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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Total Industrial & Packaging Corporation

File: B-295434

Date: February 22, 2005

Byron W. King, Esq., Jones, Gregg, Creehan & Gerace, for the protester.
Steven B. Hilkowitz, Esq., Defense Logistics Agency, for the agency.
Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably awarded noncompetitive contracts for sandbags to four qualified Historically Underutilized Business Zone firms to meet agency's urgent requirement for sandbags in support of military operations.

DECISION

Total Industrial & Packaging Corporation protests the noncompetitive award by Defense Supply Center Philadelphia, Defense Logistics Agency of contracts to C.H.K. Manufacturing Co. Inc.; La Pac Manufacturing, Inc.; Ampack, LLC; and Dayton Bag & Burlap Co., for polypropylene sandbags.

We deny the protest.

Prior to the noncompetitive awards at issue here, on March 4, 2004, the agency issued a competitive solicitation for the sandbags, set aside for offerors that would manufacture the product in a Historically Underutilized Business Zone (HUBZone), as certified by the Small Business Administration (SBA).¹ On July 27, five contracts were awarded to HUBZone firms, including Total, under that solicitation.² On August 4, a stop-work order was issued to Total after the agency learned that Total's subcontractor (located in Texas) for this contract, which was manufacturing the

¹ In 2002, the SBA recommended that procurements of sandbags be set aside for HUBZone firms.

² Total received the largest award share under the solicitation.

sandbags, was not a certified HUBZone firm, and thus the sandbags being produced by that subcontractor did not meet the solicitation's requirement that the sandbags be produced by a certified HUBZone firm. On August 19, Total informed the agency that it had located a new HUBZone manufacturer in Puerto Rico that it intended to use as a subcontractor. On that same date, the agency rescinded the stop-work order. On October 18, the agency notified Total that it had failed to adhere to the delivery schedule as established by its contract. Total replied on October 27 that its new subcontractor has a "much smaller capacity" to manufacture, and that it could not complete the deliveries until March 31, 2005. Agency Report, Tab 10, Letter from Total to Agency. On November 9, 2004, after receiving information that the material used by Total's new subcontractor to manufacture the sandbags might be foreign and that not all of the sandbags were produced at the subcontractor's facility, the agency issued another stop-work order. The agency noted that the contract included the requirement that the material for the sandbags, as well as the final product, be domestically manufactured, and therefore, the agency requested proof regarding the actual manufacturer of the sandbag. The record evidences that Total has not provided the requested proof, the stop-work order is still in effect, and the agency and Total are still engaged in discussions concerning the performance of that contract.

From November 5 to November 10, the agency noncompetitively issued contracts to C.H.K., La Pac, Ampack, and Dayton to satisfy urgent requirements for polypropylene sandbags in support of Operation Iraqi Freedom. As indicated in the Justification and Approval, dated November 22, of these noncompetitive contracts, the sandbag requirements could not be met under current contracts for a variety of unforeseen reasons. First, developments in Iraq at the time these noncompetitive awards were made indicated that more sandbags were needed on an expedited basis to meet force-protection requirements. In addition, the sandbags currently in use in Iraq have deteriorated at an unexpectedly fast rate due to the extreme climate conditions; the sun's ultraviolet rays (UV) and the wind-driven sand have more quickly broken down the polypropylene fabric than was anticipated.³ Because of the time that would be necessary to competitively procure these urgently needed sandbags, the agency instead elected to contact known qualified HUBZone manufacturers to ascertain their capability to manufacture and deliver sandbags meeting revised UV requirements by March 2005. The contracting officer decided not to contact Total because of the delinquent deliveries under its existing contract, the outstanding questions concerning the acceptability of its offered sandbags, and the fact that even if Total were able to resolve the agency's concerns regarding supplying compliant material, Total still would not have been able to complete delivery under its contract until March 31, 2005. The four noncompetitive awards were made to those qualified HUBZone manufacturers that DLA found were able to produce and deliver compliant sandbags by March 2005.

³ We note that the sandbags that were in use in Iraq were not manufactured by Total.

