



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

Decision

Matter of: T. Warehouse Corporation

File: B-248951

Date: October 9, 1992

Donald A. Tobin, Esq., Bastianelli, Brown & Touhey, for the protester.

Paul G. Dembling, Esq., Schnader, Harrison, Segal & Lewis, for Nanco Distribution Company, the interested party.

Michael Trovarelli, Esq., and Kevin T. Burke, 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

Protest that awardee did not meet definitive responsibility criterion requiring the awardee to be legally, organizationally, and operationally separate from the business of selling fresh fruit and vegetables is sustained where the contracting officer lacked adequate, objective evidence upon which to reasonably conclude that the awardee met the criterion in view of considerable evidence that the awardee was closely associated with a business that sells fresh fruit and vegetables.

DECISION

T. Warehouse Corporation¹ protests the award of a contract to Nanco Distribution Company under request for proposals (RFP) No. DLA13H-92-R-0120, issued by the Defense Logistics Agency, Defense Personnel Support Center (DPSC), for refrigerated warehouse services.

We sustain the protest.

On December 3, 1991, the DPSC issued this RFP to procure storage services in a contractor owned, contractor operated refrigerated warehouse for the Defense Subsistence Office in the Philadelphia, Pennsylvania area. The RFP contemplated the award of a 1 year, indefinite delivery, requirements

¹T. Warehouse is the incumbent contractor for the solicited services.

contract with 2 option years. The RFP instructed offerors to submit a technical and a business proposal, and provided that award would be made to the most advantageous offer conforming to the terms of the RFP, price, technical quality, and other factors considered. The technical evaluation factors listed in descending order of importance were "Experience/Past Performance", "Facility Plan," "Management Plan," "Quality Control Plan/AVI Facilities," and "Location." The RFP instructions also contained the following provision:

"L6. SPECIAL QUALIFICATION: To be eligible for award, Offerors must be legally, organizationally and operationally separate from the business of selling fresh fruit & vegetables [FF&V] and must also, at the time of award (or within such time thereafter as may be specified by the Contracting Officer), be authorized to lawfully issue nonnegotiable warehouse receipts. Offerors will be required to furnish satisfactory evidence of the foregoing qualifications at the request of the Contracting Officer."

DPSC received three timely proposals, including proposals from Nanco and T. Warehouse, in response to the RFP.² All three proposals were included in the competitive range. Nanco's low priced proposal received an initial technical rating of "minimally acceptable" because certain aspects of its facility plan failed to meet DPSC requirements. In addition, DPSC discovered during a site visit that Nanco leased from, and shared its proposed facility with, Procacci Brothers Sales Corporation, an FF&V business.³ DPSC reports that it was advised that while Procacci had produce in this warehouse, it was located in a separate room that could be kept locked. T. Warehouse, which had the highest priced proposal, and the other offeror received acceptable technical ratings.

DPSC conducted discussions with all offerors in the competitive range. In light of clause L6 (quoted above), DPSC requested Nanco to provide, with its BAFO, a copy of its lease with Procacci and a list of corporate officers for both companies. Only Nanco and T. Warehouse responded to

²A fourth proposal was rejected as late because it was received after the time set for the receipt of initial proposals.

³Procacci is an FF&V dealer with annual sales of approximately \$80 million, which has been incorporated since 1948. Procacci and its subsidiary, Garden State Farms, are listed in the RFP as FF&V suppliers to DPSC, from which produce will be acquired to be stored in these contract facilities.

the agency's request for best and final offers (BAFO). DPSC then rated Nanco's and T. Warehouse's technical proposals as acceptable.⁴ Nanco remained the low priced offeror at \$3,525,508.92, while T. Warehouse's BAFO price was \$3,682,987.34.

With regard to clause L6, the contracting officer determined that Nanco and Procacci were legally, organizationally, and operationally separate entities based upon a review of the information Nanco submitted with its BAFO. Specifically, the agency stated:

"DPSC . . . reviewed the lease agreements and organization charts supplied by Nanco in the BAFO. Evidence exists that Nanco and Procacci are legally separate entities, each being separately incorporated. Evidence also exists that both companies are organizationally separate; no interlocking officers serve on the Board of both companies simultaneously. Considerable evidence exists that the companies are operationally separate. The lease agreements are clearly legal and at arms length agreements. DPSC . . . is of the opinion that rejecting Nanco on the basis of a possible corporate connection would be unduly restricting competition."

DPSC awarded the contract to Nanco based on its lower price.

T. Warehouse filed this protest, contending, among other things, that DPSC was required to reject Nanco's proposal under clause L6 because of Nanco's relationship with Procacci. T. Warehouse maintains that the evidence surrounding the two companies establishes that (a) Joseph Procacci and/or his family control Procacci and Nanco; (b) Procacci controls and is not organizationally separate from Nanco's operations; and (c) the two companies are not legally, organizationally, or operationally separate from each other. In support of its assertions, T. Warehouse advances the following facts and allegations:

(1) Joseph Procacci is the sole stockholder of Procacci, which is in the FF&V sales business;

(2) Mr. Procacci's daughter, Ms. Rita Neczypor, is the sole owner of all Nanco stock and is President of Nanco;

⁴Both offerors received identical acceptable ratings for all technical criteria and subcriteria.

(3) Mr. Procacci's other daughter, Ms. Loretta Banecker is Procacci's Chief Financial Officer, Treasurer and Secretary and also Nanco's "Operating Executive," Treasurer and Secretary;

(4) Dun and Bradstreet reports that the two daughters sit on the Board of Directors for both companies;

(5) Procacci and Nanco both have their main offices at the same address;

(6) Nanco's phone number listed in its proposal is that of Procacci (T. Warehouse asserts that Nanco is not listed in the Philadelphia phone books);

(7) Procacci allegedly provides Nanco with management and general administrative services, such as payroll, accounting, billing, personnel management, benefits, etc.;

(8) Procacci and Nanco have the same vice president of operations, Michael Saggiomo, who is responsible for managing Procacci's six warehouses as well as the warehouse Nanco's is leasing from Procacci for the performance of this contract;

(9) Nanco's proposal was submitted by Ms. Banecker and Mr. Saggiomo who work for both Nanco and Procacci--DPSC assertedly has not dealt with any person solely employed by Nanco;

(10) Procacci owns six warehouses, one of which will be used by Nanco to perform the refrigerated warehouse services;

(11) Procacci and its subsidiary Garden State Farms store produce at the same warehouse that Nanco has leased from Procacci to perform the contract; and

(12) when Nanco submitted its BAFO, Nanco advised that "[i]f Nanco does not meet the requirements [of L6, Procacci] has consented to cease supplying DPSC with fresh fruit and vegetables when Nanco is awarded the contract"; this assertedly shows Mr. Procacci's control over, and the close ties between, both companies.

In defending the selection decision, DPSC argues that it reasonably determined that Nanco had submitted "satisfactory evidence" to satisfy the purpose of clause L6, despite Nanco's apparent connections with Procacci. DPSC reports

that clause L6 is a responsibility factor incorporated in refrigerated warehouse contracts in order to avoid potential conflicts of interest, and that, as a matter of responsibility, the contracting officer had the discretion to determine whether a company's ties to another business created a "detrimental conflict of interest," since clause L6 did not expressly define what was meant by legal, organizational, or operational separation. DPSC argues therefore that the contracting officer could reasonably determine that Nanco was sufficiently separate so as not to create a detrimental conflict of interest, based on the evidence Nanco submitted with its BAFO.

Although we agree that compliance with clause L6 is a matter of responsibility, that clause constitutes a definitive responsibility criterion, since the language in that clause obligated the offeror to meet specific requirements in order to be eligible for award. See Prime Mortgage Corp., 69 Comp. Gen. 618 (1990), 90-2 CPD ¶ 48. Definitive responsibility criteria are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor's ability to perform the contract. See Federal Acquisition Regulation (FAR) § 9.104-2; R.J. Crowley, Inc., B-229559, Mar. 2, 1988, 88-1 CPD ¶ 220. The criteria limit the class of contractors to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance, e.g., unusual expertise or specialized facilities. Townsco Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313.

Even though an agency has discretion in determining whether a particular offeror has met a definitive responsibility criterion, the agency may only find compliance with the criterion based upon objective evidence. See Prime Mortgage Corp., supra; United Materials, Inc., B-243669, Aug. 16, 1991, 91-2 CPD ¶ 161. Where an allegation is made that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted, from which the contracting officer reasonably could conclude that the criterion has been met; although we recognize that the relative quality of the evidence is a matter within the contracting officer's judgment, he may only find compliance with the definitive responsibility criterion based upon adequate, objective evidence. See United Materials, Inc., supra; Townsco Contracting Co., Inc., supra

We find that the record does not contain adequate, objective evidence that establishes that Nanco is legally, organizationally, and operationally separate from the FF&V business.

Although Nanco and Procacci are separate corporations and may conduct arms length transactions with each other (i.e., the lease agreement between the two for the warehouse Nanco will use), neither DPSC nor Nanco--which has participated as an interested party in this proceeding--has disputed T. Warehouse's assertions, based upon a Dun & Bradstreet report, that Nanco and Procacci share some common directors, the same vice president of operations and the same secretary/treasurer. Thus, it appears that there are considerable connections between Nanco and Procacci in that both businesses are operated by the same persons and share the same facilities. In addition, Procacci, an FF&V supplier to DPSC, evidently stores produce in the warehouse owned by Procacci that Nanco will use in the performance of this contract. Accordingly, while the two companies are legally separate, we find no basis in the record for the contracting officer's conclusion that the companies are organizationally and operationally separate.⁵

DPSC maintains that the threat of intermingled FF&V envisioned by clause L6 does not exist with respect to Nanco, or could be easily avoided by monitoring the way that Nanco will operate its warehouse, since the connections between Nanco and Procacci do not create a "detrimental conflict of interest." While it is true that clause L6 does not specifically define legally, organizationally, and operationally separate,⁶ this does not, as posited by Nanco, vest the procuring agency with unbridled discretion to find that a particular offeror in some way complies with the intent of the clause, even though it may be legally, organizationally, or operationally connected with the FF&V business. See United Materials, Inc., supra. The clause is a prophylactic provision intended to prevent the possibility of a conflict

⁵In concluding Nanco was sufficiently separate from Procacci to satisfy clause L6, the agency primarily relies upon the facts that Procacci and Nanco are separately owned corporations and have an "arms length" lease agreement, which provides for apparent fair rental value and penalty provisions. However, this evidence is insufficient to overcome the other evidence, outlined above, of connections between the two businesses. While the agency has specified that there is "considerable evidence" that shows the businesses are legally, organizationally, and operationally separate, it has not specified this evidence or persuasively responded to the evidence advanced by T. Warehouse showing connections between the two businesses.

⁶We think these terms did not have to be further defined since they can be interpreted in accordance with their commonly accepted meanings.

of interest of the contractor with any FF&V business.⁷ In this regard, DPSC admits that clause L6 was incorporated in the RFP not because it believed the FF&V industry was inherently dishonest, but because of the government's concern that FF&V--very fungible and untraceable products--stored at the same site as FF&V owned by private industry might be intermingled, resulting in such events as FF&V not owned by the government being shipped as government property or extra fancy grade government produce being switched for a less desirable grade. That is, the clause is intended to prevent the mere possibility of situations that government-owned FF&V could be intermingled with other FF&V because of an offeror's connections with the FF&V business. Given the express language in clause L6 and its prophylactic purpose to prevent the mere possibility of a conflict of interest, we do not see how the contracting officer, on the facts presented, could find Nanco in compliance with the clause.

DPSC argues that to the extent it has waived the requirements of clause L6, no party is prejudiced. Clause L6, however, may have deterred from the competition other offerors with connections to a FF&V business, or FF&V businesses that are connected with warehouse facilities, which could establish such relationships and safeguards that would satisfy DPSC that no actual conflict of interest situation will exist in contract performance. Therefore, if the agency believed that its needs can be satisfied by waiver of this restrictive requirement, the requirement itself must be viewed as unduly restrictive. In that case, the agency should issue a revised solicitation to reflect the relaxed requirements and permit all potential offerors an opportunity to compete on that basis. Consulting and Program Mgmt., 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229.

We sustain the protest.⁸

⁷DPSC states that this clause has been contained in solicitations for cold storage for the past 20 years.

⁸T. Warehouse also alleged that: (1) DPSC improperly evaluated Nanco's proposal under the Experience/Past Performance evaluation factor, and (2) that DPSC should have rejected Nanco's proposal as materially unbalanced. Based upon our examination of the record and DPSC's response, we do not sustain T. Warehouse's protest on these points, although we have some question how the relatively minimal experience/past performance of Nanco can be found equal to that of T. Warehouse, which has considerable, apparently successful experience. In any case, no useful purpose would be served in further addressing these issues since we sustain the protest for reasons stated above.

We recommend that DPSC review its needs to determine whether clause L6 is a necessary requirement for the performance of the contract. If DPSC determines that the clause is a legitimate need, then Nanco's responsibility should be reconsidered in light of the requirements and purpose of that clause. In the absence of reasonable objective evidence from which it could be concluded that the two companies are actually organizationally and operationally separate, Nanco should be found nonresponsible. If, on the other hand, DPSC determines that clause L6 does not reflect its actual requirements, then the agency should resolicit based on the revised requirements. If Nanco ultimately is found to be nonresponsible, or if resolicitation is appropriate, Nanco's contract should be terminated for convenience. Under the circumstances, T. Warehouse is entitled to the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1992).

Milton J. Jordan
for Comptroller General
of the United States