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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Star Food Service, Inc.

**File:** B-408535

**Date:** November 1, 2013

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John C. Mitchell, Jr., for the protester.  
Katherine B. McCulloch, Esq., Defense Logistics Agency, for the agency.  
Paula J. Haurilesko, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that a solicitation for various chicken parts improperly bundles or consolidates requirements in violation of the Small Business Act is denied, where the requirements consolidated under this procurement do not violate the terms of the Act--i.e., the requirements were not previously provided under separate, smaller contracts that were suitable for award to small business concerns.

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### DECISION

Star Food Service, Inc., of Hollywood, South Carolina, protests the terms of request for proposals (RFP) No. SPM300-13-R-0014 issued by the Defense Logistics Agency (DLA) under commercial acquisition procedures of Federal Acquisition Regulation (FAR) Part 12 for chicken products. Star argues that the RFP unreasonably bundles or consolidates requirements in violation of the Small Business Act and the Competition in Contracting Act of 1984 (CICA).

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

### BACKGROUND

Since 1993, DLA has obtained and distributed food items to U.S. forces and non-military customers outside the continental United States (OCONUS) through its Prime Vendor program. Under this program, prime vendors have contracts for specific regions, where the prime vendors are responsible for obtaining food products from subcontractors and distributing it to various locations throughout the region. DLA currently obtains chicken parts under 13 separate regional prime vendor contracts. Agency Report (AR) at 2. Prime vendors purchase chicken parts

from various suppliers at prices established in “manufacturer pricing agreements” between DLA and some suppliers of chicken parts.<sup>1</sup> Id.

In December 2012, DLA informed potential offerors of its intention to satisfy its requirements for chicken parts by entering into contracts directly with chicken suppliers, rather than satisfying these requirements through the prime vendor program. AR, Tab 6, Acquisition Strategy Memorandum, at 2. The RFP, issued in February 2013, provides for the award of two fixed-price, indefinite-delivery/indefinite-quantity contracts with quarterly economic price adjustments for chicken parts for 3 years. One contract (Lot 1) for frozen chicken wings was set aside for small businesses. The other contract (Lot 2) for various other chicken parts was unrestricted.<sup>2</sup> DLA’s OCONUS prime vendors will order chicken parts under the contracts for distribution throughout their respective regions. RFP at 34. Offerors were informed that the awards would be made on a lowest-priced, technically acceptable basis. The closing date for submission of proposals, as amended, was July 3, 2013.

On May 31, Star filed an agency-level protest with DLA, arguing that the solicitation requirements for Lot 2 reflected unreasonable bundling as defined in FAR § 2.101 and consolidation of requirements in violation of various provisions of FAR subpart 7.1 and Defense FAR Supplement (DFARS) § 207.170-2. Protest, exhib. A, Agency-Level Protest, May 31, 2013, at 10-14. DLA denied Star’s agency-level protest on July 3.

On July 12, Star protested to our Office.

## DISCUSSION

Star complains that the RFP’s aggregation of 24 chicken parts (such as breasts, thighs, or tenderloins, and processed chicken products like nuggets, strips, or patties) in Lot 2 constitutes an unreasonable bundling and consolidation, as defined by FAR § 2.101 and DFARS § 207.170-2. Protest at 2. Specifically, Star argues that the RFP’s requirements are not new, and that DLA unreasonably bundled the Lot 2 chicken parts that were previously provided under the 13 prime vendor contracts into a single contract in violation of the Small Business Act. Comments at 2-3. Star also argues that bundling the Lot 2 requirements is unduly restrictive of

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<sup>1</sup> Manufacturer pricing agreements are agreements between DLA and suppliers that set prices, but do not guarantee that a minimum quantity will be purchased from the supplier by the prime vendors. AR, Tab 6, Acquisition Strategy Memorandum, at 2-3.

<sup>2</sup> DLA aggregated the brand-specific stock numbers into generic stock numbers, resulting in a total of 6 line items for Lot 1 and 24 line items for Lot 2.

competition and violates CICA. As discussed below, we deny Star's protest that the RFP's Lot 2 requirements violate the bundling requirements of the Small Business Act and dismiss as untimely Star's complaint that that RFP otherwise violates CICA.

The Small Business Act, as amended, states that, "to the maximum extent practicable," each agency shall "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors." 15 U.S.C. § 631(j)(3) (2013). Bundling, for purposes of the Small Business Act, means "consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern." See 15 U.S.C. § 632(o)(2); see also FAR § 2.101; DFARS § 201.170-2. The term "separate smaller contract" is defined as "a contract that has been performed by 1 or more small business concerns or was suitable for award to 1 or more small business concerns." 15 U.S.C. § 632(o)(3); FAR § 2.101.

