

Protest of)	Date: December 21, 1990
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C.R. DANIELS, INC.)	
)	
Solicitation No. 104230-90-A-0100)	P.S. Protest No. 90-62

DECISION

C.R. Daniels, Inc., protests the award of a contract for the supply of large canvas hampers to D.V. Industries, Inc. contending that D.V. Industries' plan to furnish hampers which include canvas inserts manufactured by convict labor is contrary to federal statute and the requirements of the solicitation.

Solicitation No. 104230-90-A-0100 was issued by the Office of Procurement, Headquarters, on June 12, 1990, with an offer due date of July 11. The solicitation sought fixed-price offers for approximately 44,000 large canvas hampers with safety lift kit (P.S. Item 1046), with an option for an additional 25,000 hampers. Section M.1 of the solicitation, Evaluation Criteria, provided that award would be made to the responsible offeror whose proposal conforming to the solicitation requirements provided the lowest cost. The solicitation included at provision H.23, the contract clause entitled Convict Labor.^{1/} The clause states:

In connection with the work under this contract, the contractor agrees not to employ any person undergoing sentence of imprisonment, except as provided by Public Law 89-176, September 10, 1965 (18 U.S.C. 4082(c)(2)) and Executive Order 11755, December 29, 1973.

Contract Clause H.24, entitled, Walsh-Healey Public Contracts Act, states, in pertinent part, that "[a]ll representations and stipulations required by the Act and related regulations issued by the Secretary of Labor (41 CFR chapter 50) are hereby in-

^{1/}The clause is promulgated as clause 10-3 of Appendix B of the Procurement Manual (PM), and its use is governed by PM 10.2.2, which provides in pertinent part:

- a. Policy. Under 39 U.S.C. 2201, the Postal Service may not contract for supplies to be manufactured by convict labor, except for purchases from Federal Prison Industries, Inc. . . .
- b. Clause. Except for purchases from Federal Prison Industries, Inc., all contracts involving the employment of labor must contain Clause 10-3, Convict Labor.

corporated in this contract by reference.^{14/}

Six offers were received. The lowest priced offeror's proposal was rejected as technically unacceptable. On October 2, award was made to D.V. Industries, who had the next lowest priced offer at \$4,625,628.00. The protester was notified of the award to D.V. Industries, by telephone, on the same date. On October 10, this office received C.R. Daniels' protest.

Through counsel, C.R. Daniels alleges that D.V. Industries plans to supply hampers incorporating canvas inserts manufactured by Federal Prison Industries, Inc. (which uses the trade name "UNICOR"), acting as a subcontractor to D.V. Industries.^{15/} UNICOR is a government-owned corporation established to "provide employment for the greatest number of those inmates in the United States penal and correctional institutions . . . as is reasonably possible . . . , [to] operate the prison shops [so] that no single private industry shall be forced to bear an undue burden of competition from the products of the prison workshops, and to reduce to a minimum competition with private industry or free labor." 18 U.S.C. ' 4122(b)(1) (1988). C.R. Daniels asserts that such a subcontract is prohibited by 18 U.S.C. '4121 et seq. (1988).^{16/}

According to the protester, that statute permits UNICOR to sell only to agencies or departments of the federal government and expressly prohibits UNICOR from selling to private parties, such as D.V. Industries, in competition with private companies. Alternatively, the protester contends that UNICOR is obliged to, but has not complied with the notice provisions of 18 U.S.C. '4122(b)^{17/} with respect to its undertaking to furnish these canvas inserts. (The protester concedes that canvas inserts are not a "new product" for UNICOR, but contends that UNICOR's "expansion into subcontracting for these canvas hampers is a very significant expansion of its product line.")

The protester also claims that D.V. Industries' proposal did not comply with the solicitation requirements and was therefore not eligible for award because both the Convict

^{2/}This clause is promulgated at Clause 10-8 and its use is prescribed by PM 10.2.5 d.

^{3/} C.R. Daniels reports that UNICOR advised it that although it had not yet signed a subcontract with D.V. Industries, the two parties were conducting negotiations toward such a contract.

^{4/}18 U.S.C. '4122(a) (1988) provides: "[UNICOR] shall determine in what manner and to what extent industrial operations shall be carried on in Federal penal and correctional institutions for the production of commodities for consumption in such institutions or for sale to the departments or agencies of the United States, but not for sale to the public in competition with private enterprise."

