Glass

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Interior Elements, Inc.

File: B-238117

Date: March 29, 1990

Joseph G. Billings, Esq., Spriggs & Hollingsworth, for the protester.
Pamela J. Reiner, Esq., Office of the General Counsel, General Services Administration, for the agency.
Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency determination to use f.o.b. destination delivery terms for multiple-award Federal Supply Schedule contracts for conference room tables is not legally objectionable where there has been no showing that the determination was unreasonable, unduly restricted competition, or was inconsistent with applicable regulations.

DECISION

Interior Elements, Inc., protests the terms of request for proposals (RFP) No. FCNS-89-G201-B-12-21-89, issued by the General Services Administration (GSA) for multiple-award Federal Supply Schedule (FSS) contracts to supply conference room tables for the period from July 1, 1990 through June 30, 1994. Interior alleges that the solicitation requirement that offers be submitted exclusively on an f.o.b. destination basis is unduly restrictive of competition, violates GSA policy, and is inconsistent with applicable regulation.

We deny the protest.

The RFP, issued on November 3, 1989, provided that multiple awards would be made to those offerors whose offers, conforming to the solicitation, were most advantageous to the government. Offerors were required to submit prices on an f.o.b. destination basis and were cautioned that award

would be made on that basis only. (This was a change from the previous year's solicitation, under which an offeror had the option of offering on either an f.o.b. origin or f.o.b. destination basis.) Prices offered were to cover delivery to destinations located within the 48 contiguous states and the District of Columbia. This protest was filed 1 day prior to the closing date.

Of the 51 offers subsequently received in response to the solicitation, 40 submitted offers on an f.o.b. destination basis. Interior submitted five offers, all of which offered f.o.b. destination, at least on an alternative basis. Our discussion of the grounds of protest follows.

RESTRICTIVENESS OF REQUIREMENT

Interior's basic objection to GSA's requirement for submission of prices exclusively on an f.o.b. destination basis is that the requirement is not necessary to satisfy the needs of the government and unduly restricts competition in violation of the Competition in Contracting Act (CICA), 41 U.S.C. § 253(a)(1)(A) (Supp. IV 1986). Interior contends that the new requirement excludes as a source those manufacturers that do not customarily sell on an f.o.b. destination basis. Interior argues that three of its manufacturers refused to provide f.o.b. destination prices because their commercial practice is f.o.b. origin, and that Interior offered alternative f.o.b. destination prices to avoid rejection of its offer.

The agency states that the contracting officer decided to eliminate the option of f.o.b. origin delivery terms under this solicitation because experience showed that f.o.b. origin contracts did not work well, and numerous problems arose in determining the overall lowest price, in freight claims, and in contract administration. The agency reports that under f.o.b. origin contracts, ordering agencies had to bear certain responsibilities, such as obtaining delivery terms from carriers and processing freight claims, which required the expenditure of resources by the ordering agencies, some of which did not have the personnel or expertise to adjudicate freight claims. The agency further states that the average order under this solicitation is for two to five units, making any possible savings on delivery unlikely. In short, the agency maintains that the administrative burden and cost of evaluating offers on f.o.b. origin terms far outweigh any "savings" that may be realized on any individual order.

An agency is required to specify its needs and select its procurement approach in a manner designed to promote full

and open competition. See LaBarge Products, Inc., B-232201, Nov. 23, 1988, 88-2 CPD ¶ 510. Restrictive provisions should only be included to the extent necessary to satisfy the agency's minimum needs. The contracting agency, which is most familiar with its needs and how to fulfill those needs, must make the determination in the first instance. Id.

In our view, the agency has reasonably explained its decision to require offers exclusively on an f.o.b. destination basis. The purpose of the FSS multiple award contracts is to simplify purchasing of commonly used items by individual government agencies. See 41 C.F.R. §§ 101-26.402-1 and 101-26.403-1 (1989). The agencies are responsible for identifying and ordering the lowest cost item meeting their needs that is available from the FSS contracts, unless they can justify ordering a more costly item. In determining cost, the agencies are also responsible for evaluating delivery costs, if any.

We find reasonable GSA's opinion in this case that individual ordering agencies should not have to evaluate the prices of numerous f.o.b. origin contractors, which would involve a separate determination by the government of the shipping costs for each f.o.b. origin contractor, and a comparison of each of those with the prices of f.o.b. destination contractors to determine the lowest overall cost. GSA's concern about this administrative burden seems particularly apt because the average order under this FSS contract is anticipated to be only for two to five tables.1/ In short, the requirement here for prices to be submitted on an f.o.b. destination basis is consistent with the purpose of the FSS schedule, which is to simplify the purchase of commonly used items.

POLICY VIOLATION

Next, Interior contends that the requirement for f.o.b. destination terms only does not comply with GSA's published policy of conforming its multiple award schedule procurement practices with commercial practices and making those practices fair to all parties. See 47 Fed. Reg. 50,242 (1982). Interior argues that the commercial practice of the

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1/ Since each procurement is a separate transaction and must stand alone, Inter-Continental Equipment, Inc., B-225689, May 14, 1987, 87-1 CPD ¶ 511, we remain of this view even though, as the protester asserts, other FSS contracts undoubtedly exist with both f.o.b. origin and destination terms that are also burdensome to evaluate.

furniture industry is to provide a variety of delivery terms and that GSA should allow offerors to provide delivery terms consistent with their own commercial practices.

GSA's policy, as reflected in the policy statement which we have reviewed, is to employ commercial practice to the extent practical taking into consideration cost effectiveness and fairness to all parties. While violation of this policy alone would not affect the legal validity of the agency's action, in this case, GSA has specifically determined that with respect to the purchase of conference tables, it is neither cost effective nor reasonable for agencies with inexperienced personnel to receive and evaluate offers on an f.o.b. origin basis. The policy statement itself does not contain any specific requirement with respect to delivery terms. It therefore does not appear that GSA has violated its program policy here.2/

REGULATORY VIOLATION

Finally, Interior argues that the requirement violates Federal Acquisition Regulation (FAR) § 47.304, "Determination of delivery terms." Specifically, Interior contends that the FAR directs the contracting officer to use f.o.b. origin where, as here, the destinations are unknown and freight charges cannot be calculated for individual shipments.

We do not believe GSA has violated the FAR. The FAR gives broad discretion to the contracting officer to determine the appropriate delivery terms to be included in a solicitation. Although the FAR does provide that f.o.b. origin is appropriate where destinations are tentative or unknown, the FAR also recognizes several situations where f.o.b. destination is appropriate. For example, when acceptance must be at destination, the FAR states that the solicitation exclusively shall be on an f.o.b. destination basis. FAR § 47.304-1(f). The FAR further lists several conditions where solicitations normally should be on an f.o.b. destination only basis because it is advantageous to the government. The one instance that is especially applicable here is where "[e]valuation of f.o.b. origin offers is anticipated to result in increased administrative lead time

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2/ The protester also argues that the f.o.b. destination requirement modified published GSA policy, requiring publication by GSA in the Federal Register of a notice of proposed regulation. Since we find no modification of published policy, we are not persuaded by this argument.

or administrative cost that would outweigh the potential advantages of an f.o.b. origin determination." FAR § 47.304-1(g)(5).

Here, the contracting officer, on the basis of the FAR provisions, determined that the problems of increased administrative lead time and cost under f.o.b. origin contracts outweigh the benefits that may be realized under such contracts and that the f.o.b. destination requirement best met the government's needs. The protester has failed to show that the contracting officer's decision was unreasonable or an abuse of discretion.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel