Matter of: Navajo Nation Oil & Gas Company

File: B-261329

Date: September 14, 1995

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DIGEST

Clause in a solicitation for the supply of jet and diesel fuel, which sets forth specific experience requirements applicable only to offerors who are dealers and not refiner/manufacturer offerors, unduly restricts competition, where the record does not provide a reasonable basis for the agency's determination that the restrictive experience requirements reflect the agency's minimum needs.

DECISION

Navajo Nation Oil & Gas Company (NNOGC) protests the terms of request for proposals (RFP) No. SPO600-95-R-0161, issued by the Defense Fuel Supply Center (DFSC), Defense Logistics Agency, for jet and diesel fuel. The solicitation includes a clause establishing special standards of responsibility, which the protester challenges as being unduly restrictive of competition.

We sustain the protest.

The RFP, issued on March 31, 1995, as a partial set-aside for small businesses, provides for multiple awards of fixed-price, indefinite quantity contracts with economic price adjustments for the supply of approximately 1.6 billion gallons of fuel for nearly 200 using activities.[1] The solicitation contained an evaluation preference for small

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[1]This procurement is part of DFSC's Bulk Fuels program, whereunder DFSC procures large quantities of fuel for use at numerous Department of Defense (DOD) installations.

disadvantaged businesses (SDB) applicable to various items in the solicitation. The RFP also included at section L2.07 DFSC's standard "Evidence of Responsibility" clause, which provides in pertinent part that:

> "[i]f the offeror's source of supply is a firm or refinery independent of the offeror, the offeror shall submit evidence of a supply commitment from such source(s) when submitting its offer under this solicitation.
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> . . . . .
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> "Such evidence may be in the form of a signed copy of the contract between the offeror and its supplier or in the form of a contingency letter from the supplier or other satisfactory documentation."

Amendment No. 0002 to the RFP, issued on April 24, 1995, added the following clause, relating to the responsibility of non-refiner/manufacturer offerors, which DFSC intends to include as a standard clause in future procurements for its Bulk Fuels program.

> "Clause L2.07-1 EVIDENCE OF RESPONSIBILITY - ADDITIONAL CRITERIA (DFSC APR 1995)"
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> "(a) To be determined responsible, an offeror that is not performing a significant portion of the contract with its own facilities and personnel must meet the following criteria in addition to meeting the requirements of Clause L2.07, EVIDENCE OF RESPONSIBILITY:
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> > "(1) The offeror must purchase and sell petroleum products of the same general specification, quantity, and use as those offered. For products to be considered of the same general specification and use, they must be either identical, or be items for which firms in the same line of business would be an obvious source. For example, jet fuels are considered to be of the same general specification, and marine fuels are considered to be of the same general specification;
> >
> > "(2) The offeror must make ongoing and substantial sales to the public of petroleum products which are of the same general specification, quantity, and use

> as those offered (where the business would be of the same nature without any Government sales);
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> "(3) The offeror must have at least one year of experience in the purchase and sale of petroleum products which are of the same general specification, quantity, and use as those offered; and
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> "(4) The offeror itself must satisfy the above criteria.
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> "(b) The evidence of responsibility required by this provision is in addition to the responsibility criteria set forth in FAR [Federal Acquisition Regulation §] 9.104."

NNOGC, an Indian Tribal Corporation owned and controlled by the Navajo Nation (a federally recognized Native American tribe),[2] protests that the agency has no reasonable bases for any of the requirements set forth in the Evidence of

[2]DFSC initially argues that, despite NNOGC's representation that it is a potential dealer of fuel for this procurement, NNOGC should not be considered an interested party eligible to maintain this protest under our Bid Protest Regulations, and the protest should therefore be dismissed. 4 C.F.R. §§ 21.0(a); 21.l(a) (1995). DFSC points out that NNOGC did not submit a proposal in response to this RFP, and argues that in any event, NNOGC "is unlikely" to qualify as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1988), thus rendering the firm ineligible for any award. Based upon our review of the record, including the respective evidence proffered by DFSC and NNOGC, we conclude that NNOGC--which asserts that it would have submitted an offer absent the allegedly restrictive clause and that it would qualify as a regular dealer as that term is defined in the Walsh-Healey Act--is a prospective offeror whose direct economic interest would be affected by the award or failure to award a contract here, and we therefore decline to dismiss the protest. Courtney Contracting Corp., B-242945, June 24, 1991, 91-1 CPD ¶ 593 (protester is an interested party to protest the terms of a solicitation, despite the fact that it did not submit a bid, where the relief the protester seeks is the opportunity to compete under a revised solicitation).

Responsibility - Additional Criteria clause, and that the protested clause is thus unduly restrictive of competition.[3]

Under CICA, an agency is required to specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 10 U.S.C. § 2305(a)(1)(A)(i). A contracting agency may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. 10 U.S.C. § 2305(a)(1)(B)(ii). In this regard, an agency may reasonably restrict competition through the use of standards of responsibility in addition to the general standards set forth in FAR § 9.104-1, so long as these special standards of responsibility are needed to meet the agency's minimum needs, that is, to provide assurance that the contract will be adequately performed. FAR § 9.104-2; JT Constr. Co., Inc., B-244404.2, Jan. 2, 1992, 92-1 CPD ¶ 1; Military Servs., Inc. of Georgia, B-221384, Apr. 30, 1986, 86-1 CPD ¶ 423.

