

DECISION

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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-208320

DATE: June 9, 1983

MATTER OF: Foremost Foods, Inc.

DIGEST:

1. Grantee procuring activity's determination of its minimum need for fresh milk has not been shown to be clearly unreasonable by complainant's speculation that no firm is able to provide the required amount of fresh milk.
2. Grantee's requirement for fresh milk, although a limitation on competition, is not unduly restrictive since it represents the actual needs of the grantee.
3. GAO review of grant complaints deals exclusively with the propriety of the procedures followed in awarding of contracts by grantees, not issues concerning contract performance and contract administration.

Foremost Foods, Inc., requests our review of a contract awarded to Jones & Guerrero, Inc. (J&G), under invitation for bids (IFB) No. FBE-63-82 issued by the Government of Guam's Department of Education for school milk requirements. The contract was funded by a grant from the U.S. Department of Agriculture. In essence, Foremost contends that the IFB's requirement for 50 percent fresh milk and 50 percent recombined or reconstituted milk amounted to a sole-source selection of J&G, the only firm claiming that it could provide the required amount of fresh milk. In this regard, Foremost contends that J&G, the incumbent school milk contractor, was required to provide fresh milk for 50 percent of the total milk required under the previous contract, but in fact provided only about 15 percent of the more expensive fresh milk. Consequently, Foremost argues, Guam should have known that no firm, including J&G, could meet the IFB's requirement for 50 percent fresh milk;

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therefore, Foremost asserts, the IFB's fresh milk requirement should have been reduced significantly or eliminated.

We deny the complaint.

The solicitation, as amended, contained two line items; one for an estimated 2,160,000 one-half-pint containers of fresh milk and another for the same number of containers of reconstituted or recombined milk. The record indicates that J&G submitted the low responsive bid for fresh milk at \$.258 per container. Foremost's bid on this item at \$.249 was rejected as nonresponsive as its milk was not pasteurized. J&G submitted the lowest bid on the reconstituted or recombined milk at \$.099; Foremost bid \$.11895. Award was made to J&G.

In structuring the IFB to require that 50 percent of its requirement be fresh milk, Guam reports that its determination was based on a desire to obtain as much fresh milk as possible for the school children, and to act in accordance with Agriculture's regulations, which permit the use of reconstituted or recombined milk only if a sufficient supply of fresh milk is not available. See 7 C.F.R. §§ 210.2(i) and 210.10(a)(2)(i) (1982). Guam established its minimum needs for fresh milk in this IFB based on statements from J&G that it could provide fresh milk, and further, based on J&G's performance under its previous contract requiring 50 percent fresh milk.

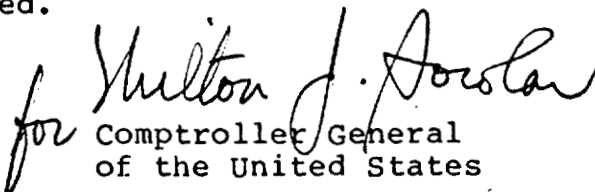
The regulations governing Agriculture's grants require that all procurement transactions shall be conducted in a manner that provides maximum open and free competition. 7 C.F.R. § 3015.182. Thus, it is proper for a grantee to impose a restriction on competition only if it can establish that the restriction is reasonably related to its minimum needs. Tennant Company, B-205914.2, December 20, 1982, 82-2 CPD 546. Once, however, the grantee shows that the restriction is related to its needs, we will not question the grantee's determination unless the complainant clearly shows that it is unreasonable. Niedermeyer-Martin Co., et al., B-203855.3, .4, .5, .6, August 23, 1982, 82-2 CPD 162. Foremost's only argument that the 50 percent fresh milk requirement is unreasonable is based on its belief that no

contractor is capable of providing the required amount of fresh milk on Guam and on J&G's alleged unsatisfactory performance under the previous contract. Although Foremost states that it has been unable to obtain the exact figures with regard to the percentage of fresh milk actually provided by J&G under the previous contract, Foremost speculates that J&G provided not more than 15 percent fresh milk. Agriculture and Guam have not addressed this matter except to indicate that the matter of J&G's prior contract performance is under review.

It is the complainant's burden to affirmatively prove its allegations. Engineering Service Systems, Inc., B-208553, September 27, 1982, 82-2 CPD 284. Foremost has provided nothing more than its speculation that J&G is, and has been, unable to provide sufficient fresh milk and that therefore Guam knew or should have known that the IFB's fresh milk requirement is unreasonable and restrictive of competition. Here, since the regulations governing the school lunch program require that fresh milk be provided if available and since, at least J&G maintains it can supply the product and has signed a contract obligating itself to supply fresh milk, we have no basis to object to Guam's inclusion of the fresh milk requirement in the solicitation. Although the fresh milk requirement may limit competition, such a limitation is not improper in these circumstances. A grantee's restriction on competition need not be regarded as unduly restrictive when it represents, as it does in this case, the actual needs of the grantee. Tennant Company, supra.

To the extent Foremost seeks our review of J&G's past and present contract performance under Guam's Department of Education milk contracts, we will not do so. Our review of grant complaints under 40 Fed. Reg. 42406, September 12, 1975, deals exclusively with the propriety of the procedures followed in awarding of contracts by grantees, not with issues concerning contract performance and contract administration. The Management Training Center, B-200842, November 28, 1980, 80-2 CPD 406. Nevertheless, Agriculture has advised us it is conducting an agency review concerning the allegation that J&G has not fulfilled its contractual requirements for fresh milk.

The complaint is denied.

for 
Comptroller General
of the United States