



Decision

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Matter of: Mechanix Wear, Inc.

File: B-416704; B-416704.2

Date: November 19, 2018

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DIGEST

Protest challenging solicitation's domestic source restriction is sustained where the item being restricted qualified for an exception to the Berry Amendment, and where the agency fails to otherwise establish the reasonableness of its need for the restriction.

DECISION

Mechanix Wear, Inc., a small business located in Valencia, California, challenges the terms of request for proposals (RFP) No. SPE1C1-18-R-0093, issued by the Defense Logistics Agency (DLA) for the procurement of Army combat gloves with capacitive capability, i.e., the capability to be used with touchscreens. The protester contends that the solicitation improperly applied the Berry Amendment to require the combat gloves be made with domestic leather. In the alternative, the protester contends that the agency failed to conduct adequate market research before applying this restriction.

We sustain the protest.

BACKGROUND

The solicitation was issued on July 3, 2018, seeking the award of an indefinite-delivery, indefinite-quantity contract with a 1-year base period and three 1-year option periods for the order of gloves with capacitive capacity. RFP at 9. The solicitation anticipated an estimated quantity of 200,000 pairs of gloves in the base period and 210,000 pairs for each option period. Id. at 13. The total number of gloves that could be potentially acquired under the resulting contract was 1,037,500 pairs. Id.

The RFP specifications required the leather used in the gloves to be goat/kidskin. Purchase Description Specifications at 6. Kidskin leather is a type of leather that is commonly made from the skin of young goats. The solicitation, as originally issued, stated that while pickled-state¹ goat/kidskin from foreign sources could be used, all tanning and processing of the goat/kidskin must be done domestically. RFP at 14.

The solicitation included Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7012, "Preference for Certain Domestic Commodities," which implements the Berry Amendment. The Berry Amendment generally restricts the Department of Defense's expenditure of funds for certain articles and items, including clothing and handwear, to domestically produced products. See 10 U.S.C. § 2533a(b).²

In February, prior to the issuance of the RFP, the agency issued a sources sought survey to determine its acquisition strategy. Supp. Agency Report (AR), exh. 6, Sources Sought Survey. Five potential suppliers responded to the survey, three of which indicated that they could provide the gloves being sought using domestic materials. See id. After the solicitation was issued, the agency conducted additional market research to determine whether goat/kidskins were available domestically to meet the requirements of the acquisition. On July 10, the agency posted a request for information on the FedBizOpps website to research if there was sufficient domestic goat/kidskin availability to meet DLA's needs in this and other acquisitions. See AR, exh. 3, Request for Info. DLA received responses from three suppliers, with two sources indicating that domestic goat/kidskins were available in sufficient quantities to meet DLA's needs for this acquisition. COS at 3.

On August 1, DLA issued RFP amendment 0001, which prohibited the use of foreign goat/kidskin, stating: "All Goat/Kidskin 'MUST' be 100% Domestic to include all tanning process." RFP amend. 1 at 2.

On August 6, Mechanix informed DLA that it could identify only one confirmed domestic source for the leather required by the RFP. COS at 4. DLA contacted this source, which confirmed that it had the capability of meeting DLA's needs. Id. Following DLA's decision not to remove the domestic restriction, Mechanix filed this protest prior to the solicitation's closing date.

¹ A pickled state is a pre-tanning state which involves treating the hides with salt and then acid. Contracting Officer's Statement (COS) at 3.

² As discussed in more detail below, DFARS clause 252.225-7012(c)(1) states that it does not apply to "items listed in section 25.104(a) of the Federal Acquisition Regulation (FAR)." One item listed at FAR § 25.104(a) is "[g]oat and kidskins."

DISCUSSION

The protester argues that the solicitation's prohibition on foreign goat/kidskin leather is unduly restrictive of competition and contrary to governing regulations. In this regard, the protester notes that the regulations implementing the Berry Amendment expressly provide for an exception from the Amendment's domestic source restrictions for goat and kidskins. The protester further argues that, even if it was permissible for the agency to make such a restriction based on its market research into the availability of domestic goat/kidskin, the market research actually conducted by the agency here was unreasonable.

