



Comptroller General
of the United States

Washington, D.C. 20548

Benejam
12-7-92

Decision

Matter of: Sea-Land Service, Inc.

File: B-246784.2

Date: August 24, 1992

Peter M. Klein, Esq., and James P. Moore, Esq., Sea-Land Service, Inc., and Raymond S.E. Pushkar, Esq., McKenna & Cuneo, for the protester.

Christopher K. Tankersley, Esq., Nemirow, Hu, Kurt & Tankersley, for Lykes Bros. Steamship Co., Inc., an interested party.

Richard S. Haynes, Esq., Charna J. Swedarsky, Esq., and John M. Binetti, Esq., Department of the Navy, for the agency.

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DIGEST

1. Solicitation for negotiated contract seeking ocean and intermodal rates for transporting cargo which designates a ceiling on rates based upon prices for comparable movements established in existing transportation agreement, above which offers will be rejected, does not constitute an impermissible auction technique, where solicitation uniformly informs all offerors of the agency's intent to reject offers that exceed the ceiling rates, and there is no evidence that the agency intends to divulge any competitor's prices or otherwise make public the offerors's relative standing in the competition.

2. Solicitation contemplating negotiated contract which designates a ceiling on rates for ocean and intermodal rates for transporting cargo based upon rates for comparable movements derived from existing multiple award transportation agreement is ambiguous, where (1) the agency recently accepted all rates in the existing agreement--including the highest rates in the agreement--as fair and reasonable and in compliance with all applicable laws and regulations, but solicitation does not inform offerors that agency intends to reject offers that contain rates that exceed the lowest rates in the existing agreement, and (2) the solicitation does not clearly indicate whether the agency intends to permit offerors to revise initial rates that exceed the designated ceilings; offerors thus could be led to prepare offers based upon different assumptions.

3. Solicitation which incorporates by reference specific terms and conditions of current agreement which expires on the effective date of contract proposed by solicitation is not ambiguous, where each term and condition is specifically identified in the solicitation and will remain in effect for the life of the proposed contract, independent from, and irrespective of, the status of the agreement.

4. Allegation that solicitation's evaluation criterion is ambiguous and unreasonably provides for comparing offered rates for ocean and intermodal transportation of cargo with commercial service contracts will not be considered, where solicitation clearly advised offerors of that evaluation method and protester failed to raise the allegation prior to the time set for receipt of proposals.

DECISION

Sea-Land Service, Inc. protests the terms of request for proposals (RFP) No. N00033-91-R-2400(F), issued by the Military Sealift Command (MSC) for ocean and intermodal transportation of Army and Air Force Exchange Service (AAFES) cargo. Sea-Land argues that the procurement will be conducted using an improper auction technique; that the RFP is unclear as to how offers will be evaluated; and that the RFP incorporates certain terms and conditions that render it ambiguous. Sea-Land also objects to MSC's proposed negotiation method.

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

BACKGROUND

MSC periodically negotiates ocean and intermodal transportation (ocean in combination with motor/rail) rates for transporting Department of Defense (DOD) cargo using United States-flag commercial carriers.¹ Under that procurement method, if MSC determines that the services of more than one carrier are necessary to meet DOD's transportation requirements on any route, MSC may accept more than one carrier's

¹MSC is the component within the Department of the Navy responsible for negotiating ocean cargo rates and serves as DOD's procuring and contracting office. Each procurement under the agreements method is termed a "cycle" and covers a 6-month period. Offers are based on (1) ocean route-- further delineated as to the direction (outbound or inbound) in which cargo will move, broad type of cargo (general, refrigerated, or vehicles), and size of container (20-foot or 40-foot) in which the cargo will be transported; and (2) land route or drayage area--that is, the route from origin to port or from the port to the ultimate destination.