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[3]The protester also argues that the protested clause violates section 8(b)(7) of the Small Business Act, 15 U.S.C. § 637(b)(7) (1994), which gives the Small Business Administration (SBA) the conclusive authority to determine the responsibility of a small business and its legal status as a regular dealer under the Walsh-Healey Act; the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1988), which gives the Department of Labor and the SBA exclusive authority to administer the Act and promulgate regulations defining "regular dealer" as that term is used in that Act; and section 8012 of the Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, 108 Stat. 2599, 2619 (1994), which states:

> "Notwithstanding any other provision of law, a qualified Indian Tribal corporation or Alaska Native Corporation furnishing the product of a responsible small business shall not be denied the opportunity to compete for and be awarded a procurement contract pursuant to section 2323 of title 10, United States Code, solely because the Indian Tribal corporation or Alaska Native Corporation is not the actual manufacturer or processor of the product to be supplied under the contract."

Because we find that the protested clause unreasonably restricts competition, and the agency has therefore failed to comply with the mandate in the Competition in Contracting Act of 1984 (CICA) that agencies obtain full and open competition, 10 U.S.C. § 2305(a)(1)(A)(i) (1994), we need not consider these other bases of protest.

Where a solicitation provision is challenged as restrictive, the procuring agency must provide support for its belief that the challenged provision is necessary to satisfy its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Keeson, Inc.; Ingram Demolition, Inc., B-245625; B-245655, Jan. 24, 1992, 92-1 CPD ¶ 108. If an agency's explanation is inadequate, or does not respond to the issue raised, our Office has no basis for concluding that the challenged provision is reasonably related to the agency's minimum needs. Nat'l Customer Eng'g, 72 Comp. Gen. 132 (1993), 93-1 CPD ¶ 225; Keeson, Inc.; Ingram Demolition, Inc., supra.

The agency explains by way of background that "[b]ecause of the nature of the petroleum industry [DFSC] primarily does business with manufacturers, not dealers," and that "it is unusual for a dealer to add value to the program."[4] The agency states that the protested clause was intended to ensure that the adequate performance of contracts awarded to dealers would not be compromised "in the event of a supply contingency" should the refiner, from which the dealer has obtained a supply commitment, "cut off the dealer, leaving DFSC short of fuel." DFSC concedes that the protested clause "may limit competition to some extent," but claims that the protested clause will "help insure that the dealers DFSC does business with are the type that can add value to the program" and "have proven track records in the type of petroleum business associated with the Bulk Fuels program."

Specifically, with regard to the requirement in paragraph 1 of the protested clause that dealers have experience in the type and volume of fuel offered, DFSC contends that the market for jet fuel is different from the market for "ground fuels such as gasoline and heating fuel," and that experience in the ground fuels market "does not translate into experience in the petroleum market DFSC requires" for

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[4]DFSC consistently refers to its desire to award contracts only to fuel dealers that "add value" to the government. According to DFSC, a dealer "adds value" if it "does a lot of business in the type of fuel DFSC seeks and has refinery connections to which DFSC would not otherwise have access." In DFSC's view, absent the protested clause, it may be in the position of "paying out millions of dollars in SDB premiums each year to firms that provide no value to the [g]overnment and would not exist but for the SDB premium program." Presuming NNOGC was determined to be otherwise responsible, NNOGC, an Indian-owned firm, would be entitled to an SDB preference if it offered to supply the product of a small business refiner as it stated it planned on doing.

this procurement. DFSC does not provide any documentation or further explanation in support of its position here.

DFSC claims that paragraph 2 of the protested clause, which requires that dealers have "ongoing and substantial sales to the public [as opposed to the government] of petroleum products which are of the same general specification, quantity, and use as those offered," is intended to minimize the risk that the dealer "will be unable to perform in the event of a supply interruption from their proposed source." The agency does not explain this statement further, but adds that a dealer with a "proven track record" is less likely to have "a supply disruption problem" because the track record "shows its reliability, that is, that firms are willing to engage in major business transactions with the dealer." DFSC further asserts that dealers with "proven track records" are more likely to have the skills necessary to perform the contracts to be awarded here. Again, the agency does not furnish any empirical or other evidence in support of its claims here.

DFSC states that paragraph 3 of the protested clause requires that "[t]he offeror must have at least one year experience in the purchase and sale of petroleum products which are of the same general specification, quantity and use as those offered," because, in its view, "a dealer with at least one year experience in the specific type of product the [g]overnment is seeking is more likely to be able to continue supplying through an alternate source in the event its primary source becomes unavailable." DFSC does not explain this statement further, but states that "[s]uch a firm is also more likely to be able to add some value to the process."

