Pietrovito

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Commercial Energies, Inc.

File: B-240148

Date: October 19, 1990

Gregory Kellam Scott, Esq., for the protester.
Judy K. Stewart for Union Natural Gas Pipeline Company, an interested party.
Timothy Thompson, Esq., and Louise Hansen, Esq., Defense Logistics Agency, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation for natural gas from wellhead producers and its transmission via the interstate pipeline to local distributing companies reasonably was found not to be a contract for utility services within the meaning of the Department of Labor's regulatory exemption from the application of the Walsh-Healey Act and thus the Walsh-Healey Act is applicable to the procurement.

2. Procuring agency properly did not set-aside procurement for small disadvantaged business (SDB) concerns where the agency determined that there was no expectation of receiving offers from two or more SDBs which would be eligible for award as manufacturers/producers or regular dealers as required by the Walsh-Healey Act.

DECISION

Commercial Energies, Inc. (CEI) protests that request for proposals (RFP) No. DLA600-90-R-0126, issued by the Defense Fuel Supply Center, Defense Logistics Agency (DLA), for the supply of natural gas, should have been set aside for small disadvantaged businesses (SDB).

We deny the protest.

The RFP was issued as a small business set-aside and contemplated the award of a fixed-price contract with economic price adjustment to provide direct supply natural

gas,1/ via the interstate pipeline to the city gate at the local distribution company (LDC) for 16 government installations in Indiana and Illinois.2/ Offerors were informed that the supply of natural gas was considered the supply of a commodity and that the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 et seq. (1988), was applicable to this procurement.

CEI, an SDB concern, protests that, pursuant to the Department of Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.502-72(a) and 219.504(b) (1988), DLA was required to set aside the RFP for SDBs since there was a reasonable expectation that offers could be obtained from at least two or more responsible SDB concerns. DLA responds that prior to the issuance of the RFP the contracting officer conducted an extensive market survey and determined that there were no SDB concerns which would be eligible for award as manufacturers (producers) of or regular dealers in natural gas as required by the Walsh-Healey Act.

The Walsh-Healey Act requires, among other things, that contracts for "supplies" be awarded only to manufacturers or regular dealers, see 41 U.S.C. § 35(a), and imposes certain employment standards on government contractors by providing that contracts made or entered into by the government for the manufacture or furnishing of materials, supplies, articles and equipment will include minimum wage requirements, child and convict labor restrictions, and work safety provisions. The Act is administered by the Secretary of Labor and implemented with regulations published at 41 C.F.R. chapter 50 (1989).

CEI argues that the Walsh-Healey Act is not applicable to this procurement because the RFP contemplated the award of a contract for utility services, which are exempt from the Act. The Secretary of Labor, pursuant to authority granted by the Walsh-Healey Act, 41 U.S.C. § 40, exempted "[c]ontracts for public utility services including electric light and power, water, steam and gas" from the application of the Act.3/ See 41 C.F.R. § 50-201.603(a).

1/ The RFP defines "direct supply natural gas" as being natural gas purchased directly from producers or other sources as a commodity.

2/ The "city gate" is the connection between the interstate pipeline and the LDC.

3/ The term "public utility services" is not specifically defined in the Walsh-Healey Act or in the regulations thereto.

DLA asserts that it is not acquiring utility services in this procurement but rather natural gas as a commodity from producers or dealers. The agency explains that the production and transmission of natural gas has been deregulated, see, e.g., The Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 et seq. (1988), as amended by The Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989), and that this deregulation provides consumers, including the government, with the opportunity to choose whether to acquire natural gas service from the LDC, or, as here, to acquire natural gas directly from wellhead producers or dealers as a commodity.4/ DLA contends that the supply of natural gas and its transmission through interstate pipelines are not utility services. The agency states that the installations, for which DLA is purchasing direct supply natural gas, will enter into separate public utility service contracts with the LDCs to distribute the natural gas purchased from the wellhead and received at the city gate.

DLA has submitted a letter from the Administrator of Labor's Wage and Hour Division, stating that this procurement is subject to the Walsh-Healey Act. Labor explains that public utility services were administratively exempted from application of the Walsh-Healey Act by 41 C.F.R. § 50-201.603 because public utilities were otherwise regulated and the application of Walsh-Healey's labor standard provisions was not necessary. Labor finds that the RFP here involves the "acquisition of deregulated natural gas" from producers or regular dealers and regulated utility services, and concludes that the public utility services exemption does not apply and the procurement is subject to the Walsh-Healey Act.

CEI argues that we should accord no weight to Labor's interpretation of this regulatory exemption because Labor has no authority to determine the applicability of the Walsh-Healey Act where the eligibility of small business firms is concerned. The protester contends that the Small Business Administration (SBA), pursuant to its authority to regulate small business matters, has determined that SDBs and other

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4/ The natural gas industry is comprised of three major segments: (1) the wellhead or production segment, in which natural gas is extracted from the ground; (2) the pipeline or transmission segment, in which the gas is transported by pipeline to the city gate; and (3) the local distribution segment, in which utility companies and/or distribution companies distribute the gas locally to commercial and residential customers. See Broadman and Kalt, How Natural Is Monopoly? The Case of Bypass in Natural Gas Distribution Markets, 6 Yale J. on Reg. 181, 182 n.11 (1989).

small business firms which supply natural gas are not subject to the Walsh-Healey Act.

The Secretary of Labor has primary responsibility for the administration of the Walsh-Healey Act. See 41 U.S.C. § 38; WestByrd, Inc., 69 Comp. Gen. 238 (1990), 90-1 CPD ¶ 159. The Secretary has delegated the authority to promulgate regulations and issue official rulings and interpretations to the Administrator of Labor's Wage and Hour Division. 41 C.F.R. § 50-206.2. SBA, on the other hand, has the more limited authority to determine the eligibility of small business concerns as manufacturers or regular dealers under the Walsh-Healey Act. See 15 U.S.C. § 637(b)(7)(B) (1988); FAR § 22.608 (FAC 84-56).

CEI has not challenged DLA's statement that CEI is not a regular dealer or manufacturer. Thus, CEI's eligibility under the Walsh-Healey Act is not in issue but rather the issue is the applicability of that Act to this procurement. Accordingly, Labor's views, not SBA's, are pertinent to this case.

In dealing with the interpretation of statutes that have been committed to a federal agency for enforcement and implementation, the agency's interpretation is entitled to great deference. See Udall v. Tallman, 380 U.S. 1 (1964). Where construction of an administrative regulation, rather than a statute, is in issue, the agency's interpretation is deemed of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Id. Furthermore, remedial statutes, such as the Walsh-Healey Act, are entitled to be liberally construed, and exemptions thereto are read narrowly. See Menlo Serv. Corp. v. United States, 765 F.2d 805 (9th Cir. 1985).

We do not find Labor's view that the RFP is subject to the Walsh-Healey Act to be unreasonable or erroneous. 41 C.F.R. § 50-210.603 only exempts public utilities from the application of the Walsh-Healey Act. Since public utilities were exempted because they were already regulated,5/ and the

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5/ Similarly, the Service Contract Act, 41 U.S.C. § 356(5) (1988), statutorily exempts any "contract for public utility services, including electric light and power, water, steam and gas." The regulations interpreting this section indicate that the "exemption is applicable to contracts for such services with companies whose rates therefor are regulated under State, local and Federal law governing the operations of public utility enterprises." 29 C.F.R. § 4.120 (1989).

natural gas industry has been deregulated,6/ Labor has reasonably found that wellhead producers need not be public utilities.7/ Thus, DLA and Labor reasonably found that this RFP was for the acquisition of a commodity, not a service.

CEI argues that the RFP contemplated the performance of substantial services in addition to the supply of natural gas and thus this is a procurement for services and not supplies. In this regard, CEI states that the RFP listed Standard Industrial Classification (SIC) codes 1311 and 4924 for natural gas extraction and natural gas distribution, respectively, which it contends show that this RFP contemplated a public utility services contract.

Notwithstanding the SIC codes referenced in the RFP,8/ the RFP does not provide for the distribution of gas to government installations. While it is true that the RFP requires the performance of services such as the processing, sampling and inspection of gas supplies, as well as its transmission via the interstate pipeline, these services are incidental to the supply of the natural gas. Thus, the RFP principally is for supply of natural gas as a commodity and not to obtain services. The inclusion of these incidental services in the RFP does not change the basic character of

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6/ CEI argues that Labor erred in determining that natural gas producers were not regulated. CEI contends that while the natural gas industry has been generally deregulated, the industry is still subject to significant regulation at the federal, state and local level. This contention is without merit. It can be taken as a given that business entities in this country are subject to regulation at some level but the regulation to which Labor refers is the regulation of public utilities. In this regard, CEI does not contend that it is a regulated public utility within the meaning of Labor's regulatory exemption to the Walsh-Healey Act.

7/ CEI also complains of the "non-adversarial" nature of Labor's determination because CEI did not participate in the determination. CEI, however, received a copy of DLA's request to Labor for its determination in this matter and apparently chose not to participate. Accordingly, CEI's failure to provide its views to Labor provides no basis on which to object to Labor's determination.