Here, DLA explains that the RFP's Lot 2 requirements for various chicken parts does not constitute bundling or consolidation under the Small Business Act, because the agency does not currently procure chicken parts directly through separate contracts. That is, DLA's requirements for chicken parts are now satisfied under the prime vendor contracts, where the prime vendors procure the chicken parts directly from chicken suppliers under pricing established under manufacturer pricing agreements. DLA also states that the prime vendor contracts will not be eliminated as a result of the new acquisition strategy. Under the RFP, DLA will contract directly with chicken suppliers, and the prime vendors will obtain the chicken parts through DLA's contracts with the chicken suppliers. AR at 5-6.

We agree with the agency that the RFP Lot 2 requirements do not constitute bundling, as defined by the Small Business Act, because DLA is not consolidating requirements that were previously provided under separate contracts into a solicitation for a single contract. Here, DLA extracted the chicken parts requirement from multiple prime vendor contracts and combined them into a single contract, from which the prime vendors will meet the requirements for their regions. With respect to Star's argument that the prime vendor contracts are the relevant separate small contracts referred to in the definition of bundling, Comments at 2, Star misinterprets the meaning of the Small Business Act provision. As relevant here, the term "separate smaller contract" is defined as "a contract that . . . was suitable for award to 1 or more small business concerns." 15 U.S.C. § 632(o)(3); FAR § 2.101. The prior contracts relevant to this analysis are the prime vendor contracts, which Star acknowledges are being performed by large businesses. See Protest, Exhib. A, Agency-Level Protest, at 11. Thus, although Star contends that small businesses were capable of providing chicken parts--and indeed, were providing chicken parts under subcontracts to the prime vendors, Star has not established that the prime vendor contracts were suitable for award to 1 or more

small businesses.<sup>3</sup> See Vox Optima, LLC, B-400451, Nov. 12, 2008, 2008 CPD ¶ 212 at 3.

With respect to Star's argument that the consolidation of the RFP's Lot 2 requirements otherwise violates DFARS § 207.170-2, this section defines "[c]onsolidation of contract requirements" as "the use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of a department, agency, or activity for supplies or services that previously have been provided to, or performed for, that department, agency, or activity under two or more separate contracts."<sup>4</sup> For the reasons discussed above, we find that the Lot 2 requirements do not constitute consolidation as defined in DFARS § 207.170-2 because the chicken parts were not previously procured by DLA under two or more separate contracts.

Star also argues that awarding a single contract for the Lot 2 requirements constitutes an undue restriction upon competition in violation of CICA. Protest at 2; Comments at 1. We find that this ground of protest is untimely.

Our Bid Protest Regulations provide that where, as here, a protest has been initially filed with the contracting agency we will consider a subsequent protest if the initial protest with the agency was timely filed. 4 C.F.R. § 21.2(a)(3) (2013). Because our regulations do not provide for the unwarranted piecemeal presentation of protest issues, where a protester initially files a timely agency-level protest, and subsequently files a protest with our Office which includes additional grounds, the additional grounds must independently satisfy our timeliness requirements. MediaNow, Inc., B-405067, June 28, 2011, 2011 CPD ¶ 133 at 2; ABF Freight Sys., Inc.; Old Dominion Freight Line, Inc.; Overnite Transp. Co.; Roadway Express, Inc.; and Yellow Freight Sys., Inc., B-291185, Nov. 8, 2002, 2002 CPD ¶ 201 at 7.

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<sup>3</sup> Additionally, to the extent that Star argues that the Lot 2 is unsuitable for award to small businesses, Protest at 4, we note that DLA has received multiple offers from small businesses to meet the requirements for all 24 line items in Lot 2. AR at 2.

<sup>4</sup> DFARS § 207.170, Consolidation of Contract Requirements, implements 10 U.S.C. § 2382, which was repealed by section 1671(c)(1) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. No. 112-239). The Small Business Act, as amended, defines "consolidation of contract requirements" as "a use of a solicitation to obtain offers for a single contract or a multiple award contract . . . to satisfy 2 or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under 2 or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited." 15 U.S.C. § 657q. Star does not contend that the RFP Lot 2 requirements constitute a consolidation of requirements as defined by the Small Business Act.

Here, Star argued in its agency-level protest that the RFP's Lot 2 requirements constituted unlawful bundling as defined by FAR § 2.101 (which implements the Small Business Act bundling requirements) and unlawful consolidation as defined by DFARS § 207.170-2. Protest, Exhib. A, Agency-Level Protest, May 31, 2013, at 10-12. Star did not contend in its agency-level protest that the RFP Lot 2 requirements constituted an undue restriction of competition in violation of CICA. Rather, these arguments were first made in its protest to our Office on July 12, nine days after the closing date for receipt of proposals. To be timely, this challenge to the terms of the solicitation was required to be filed before the closing time for receipt of proposals, but was not. See 4 C.F.R. § 21.2(a)(1).

The protest is denied in part and dismissed in part.<sup>5</sup>

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General Counsel

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<sup>5</sup> Star raises a number of other arguments concerning bundling and the agency's determination that, even if the Lot 2 requirements constituted a consolidation, the consolidation of requirements was necessary and justified. In light of our conclusion that the Lot 2 requirements do not constitute unreasonable bundling or consolidation under the Small Business Act and DFARS § 207.170-2, we need not address these additional arguments.