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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: USA Fabrics, Inc.

File: B-295737; B-295737.2

Date: April 19, 2005

James McKinney for the protester.
Todd Bailey, Esq., Department of Justice, and Laura Eyester, Esq., Small Business Administration, for the agencies.
Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation requirement that the contractor maintain minimum levels of consignment inventory is unduly restrictive of competition is denied where the record establishes that the requirement was reasonably designed to ensure that the government's needs would be met.

2. Protest challenging agency decision not to set aside procurement for Historically Underutilized Business Zone (HUBZone) small businesses is sustained where decision was based on insufficient facts to establish reasonableness of conclusion that there are not two or more HUBZone business concerns interested in performing the requirement, or that contract would not be awarded at fair market price.

DECISION

USA Fabrics, Inc. protests the terms of solicitation No. CT1696-05, issued by Federal Prison Industries (FPI) for T-shirt fabric. USA Fabrics asserts that the solicitation, issued as a total small business set-aside, instead should have been set aside for HUBZone small businesses concerns. USA Fabrics also asserts that the solicitation is unduly restrictive of competition because the agency improperly required contractors to maintain a certain level of consignment fabric inventory.

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

JURISDICTION

Preliminarily, the agency argues that because FPI is a non-appropriated fund instrumentality (NAFI), our Office lacks jurisdiction to hear the protest. The statutory authority of our Office to decide bid protests is set forth in the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3556 (2000), amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1811 (2004). CICA defines a protest as a written objection by an interested party to a solicitation by a federal agency for the procurement of property or services, or a written objection by an interested party to the award or proposed award of a contract. 31 U.S.C. § 3551(1).

Since the passage of CICA, our bid protest jurisdiction has not been based on the expenditure of appropriated funds or on the existence of some direct benefit to the government. Americable Int'l, Inc., B-251614, B-251615, Apr. 20, 1993, 93-1 CPD ¶ 336 at 2. Instead, our threshold jurisdictional concern is whether the procurement at issue is being conducted by a federal agency. Id.

In limiting our jurisdiction to procurements by federal agencies, CICA adopted the definition of that term set forth in the Federal Property and Administrative Services Act of 1949 (FPASA). 40 U.S.C.A. § 102 (West 2005). 31 U.S.C. § 3551(3). As defined therein, a federal agency includes any wholly-owned government corporation. 40 U.S.C.A. § 102(4)(B), (5). Thus, under the plain terms of CICA, we have jurisdiction to hear protests arising out of procurements by wholly-owned government corporations.

FPI is defined by statute as a wholly-owned government corporation. 18 U.S.C. § 4121 (2000); 31 U.S.C. § 9101(3)(E) (2000). As a result, we have consistently held that our Office has jurisdiction over bid protests concerning FPI procurements. E.g., Tri Tool, Inc., B-265649.2, Jan. 22, 1996, 96-1 CPD ¶ 14 at 1 n.1.

Citing Core Concepts of Florida, Inc. v. United States, 327 F.3d 1331, 1339 (Fed.Cir. 2003), the agency argues that this Office does not have jurisdiction over FPI because FPI is a NAFI.[1] According to the agency, in view of the Court's holding in Core

[1] In Core Concepts , the Federal Circuit held that the Court of Federal Claims did not have jurisdiction under the Contract Disputes Act to decide a contract claim against FPI because FPI is a NAFI to which the Contract Disputes Act does not apply. In reaching this conclusion, the Federal Circuit rejected the plaintiff's argument that FPI was funded by appropriated funds and was therefore not a NAFI. The plaintiff argued that FPI was funded by a revolving fund, which, according to GAO, constitutes a continuing annual appropriation. See Core Concepts, 327 F.3d at 1338 (citing GAO's Principles of Federal Appropriations Law, 15-83-97 (2d ed. 2001)). In this regard, GAO has long held that laws establishing working capital and revolving funds meet the constitutional requirement for an appropriation made by law. See,

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Concepts, and since our Bid Protest Regulations state that our jurisdiction does not extend to protests of procurements by NAFIs, we lack jurisdiction over the protest here. We disagree.