^{5/}18 U.S.C. '4122(b)(4) (1988) sets out a scheme by which UNICOR must analyze the "probable impact on industry and free labor of [its] plans [to produce a new product or to significantly expand the production of a new product]. . . ." It further provides that "[UNICOR] shall announce in a publication designed to most effectively provide notice to potentially affected private vendors the plans to produce any new product or to significantly expand production of an existing product . . . and shall invite comments from private industry regarding the new production or expanded production."

Labor and the Walsh-Healey Public Contracts Act contract clauses prohibit the use of convict labor. C.R. Daniels contends that award to D.V. Industries was improper and must be set aside. The protester asserts that it is entitled to the award as the next lowest priced offeror whose proposal conforms to the solicitation requirements.

The contracting officer's report responding to the protest advises that D.V. Industries' intention to subcontract with UNICOR was disclosed during a preaward survey at D.V. Industries' facility. The contracting officer argues, however, that even as of the date of her report, D.V. Industries and UNICOR had not entered into a contract, making the protester's contentions concerning UNICOR premature. The contracting officer further states that D.V. Industries is not in violation of the convict labor clause since it itself does not employ convicts, and the provision does not apply to subcontractors, who are not employees. Similarly, the contracting officer dismisses the claim that such a subcontract would violate the Walsh-Healey Public Contracts Act, as an issue that is not within our bid protest jurisdiction.^{4/} The contracting officer contends that no Walsh-Healey violation has occurred.

The contracting officer disagrees with the protester's interpretation of 18 U.S.C. ' 4122. She understands it to allow UNICOR to act as a subcontractor to a prime contractor who is producing a product under a contract with the government. She adds that the protester's allegations concerning UNICOR's non-compliance with this statute is not an issue for the Postal Service since the Postal Service does not have a contract with UNICOR. Lastly, the contracting officer asserts that D.V. Industries did conform to the solicitation requirements as evidenced by the affirmative responsibility determination that was made. She recommends that the protest be denied.

UNICOR, through counsel, submitted comments in response to C.R.Daniels' protest and the contracting officer's statement. UNICOR states that the primary issue here is that it, and not D.V. Industries, employs convicts, stressing that employees of a subcontractor are not employees of a prime contractor. UNICOR asserts that the Walsh-Healey Act was not meant to apply to it, agreeing with the contracting officer that Walsh-Healey violations are not protestable issues. UNICOR adds that it is not violating the terms of its statute because it is not selling a finished product to the general public. Instead, it is selling the canvas inserts for the hampers to D.V. Industries, who is supplying the finished product to the Postal Service. UNICOR explains that, consistent with this understanding, it has acted as a subcontractor for government prime contractors as far back as 1962. UNICOR points to the well-established principle of administrative law that an agency's long-standing and consistent interpretations of its own statutes deserve considerable deference.^{4/}

^{6/}PM 4.5.1, which establishes our protest jurisdiction, notes that Walsh-Healey protests are governed by PM 10.2.5 j. [sic, i.] PM 10.2.5 i. 3. provides that unsuccessful offerors' complaints about the Walsh-Healey eligibility made after award are to be forwarded to the Department of Labor. It is not clear that the contracting officer has dealt with C.R.Daniels' protest under this provision.

^{7/}D.V. Industries also commented, through counsel, confirming that it does not employ persons who are undergoing sentences of imprisonment. D.V. Industries agrees that UNICOR is not selling to the general public but is only supplying a component of a product that will ultimately be consumed by the federal government. D.V. Industries notes, however, that it made its offer based upon its anticipated production

C.R. Daniels disputes the contracting officer's statement that its protest is premature because the contracting officer was aware of D.V. Industries' subcontracting plans at the time of her determination of responsibility. The protester claims that both the Procurement Manual and 39 U.S.C. '2201^{1/} prohibit the Postal Service from contracting for supplies to be manufactured by convict labor at any tier, and thus the contracting officer was precluded from making award on the basis of such manufacture.^{1/}

The protester does not agree that 18 U.S.C. ' 4122 would allow UNICOR to act as a subcontractor to a prime contractor producing a product for the government. C.R. Daniels interprets this statute as allowing UNICOR only to supply products to the government directly and forbidding UNICOR to act as a subcontractor. C.R.Daniels contends that Congress crafted UNICOR's statute to strike a careful balance between offering inmates the opportunity to learn trades and the need to insure that prison industries did not unfairly compete with private enterprises. C.R. Daniels argues that UNICOR's interpretation of its statute is flawed and has no basis in the plain language of the statute. The protester asserts that nowhere does UNICOR's statute allow it to engage in the sale of component parts to the public, adding that a self-serving interpretation from UNICOR that it can make such sales is not entitled to deference. Finally, C.R. Daniels disagrees with UNICOR's statement that since it has been a subcontractor for many years, these arrangements are valid. The protester asserts that just because UNICOR has been operating contrary to the law to date, does not mean that the Postal Service has to follow suit.

