



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hunt Pan Am Aviation, Inc.

File: B-246092.3

Date: April 8, 1992

Kamta Ramnarine for the protester,
Jacalyn K. Bauer for Brownsville Air Center, Inc., an
interested party,
Kathleen A. Murphy, Esq., and Robert W. Petrosky, Defense
Logistics Agency, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Agency improperly failed to apply 10 percent small disadvantaged business (SDB) preference to an SDB regular dealer of jet fuel, who claims the preference based upon furnishing the product of a small business refiner, which the agency asserts is an affiliate of a suspended contractor; applicable regulations provide no basis for not applying the SDB preference in such circumstances. Since the agency's concerns actually relate to the responsibility of the SDB regular dealer, the agency must make a responsibility determination; a negative determination is subject to referral to the Small Business Administration under certificate of competency procedures.

DECISION

Hunt Pan Am Aviation, Inc. protests the rejection of its proposal for "into plane" jet fuel at the Brownsville International Airport, Texas, under request for proposals (RFP) No. DLA600-91-R-0123, issued by the Defense Logistics Agency, Defense Fuel Supply Center (DFSC). Hunt Pan Am contends that DFSC improperly failed to apply the small disadvantaged business (SDB) evaluation preference in evaluating its proposal.

We sustain the protest.

On February 15, 1991, DFSC issued the RFP to obtain "into plane" jet fuel for government aircraft at various commercial airports. The RFP contemplated the award of firm, fixed-price requirements contracts, with economic price adjustment clauses, for a term of 2 years for each airport.

An estimated quantity of gallons of fuel was designated for each airport. Awards under the RFP were to be made to the offeror with the lowest estimated total price for each airport.

In accordance with Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7007 (Alt. I) (DAC 88-14), the RFP provided that an evaluation preference would be accorded to SDB concerns by adding a factor of 10 percent to the prices of offers from non-SDB concerns on the same line items. The RFP provision governing application of the preference stated that an SDB regular dealer, who was requesting an SDB evaluation preference, was required to certify that it would furnish only end items manufactured or produced by small businesses. That provision, however, did not require a regular dealer SDB offeror claiming the preference to identify in its offer the manufacturer of the product that it intended to supply, nor require it, if it received the award, to obtain the consent of the government to use a different small business product.

The RFP provided that prices payable under the contract would be the contractor's base price for the fuel increased or decreased according to a specified formula based on a supplier's reference price for the fuel. The reference price was to be established from a copy of the contractor's supplier's invoice, which the RFP required offerors to submit with their proposals.

On March 25, 1991, DFSC received two proposals for the Brownsville Airport in response to the RFP. Hunt Pan Am (a regular dealer in this product) certified itself as an SDB concern and requested the SDB preference. Brownsville Air Center, Inc. (the other offeror) is a non-SDB concern. After best and final offers (BAFO) were submitted, DFSC determined Hunt Pan Am to be the low, responsible offeror, after application of the SDB preference.¹ DFSC made an award for the Brownsville Airport to Hunt Pan Am on September 18.

Brownsville Air Center protested the award, alleging, among other things, that Hunt Pan Am was not an SDB concern. DFSC then discovered that Hunt Pan Am had proposed to furnish the product of a large business refiner, and that it should have noticed this discrepancy and resolved the matter during discussions. DFSC reopened discussions with the two offerors on October 24, provided Hunt Pan Am the opportunity

¹Brownsville Air Center proposed the lowest price not considering the SDB preference.

to propose a small business refiner and requested new offers from the offerors.²

As indicated by the fuel supplier's invoice submitted as a reference price to satisfy the requirements of the economic price adjustment provisions, Hunt Pan Am's response to the second round of discussions was based upon furnishing fuel refined by the Texas United refinery located in Nixon, Texas.³ DFSC investigated the status of the refinery and determined that Texas United was affiliated with F.G. Hester and Leal Petroleum Corporation, entities, which, as of February 11, 1991, had been suspended from government contracting for alleged fraudulent activities, and that Texas United was therefore ineligible to contract with the government. On October 29, the due date for proposals, DFSC notified Hunt Pan Am that it could not obtain its fuel from Texas United. Hunt Pan Am, however, identified Texas United as its source in the second BAFO that Hunt Pan Am submitted on that same day.⁴

In evaluating Hunt Pan Am's second BAFO, DFSC evaluated the BAFO without applying the SDB preference, since it determined that Texas United was not an "eligible" small business whose product could be offered to satisfy the SDB's obligations. This resulted in Brownsville Air Center becoming the low offeror. On November 4, 1991, DFSC terminated Hunt Pan Am's contract for the convenience of the government and awarded Brownsville Air Center the contract. After filing a protest initially with the agency, Hunt Pan Am filed this protest with our Office on November 27.

DFSC reports that Texas United was determined to be affiliated with F.G. Hester and Leal Petroleum and thereby ineligible because, during the initial investigation, several factors indicated that Texas United was directly related to F.G. Hester and Leal Petroleum. For example, DFSC discovered that Leal Petroleum and Texas United shared the same address and telephone number, that there was no record of Texas United being incorporated in Texas, and that F.G. Hester is the Plant Manager and Executive Vice President of

²Brownsville Air Center protested the reopening of discussions, asserting that it should have received the award. It later withdrew this protest upon receipt of the award.

