



G A O

Accountability * Integrity * Reliability

Decision

Matter of: Triune Associates

File: B-292005

Date: May 13, 2003

Vince Fudzie for the protester.

Michael Gurwitz, Esq., Department of Agriculture, for the agency.

John W. Klein, Esq., and Kenneth Dodds, Esq., for the Small Business Administration.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Because an agency's choice of a particular North American Industry Classification System (NAICS) code is a matter for review exclusively by the Small Business Administration, protester's argument that acquisition for canned juice could reasonably have been classified under more than one NAICS code will not be considered by the General Accounting Office.

2. Pursuant to Federal Acquisition Regulation § 19.1102(a), it is the NAICS code applied to an acquisition, as opposed to the NAICS code that applies to an offeror, that governs whether a small disadvantaged business price evaluation adjustment applies.

DECISION

Triune Associates, a small disadvantaged business (SDB) concern, protests the failure of the Department of Agriculture to apply an SDB price evaluation adjustment to its offer under Announcement FV-205, Invitation 052, for canned juice.

We deny the protest.

Invitation 052, which was issued on January 30, 2003, sought offers for canned juice for distribution to domestic food assistance programs.¹ The invitation sought offers

¹ The solicitation here was issued pursuant to Announcement FV-205, which sets out the general terms and conditions applicable to acquisitions of canned juice products.

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for a total of 547,496 cases of 46-ounce cans/cartons of various types of fruit juice for delivery to a number of different locations across the country between April 1, 2003 and June 30, 2003. The invitation set the closing date for receipt of offers as February 13. Neither the invitation nor Announcement FV-205 incorporated a clause providing for a price evaluation adjustment for SDB concerns.

Evaluation of offers must be in accordance with the solicitation's evaluation provisions. Since neither the invitation nor the announcement here provided for an SDB price evaluation adjustment, application of such an adjustment would have been improper. American Imaging Servs., Inc.--Recon., B-250861.2, Jan. 5, 1993, 93-1 CPD ¶ 13 at 1.

To the extent that the protester is arguing that the solicitation should have provided for an SDB preference,² Federal Acquisition Regulation (FAR) § 19.1104 instructs contracting agencies to insert the clause at § 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, in solicitations and contracts "when the circumstances in 19.1101 and 19.1102 apply." FAR § 19.1101 provides that "[a] price evaluation adjustment for small disadvantaged business concerns shall be applied as determined by the Department of Commerce (see 19.201(b)),³ while § 19.1102(a) directs agencies to "[u]se the price evaluation adjustment in competitive acquisitions in the authorized NAICS Industry Subsector."⁴ The solicitation at issue here stated that the applicable NAICS code was 311421 with

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Specific products are acquired through issuance of "invitations" that set out the type of product sought, the offer due date, delivery requirements and destinations, and any other provisions additional to, or different from, those included in the announcement. See Agency Report, Tab 3 at 4.

² We consider this argument to be timely because it was arguably raised in an agency-level protest filed by the protester prior to the closing date for receipt of offers. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (2003).

³ Section 19.201(b) provides that "[t]he Department of Commerce will determine on an annual basis, by North American Industry Classification System (NAICS) Industry Subsector, and region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms [one of which is the price evaluation adjustment] and applicable factors (percentages)."

⁴ FAR § 19.1102(b) further instructs that the price evaluation adjustment should not be used in acquisitions that are less than or equal to the simplified acquisition threshold, awarded pursuant to the 8(a) program, set aside for small business concerns, or set aside for HUBZone small business concerns; in acquisitions where price is not an evaluation factor; or in acquisitions where all fair and reasonable offers are accepted (e.g., the award of multiple-award schedule contracts).

a small business size standard of 500 employees. NAICS code 311421 designates the fruit and vegetable canning industry, which is not an industry eligible for the SDB price evaluation adjustment.⁵