We recognize that our Bid Protest Regulations, 4 C.F.R. § 21.5(g) (2004), state that protests of procurements by nonappropriated fund activities are beyond our bid protest jurisdiction. By its terms, however, this provision excludes from our jurisdiction protests concerning procurements by agencies "other than Federal agencies" as defined in the FPASA. Accordingly, we do not view the term "nonappropriated fund activity" as used in our Regulations as including FPI, an entity defined by statute as a federal agency and therefore explicitly subject to our jurisdiction under CICA and the FPASA. See Professional Pension Termination Assocs., B-230007, B-230007.2, May 25, 1988, 88-1 CPD ¶ 498 at 5. Rather, that term refers to entities that are not "federal agencies" as defined in CICA and the FPASA. See, e.g., LDDS Worldcomm, B-270109, Feb. 6, 1996, 96-1 CPD ¶ 45 at 3; Kold-Draft Hawaii, Inc., B-222669, Apr. 4, 1986, 86-1 CPD ¶ 331.

BACKGROUND

The solicitation, issued December 17, 2004, sought fabric to produce T-shirts for the Defense Supply Center Philadelphia (DSCP), with a "reverse auction" scheduled for February 15, 2005. The contracting officer states that he did not set the procurement aside for HUBZone small businesses because he did not have a reasonable expectation of receiving offers from at least two HUBZone small businesses or of being able to make award at a fair market price. The contracting officer based his determination that there would not be participation by at least two HUBZone small businesses on an FPI procurement under solicitation No. CT1671-04, awarded in November 2004, for a similar type of T-shirt fabric. FPI had not received any inquiries or participation in that reverse auction from HUBZone small businesses, except for USA Fabrics. The record indicates that the contracting officer made no determination, prior to the reverse auction, that a HUBZone set-aside would not have produced a winning bid at a fair market price.

The original solicitation did not require that the contractor keep any specific amount of fabric in inventory. On January 14, 2005, FPI issued amendment No. 0003, which

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e.g., B-234603, Aug. 11, 1989 (revolving fund established by 42 U.S.C. § 231 constitutes an appropriation); B-288142, Sept. 6, 2001 (FEDLINK revolving fund constitutes an appropriation). For the purpose of analyzing the court's jurisdiction under the Contract Disputes Act, the Federal Circuit held that revolving funds are not appropriations, and went on to conclude that FPI was a NAFI to which the Contract Disputes Act did not apply.

added a requirement that the contractor maintain certain inventory levels dedicated to the servicing of the FPI contract, known as consignment inventory. The amendment was in response to a determination by FPI that a supply of consignment inventory held by the contractor was required to adequately meet its needs. Amendment No. 0005 increased the minimum level of consignment inventory that the contractor must maintain under the contract.

On January 10, 2005, the contracting officer received a request from USA Fabrics that the solicitation be set aside for HUBZone small businesses. He informed USA Fabrics the following day that a HUBZone set-aside would not provide adequate competition and that a small business set-aside was appropriate. On January 14, USA Fabrics protested the contracting officer's decision to our Office. In a supplemental protest filed on February 14, USA Fabrics also challenged the inventory requirement in the solicitation as restrictive.[2]

On February 15, FPI conducted the reverse auction. The starting price for the auction established by FPI was $23.3 million. The government estimate for the contract, extrapolating from the current contract price established in 1999, was $21.7 million. USA Fabrics, along with two other HUBZone small businesses, participated in the reverse auction and submitted a bid of $19.32 million, which was the lowest quotation submitted by a HUBZone small business. The lowest bid received, $16.38 million, was submitted by a large business (notwithstanding the fact that the procurement was set aside for small businesses). The agency has not yet awarded the contract.

