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Decision

Matter of: Tennier Industries, Inc.

File: B-403946.2

Date: June 29, 2012

Ruth E. Ganister, Esq., Rosenthal and Ganister, LLC, for the protester.
William Robinson, Esq., and Seth Bogin, Esq., Federal Bureau of Prisons, for Federal Prisons Industries, Inc., the intervenor.
Allison Colsey Eck, Esq., Defense Logistics Agency, and John W. Klein, Esq. and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.
Jacqueline Maeder, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that Department of Defense agency improperly permitted Federal Prison Industries, Inc. (FPI) to participate in an Historically Underutilized Business Zone (HUBZone) small business set-aside procurement for supplies on the FPI Schedule, is denied where statute and regulations specifically allow FPI to participate in the procurement.
 2. Protest that agency improperly failed to apply HUBZone price evaluation preference is denied where the solicitation did not include the price evaluation preference.
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DECISION

Tennier Industries, Inc., of Boca Raton, Florida, protests the Defense Logistics Agency's award of a contract to Federal Prison Industries, Inc. (FPI), of Washington, D.C., under request for proposals (RFP) No. SPM1C1-09-R-0081, for extreme cold/wet weather trousers. The RFP was set aside for historically underutilized business zone (HUBZone) small business concerns. Tennier contends that the award to FPI is improper because FPI is not a HUBZone small business and will not provide a product manufactured by a HUBZone small business as required by the solicitation.

We deny the protest.

The RFP, issued July 1, 2010, provided for the award on a “best value” basis of an indefinite-delivery, indefinite-quantity contract, for a 1-year base period, with two 1-year options, to manufacture and deliver two types of extreme cold/wet weather trousers: the universal camouflage pattern, national stock number (NSN) 8415-01-58-3662; and the multi-cam pattern, NSN 8415-01-580-2183. These NSNs have a Federal Supply Code (FSC) of 8415-Clothing, special purpose. FSC 8415 is on the FPI Schedule, which is a list of supplies for which FPI is a “mandatory” supplier.¹

The agency received 9 proposals, including Tennier’s and FPI’s. Contracting Officer’s Statement (COS) at 7. After evaluating the proposals, the agency determined that FPI’s proposal offered the best value to the agency, and made award to FPI for a total price of \$45,048,914.69.² After a debriefing, Tennier filed this protest with our Office.

Tennier asserts that FPI should not have been permitted to compete under this solicitation. According to the protester, allowing FPI to compete defeats the purpose of the Historically Underutilized Business (HUBZone) Act of 1997, which is to provide federal contracting assistance for qualified small business concerns located in historically underutilized business zones. Federal Acquisition Regulation (FAR) § 19.1301(b).

Based on our review of the relevant statutes and regulations, as well as the submissions of the parties and the Small Business Administration (SBA), we conclude that DLA’s decision to permit FPI to compete under the solicitation did not violate a procurement statute or regulation.

Agencies are encouraged to purchase FPI supplies and services to the maximum extent practicable. FAR § 8.601(e). In this regard, under the relevant regulations, agencies are generally required to purchase supplies listed on the FPI Schedule where, after conducting market research, the agency determines that the supplies produced by FPI are comparable to those available from the private sector in terms of price, quality, and time of delivery. FAR § 8.602(a). For items that are not comparable in one or more of the areas of price, quality, or time of delivery, agencies are to acquire the item using fully competitive procedures (e.g. the procedures in FAR § 6.102, the small-business set-aside procedures in FAR Subpart 19.5, or competition conducted in accordance with FAR Part 13), or procedures that provide a “fair opportunity” to compete under multiple award delivery-order contracts. FAR § 8.602(a)(4). However, when conducting such a

¹ The FPI Schedule is available at www.unicor.gov/prodservices/prod_dir_schedule/alphalist.cfm.

