

**May 6, 1999**

**P.S. Protest No. 99-01; -02; -03; -04; -05**

**FLAMINGO INDUSTRIES (USA) LTD; DEREK A. GILNA;  
TEDCOM INTERNATIONAL, INC; EAGLE BAG CORP;  
HOUSTON T-SHIRT BAG COMPANY**

**Solicitation No. 102590-98-A-0146**

**DIGEST**

Protest of terms of solicitation for woven plastic mail sacks is denied. Contracting officer has provided *prima facie* support for requirement that sacks have particular form of edging, and protesters have not met burden of showing that the requirement lacks a reasonable basis.

**DECISION**

Flamingo Industries (USA) Ltd., Derek A. Gilna, Tedcom International, Inc., Eagle Bag Corp, and Houston T-Shirt Bag Company protest the specification for woven polypropylene mail sacks set out in solicitation 102590-98-A-0146.

The solicitation, issued January 13, 1999, sought offers for the manufacture of more than 21 million sacks in three sizes and two colors in the first contract year, with options for 14 million additional mail sacks in each of two option years. The solicitation anticipates the award of two contracts; one for approximately 70% of the total quantity and the other for the remainder.

The protests involve the requirement of the technical specification, set out in drawings, which accompany the solicitation, that the mail sacks contain a selvedge at the open end of the sack.<sup>1</sup> The required selvedge precludes the use of fabric woven on a circular-weave loom; instead, a flat-weave loom must be used. Previous sack specifications allowed, in lieu of a selvedge edge, that the open edge of the sack could be

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<sup>1</sup> A selvedge is the edge of a piece of cloth in which the warp yarns extending from the fabric are turned back into the body of the cloth.

heat-sealed, so that the individual plastic yarns were prevented from fraying by melting them together. Sacks so made could use circular-weave loom fabric.

The protesters all raise similar objections to the specification, contending that it is unduly restrictive because it precludes them and other American sack manufacturers from producing the sacks. The protesters contend that flat-weaving is an outdated process, unusually labor intensive, and that specifying it discourages domestic production in favor of imported materials. Some protesters suggest that the requirement arise out of a preference for foreign suppliers or other favoritism toward them.

Further, the protesters assert by precluding circular-weaving, the Postal Service is violating a variety of its purchasing policies including those favoring competition (Purchasing Manual (PM) 1.7.1.); anticompetitive practices (PM 1.8); supplier diversity (PM 3.2); and domestic preference (PM 1.7.12). The protesters also suggest that the restriction is inconsistent with requirements of the Walsh-Healey Public Contracts Act (see PM 9.5); provisions regarding equal opportunity (PM 9.7); the Fair Labor Standards Act (PM 9.6); and requirements of the Occupational Safety and Health Standards Act (PM B.2.1 and Clause B-28).

Some of the protesters also note that circular-weave fabrics of domestic origin have been tested and authorized by the Deputy Administrator for Commodity Operations, U.S. Department of Agriculture, for use in 50-kilogram capacity woven polypropylene bags for use under food assistance programs administered by the Agency for International Development and the Commodity Credit Corporation.

Several of the protesters note that the specification's calculation of weight per square yard is inconsistent with its specific requirements for warp and weft of specified deniers.<sup>2</sup>

The contracting officer's statement notes, citing numerous prior decisions, that when a specification is said to be unduly restrictive, it is the purchasing entity's obligation to establish a *prima facie* justification for the elements of the specification said to be objectionable, at which point the burden shifts to the protesters to demonstrate that the stated justification is clearly unreasonable. The contracting officer contends that the protesters have failed to make such a showing.

The statement explains that woven plastic mail sacks are an inexpensive alternative to expensive canvas mail sacks. In this regard, it contends that sacks with a selvedge edge are more satisfactory in use than sacks with a heat-sealed edge. In use, the mail sacks are hung on racks by hooks, which pass through the coarse fabric of the sacks so that they may be filled with mail.<sup>3</sup> Bags with a selvedge edge are said to

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<sup>2</sup> While the protest was pending, the solicitation was amended to remove the inconsistency.

<sup>3</sup> Earlier versions of the plastic sacks had heat-sealed "grommet holes" to accommodate the hooks, but those holes interfered with the draw tape incorporated into the sack.

have a stronger top, which allows the sacks to be hung on the racks more readily, and to last longer in use. Other benefits of the selvedge edge are also asserted, including being smoother and less abrasive.

The acceptability of sacks with heat-sealed edges in agricultural commodity programs does not require their acceptability for postal use. In agricultural use, the sacks are used only once, are sewn closed, and are cut open to remove their content.

The protester's assertions that the specifications were revised with the intention to favor foreign sources are unsupported by evidence, and do not overcome the presumption that the government acts in good faith. In any event, the plastic sack specification has been revised numerous times to improve the suitability of the sacks, reduce their cost, and meet various environmental concerns, and the fact that the protesters challenge only some of the changes demonstrates that the changes are not for the improper reason asserted.