rates for transporting cargo between the same points--provided that such rates are fair and reasonable and otherwise in compliance with all applicable laws and regulations--making multiple awards possible. At the conclusion of these negotiations, MSC publishes the carriers's names and their accepted rates in the Worldwide Container Agreement and Rate Guide and the Worldwide Shipping Agreement and Rate Guide.² Using these agreements, DOD transports its cargo on the carriers's regularly scheduled commercial routes, in the same ships, and at the same time as commercial cargo. As individual requirements are generated during each cycle, DOD books cargo with the carrier whose sailing schedule meets its needs, and whose rates listed in the agreements result in the lowest overall cost to the government.³

According to MSC, the AAFES RFP at issue here is a departure from the established Worldwide Agreements approach, and reflects a new strategy to meeting DOD's transportation needs. This change is in part due to a recent report issued by our Office.⁴ That report found that in soliciting rates under the agreements concept, MSC does not provide offerors with sufficient information on the specific types of commodities or the number of containers expected to be transported between origin and destination points.⁵

The report also noted that under the agreements method, MSC does not request rates on the same basis as it procures services. That is, rather than soliciting single through rates for an entire route over which cargo will move (from

²The rates relevant here are contained in the Worldwide Container Agreement and Rate Guide (RG 38), effective through September 30, 1992. On April 15, 1992, MSC issued a solicitation seeking rates for the second cycle, which will cover the period from October 1, 1992, to March 31, 1993.

³For a more detailed discussion of the Worldwide Agreements and DOD's cargo booking policy, see American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53.

⁴DOD Commercial Transportation; Savings possible through better audit and negotiation of rates (GAO/NSIAD-92-61, Dec. 27, 1991).

⁵Our Office had previously voiced its concern about carriers having to compete for unknown requirements over 10 years ago in our report Weaknesses in Negotiating Rates and Services for Commercial Containerized Sealift (GAO/PLRD-81-27, April 28, 1981). That report recommended that MSC identify its shipping needs in terms of origin and destination points, volume, and type of cargo, and make its requirements known to the carriers.

origin to destination points), MSC solicits separate rates for each segment of the movement--i.e., from inland origin point to port, port to port, and port to inland destination.

As a means of encouraging MSC to improve its method for negotiating rates for containerized ocean cargo services, the report recommended that MSC develop estimates on the volume and specific types of commodities DOD transports between regular, established, distribution points, and provide offerors with that information. The report also recommended that MSC solicit single factor rates covering the overall route for which it actually procures services. GAO/NSIAD-92-61 at 25.

According to the agency, the RFP at issue here implements the report recommendations using a "service contract" approach.⁶ MSC states that AAFES transportation requirements are particularly suited to the use of a service contract since AAFES ships identifiable commodities at predictable, periodic volumes, to a discrete group of destinations. MSC thus determined that AAFES shipping requirements could best be met, and better rates obtained, by negotiating a contract with only one carrier, rather than by negotiating with several carriers under the Worldwide Agreements.

AAFES Solicitation

The RFP, issued on March 26, 1992, contemplates awarding a firm, fixed-rate, indefinite delivery/indefinite quantity contract, for a 12-month period. Offerors are required to

⁶The Shipping Act of 1984, 46 U.S.C. App. § 1702(21) (1988), defines "service contract" as:

"[A] contract between a shipper and an ocean common carrier . . . in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean carrier . . . commits to a certain rate or rate schedule as well as a defined service level--such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party."

The parties stipulated that whether the AAFES RFP will ultimately result in a contract that the Federal Maritime Commission, the cognizant agency, will consider to be a "service contract" under the Shipping Act is a matter outside our bid protest jurisdiction. That issue will not be considered in this decision.

submit single factor⁷ rates for transporting specific commodities⁸ from two designated AAFES distribution points in the continental United States to designated inland destinations in Germany, The Netherlands, Belgium and the United Kingdom, where AAFES retail facilities are located. The RFP states that AAFES will ship a minimum of 3,500 40-foot equivalent units of cargo during the term of the contract, and provides for liquidated damages if AAFES fails to meet that commitment. Attachment No. 7 to the RFP provides an estimated number of containers AAFES expects to ship during the life of the contract from each of the two distribution facilities to each of approximately 28 destinations in Europe.

