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Decision

Matter of: Power Connector, Inc.

File: B-285395

Date: August 24, 2000

James J. McCullough, Esq., and Catherine E. Pollack, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.

Kevin M. Kordziel, Esq., and Geoffrey A. Barrow, Esq., Jenner & Block, for Day Leather Corporation, an intervenor.

Michael A. Lewis, Esq., Department of Justice, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly awarded a small business set-aside contract to a source offering a foreign product is sustained because such set-asides are limited to sources supplying domestically-produced products.

DECISION

Power Connector, Inc. (PCI) protests the award of a contract to Day Leather Corporation under request for proposals (RFP) No. 1PI-R-1579-00, issued by Federal Prison Industries, Inc., for 1.5 million square feet of leather. PCI argues that Day Leather's offer of imported leather from Brazil is ineligible for award because the solicitation required domestic leather.

We sustain the protest.

BACKGROUND

Federal Prison Industries, Inc. is a wholly-owned government corporation within the Department of Justice that operates under the trade name UNICOR at various correctional institutions in the federal prison system. RFP at 4. The leather at issue here will be used by UNICOR's facility at the Federal Correctional Institution at Sandstone, Minnesota, to manufacture work gloves for the General Services Administration and the U.S. Forest Service. Agency Report at 2.

The solicitation anticipated award of an indefinite-delivery/indefinite-quantity contract for 1 base year, with 1 option year, to the offeror whose proposal was considered most advantageous to the government. RFP at 4, 32. The following factors, in descending order of importance, were to be used in evaluating offers: past performance, compliance with specifications, and price. Id. at 32.

Set forth in full within the solicitation was Federal Acquisition Regulation (FAR) clause 52.219-6, "Notice of Total Small Business Set-Aside (Jul 1996)," which reserved this requirement for exclusive small business participation. Id. at 18. In relevant part, this clause states:

Agreement. A small business concern submitting an offer in its own name agrees to furnish, in performing the contract, only end items manufactured or produced by small business concerns in the United States.

Id. In addition, the solicitation incorporated by reference the following FAR clauses: 52.225-9, entitled "Buy American Act--Trade Agreements--Balance of Payments Program (Jan 1996)"; and 52.225-21, entitled "Buy American Act--North American Free Trade Agreement Implementation Act--Balance of Payments Program (Jan 1997)."¹ These clauses--and the statutes and agreements they implement--permit offerors to provide foreign end items, and describe whether, and how, an evaluation differential will be applied to the non-domestic items.

In response to the solicitation, the agency received five proposals from three offerors. The awardee, Day Leather, and a second offeror both submitted a single proposal offering foreign leather. In contrast, PCI submitted three proposals--one offering domestic leather, one offering foreign leather, and one offering a mixture of foreign leather and domestic processing that the company urged the agency to evaluate as a domestic end product. PCI Cover Letter for Proposals, Apr. 11, 2000.

In reviewing the proposals, the agency evaluated past performance using adjectival ratings, and evaluated compliance with the specifications on a pass/fail basis, based on a review of bid samples. Since all five proposals passed the specification review--and were thus equal under this criterion--we set forth below only the proposed prices and past performance ratings of the five proposals:

¹ As the protester points out, the above-indicated FAR clauses incorporated by reference were revised and renumbered effective February 2000. Federal Acquisition Circular 97-15, Feb. 25, 2000. The solicitation, although issued in April 2000, referenced the obsolete clauses that were in effect prior to February 2000.

OFFEROR	PAST PERFORMANCE RATING	PRICE
Day Leather (foreign leather)	[deleted]	\$ 4.110 million
Offeror A (foreign leather)	[deleted]	[deleted]
PCI – Proposal 1 (foreign leather)	[deleted]	[deleted]
PCI – Proposal 2 (mixed source)	[deleted]	[deleted]
PCI – Proposal 3 (domestic leather)	[deleted]	[deleted]

Agency Report, at 4.

