**Comptroller General**
**of the United States**

**Washington, D.C. 20548**

# Decision

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**Matter of:** SDS Petroleum Products, Inc.

**File:** B-280430

**Date:** September 1, 1998

Sandy A. Roberts, Esq., for the protester.
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## DIGEST

Exclusion of protester's proposal from competitive range was not improper where agency reasonably concluded that the proposal failed to demonstrate the ability to purchase and transport natural gas at certain rates and terms, as required by the solicitation.

## DECISION

SDS Petroleum Products, Inc. protests the exclusion of its proposal from the competitive range, and the subsequent award of a contract to Tiger Natural Gas, Inc., under request for proposals (RFP) No. 693-16-98, issued as a competitive section 8(a) set-aside by the Department of Veterans Affairs for the supply and delivery of natural gas to 91 facilities nationwide.

We deny the protest.

On February 3, 1998, the contracting officer prepared and furnished to the Small Business Administration (SBA) an offering letter in which he determined that adequate competition existed among 8(a) contractors to set aside this national procurement for the 8(a) program. Previously, the agency had procured its gas supplies through four regional contracts by means of unrestricted procurements. By letter dated February 4, the SBA accepted the offer for a competitive 8(a) procurement.

The RFP was issued on February 24 and, as amended, contemplated award of an indefinite-delivery, indefinite-quantity (ID/IQ) contract for a base period of 1 year,

with four 1-year options. The RFP stated that, following competitive negotiations, award would be made to the offeror whose proposal conformed to the solicitation requirements and was most advantageous to the government, price and other factors considered. Section M of the RFP contained the following evaluation factors, listed in descending order of importance: (1) past performance from January 1, 1995 to present; (2) evidence of ability to purchase (a) natural gas and transportation below the Inside FERC (Federal Energy Regulatory Commission) index[1] price and (b) natural gas transportation below tariff rate; (3) quality; and (4) price.[2]

Seven proposals were received by the May 11 closing time. The evaluators initially found that SDS's proposal was technically deficient because it contained no past performance delivery information and failed to show an ability to procure natural gas below the index price or natural gas transportation below the tariff rate. SDS's proposal received 35 of the 90 available technical points (price was worth 10 points), and under the index factor, only 3 of 30 possible points. In contrast, Tiger's proposal was found to contain detailed and extensive documentary evidence of its ability to procure gas below the index price and transportation below the tariff rate. Tiger's proposal received all 90 available technical points. (The other proposals scored very low technically and are not relevant here.)

Despite the serious technical deficiencies in its proposal, SDS's proposal was retained in the competitive range for purposes of discussions. By letter dated May 18, the contracting officer advised SDS that its proposal was deficient under the past performance and index factors. Revised proposals were due on May 26. In the meantime, on May 21, amendment No. 7 was issued, making certain changes to RFP sections C, G, and H, and clarifying the minimum and maximum order quantities.

On May 23, SDS submitted additional information in a revised technical proposal, specifically, two signed natural gas contracts containing prices below-index price and letters purportedly demonstrating its ability to obtain below-tariff rate

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[1]Inside FERC is a publication that contains the market prices for natural gas for delivery to specific geographical areas. In this decision, all references to the index refer to the Inside FERC index.

[2]Price, the least important factor, consisted of a base load gas (based on fixed unit prices proposed by offerors) of 2.0 million MMBTU (equivalent to 1,000,000 BTU) and an ID/IQ portion of 9.4 million MMBTU based on index-priced gas. Thus, according to the agency, approximately 82 percent of the natural gas prices would be affected by a firm's ability to purchase gas at below-index rates. Contracting Officer's Statement at 2. The calculation of savings to the government from a below-index purchase was based on a formula contained in RFP § C.

transportation under similar contracts. On May 28, the evaluators reviewed the revised proposal. SDS's score for the past performance factor increased from 12 to 32 (out of 40 possible points). However, its score for the index factor was unchanged, the evaluators concluding that, although SDS had submitted additional information in this area, it was not sufficient to establish the ability to obtain gas and gas transportation prices below the index price and tariff rate. The results of the evaluation of Tiger's and SDS's revised proposals were as follows:

| Offeror | Technical Score | Price for Base Load Gas |
|---|---|---|
| Tiger | 90 | $6.6 million |
| SDS | 55 | [DELETED] million |

Based on these results--SDS's proposal's technical score still was considered extremely low and it was the highest-priced--the contracting officer determined that SDS had no reasonable chance for award. Consequently, by letter dated June 1, the contracting officer advised SDS that its proposal no longer was in the competitive range. The contracting officer determined that Tiger was the only offeror whose proposal was within the competitive range, provided only that firm the opportunity to submit a best and final offer (BAFO), evaluated the BAFO, and made award to Tiger. This protest followed a debriefing provided to SDS by the agency.