UNICOR submitted additional comments. UNICOR reasserts its long-standing practice to perform subcontracting work for prime contractors of government contracts. In its reply to UNICOR's additional comments, C.R.Daniels stresses that UNICOR has failed to supply any legal authority to support its interpretation and thus that the Postal Service should not rely upon it.

Discussion

costs and not based upon a possible subcontract with UNICOR.

^{8/}The protester pointed to PM 10.2.2 which states that "the Postal Service may not contract for supplies to be manufactured by convict labor, except for purchases from [UNICOR]." 39 U.S.C. '2201 reads: "Except as provided in [18 U.S.C. '4121 et seq.], the Postal Service may not make a contract for the purchase of equipment or supplies to be manufactured by convict labor."

^{9/}C.R. Daniels cites a World War II opinion of the Attorney General, 40 Op. Atty. Gen. 211 (1942) as relevant to this discussion. As we understand it, that opinion interpreted statutes proscribing the interstate shipment of convict-made goods contrary to state law. As the opinion notes, those statutes were not intended to prevent the procurement of convict-made materials by the federal government, nor did they preclude the provision of convict-made supplies furnished through subcontractors "to the extent necessary to carry out the congressional intent that procurement by the Government shall not be hampered." Since the protester does not contend that the procurement at issue here is subject to similar statutes, the opinion's relevance is limited.

Although the protester has framed the issue here in part as a challenge to UNICOR's ability to provide canvas inserts to D.V. Industries, properly, the protest is a challenge to the propriety of the Postal Service's contract award decision. C.R. Daniels would have us find D.V. Industries not responsible because of its proposed use of UNICOR as a subcontractor.

Contracting agencies do not generally directly review the responsibility of the subcontractors that an awardee may use; rather it is incumbent upon the prime contractor to review the responsibility of its subcontractors to ensure that they will comply with contract requirements. Further, the question of a subcontractor's responsibility is essentially one of the factors used to determine the prime contractor's responsibility.

Adrian Supply Company, Comp. Gen. Dec. B-237531, 90-1 CPD & 182, February 12, 1990.¹⁷

It is well settled that:

An affirmative determination of responsibility is a matter within the broad discretion of the contracting office and is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria.

Georgia Power Company, P.S. Protest No. 90-01, February 14, 1990; Knoxville Glove Company, P.S. Protest No. 88-75, November 15, 1988, (quoting Gage Constructors, P.S. Protest No. 87-11, July 13, 1987). Definitive responsibility criteria are not at issue here, no fraudulent behavior on the part of the contracting officer is alleged, and we find no abuse of the contracting officer's discretion. Both D.V. Industries and its subcontractor, UNICOR, have asserted the legality of the proposed subcontractual relationship, and the contracting officer has accepted those assertions. While we understand the policy concerns inherent in C.R. Daniel's challenge, given the extremely limited extent of our review, nothing in its submissions provides a basis for us to overturn the contracting officer's determination.

Similarly, C.R. Daniels' argument that D.V. Industries was ineligible for award because its proposed subcontract would cause it not to comply with the Convict Labor and the Walsh-Healey Act contract clauses is unavailing. Those clauses are part of the contract, once executed, not solicitation requirements. The possible violation of a contract clause by a contractor is a question of contract administration and not a topic for consideration in a bid protest. Pitney Bowes, Inc., P.S. Protest No. 87-95, November 20, 1987; Van Boxtel Ford, Inc., P.S. Protest No. 86-38, July 25, 1986; cf. PM 10.2.5 j.2; see also Ginny Baker, P.S. Protest No. 90-04, March 16, 1990.

We recognize that the decision leaves unsettled the protester's principal challenge to the issue of UNICOR's subcontracting authority, an issue apparently not previously the

^{10/}We believe this challenge was timely raised. There is no dispute that UNICOR's role as a subcontractor was considered in the determination that D.V. Industries was responsible.

subject of judicial construction. Nothing herein precludes the protester's pursuit of such analysis in a context far more definitive than our determination could be.

The protest is denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 6/24/93]