Based on these results, the contracting officer selected Day Leather’s proposal for award on the basis of the proposal’s lowest price and highest past performance rating. *Id.* The agency gave no consideration to whether the proposals offered foreign or domestic leather. This protest followed.

DISCUSSION

As a preliminary matter, there is no dispute in this case that an agency may not purchase a foreign product under a small business set-aside. FAR § 19.102(f)(1): TRS Research, B-283342, Nov. 4, 1999, 99-2 CPD ¶ 85 at 3 (protest challenging agency’s rejection of quote offering foreign product under a small business set-aside denied); Kaysam Worldwide, Inc., B-247743, June 8, 1992, 92-1 CPD ¶ 500 at 2 (protest challenging award to offeror proposing a foreign product under a small business set-aside procurement sustained); General Metals, Inc., B-247560, May 29, 1992, 92-1 CPD ¶ 486 at 2 (same). Accordingly, UNICOR could not properly award this contract to Day Leather under the terms of this solicitation.

In response to this protest the agency states that it was not aware of the domestic product restriction in the Notice of Total Small Business Set-Aside clause, and that it did not intend to limit offerors to domestic products. Contracting Officer’s (CO) Statement at 3. As discussed further below, the agency and Day Leather argue that PCI knew that the agency intended to consider offers of foreign products at the time it prepared its three proposals--one of which clearly offered foreign leather--and that the contracting officer orally advised PCI of this intention. *Id.* at 3-4. For these reasons, both the agency and Day Leather argue that this protest, in effect, raises an untimely challenge that the solicitation was ambiguous, and thus should be dismissed. In addition, the agency and Day Leather argue that PCI was not prejudiced by the agency’s acceptance of a proposal that offered foreign leather because PCI improperly “gamed” this procurement.

Timeliness

Under our Bid Protest Regulations, protests based upon alleged improprieties in solicitations which are apparent prior to the time set for receipt of initial proposals must be raised before the time proposals are due. 4 C.F.R. § 21.2(a)(1) (2000). Here, the agency and Day Leather argue that there is ample evidence in the record that PCI was aware of a conflict between the terms of the solicitation and the agency's intent to consider offers of foreign leather, thus creating an ambiguity PCI was required to protest before solicitation closing. For example, Day Leather argues that the presence of the Buy American Act clauses in the solicitation, together with express statements from the CO about the acceptability of foreign leather, made the solicitation patently ambiguous. As further evidence that PCI was aware that the agency would accept foreign leather, Day Leather points out that previous UNICOR solicitations permitted offers of foreign leather.

We disagree, as a legal matter, with the intervenor's assertion that the apparent conflict between the domestic source requirement in the small business set-aside clause and the two Buy American Act clauses creates a patent ambiguity in the solicitation that renders this protest untimely. Our Office has held that there is no conflict in a solicitation that includes both a requirement for a domestic end item and clauses that implement the Buy American Act. TRS Research, supra, at 4 (despite presence of Buy American Act clauses, inclusion of the more stringent small business set-aside restriction to domestic sources put offerors on notice that only domestic products could be offered); MTS Sys. Corp., B-238137, Apr. 27, 1990, 90-1 CPD ¶ 434 at 4 (no conflict between Department of Defense clause restricting offerors to domestic sources and Buy American Act clauses allowing evaluation of foreign end products). Given these holdings, PCI was under no obligation to file its challenge here prior to the closing time for receipt of proposals.