Noting that the RFP did not specify that a certain amount of evidence was required to meet the index factor requirements, SDS asserts that its revised proposal included adequate evidence of its ability to purchase natural gas below the index price and transportation below the tariff rate. SDS concludes that, had its proposal been evaluated properly, the proposal would have been retained in the competitive range, and it would have had the opportunity to submit a BAFO.[3]

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[3]In its comments on the agency report, SDS asserts for the first time that (1) in assigning Tiger's proposal the maximum score under the index factor, the agency improperly considered basic ordering agreements--which are not contracts--as evidence of Tiger's ability to purchase natural gas below the index price; and (2) the index factor should have been evaluated as a price factor rather than a technical factor. SDS was aware of these bases of protest, at the latest, upon its receipt of the agency report, yet it did not assert these bases of protest within 10 calendar days after its receipt of the report. In this regard, SDS's comments were not received within the normal 10-calendar-day period, see 4 C.F.R. § 21.3(i) (1998), due to our granting an extension request by SDS. Since a time extension for purposes of filing comments does not waive the timeliness rules with regard to new grounds

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In reviewing competitive range determinations, our Office will not independently reevaluate proposals; rather, we will examine the record to ensure that the evaluation was reasonable and in accordance with the solicitation's evaluation criteria. Cobra Techs., Inc., B-272041, B-272041.2, Aug. 20, 1996, 96-2 CPD ¶ 73 at 3.

Here, the evaluation and the agency's decision to exclude SDS's proposal from the competitive range were reasonable. The index factor was intended to indicate whether an offeror would be able to obtain and transport natural gas at favorable prices, which would result in savings to the government. As discussed, SDS initially provided no evidence supporting its ability to obtain such favorable prices. In its revised proposal, SDS submitted as evidence two gas purchase contracts, one dated 1995 and one dated 1998. Agency Report (AR), Tab 19. The agency determined that two contracts, one from 3 years ago, were not sufficient to clearly establish an ability to obtain favorable pricing on a large-scale basis (the contract here would cover 91 installations). Further, while these contracts established prices of [DELETED] and [DELETED] below the index price, the agency noted that they did not specify an actual price, and SDS did not provide other evidence of the actual prices paid under the contracts. In contrast, Tiger submitted evidence of hundreds of actual prices below the index prices, for delivery of natural gas at numerous points nationwide. The rationale underlying the agency's position is a reasonable one--if a firm's ability to obtain discounted natural gas prices on a large-scale, continuing basis is to be demonstrated through prior contracts, then the firm must present substantial numbers of contracts with clear evidence of the prices paid. We find the agency reasonably determined that two contracts, with no evidence of the prices actually paid, were insufficient to evidence an ongoing ability to obtain discounted natural gas on a large-scale basis.

As evidence of its ability to purchase gas transportation below the tariff rate, SDS submitted an "example" purportedly showing an "approximate" discount from the tariff rate, along with a commercially available sample gas transportation report. AR, Tab 19. SDS also submitted letters from six vendors that would sell gas and/or transportation for the contract, but these letters did not specify a price or state which pipelines would be used. Three of the letters indicated generally that discounted prices are available--but did not detail the terms or state whether SDS would be eligible for such discounts--and three of the letters merely referenced the tariff, with no indication that discounts would be available. In its comments on the agency report, the protester ignores these weaknesses in its submitted information, and does not attempt to explain how its submissions adequately met the solicitation requirements; rather, the comments are general and merely express disagreement with the agency's determination. Again, we think the agency reasonably concluded

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[3](...continued)
of protest, Anchorage Enters., Inc., B-261922, Nov. 7, 1995, 95-2 CPD ¶ 211 at 3 n.2, we dismiss these bases of protest as untimely.

that the evidence provided--an example showing only an approximate discount, and letters from suppliers with no evidence that discounted transportation would be obtained--while perhaps relevant to SDS's ability to obtain below-tariff rate transportation, simply was inadequate to establish an ability to obtain discounted prices in performing the contract.