Triune argues that while the announcement designated NAICS code 311421 for purposes of defining the size standard applicable to the solicitation, this does not mean that other NAICS codes might not also be applicable for other purposes, such as defining price evaluation adjustment eligibility. The protester cites as support for its argument FAR § 19.102(c), which provides that “[f]or size standard purposes, a product or service shall be classified in only one industry, whose definition best describes the principal nature of the product or service being acquired even though for other purposes it could be classified in more than one.” (Emphasis added.) Triune maintains that in addition to NAICS code 311421, this acquisition reasonably could have been classified under NAICS code 422490 (juices, canned or fresh, wholesaling), which corresponds to SIC code 5149, which is eligible for the price evaluation adjustment. The protester points out that the same size standard is applicable to the two codes.

Even assuming for the sake of argument that this acquisition reasonably could have been classified under code 422490 as well as code 311421, the fact remains that the solicitation here designated only code 311421, and the protester failed to challenge that designation at the Small Business Administration (SBA), which has exclusive authority over NAICS code determination appeals. See FAR § 19.303(c); 13 C.F.R. § 121.1102 (2002). Because an agency’s choice of a NAICS code is a matter for review by the SBA, not our Office, this is not a matter for our consideration. See Expeditions Int’l Travel Agency, B-252510, June 28, 1993, 93-1 CPD ¶ 497 at 4.

Triune also argues that as an SDB in an eligible industry, *i.e.*, SIC Group 51 (wholesale trade–nondurable goods), it is entitled to the 10 percent price evaluation adjustment regardless of the industry classification assigned to the solicitation by the contracting officer. The protester observes that an agency’s designation of a particular NAICS code in a solicitation does not preclude an offeror outside the identified industry from submitting an offer and receiving an award, provided it meets the associated small business size standard; thus, Triune asserts, an agency’s designation of a NAICS code from an industry not eligible for the price evaluation

⁵ While the NAICS replaced the U.S. Standard Industrial Classification (SIC) system as of October 1, 2000, the Department of Commerce determination posted at <http://www.arnet.gov/References/sdbadjustments.htm> was last updated on September 29, 2000 and still references SIC, as opposed to NAICS, codes. The determination does not list SIC Major Group 20 (Manufacturing: Food and Kindred Products), which encompasses the SIC code (*i.e.*, 2033) that corresponds to NAICS code 311421, as one of the industries eligible for the 10 percent price evaluation adjustment.

adjustment should not prevent an offeror from an industry that is eligible for the price evaluation adjustment from invoking it.

As noted above, FAR § 19.1102(a) instructs agencies to “[u]se the price evaluation adjustment in competitive acquisitions in the authorized NAICS Industry Subsector.” While we recognize that a straightforward application of the provision may lead to some anomalous results,⁶ we nonetheless think that the clause is susceptible of only one reasonable interpretation: it is the NAICS code applied to the acquisition, as opposed to the NAICS code that applies to an offeror, that governs whether or not the price evaluation adjustment applies. Accordingly, since the NAICS code applied to this solicitation was 311421, which corresponds to an ineligible industry, we find no basis upon which to conclude that the Department of Agriculture violated the FAR by failing to incorporate a clause providing for a price evaluation adjustment for SDBs into the solicitation.⁷

The protest is denied.

Anthony H. Gamboa
General Counsel

⁶ For example, an SDB wholesaler responding to a solicitation classified under NAICS code 311421 would not be entitled to a price evaluation adjustment despite the fact that wholesaling is an eligible industry, while an SDB food manufacturer responding to a solicitation classified under a wholesale NAICS code would be entitled to a price evaluation adjustment despite the fact that it is not part of an eligible industry.

⁷ We solicited the comments of the SBA on the issues raised in Triune’s protest, and, consistent with our view, they took the position that “although not painfully explicit, FAR subpart 19.11 provides that, for purposes of applicability of the SDB PEA [price evaluation adjustment], it is the single classification code for the prime contract that is determinative: “[u]se the price evaluation adjustment in competitive acquisitions in the authorized NAICS Industry Subsector.” Letter from SBA to GAO, Apr. 23, 2003, at 3.