**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Resource Recovery International Group, Inc.

File: B-265880

Date: December 19, 1995

Michael Deal for the protester.
Matthew Pausch, Esq., Defense Logistics Agency, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Although solicitation for sale of former naval vessel for scrap involves the removal and proper disposal of hazardous materials, the Service Contract Act does not apply because the proposed contract is not principally for services.

2. Protest that domestic scrapping requirement, as condition of sale of former naval vessel, is unduly restrictive is denied where agency presents a reasonable explanation in support of the condition and protester fails to show that the requirement is clearly unreasonable.

DECISION

Resource Recovery International Group, Inc. (RRI) protests the terms of the invitation for bids (IFB) covering Sale No. 31-5179, issued by the Defense Reutilization and Marketing Service (DRMS), Defense Logistics Agency (DLA), for the sale of the ex-U.S.S. Oriskany for scrap.[1] RRI contends that the solicitation is flawed for various reasons.

We deny the protest.

The IFB sought bids to purchase the ex-U.S.S. Oriskany, a World War II era aircraft carrier which is no longer in active service and has been stricken from the U.S. Naval Register. Award was to be made to the responsive, responsible bidder submitting the highest acceptable bid. The awardee is required to scrap and demilitarize the vessel in the United States or its territories. Scrapping is to be

[1]We consider this protest under 4 C.F.R. § 21.11 (1995). DLA, by letter dated January 13, 1987, has agreed to our considering bid protests involving its surplus property sales. See Consolidated Aeronautics, B-225337, Mar. 27, 1987, 87-1 CPD ¶ 353.

accomplished by dismantlement and mutilation of the hull and superstructure in such a manner that no considerable part of the vessel is left intact or undisturbed. Title to the scrap, parts, and/or components available for removal vests in the purchaser at the time when the scrap/property is physically removed from the vessel. As a further condition of the sale, the purchaser assumes responsibility for proper removal and disposal of all hazardous materials present on board or produced as part of the scrapping process. These hazardous materials include asbestos, sodium chromate, polychlorinated biphenyls (PCB) and others. Although the government remains a co-generator of any PCB waste (see Toxic Substances Control Act, 15 U.S.C. § 2601 et seq. (1994)), the purchaser is responsible both for ascertaining the extent to which local, state, and federal statutes and regulations apply to this and other hazardous materials and for compliance with the law in the disposal of those materials. The IFB provided a survey of locations of the hazardous materials, including asbestos and PCBs, but expressly disclaimed any warranty as to the completeness of these surveys.

RRI did not bid, and instead filed this protest prior to bid opening. Three responsive bids were submitted by the September 6 bid opening date. The high bidder was Pegasus, Inc. DRMS awarded Pegasus the contract on September 29. Performance of the contract has been stayed pending this decision.

RRI contends that this IFB is actually a solicitation for hazardous waste remediation and disposal services, rather than a sale. In the protester's view, the scrap represents the payment for these services and the purchase price is "merely" an adjustment. RRI thus argues that the IFB is flawed because it does not contain provisions of the Federal Acquisition Regulation (FAR) associated with service contracts. The only provision identified by the protester is that associated with the Service Contract Act of 1965, 41 U.S.C. § 351 et seq. (1988).

The Service Contract Act requires federal contractors performing service contracts entered into by the United States to pay minimum wages and fringe benefits, as determined by the Secretary of Labor. If a contracting officer believes that a proposed contract "may be subject to" the Service Contract Act, he is required to notify the Department of Labor (DOL) of the agency's intent to make a service contract so that DOL can provide the appropriate wage determination. 29 C.F.R. § 4.4 (1995). If the agency does not believe a contract may be subject to the Service Contract Act, then there is no duty on its part to notify DOL or to include Service Contract Act provisions in the solicitation. 53 Comp. Gen. 412 (1973); Tenavision, Inc., B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114. When a protester challenges an agency's decision that the Service Contact Act does not apply to a particular procurement, the determination to be made is whether the agency acted reasonably. Id.

The Service Contract Act is applicable to contracts, the "principal purpose" of which is to furnish services through service employees. 41 U.S.C. § 351. Here, while the solicitation imposes conditions on the sale of the ex-U.S.S. Oriskany, including removal and proper disposal of hazardous materials, the principal purpose of the contract clearly is for the sale of surplus material. In this regard, the record reflects that the value of the scrap well exceeds the cost of hazardous material disposal and the purchase price of the vessel. While RRI argues that remediation costs would exceed the costs of domestic scrapping, the vessel's appraised value was $600,000 and the highest bid submitted exceeded $1.2 million. Thus, we think the agency reasonably concluded that the principal purpose of the contract was a sale and not hazardous material remediation.

RRI next contends that the scrap warranty, which requires that scrapping be done within the United States, is unreasonable. According to the protester, the better approach would be a so-called "hybrid scrapping," which would require some domestic scrapping, but would allow export of the hull for final scrapping. Since overseas prices for scrap steel are higher, bids for this hybrid scrapping would be higher, resulting in increased revenue for the government.

The determination of the agency's minimum needs and the best method of accommodating them are primarily within the agency's discretion and, therefore, we will not question such a determination unless the record clearly shows that it was without a reasonable basis. CardioMetrix, B-257408, Aug. 3, 1994, 94-2 CPD ¶ 57; RMS Indus., B-247233; B-247234, May 1, 1992, 92-1 CPD ¶ 412.