² Tennier’s total offered price was [redacted]. Agency E-Mail, June 7, 2012, at 1.

competition, the agency shall include FPI in the solicitation process and consider a timely offer from FPI in accordance with the item description or specifications and the evaluation factors provided in the solicitation. FAR § 8.602(a)(4)(ii); see 10 U.S.C. § 2410n(a) (2009 Supp.).

In addition, the Department of Defense (DOD) must also use competitive procedures to purchase a product listed on the FPI Schedule if FPI has a significant market share, that is, where FPI's share of the DOD market for that particular category of products is greater than 5 percent. 10 U.S.C. § 2410n(b). (The Director of Defense Procurement Acquisition Policy and Strategic Sourcing (DPAP) issues a yearly memorandum identifying those FSCs for which FPI will be treated as having a significant market share.) When conducting such a competition, the agency shall include FPI in the solicitation process and consider a timely offer from FPI. Id.

Here, the March 19, 2010 DPAP memorandum, which was applicable at the time the solicitation was issued, identified FCS 8415 as a product category for which FPI's share of DOD's market was greater than 5 percent, and therefore, any DOD acquisition for these items had to be a competitive acquisition.³ Agency Report (AR), Tab 9, DPAP Memorandum, March 19, 2010, at 5. Again, however, DLA was required to include FPI in the competition. 10 U.S.C. § 2410n(b). Accordingly, we find nothing improper with FPI's participation in the procurement.

Tennier argues that FPI will not provide products manufactured by a HUBZone small business concern as required under the HUBZone program. Specifically, the regulations implementing the HUBZone program, set forth at FAR Subpart 19.13, require that a procurement, as here, set aside for HUBZone small business concerns, include FAR § 52.219-3, Notice of HubZone Set-Aside or Sole Source Award. FAR § 19.1309(a). This provision, which was included in the RFP, provides as follows:

A HUBZone small business concern agrees that in the performance of the contract for. . . [s]upplies (other than acquisition from a nonmanufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, will be performed by the concern or other HUBZone small business concerns.

³ FSC 8415 was not included in the 2012 DPAP Memorandum listing the items for which FPI's share of the DOD market is greater than 5 percent; therefore, DLA currently would be required to acquire the items here from FPI if they were found to be comparable as to quality, delivery and price. COS at 9 n.2; AR, Tab 9, DPAP Memorandum, Jan. 12, 2012.

FAR § 52.219-3(d). Since neither FPI nor its proposed subcontractor is a HUBZone small business concern, Tennier argues that FPI will not comply with the subcontracting provision cited above.

We find no basis to conclude that FPI is required to comply with the HUBZone subcontracting provision. COS at 11; SBA Report at 6. In this regard, we agree with the SBA that, because FPI is not a HUBZone, nor indeed a small business concern, limitations imposed under FAR § 52.219-3 on subcontracting by a “HUBZone small business concern” do not apply to FPI.

Tennier asserts, and the SBA agrees, that a HUBZone price evaluation preference should be applied in this procurement because FPI, an other-than-small business, was permitted to compete with a HUBZone small business. In this regard, FAR § 19.1307(a) provides that a price evaluation preference for HUBZone small businesses shall be used in acquisitions “conducted using full and open competition.” DLA denies that it was required to include a HUBZone price evaluation preference in a solicitation set aside for HUBZone small businesses. We need not resolve this dispute. Since the solicitation in fact did not include a HUBZone price evaluation preference, the agency has not violated the terms of the solicitation or otherwise acted improperly by failing to apply the preference here. Goel Services, Inc., B-310822.2, May 23, 2008, 2008 CPD ¶ 99 at 3; see Ironclad Services, Inc., B-406037, Jan. 11, 2012, 2012 CPD ¶ 23 at 3.⁴

The protest is denied.

Lynn H. Gibson
General Counsel

⁴ To the extent that Tennier believes the solicitation should have included a HUBZone price evaluation preference for application in the event that FPI competed, the protester as discussed above was on notice that FPI could compete even though the solicitation was issued as a set-aside for HUBZone small business concerns, and it was required to file any protest in this regard prior to closing. 4 C.F.R. § 21.2(a)(1) (2012).