Comptroller General
of the United States

Washington, D.C. 20548

337209

Decision

Matter of: Kumasi Ltd./Kukawa Ltd.--Reconsideration; Maritime Administration--Request for Modification of Recommendation; Crowley Maritime Corporation; Puerto Rico Marine Management--Entitlement to Costs

File: B-247975.12; B-247975.13; B-247975.14; B-247975.15

Date: September 27, 1993

Thomas J. Touhey, Esq., Donald A. Tobin, Esq., and James A. Kelley, Esq., Bastianelli, Brown & Touhey, for Crowley Maritime Corporation; Wayne A. Keup, Esq., Dyer, Ellis, Joseph & Mills, for Kumasi Ltd./Kukawa Ltd.; and Daniel R. Weckstein, Esq., and William M. Dozier, Esq., Vandeventer, Black, Meredith & Martin, for Puerto Rico Marine Management, Inc., the protesters.
Michael McMorrow, Esq., Maritime Administration, Department of Transportation, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. When the head of a procuring activity decides under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(d)(2)(A)(i), to continue performance of a protested contract based on a finding that to do so would be in the best interest of the government, the General Accounting Office (GAO) is required under 31 U.S.C. § 3554(b)(2) to make any recommendation without regard to any cost or disruption that would result from terminating, recompeting, or reawarding the contract; accordingly, with respect to the ships not yet delivered to the government, GAO will not modify recommendation to reopen negotiations on the basis of agency claim that continued performance of the contracts after best interest determination made implementation of recommendation impracticable.

2. Protester remained an interested party to pursue protest notwithstanding offer during protest process to charter to another agency vessels proposed under protested procurement where contracting agency had previously determined to continue performance notwithstanding the protest and had accepted delivery of up to 9 of the 12 ships for which award had been made; in these circumstances, it was primarily the actions of the agency, and not those of the protester, after the protest was filed that were responsible for precluding the possibility of the protester receiving an effective opportunity to compete for award.

DECISION

Kumasi Ltd./Kukawa Ltd. (KK) requests reconsideration of our decision Kumasi Ltd./Kukawa Ltd., et al., B-247975.7 et al., May 3, 1993, 93-1 CPD ¶ 352, wherein we sustained the protests of Crowley Maritime Corporation and Puerto Rico Marine Management, Inc. (PRMMI), but denied KK's protest, against the awards under request for proposals (RFP) No. DTMA91-92-R-200079, issued by the Maritime Administration (MarAd), Department of Transportation, for ships to be used in the Ready Reserve Force (RRF). MarAd requests modification of our recommended corrective action. Crowley and PRMMI request proposal preparation costs.

We affirm our prior decision, including, specifically, our recommendation (in so far as it concerns the ships not yet delivered to the government), and also find that Crowley and PRMMI are entitled to recover their proposal preparation costs if MarAd nevertheless declines to implement our recommendation.

MarAd awarded 9 contracts for 12 roll-on/roll-off (RO/RO) vessels. In our May 3 decision, we sustained the ensuing protests filed by Crowley and PRMMI against the awards, holding that: (1) the agency evaluation gave importance to the stated evaluation criterion for the heavy lift capacity of the proposed vessels beyond that which would reasonably be expected by offerors, thereby depriving them of the opportunity to modify their vessels, or otherwise secure higher approved capacity for deck space, which could have significantly increased their technical scores; (2) the evaluation failed to account for all of PRMMI's vessel's current light lift capacity; (3) the agency double-counted the cost of certain required upgrades to PRMMI's vessel; and (4) the agency improperly included in the adjustments made to offerors' fixed prices the substantial cost of enhancements not required for seaworthiness or to meet applicable regulatory and classification society requirements. We recommended that MarAd revise the solicitation to accurately describe its needs with respect to heavy lift capacity and upgrade to RRF standards, and then request revised proposals from technically acceptable offerors whose vessels conform to the minimum qualification standards set forth in the solicitation. In addition, we found PRMMI and Crowley entitled to recover their protest costs. We denied KK's protest that the failure to select its vessels was inconsistent with the stated evaluation factors; since the record supported MarAd's conclusion that the KK vessels were in very poor material condition, we concluded that MarAd could reasonably find the KK vessels to be unacceptable.

KK RECONSIDERATION

KK essentially reiterates the argument it made in its initial protest: that MarAd's failure to select its vessels was inconsistent with the stated evaluation factors, which already took into account both the age and condition of the vessels, and with the results of the agency's numerical evaluation of technical and cost proposals, under which the two KK vessels received higher overall ship scores than did 8 of the 12 awardees. (Their higher scores in large measure resulted from their larger capacity.)

As we noted in our decision, however, MarAd determined, based on a survey of the vessels, that the KK vessels were "in very poor material condition"; the vessels, which were 16 and 17 years old, were evaluated as requiring extensive repairs and a higher total cost to upgrade and reflag than any of the awardees' vessels. KK offered no evidence showing that MarAd's conclusions regarding the condition of its vessels were inaccurate. We therefore concluded that, given the very poor material condition of the vessels, as documented by the agency's survey, the potential for as yet undiscovered significant deficiencies suggested by the known problems, and the need to acquire vessels offering many years of potential future service, MarAd could reasonably find the KK vessels to be unacceptable. In our view, whatever their capacity, without the assurance of reliable future operation, selection of the KK vessels would not further MarAd's stated objective of increasing the future mobility capability of the Department of Defense.