Offerors are required to submit rates for shipping the containers from the domestic origin points to European destinations in the following combinations: 1) domestic inland (origin) point to European inland (destination) point, 2) domestic origin base port to European inland (destination) point, and 3) domestic origin point to European base port. The RFP also calls for separate ocean rates for shipping the containers from domestic origin base ports to European destination base ports. The RFP requests a total of approximately 200 separate rates.

The corresponding ocean route covering the origin and destination ports under the current Worldwide Agreement is Route Index 05. That agreement also contains the various domestic inland routes and European routes covered by the AAFES RFP. The Worldwide Agreement in effect at the time MSC issued the AAFES RFP lists the protester and Lykes Bros. Steamship Co., Inc., an interested party in this protest, as the only two carriers who provide both ocean and inland transportation services from the origin points to the destination points covered by the AAFES RFP.

The RFP states that for evaluation purposes the government will compute each solicited rate separately using a formula announced in the RFP. That formula essentially results in weighted rates, taking into account the estimated number of containers to be shipped from the distribution points to each destination point specified in the RFP. The RFP contemplates award to the overall low cost, technically acceptable, responsible offeror.

⁷The RFP defines "single factor" rates as "[a] single rate which includes all segments of the international transportation move from origin to destination."

⁸Annex B of the RFP lists approximately 41 different types of commodities (e.g., auto parts, furniture, sporting goods) that MSC expects to ship under the resulting contract.

PROTESTER'S CONTENTIONS

In its protest, Sea-Land initially maintained that the AAFES solicitation was an impermissible attempt by MSC to reopen the bidding and conduct an auction with respect to that portion of the general cargo that is covered by, and according to Sea-Land should move under, the existing Worldwide Container Agreement (RG 38), to which Sea-Land is a party. That agreement is effective through September 30, 1992, and thus overlapped by approximately 3 months the period covered by the proposed AAFES contract. According to Sea-Land, numerous terms of the AAFES solicitation conflicted with the terms and conditions in the Worldwide Agreement. After Sea-Land filed its protest, MSC issued amendment No. A0002, revising the effective date of the proposed AAFES contract to October 1, 1992.

Although the protester states that amendment No. A0002 cures most of the technical defects and inconsistencies in the AAFES RFP it initially complained of, including the alleged auction problem stemming from the initial overlap of effective dates, Sea-Land argues that the amendment further compounds other errors and ambiguities in the solicitation. Sea-Land contends that in connection with the transportation of the AAFES cargo, the solicitation unreasonably demands several costly services, not currently provided under the Worldwide Agreement, at rates below those published in the agreement.⁶ The protester thus argues that the RFP improperly sets a ceiling on rates it may offer to be considered acceptable, tantamount to a prohibited auction. Sea-Land also challenges as ambiguous one of the evaluation criteria; objects that certain other terms of the RFP are unclear and inconsistent; and argues that MSC intends to employ a negotiation strategy prejudicial to offerors.

⁶The RFP requires offerors to guarantee total transit time from any origin port to any inland destination in Europe and the United Kingdom of 19 and 20 days, respectively; and to provide a specified number of dedicated standby pools of empty containers at the AAFES distribution points. The RFP also sets 10 calendar days as the total amount of "free time" in Europe allowed for each container, an increase from the current 7 days allowed under the Worldwide Agreement; and doubles from 4 to 8 hours the amount of time allowed at any stop-off location.

DISCUSSION

Auction

The main thrust of Sea-Land's protest is its contention that the RFP improperly sets a ceiling on rates based upon competing carriers' published agreement prices, tantamount to an impermissible auction. The protester does not allege that the enhanced service requirements exceed the agency's minimum needs or that it cannot provide these services. Indeed, the protester concedes that AAFES may have legitimate special needs not currently met under the agreements. Sea-Land objects, however, that the Worldwide Agreement rates should not be used as a cap on rates offered under the AAFES RFP, because the RFP requires costly enhancements over the services currently provided, thus shifting higher risks onto the carriers, at rates below those in the Worldwide Agreement, which MSC previously accepted as fair and reasonable for a lower level of service.

Central to the protester's position is the evaluation criterion at paragraph C.2 of the RFP, which states in full:

"The contracting officer will make a comparison of the ocean and single factor rates of the overall low cost evaluated offer . . . to the corresponding ocean and combined ocean/linehaul multifactor rates contained in Ref. (B) [the Worldwide Agreement]. Any overall low cost offer that contains rates equal to or greater than the rates for the same movements under Ref. (B) will be rejected."

Sea-Land maintains that by pointing to the rates in the Worldwide Agreement and requiring offerors to beat those rates, or suffer rejection, MSC is essentially soliciting rates in contravention of Federal Acquisition Regulation (FAR) § 15.610(e)(2)(i). That section prohibits the use of auction techniques, such as "indicating to an offeror a cost or price that it must meet to obtain further consideration." According to Sea-Land, as announced in the AAFES solicitation, MSC intends to go beyond merely comparing offered rates with the Worldwide Agreement rates, or announcing a total ceiling price--to which the protester apparently would have no objection. Rather, Sea-Land contends that the AAFES solicitation improperly plays one Worldwide Agreement carrier against the other, with a directive for each competitor to beat the other's published rates, or suffer rejection. Sea-Land argues that rather than placing a cap on the rates it may offer based upon the Worldwide Agreement rates, MSC should negotiate rates offered under the AAFES RFP, independent of the agreement rates.

The agency denies that it is conducting an auction. MSC asserts that since it will not reveal any offeror's rates or their competitive standing during negotiations, the evaluation criterion at paragraph C.2 does not create a prohibited auction. MSC states that any letter calling for discussions of rates will only designate certain rates as either acceptable or subject to negotiations.

The agency further explains that the fundamental rationale behind paragraph C.2 of the RFP is the concept of service contracts as used in commercial practice. According to MSC, by entering into a service contract, a commercial shipper reserves space for a guaranteed volume of cargo at a preferred rate. In exchange for the cargo commitment, the carrier agrees, not only to a better rate than it would otherwise charge under the carrier's general tariff, but also to a certain level of services not necessarily provided under the tariff rate. By paralleling the evaluation methodology in this procurement to the service contract approach, the agency explains, MSC simply expects to be accorded the same benefits as commercial shippers entering into service contracts--i.e., better services at lower rates than the otherwise applicable Worldwide Agreement rates, in exchange for guaranteed cargo volume. The agency thus argues that in view of the RFP's guaranteed minimum cargo commitment and liquidated damages provision, rates offered in response to the AAFES solicitation which do not reflect a reduction in price from the Worldwide Agreement rates for the same movements are per se unreasonable and will not be considered acceptable.

In summary, the agency states that the evaluation criterion at paragraph C.2 simply reflects MSC's business judgment vis-a-vis this procurement. That is, if MSC cannot obtain a cost saving over the Worldwide Agreement rates, then there is no sound basis for the agency to assume the additional obligations (guaranteed minimum cargo commitment) and risks (liquidated damages) that would be imposed on MSC under the contemplated AAFES contract--risks and obligations that are not imposed under the agreements. On the other hand, MSC argues, in deciding whether to compete for the AAFES cargo, offerors may consider whether the revenue expected to be derived from the guaranteed minimum cargo commitment offsets any potential costs involved in providing the required services.

We find that the record here does not support Sea-Land's position that the agency intends to conduct a prohibited auction. Prohibited auction techniques essentially consist of indicating one offeror's price to another during negotiations, thereby promoting direct price bidding between offerors. See FAR § 15.610(e)(2)(i); Youth Dev. Assocs., B-216801, Feb. 1, 1985, 85-1 CPD ¶ 126. The protester does

not allege, and there is nothing in the record to indicate, that MSC intends to disclose any competitor's rates offered under the AAFES RFP. Nor does MSC intend to furnish any information about the prices offered under the AAFES RFP or to otherwise divulge any offeror's standing in the competition. By informing offerors that it will reject offers that contain rates equal to or higher than the rates in the Worldwide Agreement for similar movements, MSC is simply uniformly indicating to all offerors that any rates that exceed the comparable rates in the Worldwide Agreement will not be considered fair and reasonable under the AAFES RFP. The protester has not shown and we fail to see how providing such identical information to all competing firms is prejudicial to Sea-Land, how it promotes direct price bidding between offerors, or how it otherwise confers a competitive advantage on any offeror. We therefore cannot agree with the protester that the RFP contemplates an impermissible auction.

While the protester takes the position that the Worldwide Agreements should not be viewed as the applicable general tariff, there is nothing inherently unreasonable about the agency's rationale which forms the basis for its evaluation methodology--i.e., to conduct a procurement which parallels service contracts as that concept is applied in the commercial sector. As for placing a cap on rates, it is not unduly restrictive of competition for the agency to predesignate pricing in order to protect legitimate government interests. See Orthopedic Servs., Inc., B-247695, June 30, 1992, 92-1 CPD ¶ _____, citing Laidlaw Envtl. Servs. (GS), Inc., B-245587; B-245587.2, Jan. 16, 1992, 92-1 CPD ¶ 82, recon. denied, B-245587.4, June 12, 1992, 92-1 CPD ¶ _____. The agency here has provided a reasonable explanation for designating price ceilings. In our view, given the significant cargo commitment MSC is willing to make to one carrier and the substantial liquidated damages for failure to meet that commitment, MSC has a legitimate interest in negotiating better rates than it would otherwise have available under the agreements.

To the extent that the protester complains that the proposed AAFES contract imposes additional risks that are not imposed by the Worldwide Agreement, agencies are not prohibited from proposing to enter into contracts that impose substantial risk upon the contractor and place minimum administrative burdens upon the agency. LBM Inc., 70 Comp. Gen. 493 (1991), 91-1 CPD ¶ 476. As there is some amount of risk present in any procurement, offerors are expected to use their professional expertise and business judgment in taking these risks into account in computing their offers. S.P.I.R.I.T. Specialist Unltd., Inc., B-237114.2, Mar. 8, 1990, 90-1 CPD ¶ 257. Here, the solicitation specifies the required services and the estimated number of containers to

be shipped from each distribution point. Accordingly, experienced carriers such as Sea-Land could reasonably calculate their risks and account for them in their offer. The fact that Sea-Land may not be a party to any commercial service contracts which impose similar obligations on the carrier, as the protester argues, does not make the obligations here unreasonable.

Ambiguous Evaluation Criterion

Sea-Land contends that the criterion at paragraph C.2 is ambiguous. The protester argues that the RFP fails to indicate which agreement rates must not be exceeded to be considered acceptable (e.g., Sea-Land's Worldwide Agreement rates or Lykes's generally lower rates). Sea-Land further maintains that it is not clear whether the phrase "will be rejected" in paragraph C.2 of the RFP means that MSC will reject initial offers that exceed the comparison rates, or whether offerors will be given an opportunity to revise any excessive rates.¹⁰

During the hearing held in this protest, the contracting officer testified that in evaluating rates under paragraph C.2 of the AAFES RFP, MSC intends to use the lowest rates accepted for comparable movements under the Worldwide Agreement in effect when the RFP was issued (i.e., RG 38). Applying paragraph C.2, any rate offered under the AAFES solicitation that is equal to, or exceeds, the rate for the corresponding movement under the Worldwide Agreement, will be rejected. The contracting officer also testified that although MSC does not intend to reject initial offers which contain rates that exceed the agreement rate for comparable movement, it is MSC's intention to ultimately reject those offers if they still contain the excessive rates in the best and final offers (BAFO).