DISCUSSION

USA Fabrics asserts that it was improper for the agency to require contractors to maintain consignment fabric inventory at a certain level, because previous solicitations did not include this requirement and the requirement is burdensome on small businesses.

While a contracting agency has the discretion to determine its needs and the best method to accommodate them, Mark Dunning Indus., Inc., B-289378, Feb. 27, 2002, 2002 CPD ¶ 46 at 3-4, those needs must be specified in a manner designed to achieve full and open competition; solicitations may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. 41 U.S.C. §§ 253a(a)(1)(A), (2)(B) (2000). 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. The adequacy of the agency's justification is ascertained through examining whether the agency's

[2] The protester also challenged a solicitation provision establishing a minimum bid amount, but subsequently withdrew this ground of protest.

explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3. A protester's mere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. See AT&T Corp., B-270841 et al., May 1, 1996, 96-1 CPD ¶ 237 at 7-8.

As a preliminary matter, we note that a requirement is not unreasonable simply by virtue of its being new. We are therefore not persuaded by the protester's argument that the inventory requirement here is unduly restrictive simply because other contracting activities may not have required consignment inventory in the past. In this regard, each procurement action is a separate transaction, and the action taken under one procurement is not relevant to the propriety of the action taken under another procurement for purposes of a bid protest. Westbrook Indus., Inc., B-248854, Sept. 28, 1992, 92-2 CPD ¶ 213 at 3.

The consignment inventory requirement is intended to reduce the amount of time that it takes FPI to supply DSCP with T-shirts for the military. We see no reason to question the agency's conclusion that the expedited T-shirt delivery made possible by the required fabric inventory was necessary to satisfy the government's requirements. Accordingly, to the extent that USA Fabric contends that the inventory requirement is unduly restrictive of competition, the protest is denied.

The protester also asserts that the agency unreasonably determined not to set the procurement aside for HUBZone small business concerns. Acquisitions must be set aside for HUBZone small businesses if the agency makes two determinations: that there is a reasonable expectation that offers will be received from two or more HUBZone small business concerns, and that award will be made at a fair market price. Federal Acquisition Regulation § 19.1305(a), (b). An agency must make reasonable efforts to ascertain whether it will receive offers from at least two HUBZone small business concerns with the capability to perform the work, and we will review a protest to determine whether the agency has done so. Global Solutions Network, Inc., B-292568, Oct. 3, 2003, 2003 CPD ¶ 174 at 3. While the use of any particular method of assessing the availability of HUBZone small businesses is not required, and measures such as prior procurement history, market surveys, and advice from the agency's small business specialist may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement, American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3, the assessment must be based on sufficient facts so as to establish its reasonableness. Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 5.

In this case, the agency undertook only minimal efforts to determine whether two capable HUBZone firms would submit offers, and we find that the agency's efforts were insufficient under the circumstances. Specifically, the only market research performed by the contracting officer was a review of one prior FPI procurement. The agency made no use of commonly referenced, readily available databases of possible HUBZone firms, such as the Dynamic Small Business Search database

(www.ccr.gov), nor did the agency contact the SBA. We sought the review of the SBA during the development of the protest. Based on its review of the record, the SBA concluded that the contracting officer's assessment that he did not have a reasonable expectation of receiving offers from at least two HUBZone firms was not reasonable. We accord substantial weight to the fact that the contracting officer's determination was reviewed by the SBA and found not to be reasonable. See American Artisan Prods., Inc., B-292380, July 30, 2003, 2003 CPD ¶ 132 at 6. Under the circumstances here, we conclude that the agency failed to make reasonable efforts to ascertain the likelihood of receiving offers from two or more HUBZone firms.

The agency argues that, even if it did not make a reasonable effort to ascertain the likelihood that two or more HUBZone small businesses would compete in the reverse auction, the agency was nevertheless not required to set aside the procurement for HUBZone businesses, because to have done so would have led to an award that was not at a fair market price. The auction results themselves, the agency asserts, demonstrate that a HUBZone set-aside would not have produced a winning bid at a fair market price.