With respect to some of the protester's specific contentions, the contracting officer's statement asserts as follows:

- The asserted violations of Purchasing Manual policy may not be protested given the limitation at PM 1.1.1 b.4.
- The PM 1.7.1 requirement for competition has been met. While this protest has been pending, eight offerors have submitted nine offers in response to the solicitation, of which three offers have proposed domestic performance.
- The anticompetitive practices provision of PM 1.8 has to do with the practices of suppliers, not the Postal Service.
- Supplier diversity as contemplated by PM 3.2.1 is the providing of all suppliers with equal access to purchasing opportunities. In this case, all of the offerors are small businesses, and four are minority- or woman-owned.
- As noted above, three domestic-sources offers have been received, refuting the protester's contention that the specification requirements preclude domestic production.<sup>4</sup> In any event, however, the Postal Service's domestic preference ("buy American") policy does not preclude the acceptance of non-domestic products (citing cases); while it affords a 6% price preference for goods of domestic manufacture, it is not "a thorough attempt to equalize costs between foreign and domestic competitors, but rather . . . express[es] a policy determination that domestic firms are to be given a preference in the amount of

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<sup>4</sup> In addition, the contracting officer identifies other domestic sources with flat looms that could have responded to the requirement.

the factor.” (Quoting *Riddle Corporation*, P.S. Protest No. 89-16, March 13, 1989).

Individual protesters submitted additional comments and rebuttal comments to the contracting officer’s report which reiterate many of their previous concerns and responded to the contracting officer’s statement. Those comments take exception to various of the contracting officer’s statements, asserting, *inter alia*, that in 1993 the specifications were changed to make the plastic sacks “one-way” single-use, instead of multiple-use, and to require the use of flat weaving “in order to favor Mexican machinery and production . . . under the instruction of [Mail Transportation Equipment] personnel.” They further contend that that the specification was changed because of problems of rashes and cut hands experienced by some who handled mail sacks, which are said to be related to chemical defects in the composition of the foreign-made fabric. Several protesters complain that they were not contacted about specification changes before the change was made, only later, and then only on the subject of packing, not manufacturing.

One protester contends that the decision to require flat weaving was arrived at with the cooperation of the company which was developing the concept of Mail Transportation Equipment Centers for the Postal Service (which was not a sack producer) and of two sack suppliers, one of which “eventually was awarded millions of dollars in sack contracts which [it] then sub-contracted to Mexico” and the other of which also used the same Mexican firm to produce sack fabric.<sup>5</sup>

The contracting officer’s citations to industry publications concerning production methods are said to be outdated and fail to reflect changes in the industry. His identifications of domestic firms with flat weaving capacity are said to be erroneous with respect to specific firms and to reflect vendors engaged in other portions of the plastic fabric market who have not, and do not intend to produce sacks for the Postal Service.

Several protesters contend that manufacturers using circular weaving could produce a bag to a modified specification which would have a stronger open end,<sup>6</sup> and that, contrary to the contracting officer’s suggestion, the Postal Service has sufficient inventory of plastic sacks to allow the consideration and evaluation of alternative proposals in that regard.

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<sup>5</sup> Elsewhere, the protester contends that its claims of anti-competitive practices are supported by these contractors’ use of a common subcontractor, making “it is obvious each knew the other[’s] bid prior to award and bid to corner the market.” (Such a conclusion is not as self-evident as the protester appears to believe. While the two offers would have a similar cost component (the subcontractor’s price), neither offeror would necessarily communicate its final price to the subcontractor or to the other offeror.)

<sup>6</sup> Two protesters offered sample bags produced using circular weaving said to be fully satisfactory for the Postal Service’s needs.

Central to the protester's concerns is the economic benefit of domestic production. They note that the principal advantage of the Department of Agriculture program that they cite is to require that the commodity produce bags be domestically produced. They also note that the Postal Service has a requirement that postal uniforms be domestically produced, and asserted that it should have a similar requirement here.

Exception is also taken to the contracting officer's comments with respect to the applicability or relationship of the various Purchasing Manual provisions that it contends are being violated by the specification. One protester asserts that the PM "should be strictly followed" and that it has met its burden of proof that the Postal Service's actions are "clearly unreasonable."

Two interested parties who plan to supply flat-woven sacks submitted comments in support of the contracting officer's position with respect to the superiority of selvedge-edged sacks, the availability of domestic flat-loomed capacity, and other matters.

The contracting officer submitted further comments that addressed several of the protesters' comments as follows:

- The sacks at issue are not "one-way sacks," intended for only one use. They are intended for multiple use, and are warehoused and reused for that purpose. As a result, durability is an issue for the sacks.
- Contentions that foreign-produced fabrics contain chemicals or lead which causes rashes when the sacks are handled are not correct; tests of the sacks have confirmed this.
- Contentions that domestic offerors cannot produce the sacks are incorrect; offerors have confirmed domestic sources for the larger award.
- The selvedge edge specification was not the product of a current manufacturer or of the warehouse contractor; the protesters have been consulted with respect to the selvedge requirement, and one protester advised it could produce it.
- The identification of domestic flat-loom users was not intended to indicate those users currently produced postal sacks, but to refute the contention that the process was no longer current or available.
- The Postal Service does have an urgent need for these plastic sacks. Contrary to one protester's contentions, fewer than one million of a desired ten million sacks are warehoused, and sacks are being rationed to mailers. Accordingly, time does not permit consideration of alternate designs for this purchase, although manufacturers may submit alternatives for consideration in future purchases.

