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

Decision

Matter of: Commercial Energies, Inc.

File: B-243402

Date: July 30, 1991

G. Kellam Scott, Esq., for the protester.
J. Abel Godines for Krystal Gas Marketing Company, Livia Whisenhunt for Petroleum Source & Systems Group, Inc., and Judy K. Stewart for Union Natural Gas Pipeline Company, the interested parties.
Gregory Zagorin, Esq., Defense Logistics Agency, for the agency.
Robert C. Arsenoff, Esq., and John W. Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of a decision not to set a solicitation aside for small disadvantaged businesses (SDBs) is denied where agency reasonably determined that it would not receive offers from at least two responsible SDBs and where, for a portion of its requirements, agency reasonably concluded that its requirements for natural gas had been previously acquired successfully through small business set-asides.

2. Agency is not required to apply evaluation preference for small disadvantaged businesses to contract price elements which are not evaluation factors for award.

3. Evaluation preference for small disadvantaged businesses is authorized by statute governing the obligation of Department of Defense (DOD) funds only and, therefore, should not be used in evaluation items which are to be acquired with non-DOD funds.

DECISION

Commercial Energies, Inc. (CEI) protests the terms of request for proposals (RFP) No. DLA600-91-R-0119, issued by the Defense Logistics Agency (DLA) as a partial small business set-aside for the supply of natural gas to various government installations in and outside the Department of Defense (DOD) in three designated regions: No. 1, Northeast; No. 2, Southeast; and No. 3, Midwest. CEI principally alleges that DLA was required to set the procurement aside for small

disadvantaged businesses (SDBs), and that DLA failed to properly extend a price evaluation preference for SDBs under DOD Federal Acquisition Regulation Supplement (DFARS) § 219.7001 to all price factors and to all items to be evaluated.1/

We deny the protest in part and dismiss it in part.

The RFP contemplates item-by-item awards for various locations to the responsible offeror with the lowest "total adjustment factor" (TAF), which is defined as the sum of a "supply adjustment factor" and a "transportation adjustment factor"--the only price elements listed in the schedule of items which could vary among competitors.2/ In addition, pursuant to DFARS § 219.7001, the RFP provides for a 10-percent evaluation preference to be added to the evaluated prices of non-SDBs when competing with SDBs. The RFP also provides for the application of such a preference only to those items which involve DOD locations.

1/ The listed issues are those we will consider. We conclude that CEI has abandoned other allegations involving bad faith on DLA's part and the use of ceilings in the RFP's economic price adjustment clause since DLA responded to these issues in its report and CEI provided no rebuttal to the agency's positions in its comments on that report. Accordingly, we dismiss these allegations. Anderson-Elerding Travel Serv., Inc., B-238527.3, Dec. 19, 1990, 90-2 CPD ¶ 500. Likewise, we dismiss CEI's challenge to the selection of a small business size standard for the RFP since this is a matter exclusively within the jurisdiction of the Small Business Administration to resolve. See Ebon Research Sys., B-240391.2, Nov. 6, 1990, 90-2 CPD ¶ 367.

2/ Line item contract prices also include other elements common to all offerors which DLA refers to as "pass through items" and which are not part of the comparative evaluation: a "supply index price," a "transport index price," and a "transport fuel factor." These elements are controlled by a market index published monthly by the Federal Energy Regulatory Commission or locally applicable pipeline tariffs outside the control of offerors. In its comments on the agency report, CEI appears to suggest that the use of such indexes is legally inappropriate in fixed-price, economic price adjustment procurements; since Federal Acquisition Regulation § 16.203 expressly authorizes them in such contracts, we dismiss this aspect of the protest for failure to state a valid basis of protest. See Ebon Research Sys., B-240391.2, supra.

CEI principally argues that all three regions of the solicitation should have been set aside exclusively for SDBs. In this respect, DFARS § 219.502-72(a) provides that a procurement shall be set aside for SDBs if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible SDB concerns; and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. In addition, DFARS § 19.502-72(b)(1) precludes the use of an SDB set-aside if the product to be purchased has been "previously acquired successfully" on the basis of a small business set-aside.

The decision to conduct a particular procurement as an SDB set-aside is a business judgment within the discretion of the contracting officer, and we will not disturb such a set-aside determination unless it had no reasonable basis. See Commercial Energies, Inc., B-234789, July 12, 1989, 89-2 CPD ¶ 40. Here, DLA decided not to set the RFP aside for SDBs in Regions 1 and 2 because it determined that there was no reasonable expectation of offers from at least two responsible SDBs at reasonable prices as defined by the regulation. DLA also decided against setting aside Region 3 for SDBs because it determined, on the basis of competition achieved and contracts awarded in 1990 under RFP No. DLA600-90-R-0126 (RFP No. 0126), that natural gas had been previously successfully acquired in that region on the basis of a small business set-aside.

With respect to Regions 1 and 2, the record reflects that, prior to determining that SDB set-asides would be inappropriate, the contracting officer conducted an investigation which included contacting about 300 firms regarding their capacity to provide natural gas. As a result, DLA developed a mailing list which included 25 SDB concerns. The agency determined that only one of those 25 SDBs--Krystal Gas Marketing Company--potentially could be considered a responsible SDB. The investigation also included a review of Federal Energy Regulatory Commission data concerning current interstate pipeline shippers of natural gas in Regions 1 and 2. None of the 25 SDBs on the agency's mailing list, including CEI and Krystal, is listed as a current shipper for any of the 10 pipelines in these regions. In addition, the agency published a notice in the Commerce Business Daily requesting interested SDBs to contact DLA. CEI and two other firms responded. Based on incomplete data in CEI's response, the contracting officer was unable to determine that the firm was a regular dealer in natural gas as required by the solicitation, and the agency was not otherwise able to conclude that SDBs other than Krystal were potentially responsible contractors to supply natural gas in Regions 1 and 2.