The agency relies principally on our decision in American Imaging Servs., B-238969; B-238971, July 19, 1990, 90-2 CPD ¶ 51. In that case, although the original request for proposals (RFP) was issued a small business set-aside, the Navy received responses from large and small businesses, and the prices from the large businesses represented significant savings to the government. The Navy concluded that the large price differential between the offers from the protester, a small business, and the large businesses indicated that the protester's offer "clearly exceeded the fair market price." Id. at 2. The protester challenged the agency's decision to cancel the RFP and to reissue it on an unrestricted basis. We denied the protest, finding that the Navy properly dissolved the small business set-aside based on its conclusion regarding the unreasonableness of the protester's prices.

The agency seems to assert that American Imaging stands for the proposition that in any case where, after a contracting officer has initially failed to support his or her decision to set aside a procurement, the results of the procurement nevertheless provide support for the contracting officer's actions, the procurement has been conducted properly. We disagree.

We view the decision to cancel and resolicit as unrestricted a procurement that originally had been set aside as quite different from an attempt to justify never having set aside a procurement in the first place, using the results of that procurement. In other words, we will scrutinize more closely and grant relatively less weight to an agency's after-the-fact judgments that are arrived at in the heat of litigation. See Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Specifically here, the agency proceeded with the procurement as a small business set-aside, not a HUBZone small business set-aside, without first making the required determination that the procurement was not

suitable for a HUBZone set-aside. There can thus be no way of knowing what bids might have been offered by which eligible HUBZone small businesses in a reverse auction set aside for HUBZone small businesses, and whether the winning bid would have, in the agency's judgment, represented a fair market price for the government. By contrast, in American Imaging, the contracting officer knew the results of the set-aside procurement prior to making a decision to cancel the set-aside and reissue the procurement as unrestricted.

Under certain circumstances, of course, an agency could justify, based on the results of a procurement, a decision not to have set aside the procurement initially. The reasonableness of the agency's actions will depend on the particular facts of the case, including how the protester's bid compares with that of the lowest bidder and, if there is one, with the government's estimate of the contract cost. Here, the starting bid amount established by FPI was $23.3 million, and the government estimated the contract price at $21.7 million. The protester bid $19.32 million, with the winning bid at $16.38 million. While the protester's bid thus was nearly 18 percent higher than the lowest large business bid, it was substantially lower--over 12 percent--than the government's estimate of the contract price. Moreover, while a large business bid can be used as a reference in determining fair market price, a small business's price is not unreasonable merely because it is greater than the price of a large business bidder, since there is a range over and above the price submitted by a large business that may be considered reasonable in a set-aside situation. Vitronics, Inc., B-237249, Jan. 16, 1990, 90-1 CPD ¶ 57 at 2; CDI Marine Co., B-188905, Nov. 15, 1977, 77-2 CPD ¶ 367 at 2-3. The facts here thus do not establish that the protester's bid was per se in excess of a fair market price, and we simply cannot be certain that, were the judgment not reached in the heat of an adversarial process, the contracting officer would have concluded that USA Fabrics's bid exceeded a fair market price.

In sum, we conclude that the agency failed to make reasonable efforts to ascertain the likelihood of receiving offers from two or more HUBZone firms and of making award at a fair market price, and we sustain the protest on that basis. SWR, Inc., B-294266, Oct. 16, 2004, 2004 CPD ¶ 219.

Because two or more HUBZone small businesses participated in the reverse auction, we recommend that the contracting officer cancel the solicitation and re-issue it as a HUBZone small business set-aside, unless he determines, after conducting a proper market survey, that there is not a reasonable expectation of award being made at a fair market price. We also recommend that USA Fabrics be reimbursed the reasonable costs of filing and pursuing the protest. 4 C.F.R § 21.8(d)(1). The

protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision.

The protest is sustained in part and denied in part.

Anthony H. Gamboa
General Counsel