144401 Ahearn

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Sea Containers America, Inc.

File: B-243228

Date: July 11, 1991

Richard A. Lidinsky, Jr., Esq., for the protester.
James J. Janosek, Esq., Alan W. Mendelsohn, Esq., and Richard S. Haynes, Esq., Department of the Navy, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that relaxation of specifications by amendment issued after receipt of initial proposals evidences agency bias against protester and in favor of awardee is dismissed; there is nothing inherently biased or otherwise improper in agency's relaxing specifications to increase competition, and record shows relaxation benefited three offerors. General Accounting Office generally will not entertain argument that agency should have used more restrictive specifications.

2. Protest alleging entitlement to evaluation preference under Buy American Act is dismissed for lack of interest where firm's offer properly was determined technically unacceptable due to qualification of option offer; even if the protest on this basis were sustained, protester would not be eligible for award.

DECISION

Sea Containers America, Inc. protests the award of a contract to Finsam International under request for proposals (RFP) No. N00033-91-R-3098, issued by the Department of the Navy, Military Sealift Command (MSC), for refrigerated cargo containers in support of Operation Desert Storm. Sea Containers primarily argues that MSC conducted the procurement in a biased manner, as evidenced by procurement actions which purportedly favored Finsam.

We dismiss the protest.

The RFP provided for award of a fixed-price contract for 100 containers, with an option for an additional 300. Among the numerous solicitation requirements, the first 100 containers were permitted to be either new or like-new, but only new containers were acceptable for the option quantities. Delivery was required within 1 day of award for the first lot of 36 containers and within 8 days of award for the second lot of the remaining 64 containers. For the option quantities, which were to be ordered in lots of 10, delivery was required within 7 days of option exercise. The cost evaluation included a preference for new containers and inclusion of the estimated transportation cost to the government from place of delivery to the Persian Gulf. Award was to be made to the responsible, technically acceptable offeror whose proposal was considered in the best interest of the government.

MSC received 12 initial proposals, including those from Sea Containers and Finsam, by the February 19, 1991, closing date. The protester's proposal included the qualification that the "option amounts . . . are being quoted subject to progress on another large Department of Defense tender." On the same date, the agency issued amendment No. 0002, revising five of the container specifications. The amendment was the result of a technical evaluation of the specifications made to reassess the agency's minimum needs, following receipt of comments, suggestions, and exceptions from several offerors. In addition, the amendment advised offerors that for technical acceptability "all qualifications and contingencies must be removed from offers, including those placed on options and availability."

Both Sea Containers and Finsam (and four other offerors) submitted best and final offers (BAFO) by the February 20 closing date. In its BAFO, Sea Containers continued to condition the option portion of its proposal; the firm explained that it normally kept only 100 new containers in stock and proposed that, in the event that any of the options were exercised, it be permitted to furnish used containers until new ones were available, unless the government was willing to provide relaxed delivery terms to which Sea Containers could agree. As a result of this qualification, the contracting officer determined that Sea Containers's second-low BAFO (priced at $9,515,000, evaluated at $10,278,524) was technically unacceptable. Finsam was evaluated as the low, technically acceptable offeror (offer of $9,191,550, evaluated at $10,443,058), and award was made to the firm on February 21. On the same date, Sea Containers filed an agency-level protest challenging the award. That protest was denied on February 28 and the firm filed this protest with our Office on March 8.

Sea Containers primarily argues that MSC was biased against it and in favor of Finsam, that is, that MSC steered the award to Finsam. The primary indicia of this purported bias, according to Sea Containers, are the amendment of the technical specifications after receipt of initial proposals; MSC's inquiry to Sea Containers, prior to receipt of initial proposals, as to whether the firm knew of other potential offerors for the requirement; and the alleged relaxation of the delivery schedule upon award.1/

The purpose of our bid protest function, consistent with the Competition in Contracting Act of 1984, 10 U.S.C. § 2301 (1988), is to ensure that full and open competition is obtained to the maximum extent practicable; accordingly, we will not consider a protest challenging otherwise proper agency actions taken to increase competition. See Waste Management of Greater Washington, B-237928, Dec. 15, 1989, 89-2 CPD ¶ 559. Agencies have the discretion to amend specifications to reflect their determination of how best to accommodate their minimum needs, and are entitled to use relaxed specifications they reasonably conclude will satisfy these needs, in order to obtain competition. Canaveral Maritime, Inc., 69 Comp. Gen. 604 (1990), 90-2 CPD ¶ 41; The record shows that this is precisely what happened here.

Contrary to Sea Containers's contention that each of the five specification changes is suspect because they were made after receipt of initial offers, the record indicates that the only amended specification that benefited Finsam was the relaxation of the container power cabling length from 25 to 18 meters; Finsam initially offered cables of 18 meters rather than the required 25 meters.2/ The change in cabling length was made

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1/ As a preliminary matter, the Navy argues that Sea Containers lacks the necessary direct and substantial interest to qualify as an "interested party" eligible to bring this basis of protest under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1991), because the firm was determined ineligible for award. Sea Containers clearly is an interested party to protest alleged defects in the competition itself, since if we sustained this protest, the appropriate remedy could involve a resolicitation in which the protester would be afforded a further opportunity to compete. See East West Research, Inc., B-243224, Mar. 19, 1991, 91-1 CPD ¶ 303.