CEI disputes these findings arguing that, in addition to Krystal, there is at least one other responsible SDB. With regard to its own status, CEI contends that DLA knew that it had a previous contract to supply natural gas to the Navy at a training facility in Illinois. In contrast, the agency notes that Illinois is not in Region 1 or 2, and CEI has never supplied gas in those regions. CEI also has not explained why it did not respond to a request for additional information regarding its capabilities, nor has the protester rebutted the agency's position that the firm is not listed by the Federal Energy Regulatory Commission as a current transporter of natural gas in either region.3/ Although CEI suggests that there are firms other than itself which should have been considered responsible SDBs for the solicitation--namely, SDS Petroleum and Union Natural Gas Pipeline Company--the protester has provided no substantiation for its claims in this regard, and the record does not otherwise suggest that the agency improperly evaluated the status of those firms in concluding that they were not responsible SDBs. Accordingly, we are presented with no basis to disturb the contracting officer's decision not to set-aside Regions 1 and 2 under the RFP for SDBs. Commercial Energies, Inc., B-234789, supra.

As to Region 3, as mentioned above, DLA determined on the basis of competition achieved and awards made in 1990 under RFP No. 0126 that natural gas had been previously acquired successfully on the basis of a small business set-aside, a circumstance which precludes the use of a present SDB set-aside. In its comments on the agency report, CEI disputes DLA's determination in this regard by referring to a May 1991 magazine article which indicates that previous DLA awardees in the region have been determined by the Small Business Administration (SBA) to be other than small businesses.

The record reflects that there was small business competition on RFP No. 0126 from firms other than the awardees who were later found to be other than small by SBA. The existence of such competition is a factor which may properly be considered by a contracting officer in determining whether or not a

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3/ Notwithstanding CEI's suggestions to the contrary, it is appropriate for a contracting officer to conduct a presolicitation review of the responsibility of prospective offerors incident to making a set-aside determination. See MVM, Inc.; Cook Int'l, Inc.; Special Investigations, Inc.; and Varicon, Inc., B-237620, Mar. 13, 1990, 90-1 CPD ¶ 270.

product has been successfully acquired through the use of a small business set-aside. The Saxon Corp., B-238652, June 20, 1990, 90-1 CPD ¶ 575. We thus have no reason to disturb DLA's decision not to set aside Region 3 under the RFP.4/

CEI's secondary bases of protest involves the application of DFARS § 219.7001 to this procurement. As indicated above, that section requires that SDBs receive a 10-percent price evaluation preference when competing with non-SDBs. CEI contends that DLA erred in its RFP by limiting application of the required preference solely to the TAF price elements which could vary among offerors and by not applying the evaluation preference to the indexed factors which also are a part of the contract price. We find no merit to CEI's contention in this regard.

We have previously upheld virtually identical evaluation formulas under which SDB evaluation preferences were applied solely to those price factors which actually formed the basis for an award decision. Hudson Bay Natural Gas Corp., 69 Comp. Gen. 188 (1990), 90-1 CPD ¶ 151, aff'd Hudson Bay Natural Gas Corp.--Recon., B-237264.2, Apr. 18, 1990, 90-1 CPD ¶ 397; SDS Petroleum Prods. Inc., B-239534, Aug. 28, 1990, 90-2 CPD ¶ 164. In addition, the courts have upheld evaluation formulas which are virtually identical to the one in question here. Commercial Energies v. United States, 20 Cl. Ct. 140 (1990), aff'd 929 F.2d 682 (Fed. Cir. 1991).

CEI attempts to distinguish these decisions by asserting that a portion of DFARS § 219.7001 which requires application of the SDB preference to other "evaluation factors," including "transportation," was never directly at issue in those cases, and argues that, therefore, this part of the regulation mandates the inclusion of the indexed contract price factors contained in the protested RFP when considering application of the preference. The clear import of all of the cited decisions is that an RFP evaluation formula which applies the SDB preference solely to those factors upon which award is to be based is legally acceptable. That is precisely the situation in this case, and since the indexed price factors common to all offerors are simply not "evaluation factors" within any reasonable reading of DFARS § 219.7001, we deny this aspect of CEI's protest.

4/ We also note that the record supports a conclusion that competition from at least two responsible SDBs at reasonable prices could not reasonably be expected in Region 3.

Finally, CEI argues that, pursuant to DFARS § 219.7001, DLA does not have authority to exclude RFP items involving non-DOD locations from application of the SDB preference. We do not agree. Statutory provisions governing DOD apply only to those items involving obligation of DOD funds, and do not extend to items involving the obligation of other agencies' funds. See Wilde Tool Co., Inc., 63 Comp. Gen. 325 (1984), 84-1 CPD ¶ 245; Idealspaten, Gmbh, B-205323, Apr. 27, 1982, 82-1 CPD ¶ 389; Procurement of Stainless Steel Flatware, B-186422, Oct. 26, 1976, 76-2 CPD ¶ 364. Here, as the agency points out, only DOD is authorized to pay a preference for SDBs by language first contained in the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-61, § 1207, 100 Stat. 3816 (1986) (which has subsequently been extended throughout successive Fiscal Years). Since, as DLA explains, natural gas for non-DOD locations is not funded by DOD appropriations, we have no basis to object to the application of the SDB evaluation preference only to the items funded by DOD.

The protest is denied in part and dismissed in part.

for James F. Hinchman
General Counsel