Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SDS Petroleum Products, Inc.

File: B-239534

Date: August 28, 1990

J.T. Smith for the protester.
Gregory D. Timm, Esq., Berniger, Berg, Rioth & Diver, P.C., for Coastal Gas Marketing, an interested party.
Col. Herman A. Peguese, Department of the Air Force, for the agency.
Kathleen A. Gilhooly, Esq., and James S. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In light of agency's broad discretion to decide whether to contract or not under the section 8(a) program, there is no legal basis to object to agency's reasoned decision to delete a portion of a requirement in a solicitation reserved for an 8(a) firm.

2. General Accounting Office (GAO) denies protest concerning the proper method of applying the small disadvantaged business preference to procurement of natural gas where the identical issue was resolved in a recent GAO protest and Claims Court decisions involving the same agency and the same type of procurement.

DECISION

SDS Petroleum Products, Inc. protests the terms of request for proposals (RFP) No. F05611-90-R-0202, issued by the Department of the Air Force to obtain natural gas for military installations in the Colorado Springs, Colorado, area. SDS objects that the RFP, as amended, improperly removes the reservation of 10 percent of the gas requirements for contract with a small disadvantaged business (SDB) concern under section 8(a) of the Small Business Act; provides for an irrational application of the 10 percent SDB evaluation preference; and should have been issued as a total SDB set-aside.

We deny the protest in part and dismiss it in part.

The RFP, issued April 2, 1990, requested proposals by May 7 to supply a portion of the firm and interruptible natural gas supplies for the Air Force Academy and Fort Carson. This gas was to be delivered to the Colorado Interstate Gas Company receipt points at those facilities. Additionally, the RFP provided for the interruptible supply of natural gas to Falcon Air Force Base, which was contingent upon installation of a pipeline and negotiation of a transportation agreement. The initial RFP also provided that 10 percent of the gas requirement was reserved for contract with a concern under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988).

The RFP contemplated an indexed, firm, fixed-price requirements contract for a base year and 4 option years. The bidding schedule required offerors to enter prices for the winter and summer supply adjustment factors (SAF). The SAF consisted of the amount above or below the supply index price (SIP) cited in Inside FERC's Gas Market Report that the contractor would charge for the gas. The government's price for natural gas purchases would be the total of the SIP and either the summer or winter SAF.

Amendment No. 1, issued April 24, deleted the Falcon Air Force Base requirement and the reservation of 10 percent of the requirements for the 8(a) program. The amendment also added the Department of Defense Federal Acquisition Regulation Supplement § 252.219-7007, "NOTICE OF EVALUATION PREFERENCE FOR SMALL DISADVANTAGED BUSINESS (SDB) CONCERNS." The amendment provided that prices for the winter and summer SAFs would be evaluated by adding a factor of 10 percent to offers from concerns that were not SDB concerns and to SDB concerns that elected to waive the SDB evaluation preference. Amendment No. 2 clarified the "Method of Award" clause by providing that offerors were required to quote on the summer and winter SAF for the base year plus each option year.

SDS first contends that the Air Force should not have eliminated the original RFP provision reserving 10 percent of the gas requirements for contract with a small business concern under section 8(a) of the Small Business Act. SDS complains that the Air Force and the Small Business Administration (SBA) had advised it to prepare for award of those requirements, but later asked SDS to accept the gas requirements for Falcon Air Force Base instead. SDS states

that although it is willing to accept the requirements for Falcon, it is unwilling to "trade" the requirements reserved under the original RFP for gas requirements of a military installation not yet able to accept gas.

The Air Force responds that after its technical advisor reviewed the procurement, it became concerned about the administrative burden of breaking out day-to-day fees to allow for a contract with an 8(a) concern for 10 percent of the overall requirements. After consulting with SBA, the Air Force decided the most reasonable course of action was to delete the 10 percent provision from the RFP, break out the requirement for Falcon Air Force Base from the RFP, and reserve the Falcon requirement for a contract under the 8(a) program. This was partially implemented in amendment No. 1.