Application of Berry Amendment

Section 225.7002-1 of the DFARS implements the restrictions found in the Berry Amendment, 10 U.S.C. § 2533a, prohibiting the use of appropriated funds for items, including clothing and handwear items, where the item is not "grown, reprocessed, reused, or produced in the United States." DFARS § 225.7002-1(a)(1). This restriction was incorporated into the solicitation here via DFARS clause 252.225-7012, "Preference for Certain Domestic Commodities."

Both DFARS sections contain an exception to these requirements which states that the applicable restriction does not apply to "items listed in section 25.104(a) of the Federal Acquisition Regulation (FAR)." DFARS clause 252.225-7012(c)(1); see also DFARS § 225.7002-2(c). Section 25.104(a) of the FAR, which falls within the FAR section implementing the Buy American Act, lists various "[n]onavailable articles," including "[g]oat and kidskins." FAR § 25.104(a). Nonavailable articles are defined as those articles for which there has been a "[c]lass determination" that domestic sources can meet only 50 percent or less of total U.S. government and nongovernment demand. FAR § 25.103(b)(1).

The protester argues that because goat and kidskins fall within an express exception to the DFARS provisions implementing the Berry Amendment, it was both unreasonable and contrary to regulation for the agency to impose a domestic source restriction on the goat/kidskin leather used to make the gloves being sought here.

In response to this argument, the agency asserts that the meaning of the exception found at DFARS § 225.7002-2(c) and DFARS clause 252.225-7012(c)(1) cannot be understood in isolation and instead must be interpreted in conjunction with other considerations, including the provisions of FAR § 25.103(b)(1), the history of the applicable FAR provisions, and the purpose of the Berry Amendment. The agency argues that these considerations make clear that the agency is required to conduct market research to determine the availability of articles before accepting that those articles qualify for a nonavailability exception.

With respect to the provisions of FAR § 25.103(b)(1), DLA argues that this provision contains guidance that clarifies the application of the FAR § 25.104(a) nonavailability

exception. In support of this assertion, the agency notes that FAR § 25.104(a) provides that the nonavailable articles listed in that section “have been determined to be nonavailable in accordance with [FAR] 25.103(b)(1)(i).” Section 25.103(b)(1)(i), in turn, states that this nonavailability determination “does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.” DLA further notes that FAR § 25.103(b)(1)(ii) specifically requires the contracting officer to perform market research before relying on the list in FAR § 25.104(a), and FAR § 25.103(b)(1)(iii) states that the nonavailability determination does not apply if the contracting officer learns at any time before the close of the solicitation that there is sufficient domestic supply. Taken together, DLA argues that these provisions mean that the agency is required to conduct market research before determining an article qualifies for the nonavailability exception, including when applying that exception to the Berry Amendment’s domestic sourcing restrictions.

Notwithstanding DLA’s contentions, as set forth below, we see no support in the applicable FAR and DFARS provisions for DLA’s contentions that the market research provisions of FAR § 25.103(b)(1)(ii) and (iii) are applicable to the Berry Amendment’s domestic sourcing restrictions implemented in the DFARS. Without such a connection between the two similar, but distinct schemes, we conclude the agency has not established that it has the authority to use the FAR Buy American Act’s market research provisions to evade the applicability of the “nonavailable articles” exception to the Berry Amendment.