The domestic-only scrapping requirement is reasonable. The agency explains that its scrapping requirement represents a valid minimum need of the government. See NR Vessel Corp., B-250925, Feb. 11, 1993, 93-1 CPD ¶128. It is Navy policy to require the scrapping of hulls of combatant ships as a condition of sale and scrapping is to be accomplished in the United States whenever practicable to ensure effective and permanent demilitarization. OPNAVINST 4770.5F, § 712 (Scrapping Policy). This policy also guards against the possibility that a ship on which men have served, fought, or died may fall into undesirable hands or be used for an objectionable purpose. Id. While the Navy is investigating the potential for use of hybrid scrapping, it is requiring domestic scrapping until its investigation is complete.

The Navy's position also reflects its concerns regarding its responsibility in the proper disposal of PCB wastes. For hybrid scrapping to be feasible, a contractor must remove all regulated PCBs from the hull so that it can be exported in compliance with these regulations. The Environmental Protection Agency has issued proposed revisions to the PCB regulations which would allow export of vessels containing PCBs if certain conditions are met. However, these conditions are onerous in the Navy's opinion. For example, to export a vessel with PCB on

board, a contractor must obtain a certification from the receiving country that it has received accurate and complete information about the waste, consents to receive it, and has adequate disposal facilities. Given the difficulty in identifying the precise locations of PCB wastes on decommissioned vessels, the Navy believes this requirement may be unachievable. Until these and other considerations are resolved, the Navy has determined not to allow hybrid scrapping of its vessels.

The Navy's concerns with permitting other than domestic-only scrapping appear reasonable on their face, and RRI has not shown otherwise. Apart from expressing its view that hybrid scrapping would result in higher revenues for the government, RRI has not demonstrated that the Navy's policy is unduly restrictive of competition; other than affecting the potential income from the sale of scrap, RRI has not shown that the warranty in any way limits its ability to bid on the vessel. In this regard, we note that the only restriction is on where the scrapping is accomplished; there is no restriction on exporting the scrap steel once it is separated from the vessel. While the protester argues that the agency allowed it to use hybrid scrapping on another vessel (the ex-U.S.S. Bennington) under a prior sales contract, the mere fact that the Navy previously allowed this method does not show that the current provision is unreasonable; each sale is a separate transaction and just as what happens under one procurement does not determine the propriety of what occurs under another procurement, see Komatsu Dresser Co., B-251944, May 5, 1993, 93-1 CPD ¶ 369, neither does action under a prior sale control what is to happen under a subsequent sale.[2] Under these circumstances, we find no basis for objecting to the agency's requirement for domestic-only scrapping.

RRI also contends that the solicitation is flawed because it does not adequately identify the type and quantity of all hazardous materials. We disagree.

Although a procuring agency must provide sufficient detail in a solicitation to permit competition on a relatively equal basis, the solicitation need not be so detailed as to remove any uncertainty from the minds of prospective bidders or to eliminate every performance risk. J&J Maintenance, Inc., B-248915, Oct. 8, 1992, 92-2 CPD ¶ 232. Rather, risks are inherent in contracts, and bidders are expected to use their professional expertise and business judgment in taking these risks into account in computing their bids. See United Terex, Inc., B-245606, Jan. 16, 1992, 92-1 CPD ¶ 84.

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[2]Moreover, we note that the hybrid scrapping permitted under the earlier contract was accomplished pursuant to a modification to that contract and was not based on a specific allowance for this method in the solicitation. The propriety of that modification has been challenged in pending court litigation by Schnitzer Steel Industries, Inc., another bidder on the sale of the ex-U.S.S. Bennington (Civil Action No. 94-2737, U.S. District Court for the District of Columbia).

Here, the agency took sufficient steps to ensure competition on an equal basis. DRMS explains that it has identified as much of the hazardous material as possible and disclosed it to potential bidders. Specifically, DRMS had surveys conducted of hazardous materials and made them available to prospective bidders. These surveys included a 143-page asbestos survey of each compartment on the vessel, identifying type and condition of asbestos, and a PCB survey identifying classes of materials containing PCBs (liquid and solid) and sample amounts for some 158 separate items. DRMS also provided an opportunity for bidders to examine the vessel prior to submitting bids. While the protester believes that the agency should have done more in identifying hazardous materials, there is no basis for finding that the agency's efforts were inadequate or unreasonable. There certainly is nothing inherently objectionable in the government's requiring bidders to assume the risk of complete identification of hazardous materials and compliance with applicable laws and regulations governing removal, transport, and disposal of hazardous wastes.[3]

The protest is denied.

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[3]The protester also argues that the agency's failure to identify these materials violates 10 U.S.C. § 7311 (1994). This statute, which concerns contracts for work on naval vessels other than new construction, requires the Navy to identify the types and amounts of hazardous wastes that must be removed and to do so in sufficient detail to allow the contractor to comply with applicable laws governing hazardous waste. By its terms, this statute is inapplicable to this solicitation. Not only is the ex-U.S.S. Oriskany no longer a "naval vessel," the contract is for sale of the vessel and not for "work" on the vessel. Sales of vessels are governed by 10 U.S.C. § 7305, which does not contain any comparable hazardous waste identification requirement.