Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Las Energy Corporation

File: B-242733

Date: May 21, 1991

Leslie H. Lepow, Esq., and John M. Barr, Esq., Jenner & Block, for the protester.
Richard D. Saviet, Esq., Defense Logistics Agency, for the agency.
Steven W. DeGeorge, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Generally, statutes and regulations governing regular federal procurements are not strictly applicable to reprocurement after default; General Accounting Office will review reprocurement only to determine if the contracting agency's actions were reasonable in the circumstances. Decision to limit reprocurement of jet fuel to historical suppliers based upon an urgent need for such fuel was reasonable under the circumstances of this case.

DECISION

Las Energy Corporation protests the refusal of the Defense Logistics Agency, Defense Fuel Supply Center (DFSC), to provide it an opportunity to submit a proposal in response to request for proposals (RFP) No. DLA600-91-R-0093 for the fulfillment of JP-4 jet fuel requirements of 31 activities located in the Eastern Inland United States. The solicitation was issued as a reprocurement following the default termination of a previously awarded contract for these same requirements. The protester contends that it is a responsible small disadvantaged business (SDB) capable of supplying the required fuel. The protester further contends that it was improperly refused a copy of the RFP and that the agency lacked a reasonable basis to restrict this reprocurement to certain preselected firms.

We deny the protest.

The RFP was issued on January 16, 1991, as a reprocurement for JP-4 jet fuel requirements that had been the subject of a

contract awarded to Phoenix Petroleum Company in 1990. The Phoenix contract was terminated for default on January 15 due to alleged delivery failures. According to the agency, Phoenix had delivered only 1.9 million gallons of the total 31.2 million gallons which had been ordered under the contract. Approximately 5.5 million gallons of this shortfall has since been obtained from other sources.

The day after the default of the Phoenix contract, the contracting officer wired the subject RFP to 10 firms. The selected firms consisted of the nine original competitors for the defaulted Phoenix contract, less Phoenix, and one additional firm which is a current supplier of JP-4 under other DFSC contracts. According to the contracting officer, these particular firms were selected because, in his view, they presented no question regarding the technical, financial and other capability needed to supply the requirements. The contracting officer felt it necessary to restrict the solicitation to these historical suppliers of JP-4 because, in his view, an urgent need existed for the requirements, which could not withstand a potentially time-consuming preaward survey of a questionably capable supplier.

The solicitation called for an indefinite quantity of up to 91,609,000 gallons of JP-4 intended to cover the remaining 8-month period of the Phoenix contract. The contracting officer determined to reprocure the entirety of the remaining requirements of the Phoenix contract, as opposed to some smaller amount, because he believed that better prices could be obtained for the larger requirement, thus mitigating potential damages to Phoenix.

Learning that a solicitation for JP-4 had been issued by DFSC, the protester telefaxed a letter to the agency on January 23, requesting a copy of the RFP. On this same date, the president of Las Energy spoke with the contracting officer by telephone and orally requested a copy of the solicitation. In that telephone conversation, the contracting officer refused the protester's request, explaining his decision to restrict the reprocurement to historical suppliers based upon his urgency determination. The contracting officer also advised the protester that the closing date of the solicitation was the following day, January 24 at 12 noon. Las Energy filed its protest with our Office 5 minutes prior to this closing time.

Seven proposals were received in response to the solicitation. Following best and final offers, awards were made to four firms for varying quantities of JP-4 at prices determined by the agency to be reasonable. In fact, the agency reports that 68 percent of the amount of JP-4 covered by the awards was priced lower than under the defaulted Phoenix contract.

