Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: District Moving & Storage, Inc.; Guardian Storage, Inc.; and Quality Transport Services, Inc.

File: B-272070

Date: August 9, 1996

Alan F. Wohlstetter, Esq., and Stanley I. Goldman, Esq., Denning & Wohlstetter, for the protesters.
Dennis J. Gallagher, Esq., Department of State, for the agency.
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DIGEST

Under solicitation that contemplates multiple awards, provision that restricts award to only one of any affiliated offerors is not unduly restrictive of competition where the record shows that the agency reasonably concluded that multiple awards to affiliated offerors would be prejudicial to the government's interests, and, thus, that the provision is reasonably necessary to meet the agency's minimum needs.

DECISION

District Moving & Storage, Inc., Guardian Storage, Inc., and Quality Transport Services, Inc. protest the terms of request for proposals (RFP) No. S-OPRAQ-96-R-0515, issued by the Department of State for non-temporary storage and related services. The protesters contend that the solicitation, which contemplates multiple awards, improperly restricts award to only one of any affiliated offerors.

We deny the protest.

Our Office has long held that contracting agencies are not required to reject offers from affiliated firms, or to limit them to one award, unless doing so would be prejudicial to the interests of the government or would give the affiliated offerors an unfair advantage over other offerors. See 39 Comp. Gen. 892 (1960); see also Fiber-Lam Inc., 69 Comp. Gen. 364 (1990), 90-1 CPD ¶ 351; Colonial Storage Co.; Paxton Van Lines, Inc., B-253501.5 et al., Oct. 19, 1993, 93-2 CPD ¶ 234; Pioneer Recovery Sys., Inc., B-214700; B-214878, Nov. 13, 1984, 84-2 CPD ¶ 520. This protest presents the question whether State may properly restrict award to only one of any affiliated offerors under this solicitation.

The solicitation contemplates the award of five fixed-price, indefinite quantity contracts to firms that will pick up, receive, weigh, store, and deliver out of storage the household and personal effects of government employees arriving in and departing from the Washington, D.C. metropolitan area. Each contract will run for 1 base year, with up to 4 option years.

Award will be made to the firms whose offers are most advantageous to the government, considering technical merit and price. Technical merit is more important than price, but price may become the determining factor as the proposals become more equal in technical merit. The RFP sets forth five technical merit evaluation factors and requires offerors to include current financial statements along with their price proposals.

Section H.22 of the solicitation governs which contractors will be entitled to receive the most orders. While each contractor will receive a minimum order, the lowest-priced contractor will be entitled to receive the most orders, followed by the next low-priced contractor, and so on.[1] A certain percentage of orders is also set aside for the contractors who perform quality service as defined in this section. Finally, the section provides that no contractor will receive more than 30 percent of the total projected annual volume.

Section B.1 of the RFP contains the provision at issue in this protest:

> "NOTE: Only one company from affiliated companies shall be allowed to receive an award for this requirement. Affiliated is defined for the purpose of this solicitation as: Any business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity or interests among family members, shared facilities, equipment, and common use of employees."

District, Guardian, and Quality, self-described as affiliated firms under the above definition, filed an agency-level protest objecting that this requirement is unduly restrictive of competition. After State denied the protest, the firms filed the same protest in our Office.

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[1]The low-priced contractor is to receive 25 percent of the traffic, with the other contractors receiving lesser percentages--20, 15, 10, and 5 percent, in order of their respective prices.

A procuring agency must specify its needs in a manner designed to promote full and open competition, and may include restrictive provisions in a solicitation only to the extent necessary to satisfy the agency's minimum needs. See 41 U.S.C. § 253a(a)(1)(A), (2)(B) (1994); CardioMetrix, B-259736, Apr. 28, 1995, 95-1 CPD ¶ 223; Omega World Travel, Inc., B-258374, Jan. 13, 1995, 95-1 CPD ¶ 20. Where a protester challenges a specification as unduly restrictive of competition, it is the agency's responsibility to establish that the specification is reasonably necessary to meet its minimum needs. Id. In our review, we examine the adequacy of the agency's position not simply with regard to the reasonableness of the rationale asserted, but also the analysis given in support of the reasons advanced by the agency to assure that the agency's overall position will withstand logical scrutiny. Cardiometrix, supra; The Kohler Co., B-257162, Sept. 2, 1994, 94-2 CPD ¶ 88.

A contracting officer's rejection of more than one offer submitted by two or more affiliated firms would be justified where there would otherwise be prejudice to the interests of the government or where the affiliated offerors would be afforded an unfair competitive advantage over other offerors.[2] 39 Comp. Gen. 892, supra; Colonial Storage Co.; Paxton Van Lines, Inc., supra. It follows that the validity of the protested "affiliation restriction", which limits affiliated offerors to one award, must be determined based upon these same considerations.

State principally argues that the government's interests would be prejudiced absent this restriction, and, thus, that it is reasonably necessary to meet its minimum needs.[3] State asserts that the nonperformance or business failure of a moving and

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[2]In the Colonial protest, unsuccessful offerors under a State moving and storage services procurement argued that the agency's award of contracts to each of the three affiliated firms now protesting was improper due to the requirement, also present here, that no contractor may receive more than 30 percent of the total business. In that case, where the agency supported the awards to these affiliated firms and there was no showing of prejudice to the government or to other offerors, we were unable to say that the awards were improper. While the protesters make much of that conclusion and of the position then taken by the agency, each solicitation stands on its own, and the absence of the affiliation restriction in any prior procurements for these services does not establish its unreasonableness here. See Lionhart Group, Ltd., B-257715, Oct. 31, 1994, 94-2 CPD ¶ 170; Cobra Technologies, Inc., B-249323, Oct. 30, 1992, 92-2 CPD ¶ 310.