SDS seems to argue that, no matter how low its proposal's evaluation rating relative to Tiger's, the agency was required to retain its proposal in the competitive range since it was the second-highest rated. We find no merit in this argument, which is apparently based on the recent rewrite of Part 15 of the Federal Acquisition Regulation (FAR) that changed the language governing competitive range determinations. The earlier language, FAR § 15.609(a) (June 1997), stated that the competitive range "shall include all proposals that have a reasonable chance of being selected for award" and that "[w]hen there is doubt as to whether a proposal is in the competitive range, the proposal should be included." The current language, which governs this procurement, states, "Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range comprised of all of the most highly rated proposals, unless the range is further reduced for purposes of efficiency pursuant to paragraph (c)(2) of this section."[4] FAR § 15.306(c)(1) (FAC 97-02). We do not read the revised language to require agencies to retain in the competitive range a proposal that the agency reasonably concludes has no realistic prospect of award, even if that proposal is, as here, the second-highest rated proposal.

The explanatory preamble published at the time the final version of the FAR Part 15 rewrite was issued makes clear that the intent of the revised language was to permit a competitive range more limited than under the prior "reasonable chance of being selected for award" standard. That preamble states that the drafters had elected to require contracting officers to retain in the competitive range "only" the most highly rated offers rather than include in that range the potentially broader range of proposals that could be viewed as having a reasonable chance of award. 62 Fed. Reg. 51,224, 51,226 (1997). Specifically, the preamble stated that the new language would "ensure[] that offerors with little probability of success . . . are advised early on that their competitive position does not merit additional expense in a largely futile attempt to secure the contract." Id.

Accordingly, we conclude that the Part 15 rewrite does not require that agencies retain in the competitive range a proposal that is determined to have no reasonable

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[4]Because the ratings are to reflect assessment against "all evaluation criteria" and cost (or price) must always be one of those criteria, 41 U.S.C. § 253a(c)(1)(B) (West Supp. 1998), FAR § 15.304(c)(1) (FAC 97-02), the assessment of which are the "most highly rated proposals" must reflect cost (or price) as well as other evaluation criteria.

prospect of award simply to avoid a competitive range of one. We have long held that there is nothing inherently improper in a competitive range of one, Cobra Techs., Inc., supra, at 3, and we do not view the Part 15 rewrite as effecting a change in that regard; conducting discussions and requesting BAFOs from an offeror with no reasonable chance of award would benefit neither the offeror nor the government. See 62 Fed. Reg. 51,226 (retaining marginal offers in competitive range imposes additional and largely futile effort and cost on government and industry).

SDS also argues that amendment No. 7, issued May 21, 5 days before revised proposals were due, on May 26, made such substantial changes to the solicitation that cancellation of the RFP and resolicitation were required. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1). If SDS believed that the changes made by amendment No. 7 were improper or required resolicitation, it was required to protest on this ground prior to the next closing date, May 26. As SDS did not do so, its protest on this basis is untimely and will not be considered.[5]

Finally, SDS argues that the agency failed to provide critical information in its letter offering this requirement for the 8(a) program, which prevented SBA from determining that the placement of the procurement in the 8(a) program would have an adverse impact on other small business programs or on other individual small businesses, such as the incumbent. Since SDS is an 8(a) firm and the procurement was set aside under the competitive 8(a) program, SDS could not have been competitively prejudiced by any improper action related to the decision to accept this procurement in the 8(a) program, and is not an interested party to raise this issue on behalf of non-8(a) small business firms. Stated differently, a protester is not an interested party to raise issues affecting other firms in which the protester has no direct economic interest. 4 C.F.R. § 21.0(a); see XMCO, Inc., B-228357, Jan. 26, 1988, 88-1 CPD ¶ 75 at 5.

The protest is denied.

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[5]The protester also argues that, even if the evidence it furnished was deemed inadequate, it still should have received award of the fixed-price, base load gas portion of the contract. However, the RFP required a single award and, in any event, the protester's price was not low for the base load gas quantity.