonable in light of the availability of domestic cotton through Kendall. In other words, the only reasonable interpretation of the preference for domestic commodities clause is that a procurement involving articles of cotton is subject to the restrictions imposed by the DOD Appropriations Act and the exception to this provision arises only where the Secretary of DOD or his designee determines that a satisfactory quality and sufficient quantity of domestic cotton is not available at U.S. market prices. In this case, the exception which would permit the acquisition of foreign articles of cotton is clearly not applicable since domestic cotton was available in sufficient quantity and quality to meet the government's needs. DFARS § 225.7002(a)(7).

Morecver, NFA's allegation that U.S. market prices cannot be determined from a sole offer of domestic cotton is unreasonable. As the agency correctly points out, there is nothing in the regulation which requires the participation of more than one firm offering domestic articles of cotton for purposes of determining U.S. market prices. We have no basis to object to the contracting officer's comparison of Kendall's price to the procurement history for this item and the current catalog prices for domestic cotton or his finding that Kendall's offered price was fair, reasonable and consistent with the U.S. market price for this item.

Finally, in its initial protest submission, NFA had alleged that its offered product qualified as a domestic end product because the cost of manufacturing the components in the United States exceeds 50 percent of the total end product and 100 percent of the manufacturing is performed in the United States. Because DPSC rebutted these arguments in its report on the protest and the protester did not pursue these bases of protests in its comments on the agency report, we consider them abandoned. See F&E Erection Co., B-234927, June 19, 1989, 89-1 CPD ¶ 573. In view of our resolution of the protest, NFA's claim for cost is also denied. See 4 C.F.R. § 21.6(d) (1989).

The protest is denied.

James F. Hinchman
General Counsel