Also, given the conflicting statements in the record, we are unable to conclude that the CO expressly advised offerors that foreign leather would be acceptable to the agency. Although the CO states that she gave such advice to PCI's General Manager, and to each of the other offerors, she also concedes that she made no written notes of her conversation, and cannot say when the conversation occurred. CO's Statement at 4. In response, PCI's General Manager provided our Office with a sworn declaration that he had no such conversation with the CO prior to the award to Day Leather--rather, he states that he had one preaward conversation with the CO on an unrelated matter, and he confirmed the content of that conversation in a facsimile to the contracting officer that same day.² Declaration of PCI's General

² For the record, PCI's General Manager explains that he contacted the CO about the domestic source requirement after the agency announced its selection of Day
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Manager, June 26, 2000, at 1-2. Despite making subsequent filings on other issues, the agency offered no reply to this sworn declaration. Under these circumstances, we will not conclude that the protest is untimely.³ See Precise Constr. Management, B-278144.2, Feb. 24, 1998, 98-1 CPD ¶ 63 at 2-3 (timeliness dispute resolved in favor of protester where agency offers no rebuttal to protester's sworn statements offered to establish timeliness of protest).

Prejudice

The agency and intervenor also point to PCI's alternate proposal of foreign leather as evidence that PCI cannot claim it was prejudiced by the agency's failure to enforce the requirement for a domestic product. For the reasons below, we disagree.

We recognize that PCI's alternate proposal raises the troubling appearance that PCI has successfully "gamed" this procurement. We also recognize that, as a practical matter, a solicitation sends a confusing message when it states that no foreign products will be accepted, and also states how foreign products will be evaluated using a price differential—even if there is no legal conflict in a solicitation that includes both a domestic source requirement and Buy American Act clauses. Faced with the possibility that the agency might make an unlawful award to an offeror proposing foreign leather, PCI's alternate proposal strikes us as a strategy designed to reduce its risk of nonselection. While we share the concerns voiced by the agency and the intervenor, PCI's actions cannot be termed unlawful, and do not prevent the company from establishing that it has been prejudiced by the agency's decision to make an award the solicitation barred it from making.

Our standard of prejudice is that we will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, as the only offeror proposing domestic leather in a solicitation barring acceptance of foreign leather, PCI can appropriately claim that, but for the agency's

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Leather--and he submits copies of written follow-up questions on this subject that were sent to the CO's supervisor. Id. at 2-3, attach.

³ We note that Day Leather offered no support for the CO's claim that she orally advised it that foreign leather would be accepted, but instead described a similar conversation with a different CO on an earlier procurement. Intervenor's Comments, June 26, 2000, at 4-5. In addition, we do not agree that information from earlier procurements can be used to alter the plain meaning of the solicitation here. See 440 East 62nd St. Co., B-276787, July 24, 1997, 97-2 CPD ¶ 30 at 4 n.5.

waiver of the restriction against proposing foreign leather, it would have received this award.

In addition, PCI points out that the requirement for domestic products here is set forth within the standard small business set-aside clause. According to PCI, if this procurement had not been set aside--i.e., had PCI been competing with large businesses on a non-set-aside basis--it would have structured its proposal differently to be competitive. As we concluded in MTS Sys. Corp., supra, at 5, we have no basis to dispute the contention that a change in the set-aside status of this procurement might have resulted in a change in PCI's proposal.

RECOMMENDATION

We recommend that the agency terminate for the convenience of the government the contract awarded to Day Leather because that firm's proposal could not be selected for award under the solicitation here. At this juncture, however, we do not recommend that the agency award a contract under the solicitation to PCI.

During the course of this protest, the agency indicated that it "mistakenly included the small business set-aside clause in the solicitation without realizing that it had a domestic-source provision, which was inconsistent with UNICOR's needs for this procurement." Agency Report at 5. Since it appears the agency may wish to revisit the decision to set aside this procurement for small business, we note the following options available to UNICOR: (1) conclude that this procurement was appropriately conducted as a small business set-aside, in which case only offers of domestic leather are eligible for award, and award should be made to PCI; (2) conclude that the procurement should be conducted as a small business set aside, but request a waiver, if appropriate, of the requirement for domestic products from the Small Business Administration (see FAR § 19.102(f)(5); 13 C.F.R. § 121.406(b)(3) (2000)), and resolicit; or (3) conclude that the procurement should be conducted on a non-restricted basis, and resolicit.

We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). In accordance with 4 C.F.R. § 21.8(f)(1), PCI's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Robert P. Murphy
General Counsel