A solicitation must contain sufficient information to allow offerors to compete intelligently and on an equal basis. University Research Corp., 64 Comp. Gen. 273 (1985), 85-1 CPD ¶ 210. A solicitation requirement is ambiguous when it is susceptible to two or more reasonable interpretations.

¹⁰The protester also maintains that the AAFES RFP does not identify which agreement rates MSC will use in the evaluation, the current published rates or those recently submitted (but not yet effective), in response to the solicitation of rates for the second cycle agreements. We find this contention without merit, since the "Ref. (B)" in paragraph C.2 of the RFP is clearly identified as "[MSC]'s Worldwide Container Agreement--RG 38 First Cycle" on page 1 of the solicitation.

See Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234. When a dispute exists as to the actual meaning of a solicitation requirement, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Id. A solicitation is materially defective where it does not set forth a common basis for evaluating offers which ensures that all firms are on notice of the factors for award and compete on an equal basis. The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425. Here, we find that the RFP is materially defective because it fails to provide offerors with a common basis for preparing their offers.

The AAFES solicitation provides offerors insufficient information with respect to the Worldwide Agreement rates MSC intends to use in the evaluation. While the RFP generally references the current Worldwide Agreement "RG 38" as the document containing the applicable rates that MSC will use in its evaluation, nowhere does the solicitation indicate that MSC intends to use only the lowest agreement rates in its evaluation as the contracting officer testified. Since approximately 6 months earlier, MSC considered all of the Worldwide Agreement rates--including the highest rates listed in that document--to be fair and reasonable and in compliance with all applicable laws and regulations, offerors could reasonably interpret the AAFES RFP as announcing that MSC will not reject offers which contain rates that are lower than the highest agreement rates for comparable movements. Offerors could thus be led to believe that MSC would accept offers which contain rates that fall within a range of prices that MSC accepted for comparable movements under the Worldwide Agreement. This is a reasonable interpretation and is consistent with MSC's position that the AAFES solicitation seeks better overall rates than would otherwise be available under the agreement.

We find that the solicitation is ambiguous because offerors could reasonably be led to prepare offers based on different assumptions of how their rates will be evaluated. Accordingly, we sustain the protest on this basis. See US Sprint Com. Co. Ltd. Partnership, B-243767, Aug. 27, 1991, 91-2 CPD ¶ 201.

With respect to the protester's allegation that it is not clear whether the phrase "will be rejected" in paragraph C.2 means that MSC will reject initial offers, or permit revisions, we agree that this provision could be made clearer. In view of MSC's explanation, we think that the RFP should be amended to clearly indicate that MSC intends to permit offerors to revise excessive initial rates if that is its intention.

Additional Ambiguous Terms and Conditions

According to Sea-Land, while the firm prepared and submitted an offer in response to the AAFES solicitation, its offer was based on its "best guess" as to the applicable terms and conditions. The protester argues, for example, that since the effective date of the proposed AAFES contract (October 1, 1992) coincides with the expiration of the terms and conditions of the Worldwide Agreement, First Cycle, Sea-Land assumes that the AAFES solicitation would actually incorporate the terms and conditions in the Second Cycle RFP--that is, at least for the first 6 months when the AAFES contract would overlap the period covered by the Worldwide Agreement, Second Cycle (i.e., October 1, 1992 to March 31, 1993). The protester argues, however, that even if offerors were to assume that to be the case, they would do so at their own peril since the actual Second Cycle terms and conditions will not be finalized until sometime in September 1992, presumably to be effective by October 1, 1992, by which time First Cycle documents "become inoperative."¹¹ Sea-Land further maintains that since the period covered by the AAFES contract extends 6 months beyond the expiration date of the Worldwide Agreement, Second Cycle (March 31, 1993), offerors are left with insufficient information upon which to submit an intelligent offer.

The record shows that after Sea-Land filed this protest, MSC issued amendment No. A0002 to the RFP on May 21, 1992. Under the section entitled "TERMS OF CONTRACT," the amendment clearly states that "[t]his contract shall become effective on October 1, 1992 and remain in force until and including September 30, 1993, after which period it shall expire unless extended. . . ." The amendment specifically identifies every provision and clause the RFP incorporates by reference from the current Worldwide Agreement; to highlight each instance of a changed or amended provision, each modification is underlined. The amendment also provides replacement pages, reflecting all of the changes, for offerors to incorporate into the original RFP.

We find that contrary to Sea-Land's contentions, the solicitation clearly identifies all terms and conditions that are incorporated by reference from the current Worldwide Container Agreement (RG 38). We recognize that by their terms, each agreement terminates upon the effective date of the new agreement for the next procurement cycle.

¹¹The Container Agreement, MSC form No. 4280/7 states in relevant part that "[u]pon the effective date of this Agreement [October 1, 1992] . . . any previously existing Container Agreement, Shipping Agreement or Shipping Contract between the parties shall terminate. . . ."

Reading the AAFES solicitation as a whole, however, and in a manner that gives effect to all of its provisions, leads us to conclude that the only reasonable interpretation of the RFP is that the terms and conditions individually and specifically incorporated by reference into the RFP, will remain effective with respect to the proposed AAFES contract throughout the life of that contract, irrespective of the status of the Worldwide Agreement. While Sea-Land appears to question the agency's decision to incorporate terms and conditions into the AAFES solicitation from a Worldwide Agreement that by its terms expires upon the effective date of the proposed AAFES contract, there is nothing ambiguous or improper about doing so where each of those terms is specifically identified, and each will clearly become operative at the inception of the AAFES contract and remain in full force throughout the life of the proposed AAFES contract.

Negotiation Procedures

Sea-Land argues that the negotiation procedures announced in the AAFES RFP are prejudicial to Sea-Land. In this connection, paragraph G of the solicitation states in part:

"[T]he government intends to evaluate proposals and make award without discussions . . . [but] reserves the right to conduct discussions . . . In particular, offerors are advised that for purposes of limiting the scope of negotiations, the government may identify some or all rates initially offered as acceptable. If negotiations are conducted, they may be limited to certain rates or service specifically identified in writing by the contracting officer. . . ."

Sea-Land argues that in order to avoid "whipsawing" offerors in the negotiations process, MSC should negotiate all rates on an all-or-none basis. The protester does not fully explain its contention, however, and the case Sea-Land relies upon is inapplicable here.¹² In any event, despite

¹²Sea-Land argues that the proposed negotiation procedure is similar to the procedure the protester complained of in Crowley Caribbean Transport, B-246784, Mar. 31, 1992, 92-1 CPD ¶ 323 (dismissed on procedural grounds). In that case, Crowley argued that MSC improperly conferred an advantage on a competitor, because by informing the competing carrier during negotiations that MSC had rejected certain of its ocean transportation rates for various routes, MSC disclosed that it must have accepted the protester's lower rates on those routes. The protester thus argued that the competing
(continued...)

MSC's indicating to offerors which rates are "acceptable" during negotiations, offerors within the competitive range have a right to change their proposals, including price, for any reason, as long as negotiations remain open. See Joint Action In Community Serv., Inc., B-214564, Aug. 27, 1984, 84-2 CPD ¶ 228, citing University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD ¶ 201. Since offerors would not be precluded from modifying any initial rate in their BAFOs, we find nothing improper with the agency's proposed negotiations procedure.

MISCELLANEOUS CONTENTIONS

Regarding the subsequently raised protest allegation that paragraphs C.1 and C.3, as amended, further confuse the evaluation criteria, this basis of protest will not be considered. The protester maintains that those provisions are defective because they fail to advise how offers will be evaluated against allegedly comparable service contracts. Sea-Land contends that it has no "bilateral commercial service contracts." At the hearing held in this case, Sea-Land also attempted to introduce evidence, over objections from MSC, that there are no comparable commercial service contracts against which rates offered under the AAFES solicitation could be reasonably compared.