Under section 8(a) of the Small Business Act, a government contracting officer is authorized "in his discretion" to let the contract to SBA upon terms and conditions to which the agency and SBA agree. 15 U.S.C. § 637(a)(1). Therefore, no firm has a right to have the government satisfy a specific procurement need through the 8(a) program or award a contract to that firm. Lee Assocs., B-232411, Dec. 22, 1988, 88-2 CPD ¶ 618. We will object to an agency's action under the section 8(a) program only where it is shown that agency officials engaged in a bad faith or fraud or violated regulations. COMSIS Corp., 69 Comp. Gen. 189 (1990), 90-1 CPD ¶ 86.

In this case, considering the contracting officer's broad discretion, the Air Force's reasoned decision to substitute the Falcon Air Force Base gas requirements for the original RFP requirements reserved for contract under section 8(a) of the Small Business Act is legally unobjectionable. Consequently, we dismiss SDS' protest on this issue.

SDS also contends that the RFP improperly applies the 10 percent SDS evaluation preference to only the SAFs rather than to the entire contract value, i.e., adjustment prices plus the index price of the natural gas. SDS cites Commercial Energies, Inc. v. United States, 20 Cl. Ct. 140 (1990), in support of its argument that applying the evaluation preference to less than the total price is irrational.

The issue raised and arguments made in this protest are identical to the ones resolved in Hudson Bay Natural Gas Corp., 69 Comp. Gen. 233 (1990), 90-1 CPD ¶ 151, aff'd, Hudson Bay Natural Gas Corp.--Request for Recon., B-237264.2, Apr. 18, 1990, 90-1 CPD ¶ 397, which involved the application of the 10 percent SDB preference in another

Air Force natural gas solicitation for Whiteman and McConnell Air Force Bases. In that decision, we held that the application of the 10 percent SDB evaluation preference only to adjustment factors was a reasonable interpretation of the applicable Department of Defense regulations and congressional intent. We determined that it was reasonable, in the context of a contract which incorporated index pricing, to limit the application of the preference only to those portions of the contract which were actually priced by the offerors, since the index pricing fluctuated and was not within the offeror's control. We therefore denied Hudson Bay's protest.

SDS' reliance on the Claim Court's decision in Commercial Energies, Inc. is misplaced. In that case, the court expressly found that the solicitation bid schedule was different from that in Hudson Bay1/ and held that the Air Force was required to apply the 10 percent evaluation preference either to total contract price or to each line item that constituted the basis for award. In response to the court's decision, the Air Force revised the solicitation to indicate that award would be made only on the basis of a SAF and a transportation adjustment factor. The revised RFP provided offerors with space for quoting prices for those two line items only, and provided for application of the evaluation preference only to those two items. When Commercial Energies objected to the revised RFP, the court ruled that the Air Force had complied with the letter of the regulations. Commercial Energies, Inc. v. United States, No. 90-300C, slip op. (Cl. Ct. May 15, 1990). In response to Commercial Energies' request to reconsider this order, the court found that the application of the evaluation preference to the two line items that constituted the basis for award was in accordance with applicable agency regulations. Commercial Energies, Inc. v. United States, No. 90-300C, slip op. (Cl. Ct. June 29, 1990).

1/ Our review did not indicate any significant differences between the pertinent solicitation provisions in Hudson Bay and Commercial Energies. See Commercial Energies, Inc., B-237572, Feb. 7, 1990, 90-1 CPD ¶ 160.

The RFP at issue here mirrors the revised Commercial Energies solicitation and the Hudson Bay solicitation. Accordingly we deny SDS' protest on this issue.2/

Finally, on May 14, SDS amended its original protest to add an additional protest ground that the RFP should have been issued as a total SDB set-aside. SDS' contention regarding the failure to set the solicitation aside for the SDBs was apparent from the face of the solicitation and is thus untimely filed under our Bid Protest Regulations, and will not be considered, since it was not filed prior to the May 7 closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1990); Robinson Enters.--Request for Recon., B-238594.2, Apr. 19, 1990, 90-1 CPD ¶ 402.

The protest is denied in part and dismissed in part.

Robert P. Murphy

James F. Hinchman
for General Counsel

2/ To the extent the reasoning in Commercial Energies, Inc. V. United States, 20 Cl. Ct., supra, is inconsistent with Hudson Bay, we do not follow that court's decision. See Frank Cain & Sons, Inc.--Request for Recon., B-236893.2, June 1, 1990, 90-1 CPD ¶ 516. Commercial Energies has filed a notice of appeal with the United States Court of Appeals in the Federal Circuit Court of the Claims Court's orders.