8/ We do not understand why the RFP referenced the SIC code for the distribution of gas. As noted by the protester, a more recently issued solicitation for the acquisition of direct supply natural gas does not mention this SIC code.

the acquisition. See generally Tenavision, Inc., B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114.

CEI also cites DFARS Supplement No. 5 and the agreement of understanding between the General Services Administration and the Department of Defense (DOD) concerning DOD's procurement of utility services as requiring DLA to purchase gas through a public utility services contract.9/ We disagree.

The supplement and agreement do not address the applicability of the Walsh-Healey Act, which is the issue here. Moreover, the supplement and agreement both predate the deregulation of the natural gas industry and reflect the situation then existing, which generally required the government to acquire natural gas as a utility service from an LDC. In this regard, both the supplement and the agreement define "utility services" in terms of distributing or furnishing natural gas to the ultimate user.

The RFP, however, is to obtain natural gas from producers and transmit the gas to an LDC, which will distribute the gas to the government under a separate public utility services contract. Neither the supplement nor the agreement prohibit DLA from separating the acquisition of gas supplies, and their transmission via the interstate pipeline, from a public utility services contract for the ultimate distribution of the gas.

The protester primarily relies on our decision in 45 Comp. Gen. 59 (1965), which stated that natural "gas is by definition a utility." CEI argues that therefore any contract for the furnishing of gas is by definition a utility services contract within the meaning of the regulatory exemption to the Walsh-Healey Act.

That decision, which also predated deregulation of the natural gas industry, involved a procurement for the distribution of gas to the installation and not, as here, the production and transmission of natural gas to a distributor.

9/ The Federal Property and Administrative Services Act, 40 U.S.C. § 481(a) (1988), grants GSA the authority to manage, procure, and supply public utility services to the government. The Act also provides that DOD may procure its own utilities services where it is in the best interest of national security. Pursuant to this authority, GSA and DOD agreed that DOD would procure its own utility services. Procurement of Utility Services (Power, Gas, Water), Statement of Understanding Between Department of Defense and General Services Administration, Nov. 2, 1950, reprinted in, 15 Fed. Reg. 8227 (Dec. 1, 1950).

Furthermore, the issue in that decision was not the applicability of the Walsh-Healey Act, but whether the procuring agency had the authority to enter into a long-term, public utility services contract under the Federal Property and Administrative Services Act, 40 U.S.C. § 481(a)(3). We found, inter alia, that 40 U.S.C. § 481(a)(3) was enacted to permit the government to enter into such long-term contracts as a means of effecting economy, and that this statutory provision was not restricted to contracts with regulated, public utilities. In determining what was a "utility service" within the meaning of that statute, we stated that it was the nature of the service provided and not the nature of the provider that determined the applicability of that statutory provision.10/

As discussed above, the purpose of the regulatory exemption for public utilities under the Walsh-Healey Act was to excuse from the labor provisions of the Act public utility concerns which were otherwise regulated. Thus, under Labor's view, whether or not a firm should be exempt from the application of the Walsh-Healey Act depends upon the nature of the provider and not the services rendered. Accordingly, whether the acquisition of natural gas is considered to be a public utility services contract under 40 U.S.C. § 481(a)(3) is not controlling as to whether the Walsh-Healey Act is applicable. In this regard, we found in 62 Comp. Gen. 569 (1983), which also involved the application of 40 U.S.C. § 481(a)(3), that:

> "[T]he concept of what product or service constitutes a public utility service is not static for the purpose of statutory construction, but instead is flexible and adaptive, permitting statutes to be construed in light of the changes in technologies and methodologies for providing the product or service. Finally, it is also clear that while a particular activity may be a public utility service for the purpose of one law, the same activity may not be a public utility service for the purpose of another law." 62 Comp. Gen. supra, at 575. [Footnotes omitted.]

Thus, DLA and Labor reasonably found that the RFP was not to acquire public utility services within the meaning of the regulatory exemption to the Walsh-Healey Act. Therefore, offerors under the RFP were required to be manufacturers/

10/ In that case, we found it doubtful that the awardee was a public utility because it was not subject to regulatory control and did not serve the public generally with natural gas.

producers or regular dealers as required by the Walsh-Healey Act to be eligible for award.

DLA found no SDB concerns which would qualify as manufacturers/producers or regular dealers in natural gas. CEI does not dispute that it is not a regular dealer or manufacturer/producer, nor has it identified other eligible SDB concerns. Accordingly, the agency acted properly in not setting this procurement aside for SDB concerns.

The protest is denied.

James F. Hinchman
General Counsel