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) (1992). This requirement is intended to provide our Office and the contracting agency with a sufficient understanding of the protest grounds and with the opportunity to expeditiously consider and resolve the matter with minimal disruption of the orderly process of government procurements. Sector Tech., Inc., B-239420, June 7, 1990, 90-1 CPD ¶ 536.

¹²(...continued)

carrier could then underbid on the remaining line items in order to successfully book cargo on those routes. That case is distinguishable from the instant case, however, since it involved a solicitation for Worldwide Agreement rates which contemplated multiple awards for transportation of cargo between the same points. Since the AAFES solicitation at issue here contemplates a single award, informing offerors that certain of their initial rates are not acceptable would not provide any offeror with information about the status of its competitor's rates. Sea-Land's reliance on the logic of the arguments Crowley raised to advance its position here, is therefore misplaced. In any case, the issue raised by Crowley concerning MSC's negotiation strategy with respect to the Worldwide Agreement will be addressed in a separate decision.

We have reviewed the original protest letter and find that Sea-Land failed to raise the issues concerning paragraphs C.1 and C.3 in its protest. The only arguable reference Sea-Land makes to the comparability of commercial service contracts appears on page 26 of its 27-page protest. In summary fashion, Sea-Land points to an RFP provision--not paragraphs C.1 or C.3--which requests offerors to identify "applicable commercial tariffs . . . for the trade indices bid under this solicitation, including the applicable service contract commercial tariffs." Sea-Land then generally states that regarding the "Federal Maritime Commission aspects of the AAFES solicitation," this provision presumes that offerors have commercial tariffs with terms and conditions comparable to the Worldwide Agreement. In our view, this general statement concerning a different RFP provision, did not reasonably give the agency sufficient notice that Sea-Land also objected to the evaluation criteria at C.1 and C.3 of the RFP. If Sea-Land had any objections to those provisions--which unambiguously state that MSC intends to compare rates offered under the AAFES RFP to comparable service contract rates--then Sea-Land was required to so state in its initial protest.¹³

We thus regard Sea-Land's belated raising of the issues concerning the C.1 and C.3 evaluation criteria in its comments, and its continued attempt to introduce evidence in support of its position in this regard during the hearing, as a piecemeal presentation or development of the protest issue. See, e.g., American President Lines, Ltd., B-236834.8; B-236834.9, May 15, 1991, 91-1 CPD ¶ 470. Where a protester, subsequent to filing its original protest, specifies for the first time an alleged procurement deficiency not reasonably encompassed by its protest, the detailed arguments will not be considered unless they independently satisfy the timeliness requirements under our Regulations. Julie Research Laboratories, Inc., 70 Comp. Gen. 158 (1990), 90-2 CPD ¶ 526. We therefore will not consider Sea-Land's detailed arguments in its comments on the agency's report and in its post-hearing submission concerning paragraphs C.1 and C.3 of the RFP, because those arguments concern alleged solicitation improprieties that were not raised before the time set for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1).

¹³Although Lykes, the interested party, also raised similar allegations in its submissions, Lykes did not separately file a protest challenging those provisions, and all of its submissions were filed after the time set for receipt of proposals.

RECOMMENDATION

We recommend that MSC amend the AAFES RFP to specify which rates MSC intends to use in evaluating offers under the AAFES solicitation, and to clarify its intent with regard to allowing revisions of initial offers which contain rates that exceed the applicable ceilings. Since the closing date for receipt of proposals has passed, we recommend that the agency permit offerors to submit amended offers prepared based upon the amended evaluation criteria. In addition, we find that Sea-Land is entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). Sea-Land should submit its claim for such costs directly to the agency.

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

for Milton J. Hester
Comptroller General
of the United States