2/ The protester complains that without all relevant documents it is unable to verify which specification changes were of benefit to Finsam. We find no merit to this complaint. Copies of Finsam's original and BAFO were included in the agency report on the protest. These documents, which contain

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after the contracting officer determined, based on the advice of the agency's technical evaluator, that the shorter length would satisfy the government's minimum needs. This being the case, the change was deemed appropriate as a means of increasing competition. Contrary to the protester's assertion, this change did not benefit Finsam alone; two other offerors also initially offered the shorter length cabling. Thus, this specification change clearly was aimed at increasing competition. As the solicitation changes, the protester cites as proof of bias in fact were permissible under the above standard, they do not constitute a valid basis for challenging the agency's actions as biased. See Waste Management of Greater Washington, B-237928, supra. (We note that one of the other changes to the container requirements, a deletion of the requirement for heat load calculations for a performance test, was made at the request of Sea Containers.)

Sea Containers contends that the specification changes were unreasonable, and therefore improper, because they allowed offers of containers of lesser quality than is required under MSC's master specification for refrigerated cargo containers. Again, as stated above, we will not consider arguments challenging the relaxation of specifications to enhance competition under the circumstances here. See Petchem Inc., B-228093, Sept. 8, 1987, 87-2 CPD ¶ 228 (General Accounting Office's role in reviewing bid protests is to ensure that statutory requirements for full and open competition are met, not to protest any interest a protester may have in more restrictive specifications).

The fact that MSC sought information from Sea Containers as to possible sources for the agency's requirement after issuance of the solicitation and prior to receipt of initial proposals also does not evidence bias or any other impropriety in the procurement. There is nothing improper in an agency's seeking information as to additional potential competitors prior to the receipt of proposals. MSC's request is evidence only that the agency was fulfilling its duty to maximize competition.

Regarding the delivery schedule, Sea Containers is correct that the contract as originally executed required delivery of the first lot of containers within 7 days of award, rather than 1 day as the solicitation required, and required delivery of the second lot within 15 days of award, rather than 8 days, as also was required. The agency explains, however, that these delivery dates resulted from a clerical error, not an

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the specifications of Finsam's offered product, were sufficient for the protester to develop its argument in this area.

intent to relax the delivery schedule. This discrepancy was corrected 1 day after the award; the agency issued a modification to the contract on February 22, as well as a corrected notice of award, containing the same delivery terms as those specified in the RFP. We also note that the award was based on Finsam's offer, which was compliant with the RFP's delivery schedule, and that the record confirms (through Finsam memoranda and Department of Defense Form 250, "Material Inspection and Receiving Report") that delivery of the two lots of containers was made and accepted within the RFP's required delivery schedule. As the delivery schedule was not relaxed for Finsam, this argument too evidences no bias or improper action by MSC.

In sum, Sea Containers's purported evidence of bias consists solely of the firm's speculation that otherwise proper actions by MSC must have been undertaken because of improper or suspect motives. When a protester contends that contracting officials were motivated by bias or bad faith, it must submit convincing proof that the agency directed its actions with the specific and malicious intent to hurt the protester. Infection Control & Prevention Analysts, Inc., B-238964, July 3, 1990, 90-2 CPD ¶ 6. Sea Containers's speculation does not constitute such proof, and we find nothing in the record that shows bias on MSC's part. See Canaveral Maritime, Inc., 69 Comp. Gen. 604, supra.

Finally, Sea Containers alleges that its offer was entitled to an evaluation preference under the Buy American Act, 41 U.S.C. § 10a et seq. (1988), and the Memorandum of Understanding between the United States and the United Kingdom, see Department of Defense Federal Acquisition Regulation Supplement § 225.7400 et seq. According to the protester, an evaluation with this preference would have resulted in its offer being evaluated low.

The protester is not an interested party to protest this aspect of the evaluation of its proposal. A protester lacks sufficient economic interest in a procurement to challenge the award where it would not be in line for the award even if its protest were sustained. See InterAmerica Research Assocs., Inc., B-237305.2, Feb. 20, 1990, 90-1 CPD ¶ 293. Even if we sustained Sea Containers's protest of the Buy American Act evaluation of its proposal, the firm would not be eligible for award since its offer was found unacceptable due to its

qualification of the option requirement.3/ Thus, the protester lacks the economic interest necessary to qualify as an interested party for purposes of this allegation.

The protest is dismissed.

John M. Melody
Assistant General Counsel

3/ The protester has provided no timely argument that would warrant disturbing MSC's conclusion in this regard and, in any case, the agency's conclusion is correct. Specifically, the delivery schedule and new container requirement for option quantities, qualified by the protester's offer, are material terms of the solicitation. A proposal that fails to satisfy material solicitation terms is unacceptable and may not form the basis for an award. Marisco, Ltd., B-235773, June 26, 1989, 89-2 CPD ¶ 8. Sea Containers complains that the agency's explanation of the firm's unacceptability came after award was made. The agency's post-award notification (i.e., 4 days after award) is irrelevant to the determination of the acceptability of the firm's proposal.