The protester basically contends that it should not have been excluded from competing for this reprocurement. The protester argues that the urgency relied upon by the agency as the basis for its restrictive action did not truly exist. In this regard, the protester maintains that the agency was actually not in danger of a critical shortage of JP-4 fuel reserves relative to the locations concerned, and could have easily diverted excess fuel from other locations if necessary. Furthermore, the protester objects to the agency's decision to include the entirety of the requirements remaining under the Phoenix contract in this reprocurement. The protester maintains that the reprocurement should instead have been limited in scope to the amount of JP-4 ordered but not delivered prior to the default, since that is the maximum amount which, according to the protester, could reasonably be considered urgently needed.1/

Generally, in the case of a reprocurement after default, the statutes and regulations governing regular federal procurements are not strictly applicable. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. Under the Federal Acquisition Regulation (FAR), the contracting officer may use any terms and acquisition method deemed appropriate for repurchase of the requirement, but must repurchase at as reasonable a price as practicable and obtain competition to the maximum extent practicable. FAR § 49.402-6. Our review of a reprocurement therefore is limited to determining whether the contracting agency proceeded reasonably under the circumstances. See TSCO, Inc., 65 Comp. Gen. 347, supra. Based upon the record here, we find that the agency's actions were in fact reasonable.

1/ In its comments on the agency report, Las Energy argued, for the first time, that the reprocurement should have been conducted as an SDB set-aside. This allegation is untimely under our Bid Protest Regulations. A protest must be filed within 10 working days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1991). Here, Las Energy obtained a copy of the solicitation, which should have disclosed this basis for protest, no later than February 4. However, its comments on the agency's report were not filed until March 11. Where a protester files a timely protest and later supplements it with new and independent grounds of protest, the latter raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation of protest issues. EER Sys. Corp., 69 Comp. Gen. 207 (1990), 90-1 CPD ¶ 123.

The central basis for the agency's decision to restrict this reprocurement to historical suppliers of JP-4 fuel, thereby excluding the protester, was a finding that the requirements were urgently needed. The agency reports that, according to data available to the contracting officer, applicable fuel reserves had been depleted and were approaching critical war reserve levels. In addition, the continued diversion of fuel from the Gulf Coast region to the Eastern Inland region, in order to compensate for fuel undelivered by Phoenix, had reportedly become intolerable because of the need to maintain the war readiness posture of those Gulf Coast activities.

While the protester disputes the amount of fuel available to the agency, we think the circumstances described by the agency, particularly in light of the Persian Gulf conflict then taking place, reasonably could lead the contracting officer to believe that he was faced with an urgent situation, such that he reasonably could decide to restrict the reprocurement to historical, reliable suppliers so that he could make award promptly after receipt of offers. See Aerosonic Corp., 68 Comp. Gen. 179 (1989), 89-1 CPD ¶ 45.

In this regard, the contracting officer reports that Las Energy was not a reliable or historical supplier--it had never been awarded a bulk fuel contract by DFSC, having been found nonresponsible by both DFSC and the Small Business Administration on those occasions when it responded to bulk fuel solicitations, and was experiencing performance problems and had been defaulted in connection with other fuel contracts. Thus, while we believe that it would have been appropriate for the agency to have provided a copy of the RFP to Las Energy in response to its requests, see FAR § 5.102(a)(2), since the reprocurement was reasonably limited to historical suppliers and Las Energy was not such a supplier, no prejudice to the protester resulted from this action. See Merrick Eng'g, B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130.

We also view as reasonable the agency's decision to include the entirety of the remaining requirements under the Phoenix contract within the scope of this reprocurement. The agency reports that this was necessary so as to attract a sufficient number of offers in order to obtain favorable prices and accordingly mitigate damages to Phoenix. In support, the agency refers to its prior experience with procurements for small quantities of JP-4, where relatively few offers were received. The agency explains further that in its experience, bulk refiners are typically reluctant to contract for small quantities of JP-4 due to the time and expense necessary to reconfigure their refineries in order to produce military jet

fuel. In our view, these were appropriate considerations on the part of the agency and reasonably supported its decision to maximize the scope of the reprocurement.

The protest is denied.

for James F. Hinchman
General Counsel