Total protests that the agency's award of the four contracts on a noncompetitive basis for sandbags was improper. The Competition in Contracting Act of 1984 (CICA) provides for the use of noncompetitive procedures where an agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2) (2000). Although CICA requires that the agency request offers from "as many potential sources as is practicable under the circumstances," 10 U.S.C. § 2304(e); see Federal Acquisition Regulation (FAR) § 6.302(c)(2), an agency may still limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. McGregor Mfg. Corp., B-285341, Aug. 18, 2000, 2000 CPD ¶ 151 at 6; Hercules Aerospace Co., B-254677, Jan. 10, 1994, 94-1 CPD ¶ 7 at 3. We will object to the agency's determination only where the decision lacks a reasonable basis. Signals & Sys., Inc., B-288107, Sept. 21, 2001, 2001 CPD ¶ 168 at 12. In this regard, a military agency's assertion that there is a critical need related to human safety and which affects military operations carries considerable weight. McGregor Mfg. Corp., supra, at 7. The reasonableness of the contracting officer's judgments must be considered in the context of the time when they were made and the information that was available at that time. Equa Indus., Inc., B-257197, Sept. 6, 1994, 94-2 CPD ¶ 96 at 3 n.1.

We find the contracting officer had a reasonable basis for the noncompetitive awards. The basic undisputed facts known to the contracting officer at the time he decided that it would be necessary to make noncompetitive awards, providing for delivery of the sandbags in March 2005, were: (1) the demand for sandbags had increased over the past year in support of Operations Enduring Freedom and Iraqi Freedom, (2) sandbags that were being used in Iraq were deteriorating at an unexpectedly fast rate, (3) the contractor that had received the largest share of the award under the previous contract for sandbags—that is, Total—was delinquent in its deliveries and its performance had been suspended because of concerns about the compliance with the contract's HUBZone and domestic manufacturing requirements, and (4) prior awards for this item were set aside 100 percent for HUBZone firms by the SBA. In view of the fact that the sandbags were reasonably found critical to successful military operations, the contracting officer reasonably determined that the requirement was urgent and that the procurement process must be expedited through the multiple noncompetitive awards.

Total claims that the urgency-based noncompetitive contracts were caused by a lack of advance procurement planning and by the agency's decision to obtain these sandbags only from HUBZone manufacturers. The record does not establish that a lack of advance procurement planning was the cause of this urgent requirement; instead, the record shows that the urgency of the requirement was caused by the unexpected rapid deterioration of sandbags, increased demand for sandbags in Iraq, and the performance problems on Total's current contract. The record also does not show that the urgency here was caused by the agency's determination that the

sandbag requirement should be set aside for certified HUBZone firms, given that four HUBZone firms have been found that are able to satisfy the agency's urgent delivery requirements. In any case, FAR § 19.1306 provides express authority to make noncompetitive awards to HUBZone concerns.

Total argues that it should have been solicited for this requirement, contending that it has supplied sandbags and that, if solicited, it could have satisfactorily met the agency's delivery requirements, given that it has a significant number of sandbags in stock and ready for delivery. Total also argues that it is currently in negotiations with another subcontractor, and that it was in a position to compete for the current procurement to provide sandbags that meet the more rigorous UV specifications.

Given Total's delinquency and suspension of performance under its current contract—which contributed to the urgent need here—we find no basis to disagree with the agency's judgment not to consider Total for an award for delivery of the sandbags by March 2005. We also note in this regard that Total has not established that the sandbags that it has available for immediate delivery are manufactured by qualified HUBZone firms and meet the more rigorous UV specifications. Additionally, while Total stated that it is in negotiations with another subcontractor, and can produce sandbags that meet the new specifications, Total has not stated that it can do so by March 2005.

Total challenges Dayton's and La Pac's HUBZone status and manufacturing capabilities, stating that DLA did not give the same scrutiny to these firms as it did to Total before making the noncompetitive awards. However, under 15 U.S.C. § 637(b)(6) (2000), the SBA has conclusive authority to determine matters of size status for federal purposes and our Office will neither make nor review size status determination. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(1) (2004). Similarly, the SBA is the designated authority for determining whether a firm is an eligible HUBZone small business concern, and it has established procedures for interested parties, including procuring agencies, for challenging a firm's status as a qualified HUBZone small business concern. 15 U.S.C. §§ 632(p)(5)(A), 657a(c)(1); 13 C.F.R. §§ 126.503, 126.801 (2004); FAR §§ 19.306, 19.1303. As a consequence, our Office will neither make nor review HUBZone status determinations. Ashe Facility Serv., Inc., B-292218.3, B-292218.4, March 31, 2004, 2004 CPD ¶ 80 at 17.

With regard to the manufacturing capabilities, the record evidences that DLA has sufficiently confirmed the ability of these firms to meet the contract requirements, including the HUBZone requirements. To the extent Total asserts that these firms are not in fact meeting contract requirements, this is a matter of contract

administration. We do not review matters of contract administration absent circumstances not present here; rather, such matters are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the Court of Federal Claims. 4 C.F.R. § 21.5(a).

The protest is denied.

Anthony H. Gamboa
General Counsel