

McArthur



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Petchem Inc.
File: B-233006
Date: February 8, 1989

DIGEST

1. Where protester fails to show that evaluation scheme designed to aid agency determination of price reasonableness places undue risk upon offerors or will not result in lowest cost to government in terms of actual performance, protest against pricing structure and evaluation scheme is without merit.
2. Request for proposals provision allowing intermittent fendering of tugs is not ambiguous where it is not susceptible of more than one interpretation.
3. Contention that contracting agency will improperly withdraw small business set-aside is premature and will not be considered where contention is based upon presumption that agency will act unreasonably.
4. Where protester presents no evidence that agency use of commercial tugboat operator tariff and erroneous release of government estimate were intended to establish a price goal for offerors, protest alleging use of auction techniques is denied.

DECISION

Petchem Inc., a small business, protests any award under request for proposals (RFP) No. N68836-88-R-0129, a small business set-aside, issued by the Navy for tug and towing services at Port Canaveral, Florida. Petchem alleges that in an effort to establish that prices offered by small businesses are unreasonable and thereby justify withdrawal of the set-aside, the agency has designed the solicitation to place unacceptable cost risks upon small businesses.

We deny the protest in part and dismiss it in part.

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On July 28, 1988, the Naval Supply Center, Jacksonville, Florida, issued the solicitation. The RFP has been amended and clarified several times, in part in response to questions raised by Petchem. The amended RFP provides for award of a firm, fixed-price requirements contract for a base period and four 1-year option periods. The solicitation requires potential contractors to submit offers for two lots: Lot I, allowing for 4-hour routine notice to the contractor for the tug and towing services and 1-hour emergency notice, and Lot II, allowing for 12-hour routine notice and a 1-hour emergency notice. Lot II also limits the contractor's obligation to perform emergency services by providing the contractor a right of first refusal. The agency will award only one lot to the lowest priced acceptable offer. The RFP further requires offerors to submit separate prices for moving each of 15 weight categories of vessels (i.e., less than 5,000 tons; 5,000 to 7,000 tons; up to 24,000 to 25,000 tons), in addition to waiting time and miscellaneous services. The solicitation also provides estimated numbers of moves of vessels for each weight category and contains a variation in estimate clause which provides for a price adjustment if the overall estimated quantity exceeds 15 percent of the stated quantity.

Prior to the receipt of initial proposals, Petchem filed this protest. The protester primarily raises four issues. First, the protester argues that the requirement for prices for each of 15 vessel weight categories is not based on actual needs because the weight of the ship to be towed bears little relation to the cost of the towing. Second, the protester asserts that the RFP requirement for emergency tugboat services based on the 1-hour notice is improperly stated since only continually manned tugboats can meet this requirement and thus the agency's need is for 24-hour service by fully manned tugs. Third, the protester argues the requirement for an adequate fendering system for the tug, that is, a protective device or guard to avoid damage to the tug and the vessel towed, is ambiguous. Fourth, the protester argues that the agency's release of the government estimate and its stated intention to compare prices received under the solicitation with rates contained in a large business commercial tariff for similar services effectively created an auction and was unreasonable. The protester charges that these solicitation improprieties will inhibit small businesses from competing by, among other things, placing unreasonable risk of increased costs and also ultimately result in the withdrawal of the small business set-aside.

With regard to the first issue, the protester argues that the requirement for submission of prices for 15 different weight categories is irrational because the weight of a vessel bears no relation to contractor cost except for a minor increase in fuel cost for moving larger vessels. The protester claims that commercial operators charge by weight categories because a larger ship has a greater economic value to its owner, but that this relationship does not exist for combat vessels.

The agency concedes that one of its purposes in using the 15 weight categories is to make its determination of price reasonableness easier by allowing it to compare prices offered under the RFP with the rates offered by the local commercial tariff tugboat operator. In addition, the agency believes that the cost of moving a larger vessel may be greater than the cost of moving a smaller one. In any event, the agency believes that its pricing method is specific, detailed and can be understood by potential offerors.

We do not see how this pricing structure places any undue risk upon offerors in view of the protester's assertion that there is little difference in the cost of moving a smaller and a larger vessel. Nor, for that matter, would the fact that the pricing structure places some risk upon offerors render that structure improper, since offerors are expected to take risk into account in formulating their proposals. Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD ¶ 116.1/ Furthermore, the protester provides no reason to doubt that award to the lowest acceptable offeror will

1/ The protester also argues that the unreliability of agency estimates increases the risk upon small businesses. There is no requirement that the estimates be absolutely correct. Apart from demonstrating that the number of moves experienced under prior contracts has varied from solicitation estimates, the protester has not shown that current estimates misrepresent anticipated actual requirements, are not based on the best information available or resulted from bad faith or fraud. Hero, Inc., 63 Comp. Gen. 117 (1983), 83-2 CPD ¶ 687.

result in the lowest cost to the government in terms of actual performance. See, for example, T.L. James & Co., Inc., 64 Comp. Gen. 854 (1985), 85-2 CPD ¶ 296. We see no reason therefore to object to the agency's proposed evaluation scheme.^{2/}

The protester also asserts that the solicitation requirement that tugs have an adequate fendering system "sized and arranged to preclude any metal-to-metal contact" between the tug and the vessel being towed, is ambiguous. Petchem contends that it remains uncertain whether this provision requires tugs to have intermittent or continuous fendering.

Solicitations must be drafted to inform all offerors in clear and unambiguous terms of what is required of them so that they can compete on an equal basis. Newport News Shipbuilding and Drydock Co., B-221888, July 2, 1986, 86-2 CPD ¶ 23. The mere allegation that a solicitation is ambiguous does not however make it so. Niedermeyer-Martin Co., B-226623, July 8, 1987, 87-2 CPD ¶ 23. There is no legal requirement that specifications be drafted in such detail as to eliminate completely any risk to the contractor or to eliminate the possibility that the contractor will be required to perform work other than that specified in the solicitation. Aaron Refrigeration Services, B-230833.2, Aug. 17, 1988, 88-2 CPD ¶ 153. Rather, offerors are expected to exercise some business judgment in preparing their proposals.

The record before us establishes that Petchem, which is the incumbent contractor, has boats with continuous fendering, which apparently is more expensive, and has on several occasions urged the agency to specify such fendering. The protester argues that the specifications would be free from doubt if they specifically required continuous fendering. The agency has consistently stated that it will accept

^{2/} The protester argues for the first time in his protest comments that the solicitation fails to explain how the agency will select which lot to award. The agency indicates that this decision will be based on the prices it receives, which is consistent with the solicitation language that award is to be based on price and, as we understand it, on available funding. In any event, this issue concerns a solicitation impropriety which should have been filed before the initial closing date. 4 C.F.R. § 21.2(a)(1) (1988).

intermittent fendering as long as it does not allow metal-to-metal contact between ships and that intermittent fendering meets its needs provided it conforms to the prohibition against metal-to-metal contact.^{3/} Also, Petchem, the incumbent operator, does not allege that the identity of the vessels using Port Canaveral is unknown or that their configuration is not available to the general public. Thus, Petchem and other potential offerors are reasonably aware of the ship configurations it will be towing and thus what fendering is needed. Further, Petchem's protest on this issue advocates a more restrictive fendering requirement than the agency needs. Since the objective of our bid protest function is to insure full and open competition for government contracts, our Office generally will not review a protest that has the explicit or implicit purpose of reducing competition. Dante Valve Co., B-232749, Oct. 4, 1988, 88-2 CPD ¶ 322. We see no ambiguity in the specification and find no basis upon which to challenge the agency's decision to allow intermittent as well as continuous fendering.

The protester also believes that in requiring 1-hour emergency service under Lot 1, the agency is effectively requiring 24-hour manning of the tug to insure timely response. Similarly, according to the protester, if a contractor wants to exercise his option to perform emergency service under Lot II, he must submit a price based on 24-hour manning. In this respect, we note that the protester argues the RFP should be structured to require rates for chartering a tugboat on a 24-hour basis.

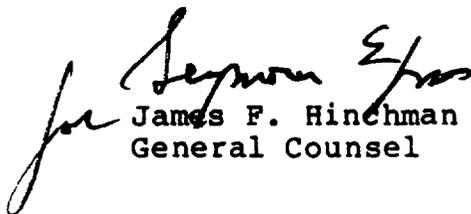
The only risk that Petchem identifies in this regard is the risk that the agency may reject an offeror's proposal if having tried to price the 1-hour requirement, the successful offeror is found to have submitted an unreasonable and unacceptable price. In this connection, the protester's principal objection to the RFP evaluation scheme is its anticipation that the agency will find the prices offered under the RFP unreasonable without taking into account the different services required under the contract compared to the commercial tariff which generally is not priced based on any notice requirements. The protester essentially is arguing that the agency will improperly withdraw the small business set-aside based on an improper determination that

^{3/} To the extent that Petchem anticipates that the agency will apply the "metal-to-metal contact" standard incorrectly, its protest is premature. See Aguirre Architects, Inc.--Request for Reconsideration, B-230256.2, May 19, 1988, 88-1 CPD ¶ 478.

prices are unreasonable. This contention is premature and will not be considered by our Office where there is no evidence supporting the protester's contentions other than its speculation that the agency plans to act improperly. Petchem, Inc., B-228093, Sept. 8, 1987, 87-2 CPD ¶ 228.

Finally, the protester contends that the agency has by its release of the agency's estimate and contemplated use of the commercial tariff to evaluate price reasonableness created an auction atmosphere, based partially on its assumption that the agency will use the commercial tariff to make a determination of price unreasonableness without regard to significant distinctions between the services covered by the tariff and the protested solicitation. The commercial tariff is apparently public information; the agency advises that the government estimate was released by mistake. We find no evidence that the estimate was furnished to offerors with the intention of establishing a price to beat. Furthermore, the protester concedes that the services under the RFP are not the same as those priced under the tariff. We cannot, therefore, conclude that the availability of the commercial tariff and the agency's release of the estimate constitute an improper auction technique within the meaning of Federal Acquisition Regulation § 15.610(d)(3) (Federal Acquisition Circular 84-16), where there is no indication that the contracting agency's purpose in releasing such information was to give one offeror a competitive advantage or that the agency disclosed its estimate with the intent of establishing a price goal for the offerors or disclosed their relative standing. Pantel Associates, B-230793, June 17, 1988, 88-1 CPD ¶ 581; CC Distributors, Inc., B-225446, Feb. 18, 1987, 87-1 CPD ¶ 183.

The protest is denied in part and dismissed in part.


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