Three protesters submitted comments, which continued to challenge some of the contracting officer's contentions along the lines previously indicated.

## DISCUSSION

The contracting officer has correctly stated the standard applicable to our review of a contention that a specification is unduly restrictive.

Where a protester alleges that a solicitation is unduly restrictive, it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Once the Postal Service establishes prima facie support for the allegedly restrictive requirements, the protester must present an extremely high level of proof to show that those restrictions are clearly unreasonable.

The determination of what constitutes the Postal Service's minimum needs is properly to be made by the requiring activity, and is not subject to being overturned in the absence of a clear showing that the determination lacks a reasonable basis. If a specification is otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive if they reflect the legitimate needs of the procuring activity.

This office will not substitute its judgment for that of the technical personnel absent fraud, prejudice, or arbitrary and capricious action.

*Memorex Telex Corporation*, P.S. Protest No. 92-73, January 8, 1993 (citations and internal quotations omitted).

In this instance, the contracting officer has identified an acceptable basis for preferring sacks with a selvedge edge to those with a heat-sealed edge, and the protesters have not met its burden of showing that the preference is clearly unreasonable. It is clearly not unreasonable to prefer a manufacturing method that results in a stronger, smoother, and less abrasive sack. The protester's assertions that that conclusion is incorrect, or that other, improper, considerations went into the decision are not supported on this record and do not rise to the level of proof necessary to overturn it.<sup>7</sup>

The protester's principal contentions; that the effect of the requirement for a selvedge edge is to limit competition to foreign sources is both persuasively con-

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<sup>7</sup> To the extent that the protesters contend that the decision was the result of bias, they are faced with an extremely heavy burden of proof that they have failed to meet. The evidence in that regard must be "well-nigh irrefragable," that is, "impossible to deny or refute." See, e.g., *Timekeeping Systems, Inc.*, P.S. Protest No. 93-29, February 15, 1994.

tested by the contracting officer and irrelevant. There is no requirement that specifications be tailored to encourage domestic sourcing. The only domestic source preference applicable to this purchase is the 6% proposal evaluation preference afforded to domestic source products by the buy American policy set out at PM 1.7.12 and implemented here by Clause 1-9, set out at paragraph 48 of section H of the solicitation.<sup>8</sup>

The protester's other contentions may be addressed briefly:

- That the specification prevents the protesters from participating in the purchase does not establish the absence of adequate competition (*Haworth, Inc.*, P.S. Protest No. 92-22, June 4, 1992), and the contracting officer has demonstrated the contrary.
- Issues of restraint of trade and anticompetitive practices are not for consideration in the protest process. *IMTEC, Inc.*, P.S. Protest No. 91-26, July 5, 1991.
- “Effective supplier diversity ensures that no suppliers are excluded from competition on the basis of race, color, religion, sex, age or national origin.” PM 3.2.1 b. The protesters have not demonstrated that the limitation imposed by the specification has been established on such a basis, or that it would necessarily have such a result. *Cf., e.g., Good Food Service, Inc.* P.S. Protest No. 88-21, April 8, 1988 (requirement for performance bond in food service contract not shown to be abuse of contracting officer's discretion even though it may restrict small, disadvantaged businesses' ability to participate).
- Various statutory provisions made applicable by contract such as the Walsh-Healy Act and the Fair Labor Standard Act have no extra-territorial application. *See, e.g., SDM Corporation*, Comp. Gen. Dec. B-170026, 1970 U.S. Comp. Gen. LEXIS 1705, December 14, 1970 (Walsh-Healey Act); 29 CFR 776.7 (Fair Labor Standards Act). That they apply to domestic suppliers is one reason for the price differential provided by PM 1.7.12, but they do not otherwise impact the purchasing process. The application of Occupational Safety and Health Standards Act standards to domestic suppliers is effected by that statute, and not by the operation of any term of the postal contract. While PM Clause B-28, Safety and Health Standards, requires that supplies delivered

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<sup>8</sup> While PM 1.7.12 a. does provide for adoption of “more stringent standards for domestic manufacture when in the best interests of the Postal Service,” it leaves the decision to adopt those standards to the Postmaster General, who has not acted in that regard as to this commodity. That the Postal Service has done so in another context (for example, with respect to postal uniforms, which are not purchased under the PM's procedures; instead, they are purchased by postal employees who are reimbursed for the expense), or that other government agencies (such as the Department of Agriculture) have adopted different procedures for specific purchases does not require a different result.

under the contract conform to OSHA standards, that requirement applies to the supplies delivered by both domestic and non-domestic suppliers.

The protests are denied.

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Contract Protests and Policies