The DFARS sections implementing the Berry Amendment clearly state that “[a]cquisitions in the following categories are not subject to the restrictions found in [DFARS §] 225.7002-1 . . . (c) [a]cquisitions of items listed in FAR 25.104(a).” DFARS § 225.7002-2; see also DFARS clause 252.225-7012(c) (“This clause does not apply . . . [t]o items listed in section 25.104(a) of the [FAR] or other items for which the Government has determined that a satisfactory quality and sufficient quantity cannot be acquired as and when needed at U.S. market prices.”). These DFARS sections do not contain any limiting language or carve outs, e.g., a statement to the effect that the FAR § 25.104(a) exception does not apply where the agency finds that such items are, in fact, available in sufficient quantity and quality. Nor do the DFARS sections reference the market research contemplated in certain subsections within FAR § 25.103, which is a Buy American Act provision. In fact, the DFARS sections discussed above do not mention FAR § 25.103 at all. The plain language of these DFARS sections therefore does not support the agency’s position that the applicable Berry Amendment exception is itself subject to an exception when the agency determines, via market research, that the applicable item is sufficiently available for purposes of the specific acquisition at issue.

Similarly, the language of FAR § 25.103 does not reflect an intention for that provision to apply to Berry Amendment restrictions. Instead, the provision addresses exceptions to the Buy American Act. See FAR § 25.103 (“when one of the following exceptions applies, the contracting officer may acquire a foreign end product without regard to the

restrictions of the Buy American statute. . . .”); FAR § 25.103(b) (“Nonavailability. The Buy American statute does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired . . . are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.”). Indeed, FAR § 25.103(b)(1) directs the contracting officer, upon making an availability determination, to “[e]nsure that the appropriate Buy American statute provision and clause are included in the solicitation.” FAR § 25.103(b)(1)(iii).

The agency argues that our Office should look beyond the language of the applicable provisions, and take into consideration the history of the FAR provisions at issue, as well as the general policy underlying the Berry Amendment of protecting domestic sources of supply. In support of this argument, the agency asserts that in 2005, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council amended the FAR to clarify the intent of the nonavailability list provided at FAR § 25.104(a) and to “emphasize the need to conduct market research.” Fed. Acquisition Regulation; Nonavailable Articles-Policy, 69 Fed. Reg. 29632 (May 24, 2004) (proposed rule), final rule issued at 70 Fed. Reg. 11742 (Mar. 9, 2005).

Additionally, prior to this revision, DLA’s senior procurement executive issued a policy memorandum requiring that market research be conducted for items listed in FAR § 25.104(a), particularly for those items covered by the Berry Amendment. See Supp. AR, exh. 4, Memo. on Berry Amendment/Buy American Act Market Research Requirements, PROCLTR 03-21, at 1 (Dec. 8, 2003). The agency argues that this emphasis on market research, particularly for items covered by the Berry Amendment, led to the current iteration of FAR § 25.103. In light of this history, DLA contends that “the only reasonable interpretation of the interplay between DFARS [§] 225.7002-2(c) and FAR [§§] 25.103 and 25.104 is that it is both appropriate and required for a contracting officer to conduct market research when acquiring a Berry Amendment covered item or material listed at FAR [§] 25.104(a) rather than blindly applying the Berry Amendment exception at DFARS [§] 225.7002-2(c) without considering potential domestic availability.” Supp. Memo. of Law at 5-6.

We find this argument unavailing. Where, as here, the language of a regulation is plain on its face, and its meaning is clear, there is no reason to move beyond the plain meaning of the text. Edmond Sci. Co., B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336 at 7 n.9. Moreover, nothing in the relevant history demonstrates a clear intention for the market research requirements contained within FAR § 25.103, and applicable to the Buy American Act, to apply to Berry Amendment restrictions. While the agency relies on references to market research in the proposed rule amending FAR §§ 25.103 and 25.104, nothing in either the proposed rule or the final rule mentions the Berry Amendment. Similarly, the agency has not cited any support within the history of the DFARS sections to suggest that these sections were meant to be subject to FAR § 25.103. Additionally, while the agency cites to a policy memorandum drafted by DLA, as well as various general policy considerations, in support of its interpretation, the plain language of the relevant regulations at issue does not support this interpretation.