The protested clause's requirement that the offeror itself satisfy each of the requirements set forth in the protested clause is, according to DFSC, consistent with the purpose of the other provisions of the protested clause. The agency explains here that in its view it would be inconsistent with the agency's desire to "minimiz[e] supply disruption in the event of a subcontractor default, if the offeror could rely on the experience of the proposed subcontractor."

While specific experience requirements may be imposed on prospective contractors where necessary to meet an agency's minimum needs, see, e.g., Brevco, Inc., B-232388, Dec. 29, 1988, 88-2 CPD ¶ 634, in this case DFSC has not justified their imposition. DFSC's justification for the protested clause's experience requirements is comprised of unsubstantiated factual assertions followed, at times, by conclusory statements as to the reasonableness of the requirement. Specifically, DFSC's basic justification is predicated on its assertion that a dealer meeting the

protested clause's experience requirements will be more likely to fulfill its contractual obligations in the event the dealer's source of supply for fuel decides not to honor the supply commitment because of a "supply contingency" than a dealer which also has a supply commitment from its source of supply but does not meet the protested clause's experience requirements.[5] However, despite the protester's specific request for all documentation "relating to the creation of the [protested clause] or DFSC's decision to include the [protested clause] in this [s]olicitation," the agency has not provided any empirical, historical, or other evidence that its concerns with regard to the occurrence of "supply contingencies," or their effect on a dealer's ability to perform, are reasonable or based on fact. DFSC has made no showing that dealers, with the required supply commitments in place when submitting their proposals but without the experience requirements set forth in the protested clause, have been or will be unable to fulfill their contractual obligations to DFSC.

The agency's assertions in support of the protested clause's experience requirements do not withstand logical scrutiny. For example, as indicated previously, DFSC asserts that the experience requirements in the protested clause are reasonable because it wants to award contracts to only those dealers who "add value," that is, to those dealers who do "a lot of business in the type of fuel DFSC seeks and ha[ve] refinery connections to which DFSC would not otherwise have access." However, DFSC has not explained why dealers who do not "add value" lack the requisite capability to successfully perform contracts for jet fuel where, as here, the dealers have provided firm supply commitments from refiners.[6] We are unaware of any provision in statute or regulation that would permit an agency to reject an offeror as not responsible simply because it does not "add value" as contemplated by the agency.

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[5]As indicated above, DFSC's standard Evidence of Responsibility clause requires that dealer offerors submit with their proposals supply commitments from their sources of supply.

[6]To the extent that DFSC justifies the clause on the basis that SDB dealers, who are in line for award as a result of the application of an SDB preference, should "add value" to justify the associated cost premium, such justification is inconsistent with the statute and regulations governing the SDB program. See 10 U.S.C. § 2323 (1994); Defense Federal Acquisition Regulation Supplement subpart 219.70; DynaLantic Corp., B-256425, May 24, 1994.

DFSC has not explained, nor does its appear logical to assume, why only a "dealer [with] ongoing commercial sales and purchase experience in the type of fuels offered to the [g]overnment . . . has the skills necessary to perform a major contract" or to adequately respond in a "supply contingency" situation, whereas a dealer which does not have "ongoing commercial sales" experience, but rather has government sales experience, would be more of a performance risk and less reliable or likely to possess the skills necessary for adequate performance of a DFSC contract. Indeed, the protested clause's "commercial sales" experience requirement would render ineligible a dealer with a history of adequate, or, for that matter, excellent performance on government contracts, but without ongoing commercial sales of the same quantity of jet fuel.

Where, as here, an agency fails to establish rational support for the factual assertions purporting to establish the reasonableness of the experience requirements set forth in a protested clause, the record provides no basis to conclude that the protested clause is reasonably related to the agency's minimum needs. Nat'l Custom Eng'g, supra; Keeson, Inc.; Ingram Demolition, Inc., supra; Military Servs., Inc. of Georgia, supra. While we agree with DFSC that experience in supplying fuels could legitimately be a factor in a "best value" award evaluation process, the agency has failed to establish that an offeror's failure to possess the specified experience is a reasonable basis for concluding that the offeror cannot perform a contract and automatically eliminating that offeror from the competition. Military Servs., Inc. of Georgia, supra. We sustain the protest.

We recommend that the agency determine from the protester which of the numerous line items the protester is interested in competing for under an amended solicitation, refrain from ordering under the existing contracts for these line items any more fuel than is required, resolicit for these line items without the protested clause and in a manner consistent with this decision, and terminate the contracts if the current contractor is not the successful offeror under the resolicitation.[7] We also find the protester is entitled to the reasonable costs of filing and pursuing its

[7]On August 25, 1995, the agency informed our Office that it was proceeding with contract award and performance based upon a written determination that urgent and compelling circumstances will not permit waiting for our decision. See 31 U.S.C. § 3553(d)(2) (1988).

protest. 4 C.F.R. § 21.6(d)(1). The protester should submit its certified claim for costs directly to the agency within 60 working days of its receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

/s/ James F. Hinchman
for Comptroller General
of the United States