KK has not rebutted our conclusions. The fact that the numerical evaluation of the technical and cost proposals took into account the age and condition of the vessels did not preclude a finding that their very poor material condition and the potential for additional future significant deficiencies suggested by the known problems rendered them simply technically unacceptable. Although KK notes that (as recognized in our decision) portions of the hull and equipment of the Crowley vessels were also found to be in very poor condition, it does not appear from the record that the agency considered the perceived problems with the Crowley vessels to be of the same magnitude as those associated with the KK vessels. In any case, Crowley, unlike KK, offered credible evidence tending to show that its vessels were in significantly better condition than evaluated.

Since KK has failed to demonstrate that our decision contained any errors of law or fact upon which reversal or modification is warranted, 4 C.F.R. § 21.11 (1993), we affirm our denial of its protest.

REQUEST FOR MODIFICATION OF RECOMMENDATION

MarAd argues that, as a result of continued performance under the contracts, our recommendation to revise the solicitation and reopen negotiations is impracticable. Although the agency was notified of the protests within 10 calendar days of the awards, MarAd nevertheless determined, on January 8, 1993, not to suspend performance of 8 of the 9 contracts based upon its finding pursuant to 31 U.S.C. § 3553(d)(2)(A)(i) (1988) that performance of the contracts was in the best interest of the government. The agency subsequently determined to proceed with performance of the remaining contract under the same "best interest" exception to the suspension requirements. As a result, according to MarAd, title to 9 of the 12 selected ships has passed to the government. The agency further reports that each of the remaining three ships is one of a pair of ships purchased through a single contract under which title to the first of each pair already has passed to the agency. MarAd also reports that the owners of these three ships have undertaken actions and expended funds in order to fulfill the contracts. According to the agency, revising the solicitation and reopening negotiations therefore is impracticable.

Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(b)(2), when the head of a procuring activity decides to continue performance of a protested contract based on a finding that to do so would be in the best interest of the government, we are required to make recommendations without regard to any cost or disruption that would result from terminating, recompeting, or reawarding the contract. Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd, B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333; GIC Agric. Group, B-249065, Oct. 21, 1992, 92-2 CPD ¶ 263. Although title to nine of the selected ships has passed to the government, and corrective action therefore is unavailable with respect to those ships, see Stevens Technical Servs., Inc., B-250515.2 et al., May 17, 1993, 93-1 CPD ¶ 385, with respect to the remaining three ships, we are precluded by statute from taking into consideration the cost or disruption to MarAd from implementing our recommendation to revise the solicitation and reopen negotiations.

MarAd argues that our award of protest costs to Crowley should be reversed because, prior to our decision, Crowley offered to charter its proposed vessels to the Military Sealift Command (MSC) for a period of up to 4 1/2 years. Specifically, MarAd reports that Crowley responded to an MSC solicitation requesting proposals for the charter of RO/RO ships by the closing date of April 15, that is, more than 2 weeks prior to our May 3 decision; 5 days after our

decision, on May 8, MSC awarded the charters to Crowley. MarAd argues that by submitting a proposal to MSC Crowley effectively removed itself from the MarAd competition and precluded the possibility of corrective action, and therefore lost any potential entitlement to costs.

Under CICA, 31 U.S.C. § 3551 (1988), protests may be filed by an interested party, defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract." Our Office therefore has recognized that an offeror that unequivocally removes itself from the competition for award is not an interested party eligible to pursue a protest. See Signal Corp., 69 Comp. Gen. 659 (1990), 90-2 CPD ¶ 116, aff'd, 69 Comp. Gen. 725 (1990), 90-2 CPD ¶ 236. We have found such an unequivocal expression of disinterest in award where, for example, the protester disbanded its proposal team prior to filing its protest and disclaimed any interest in the award, id., or the protester declined an agency request to extend its offer acceptance period. SuPressor, Inc., 68 Comp. Gen. 122 (1988), 88-2 CPD ¶ 534; Marc Indus., B-243517, June 6, 1991, 91-1 CPD ¶ 542; see Federal Data Corp. v. U.S., 911 F.2d 699 (Fed. Cir. 1990).

We find no similar expression of disinterest by Crowley here. Rather, it is clear that Crowley pursued an alternate market for its vessels only after MarAd's actions compelled it to do so. Crowley did not offer to charter its vessels to MSC until mid-April, more than 3 months after MarAd determined (on January 8) that the best interest of the United States required proceeding with performance, and only after MarAd apparently had accepted up to 9 of the 12 ships for which it had made award. Furthermore, award of the charter to Crowley was not made until May 11, that is, until after officials of MarAd had advised Crowley (on May 5) that the agency was proceeding to accept the remaining three vessels notwithstanding our May 3 recommendation to reopen negotiations. In our view, therefore, Crowley's resorting to offering its vessels to MSC signaled not disinterest in the award, but resignation to the plain effect of MarAd's "best interest" awards--the elimination of any realistic possibility that Crowley would have an opportunity to compete for those awards. It would be fundamentally unfair to deny the protester cost recovery under these circumstances. We conclude that Crowley's offer to MSC does not furnish a basis for modifying our decision with respect to the award of costs. Since, however, the Crowley ships

are now under contract to MSC and therefore unavailable for this procurement, MarAd need not solicit a revised proposal from Crowley.

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