Although this reading of the relevant FAR and DFARS sections creates a divergence between the nonavailability determinations conducted under the Berry Amendment and the Buy American Act, this distinction stems directly from the language of the regulations themselves. The Buy American Act provisions found at FAR § 25.103 contemplate a comprehensive nonavailability determination that takes into consideration the contracting officer's market research, with the result being the application of the Buy American Act, even when the item being sought is listed at FAR § 25.104(a), where the contracting officer finds that the item is "available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation." FAR § 25.103(b)(1)(iii). In contrast, the Berry Amendment DFARS sections do not cite or incorporate FAR § 25.103, and instead state that application of the Berry Amendment restrictions do not apply "[t]o items listed in section 25.104(a) of the Federal Acquisition Regulation (FAR)." Nothing in this language, which applies to items found to be nonavailable in relation to total market demand, anticipates overriding the exception where the contracting officer finds the item to be domestically available in sufficient quantity and quality to meet the agency's acquisition need.

In sum, we conclude that the DFARS sections implementing the Berry Amendment do not require the agency to impose a domestic restriction on the goat/kidskins at issue here since this item qualifies for an applicable exception. Because we find that this domestic restriction is not required by an applicable regulation, and because the agency has not otherwise asserted that the restriction is reasonable or is needed to meet DLA's minimum needs, we find that the agency has not met its responsibility of establishing that the restriction is reasonably necessary to meet its needs.³ See GlobaFone Inc., B-405238, Sept. 12, 2011, 2011 CPD ¶ 178 at 3 (where a protester challenges a specification as "unduly restrictive," the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs).

Prejudice

The agency further argues that Mechanix was not competitively prejudiced by the application of the domestic restriction at issue, because the protester was able to submit a proposal in response to the solicitation. DLA contends that, in view of this fact, the protester has not demonstrated how the imposition of the restriction put it at a competitive disadvantage versus other offerors.

Competitive prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may

³ The protester argues that even if it was allowable for the agency to apply the domestic restriction at issue, the market research conducted by the agency here was inadequate. Because we find the restriction to be unduly restrictive, we need not decide the protester's in-the-alternative argument.

have shown that an agency's actions arguably were improper. DNC Parks & Resorts at Yosemite, Inc., B-410998, Apr. 14, 2015, 2015 CPD ¶ 127 at 12. In the context of a protest challenging the terms of a solicitation, competitive prejudice occurs where the challenged terms place the protester at a competitive disadvantage or otherwise affect the protester's ability to compete. CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 12. Furthermore, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis to sustain a protest. Coburn Contractors, LLC, B-408279.2, Sept. 30, 2013, 2013 CPD ¶ 230 at 5.

Here, we find that the protester has adequately demonstrated that the challenged restriction places it at a competitive disadvantage. In this regard, the protester submitted a declaration from its government sales representative attesting to the favorable pricing terms and product quality Mechanix secures for goat/kidskin as a result of a long-standing and high-volume relationship with its foreign supplier. See Sales Rep. Decl. at ¶ 4. The protester does not have this same level of relationship with any domestic supplier, a fact that means it will be less likely to secure comparatively favorable pricing and product quality vis-à-vis other offerors. See id. at ¶¶ 6-7.⁴ In light of this showing, we find that the protester has sufficiently demonstrated that the challenged domestic restriction will negatively affect its ability to compete. See NCS Techs., Inc., B-403435, Nov. 08, 2010, 2010 CPD ¶ 281 at 5 n.9 (rejecting argument that protester was not prejudiced by restrictive solicitation term, where the challenged term would prevent the protester from offering the bulk of its product line).

RECOMMENDATION

We recommend that the agency either (1) provide further reasonable support for its decision to require that these gloves be made with domestic leather, consistent with the applicable regulations; or (2) amend the solicitation's restriction on goat/kidskins consistent with this decision and the applicable regulations. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester's certified claim for costs, detailing the time expended and the costs incurred on this issue, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

⁴ We note that the solicitation required offerors to provide a medium-sized pair of gloves as a product demonstration model to be evaluated by the agency. See RFP at 9. Thus, inferior quality gloves would place an offeror at a competitive disadvantage during the proposal evaluation stage.