[3]Since we conclude that this justification is sufficient to show the reasonableness of the agency's position, we need not address the agency's argument that the restriction is necessary to prevent affiliated offerors from obtaining an unfair competitive advantage. We note State's concession that this is a minor justification.

storage contractor can spell catastrophe for its household effects moving and storage program, and that this catastrophe would be magnified if two or more contractors were affiliated--commonly owned or controlled.

To demonstrate the array of situations which can occur under these types of contracts, State cites its 1995 study of storage and claims accountability problems with numerous moving and storage firms in the Washington, D.C. metropolitan area over the past 20 years. All of these incidents resulted in loss and damage claims and associated costs to the agency, many of which have not been recovered. For example, labor strikes at some firms prevented State from storing or removing household effects. Fire, flooding, and mildew at other firms caused severe damage to stored goods and, in one instance, the contractor's insurer refused to assume liability, forcing State to have the damaged goods unpacked, dried, repacked, and transferred. Still another firm defaulted on its warehouse lease, preventing State from storing or removing household effects and forcing the agency to transfer the goods. Bankruptcies at yet other firms resulted in sealed warehouses, preventing State from gaining access to its stored goods and requiring it to be responsible for transferring the goods. Another firm unexpectedly went out of business, requiring State to move its stored goods to another facility. Managerial and financial problems due to a change in ownership of again another firm resulted in closed warehouses and undocumented moves of stored goods with associated theft and damage.

State explains that the impact of such problems is potentially far greater when two or more affiliated firms are awarded contracts. For example, if their common owners/controllers make business decisions which result in financial failure, the continued performance of all of the affiliated firms would be put into question, and the goods stored by all of the affiliated firms would be placed in jeopardy. This is particularly critical since, under the solicitation's traffic distribution scheme, three affiliated awardees would be entitled to receive as much as 60 percent of the permanent storage of household effects over the life of the contract.[4] Hence, a financial or nonperformance problem affecting the affiliated awardees could jeopardize the disposition of a large amount of State's stored household effects.

The protesters contend that the way to protect the government against contractor financial failure is to evaluate the offerors' finances, including the financial statements required by the solicitation.

This contention ignores the agency's concerns with respect to the potential nonperformance of a firm. There is nothing to suggest that State could evaluate

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[4]While the protesters contend that "this has never happened," the RFP clearly allows for this possibility.

proposals in a way that would allow certain nonperformance problems--such as fires, floods, strikes, and so on--to be predicted. For example, since nothing in the solicitation prevents affiliated offerors from utilizing common warehouses and employees, such nonperformance problems could have a significant adverse impact on the agency's operations--a labor strike by the common employees of multiple affiliated firms could shut down all of their services, a fire at the common warehouse of multiple affiliated firms could damage the goods stored by all of the firms, and so on. In a related argument, State asserts that moving firms' "high season" corresponds with the agency's peak requirements for their services, requiring the agency to spread its requirements among independent businesses to ensure adequate capacity. Multiple affiliated awardees who share warehouse space and employees undercut the agency's assurances of adequate capacity in the event of a nonperformance problem. State is also concerned that while the financial capability of individual affiliated offerors may be acceptable, their cumulative financial capability may pose an unacceptable risk; that is, the insolvency of one firm may have an impact on the solvency of the others.

The protesters contend that the RFP's required performance bond and imposition of contractor liability for loss or damage provides financial protection to the agency. While the parties dispute the extent to which the performance bond would compensate the agency for reprocurement costs, the agency persuasively asserts that even if quantifiable monetary losses can be recovered from the failed contractors' insurance and bonding, a business failure imposes tremendous strains on the entire household effects program, as routine work goes unperformed while the agency attempts to deal with the situation, which is greatly exacerbated to the extent that an affiliated firm is detrimentally affected by such a failure.

In another argument, unaddressed by the protesters, State asserts that allowing one entity to gain a larger portion of the freight places the agency at a disadvantage when managing the contract. If one affiliated awardee does not comply with the contract's terms and is placed on a non-use status, the other affiliated awardees will pick up at least part of that business and there will be no incentive to quickly correct violations. In contrast, independent companies tend to quickly resolve issues so they can receive business again.

In any event, State points out that affiliated firms can "game" their offers to the government's prejudice. If affiliated firms know that they can receive multiple contracts, some may offer lower prices and others higher prices. State explains that, considering the way that traffic is distributed,[5] a lower-priced affiliated

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[5]When State is notified of a shipment, it contacts the selected contractor to determine if the employee's packing requirements and date parameters can be met.
(continued...)

awardee can decline business knowing that it will go to the higher-priced affiliated awardee, resulting in higher costs to the government. Affiliated offerors can book the lowest-priced awardee with non-State business during the "high season," when it is difficult to book storage, so that the higher-priced awardee will receive that business. The protesters here, for example, use the same traffic management system so they are able to shift business between one firm and the others. While the protesters have not priced their offers in the way envisioned by the agency, nothing in the solicitation precludes other affiliated firms from doing so, and we think this concern clearly provides a reasonable basis for the solicitation restriction.

In short, we conclude that the record supports State's determination that the award of contracts to multiple affiliated offerors under the circumstances present here would prejudice the government's interests. As a result, we find that State reasonably concluded that the affiliation restriction is necessary to meet the agency's minimum needs, and is not unduly restrictive.

The protest is denied.

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[5](...continued)
If so, the move will be scheduled. If not, or if the selected contractor refuses the shipment for other reasons, another contractor will be selected.