³Hunt Pan Am proposed to purchase the fuel from Best Oil Sales and Service, Inc., a regular dealer in petroleum products, who was to obtain the fuel from Texas United.

⁴Hunt Pan Am asserts that it did not have sufficient time to locate another refiner after DFSC notified it that Texas United was not acceptable.

Texas United.⁵ Based upon this information, DFSC argues that it reasonably determined that Texas United was affiliated with F.G. Hester and Leal Petroleum, and that Hunt Pan Am was not entitled to the SDB preference because it had proposed an ineligible small business supplier.

Hunt Pan Am asserts that DFSC improperly failed to apply the SDB preference because Texas United is not on any debarred bidders list and is not affiliated with Leal Petroleum or F.G. Hester, but has only entered into a lease/purchase agreement to use Leal Petroleum's assets.

We find no legal justification for not applying the SDB preference to Hunt Pan Am's offer. The SDB preference provision included in the RFP does not require a regular dealer SDB offeror claiming the preference, such as Hunt Pan Am, to identify its source. The provision only requires the offeror to certify that it will supply a small business product and an offeror is free to substitute products in the performance of the contract so long as small business products are supplied. Here, Hunt Pan Am, in submitting its offer, certified that it would supply a small business product,⁶ and we see no basis for declining to apply the SDB preference.

DFSC's argues that Hunt Pan Am is not entitled to the preference because Texas United, an alleged affiliate of a suspended contractor, is not an "eligible" small business concern. DFSC cites no precedent or other authority (nor can we find any) for its assertion that the SDB preference should not be applied where the agency discovers that a regular dealer SDB is planning to supply the products of a debarred or suspended small business concern, or affiliate thereof. See generally Jarrett S. Blankenship, B-237584, Mar. 8, 1990, 90-1 CPD ¶ 258 (agency cannot apply criteria

⁵After Hunt Pan Am filed the initial agency-level protest, DFSC did obtain a copy of the lease agreement between Leal Petroleum and Texas United and a copy of the articles of incorporation of Texas United, which do not show it is owned by any of the suspended contractors. However, DFSC argues that this information supports its action because of the proximity in time between the suspension of Leal Petroleum and Texas United's incorporation and because Leal Petroleum has retained a 10 percent financial interest in the profits of Texas United under the lease/purchase agreement.

⁶Hunt Pan Am asserts, without rebuttal, that it checked with the local Small Business Administration (SBA) office which stated that Texas United qualified as a small business concern.

not stated in the regulations to deny an SDB preference to an SDB claiming the preference).

The applicable SDB preference regulations, DFARS subpart 219.70 (DAC 88-14); § 252.219-7007 do not contain any "eligibility" conditions as suggested by DFSC. To the contrary, the adjective "eligible," on which DFSC has based its arguments, is not included in the SDB preference clause to modify the term "small business," and the FAR and SBA definition of a small business concern does not exclude firms that are debarred or suspended or affiliates of debarred or suspended firms, see Federal Acquisition Regulation (FAR) § 19.001; this indicates that small business affiliates of debarred or suspended contractors still qualify as small business concerns. See generally Atchison Eng'g Co., B-208148.5, Aug. 30, 1983, 83-2 CPD ¶ 278.

Nevertheless, DFSC was entitled to consider Hunt Pan Am's use of an asserted affiliate of a suspended contractor in the performance of the contract work in making its determination as to whether or not Hunt Pan Am is a responsible contractor. See FAR § 9.104-4 and 51 Comp. Gen. 703, 706 (1972), which provide that the use of debarred or suspended contractors can and should be considered in making contractor responsibility determinations. In this regard, the suspension notice to F.G. Hester and Leal Petroleum states those contractors' "affiliation with or relationship with any organization doing business with the [g]overnment will be carefully examined to determine the impact of those ties on the responsibility of that organization to be a [g]overnment contractor"

Therefore, Hunt Pan Am's proposed use of the alleged affiliate of a suspended contractor may only be considered in assessing Hunt Pan Am's responsibility. Since Hunt Pan Am is a small business concern, if DFSC finds that Hunt Pan Am is not a responsible contractor, by virtue of its supplier or otherwise, DFSC is required to refer the matter to the SBA for a possible certificate of competency (COC). Id.

We recommend that DFSC determine whether Hunt Pan Am is a responsible contractor based upon its use of the products of the Texas United refinery and, if not, refer the matter to the SBA for a possible COC.⁷ If the SBA issues a COC, or if DFSC considers Hunt Pan Am to be responsible, we recommend that DFSC terminate Brownsville Air Center's contract

⁷Hunt Pan Am should not be permitted to change its price or to propose the product of a large business refinery unless discussions are reopened with both offerors.

for the convenience of the government and make award to Hunt Pan Am. Under the circumstances, Hunt Pan Am is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees, if any, 4 C.F.R. § 21.6(d)(1) (1991). Hunt Pan Am should submit its costs directly to the agency within 60 days of receipt of this decision, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(f)(1)).

We sustain the protest.

A handwritten signature in black ink, reading "Milton J. Fowler". The signature is written in a cursive, flowing style.

~~Acting~~ Comptroller General
of the United States