



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American President Lines, Ltd.

File: B-236834.8; B-236834.9

Date: May 15, 1991

Robert T. Basseches, Esq., I. Michael Greenberger, Esq., Elise J. Rabekoff, Esq., Patricia I. Hansen, Esq., and Eric C. Jeffrey, Esq., Shea & Gardner, for the protester. C. K. Tankersley, Esq., Nemirow, Hu, Kurt & Tankersley, for Lykes Bros. Steamship Co., Inc., an interested party. Richard S. Haynes, Esq., E. Duncan Hamner, Jr., Esq., Charna J. Swedarsky, Esq., Alan W. Mendelsohn, Esq., and Robert S. Brock, Esq., Department of the Navy, for the agency. Richard P. Burkard, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegation that in determining reasonableness of transportation rates, solicitation failed to disclose all of the agency's intended evaluation criteria and otherwise contained improper evaluation factors is academic where record shows that only evaluation factors described in the RFP and not challenged by protester were bases for rate rejections.
2. Protest allegation that solicitation did not adequately describe the types of cargo to be transported is untimely where the allegation was not raised prior to the closing date for receipt of proposals.
3. Protest against agency's rejection of rates is denied where record shows that rejection of rates was made in accordance with the solicitation's stated evaluation criteria.
4. Where solicitation advises offerors of the possibility that award may be made without discussions, the agency does not conduct discussions with any offeror, and acceptance of the most favorable initial proposal without discussions would result in the lowest overall cost to the government at a fair and reasonable price, there is no legal requirement that the agency conduct discussions with any offeror.

DECISION

American President Lines, Ltd. (APL) protests the evaluation criteria contained in request for proposals (RFP) N00033-89-R-2300, third cycle, issued by the Military Sealift Command (MSC) for ocean and intermodal transportation services for the period from April 1 to September 30, 1991. APL filed a second protest in which it objects to MSC's rejection of certain rates offered by APL under the RFP.

We dismiss the protests in part and deny them in part.

The RFP, which was issued on December 4, 1990, and amended six times, contained separate evaluation schemes for ocean rates and for linehaul rates. The RFP provided, with certain limited exceptions not applicable here, that with respect to rates requested for ocean transportation, the agency would accept only the low-priced rate and that no other rate would be evaluated, unless the agency found that the rate was not fair and reasonable or that the rate violated the Cargo Preference Act, 10 U.S.C. § 2631 (1988). The RFP provided that the fair and reasonable determination would be based on a price analysis in accordance with Federal Acquisition Regulation (FAR) § 15.805 (FAC 90-3), which provides that a contracting officer may use, among others, the following techniques: comparison of proposed prices received, comparison of prior proposed prices and contract prices with current proposed prices, and comparison of proposed prices with independent government cost estimates and with competitive published price lists or market prices. Also, in determining the fairness or reasonableness of rates offered, the RFP provided that, in limited circumstances, the contracting officer may compare a per container rate for a 20-foot container to a per container rate for a 40-foot container for the same commodity.

With respect to inland linehaul rates, the RFP provided that all fair and reasonable rates would be accepted and that linehaul rates would be evaluated based on a price analysis defined by FAR § 15.805 (FAC 90-3).

The RFP also provided that awards may be made without discussion of offers received and that the government may accept some or all rates without discussions; therefore, it cautioned, offers should be submitted initially on the most favorable terms from a price and technical standpoint.

On December 14, prior to any RFP amendments, the agency held a pre-proposal conference to explain the requirements and criteria of the RFP. At the pre-proposal conference, the agency and contractor representatives discussed, among other

topics, the method by which the agency developed its cost estimates. Specifically, the carriers were interested in the extent to which MSC used commercial service contract rates and foreign-flag rates in analyzing market conditions and preparing its estimates of what MSC believed constituted fair and reasonable prices for the requirements. The RFP was never subsequently amended to state that MSC intended to evaluate rates by reference to commercial service contract rates or by reference to foreign-flag carriers' rates.

APL filed its original protest on January 10, 1991, prior to the closing date for receipt of proposals. The protester challenges the RFP's stated evaluation method on several bases.^{1/} APL argues that the evaluation scheme violates FAR § 15.605(e), which requires that solicitations clearly state the evaluation factors, including price, that will be considered in making the source selection. The protester argues, based on statements at the pre-proposal conference, that MSC improperly intended to evaluate rates by reference to commercial tariff rates for a representative market basket of commodities and market conditions. Further, the protester asserts, also based on the discussions at the pre-proposal conference, that MSC improperly intended to evaluate rates by comparing them to service contract rates and foreign-flag rates. The protester also objects to the evaluation factor which stated, with respect to ocean rates, that the agency may compare certain per container rates for 20-foot containers to per container rates for 40-foot containers.

In its comments to the agency report and at the administrative conference held in connection with this protest, the protester attempted to raise a new protest issue. The protester argued that the RFP was defective because it did not provide prospective offerors with sufficient information regarding the types of cargo they would be required to transport. APL argued that MSC's failure to provide this information violates various procurement statutes and regulations.

MSC evaluated the rates it received and rejected a small percentage of rates offered by APL: Nine ocean rates were rejected because the agency required only one carrier, and APL's rates were not low. Two linehaul rates were rejected based on MSC's finding that they were not fair and reasonable when compared to competitor's rates and prior contract prices. Upon receipt of a notice of rejection of these rates, APL filed a second protest with our Office alleging that MSC

^{1/} The protester withdrew a protest ground raised in its initial protest relating to an RFP provision which guaranteed that, for certain routes, MSC would accept more than one rate.

failed to provide a reasonable basis for the rejection of its rates, that it failed to conduct discussions with APL, and that the written notification of the rejection was defective. The agency determined that urgent and compelling circumstances which significantly affect the interests of the United States would not permit waiting for our decision and necessitated proceeding with award under the protested RFP.

With regard to the protester's concern that MSC intended to improperly evaluate the reasonableness of its rates by reference to undisclosed evaluation factors such as commercial tariff rates, a representative market basket of commodities, or market conditions, and that MSC intended to improperly use stated evaluation criteria such as the comparison of 20-foot container rates to 40-foot containers rates, the record undisputedly shows that MSC rejected the 11 APL rates based solely on other stated evaluation criteria in the RFP which were not challenged by APL. Since the allegedly undisclosed or improper evaluation criteria did not serve as a basis for the rejection of any of APL's rates, we find that these issues are academic.

Regarding the subsequently raised protest allegation that the RFP did not contain sufficient information concerning the types of cargo to be shipped and was therefore flawed, this protest ground is untimely. Under our Bid Protest Regulations, a protest must set forth a detailed statement of the legal and factual grounds of the protest. 4 C.F.R. § 21.1(b)(4) (1991). This requirement is intended to provide us and the agency with a sufficient understanding of the grounds for protest and with the opportunity to expeditiously consider and resolve the matter with minimal disruption to the orderly process of government procurement. Sector Technology, Inc., B-239420, June 7, 1990, 90-1 CPD ¶ 536.

We do not think that the original protest raised the issue of whether the RFP's failure to disclose the precise types of cargo violated the agency's obligation to adequately describe the required services. The protest letter, which was more than 20 pages long and set forth specific grounds of protest concerning the RFP, did not include any allegation or argument that MSC had not properly stated its requirements in the RFP. The protest clearly related to the RFP's evaluation criteria. The protester prefaced its specific protest allegations with a lengthy description of MSC's failure to follow its stated RFP evaluation criteria in an earlier procurement. The protest letter unequivocally conveyed APL's concern that the evaluation factors, as written and as allegedly announced at the pre-proposal conference, would produce arbitrary and irrational award decisions.

We thus regard the belated raising of the issue that the RFP fails to adequately describe the types and volume of cargos to be shipped as piecemeal presentation or development of the protest issue. Where a protester, in its comments on the agency's report, for the first time specifies precisely an alleged procurement deficiency not reasonably encompassed by its original protest, the detailed arguments will not be considered unless they independently satisfy the timeliness requirements under our Regulations. Julie Research Laboratories, Inc., B-240885, Dec. 31, 1990, 70 Comp. Gen. ____, 90-2 CPD ¶ 526. Since this allegation was not raised prior to the closing date for receipt of proposals, this protest ground is untimely. 4 C.F.R. § 21(a)(1).

APL also protests to the rejection of its 11 rates. We have reviewed the record, and we have no basis to object to MSC's rejection of these rates. The RFP provided that, for ocean rates, the agency would only accept the low-rate offeror unless an additional carrier was necessary to assure adequate service. Nine APL ocean rates were rejected because the agency required only one carrier, and the rates submitted by APL were not the low priced, technically acceptable rates. Further, as stated, the RFP, by reference to FAR § 15.805-2 (FAC 90-3), provided that comparisons with other competitor's rates and prior rate history would be made in determining whether rates are fair and reasonable. Two linehaul rates were rejected because they were determined not to be fair and reasonable based on a comparison to competitor's rates and prior contract prices. The record shows that APL's prices were substantially higher than the low rate submitted and substantially higher than prior contract prices.

In its second protest, APL also argues that its rates should not have been rejected without conducting discussions. The FAR, as it applies to this procurement, states that a contracting officer may make an award on the basis of initial proposals without holding discussions provided that the solicitation advises offerors of this possibility, no discussions in fact are held, and the competition or prior cost experience demonstrates that the acceptance of the most favorable initial proposal would result in the lowest overall cost to the government at a fair and reasonable price. FAR § 15.610(a)(3); Ask Mr. Foster Travel Div., B-238305, May 9, 1990, 90-1 CPD ¶ 460. Here, as stated, the RFP notified all offerors of the possibility that award or partial awards might be made without discussion. The agency has advised our Office that it did not conduct discussions with any offerors before making awards for the rates which are the subject of this protest. The competition and prior cost experience supports the agency's finding that it obtained the lowest rates available. Thus, there was no legal requirement that MSC conduct discussions with APL.

Finally, APL argues that MSC violated FAR § 15.1001 (FAC 90-3) by not providing APL of the specific reasons for the rejection of certain rates. The notice of rejection sent to APL provided three possible alternate reasons for MSC's rejection of a small group of APL rates without reference to particular rates. While we think that the notice could have, and should have, contained the precise reasons which applied to a particular rate, this procedural deficiency, which had no effect on the validity of the award decisions, does not provide a basis of protest upon which to sustain a protest. See Norden Serv. Co., Inc., B-235526, Aug. 22, 1989, 89-2 CPD ¶ 167.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel