Morrow

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Crowley American Transport, Inc.

File: B-259599.2

Date: June 19, 1995

James A. Kelley, Esq., Bastianelli, Brown & Touhey, for the protester.
Richard S. Haynes, Esq., E. Duncan Hamner, Esq., and Charna J. Swedarsky, Esq., Department of the Navy, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that special military contingency operation provisions that addressed the use and possible acquisition of freight containers, which were included in a solicitation for container and breakbulk cargo transportation services on behalf of the Department of Defense (DOD) in connection with a military contingency operation in Haiti, placed disparate risks upon the carriers is denied, where the contingency provisions reflected DOD's minimum needs that it have flexibility in using the containers with limitations on possible liability, and where sufficient information was provided for potential competitors to compete intelligently and on a relatively equal basis.

DECISION

Crowley American Transport, Inc. protests the terms of request for proposals (RFP) No. N62387-94-R-9445, issued by the Department of the Navy, Military Sealift Command (MSC), for container and breakbulk cargo transportation services between ports in the United States (U.S.), Puerto Rico and Haiti.

We deny the protest.

MSC issued the RFP on November 9, 1994, to obtain rates for transportation of sustainment cargo in connection with the U.S. mission in Haiti, "Operation Uphold Democracy". The RFP called for U.S. Flag ocean and intermodal container and breakbulk transportation and related services on a liner

term basis[1] between ports and points in the U.S. and Puerto Rico and ports and points in Haiti for a period ending May 31, 1995. Because of the military and political situation in Haiti, the original RFP included section J, "Optional Military Contingency Clauses,"[2] which, among other things, designated pre-set per diem rates for the government's use of a carrier's containers with a maximum government liability of 181 days per diem at which time the agency would automatically obtain ownership of the containers based upon pre-set government replacement prices.

On November 21, MSC received two carriers' offers in response to the RFP, including one from Crowley that was subsequently withdrawn. Based upon the comments from various carriers, including Crowley, regarding section J and requests for an extension of the proposal due date, MSC extended the due date for the receipt of offers to December 7, at which time Crowley "reactivated" its offer. Prior to the due date, MSC issued two amendments, one of which modified certain aspects of section J.

Crowley filed a protest of this solicitation with our Office on December 6, primarily objecting to the clauses in section J establishing the per diem rates and the transfer of title in the containers to the government after 181 days.[3] After several meetings with carriers, including Crowley, MSC, on January 11, 1995, deleted section J from the RFP. Crowley then withdrew its protest. MSC continued meetings with the carriers concerning section J up to February 7. MSC reports that it was unable to reach a mutually satisfactory solution with the interested carriers regarding these provisions, but determined that because of the military contingency operations in Haiti, it still required the provisions that gave it flexibility in the use and possible acquisition of the carriers' containers as well

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[1]Liner term is where the carrier assumes responsibility and costs for the transportation of the cargo from the port or point where the cargo is receipted by the carrier to the destination port or point where the carrier makes the cargo available.

[2]The "MSC Worldwide Container Agreement and Rate Guide" and the "MSC Worldwide Shipping Agreement and Rate Guide" contain at section J various clauses to be incorporated in carrier contracts that are "in furtherance of military contingency operations."

[3]Crowley also filed a separate identical protest against section J as incorporated in an MSC solicitation for worldwide services.

as limitations on the government's possible liabilities for such use/acquisition.

To avoid further delay in supporting the military contingency operations in Haiti, MSC, by amendment dated February 7, included a revised section J to provide the government an option to purchase containers after 180 days of per diem (instead of automatic transfer of title previously provided for) and requesting the offeror (instead of the government) to propose per diem and replacement prices for the containers. Other provisions in section J include requirements that the contractor remove containers from the pier within 24 hours of vessel discharge and put them into a secure storage area, and that the contractor maintain reefer containers until delivery to final destination, as well as a provision allowing the government to require that a loaded container belonging to one carrier be lifted by another carrier. This amendment also revised the RFP's evaluation factors to permit rejection of a proposal if an offeror's proposed container per diem or replacement rates were determined to be not fair and reasonable. The amendment provided for proposals to be submitted by February 10.

Crowley filed this protest in our Office on February 9, basically alleging that various provisions of section J place uncertainties and undue financial and other risks upon carriers, and are ambiguous. In addition, Crowley argues that MSC failed to provide adequate time for proposal preparation and that the revised evaluation provision pertaining to container per diem and replacement rates is ambiguous.

On February 10, MSC received two offers, including one from Crowley conditioned upon the deletion of section J. Best and final offers (BAFO) were received on February 16 that again included a conditional offer from Crowley. On February 17, MSC rejected Crowley's conditional offer and awarded a contract to the other offeror, Seaboard Marine Limited, in the face of the protest, determining that urgent and compelling circumstances did not permit awaiting our decision in the matter.

The Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b) (1994), provides for a contracting agency to specify its needs and develop specifications in a manner designed to promote full and open competition with due regard for the goods or services to be acquired. See also FAR § 10.002(a). As a general rule, the contracting agency must give offerors sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. The mere allegation that a solicitation is ambiguous or restrictive does not make it so. There is no

requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. National Customer Eng'g, B-254950, Jan. 27, 1994, 94-1 CPD ¶ 44.

MSC reports that in order to meet the requirements of a military contingency operation such as Operation Uphold Democracy, the Department of Defense requires maximum flexibility in transporting containers to, from, and within the theater of military operations. MSC states that these requirements give rise to the need to place one carrier's container in another commercial carrier's vessel, the need to access specific containers for selective contents, the need to keep containers in the theater during prolonged periods far beyond normal commercial or peacetime practice, and the need for the carrier to provide the intermodal infrastructure necessary to coordinate and control the movement and distribution of sustainment containers. In addition, as a result of the lessons learned from the Desert Shield/Desert Storm operations, MSC determined that the government's exposure to open ended financial liability for per diem needed to be limited should the container be required to remain in the theater for an indeterminate time. Therefore, MSC reports that section J was included in this carrier solicitation to implement the government's minimum needs in support of the Haiti military contingency operations.

Crowley's basic complaint is that section J shifts undue risk to the contractor and improperly permits the agency to acquire the containers without adequate compensation.[4] However, an agency may offer a contract that imposes maximum risks on the contractor and minimum burdens on the agency. As risk exists in any contract, offerors are expected to use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. Id.

[4]Crowley also argues that the government's option to purchase the containers in section J is prohibited by Federal Acquisition Regulation (FAR) subpart 17.2 governing options because it allows for the purchase of supplies under a services contract. We find no legal prohibition (nor is any cited by the protester) that precludes a pre-agreement among the parties with regard to the acquisition of the containers under this services contract if it becomes necessary because of military contingencies. We note that under prior carrier contracts, there is provision for the government to obtain title to containers that are lost or destroyed.

The record indicates that all carriers, including Crowley,[5] were fully apprised of MSC's requirements, including the potential risks, and, thus, could take these factors into account in preparing the cost of their proposals. See Eagle Management, Inc., B-237685, Jan. 5, 1990, 90-1 CPD ¶ 27. Indeed, in response to previously expressed concerns, the carriers--who presumably are in the best position to determine appropriate rates--were requested to provide the applicable "fair and reasonable" per diem and replacement rates applicable to the various containers. While Crowley notes that the government would not make award if an offeror's rates were not considered to be fair and reasonable, any determination as to what was fair and reasonable would reflect the potential risk placed by the RFP on offerors--there is no indication in the record that the government would arbitrarily reject offerors' proposals as unreasonably priced.[6]

Given the military contingency situation in Haiti, we find MSC's explanation--which has not been successfully refuted by Crowley--is sufficient to support its determination that section J reflects the government's minimum needs that it have the flexibility of moving and retaining the containers, while protecting the government from open ended liability if the containers are retained for extended periods.[7] Moreover, contrary to Crowley's complaint we think that offerors were provided with sufficient detail to compete intelligently and on a relatively equal basis.[8] In sum, we

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[5]Prior to this award, Crowley had been providing similar carrier services to Haiti.

[6]We note that it is contrary to applicable regulations for the government to accept rates that are not considered to be fair and reasonable. See FAR § 15.802(b)(1).

[7]Crowley alleges that during Desert Shield/Desert Storm MSC only paid per diem for the first 180 days despite exercising the purchase option for the containers well after the 180 day period. However, MSC reports that carriers neglected to provide data on the number of days that each container was subject to per diem as required by the provision which frustrated the government's ability to exercise the option and resulted in the government protecting its right to purchase the containers by not paying per diem in excess of 180 days. MSC reports that all disputes but one have been settled.

[8]For example, while Crowley complains that the solicitation does not adequately define the contractor's responsibilities to move containers from the pier within 24 hours and to

(continued...)

find that the protested section J provisions do not place undue risk on the contractor and require no more than the reasonable exercise of the carrier's business judgment in responding to the RFP. National Customer Eng'g, supra; Eagle Management, Inc., supra.

Finally, with regard to Crowley's complaint that it was not provided sufficient time to submit an offer by February 10 after the revised section J clauses were incorporated in the RFP on February 7, the FAR prohibits agencies from awarding a contract unless offerors have had sufficient time before the closing date to consider solicitation amendments. FAR § 15.410(b). The decision as to the appropriate preparation time lies within the discretion of the contracting officer. L&E Service Co., B-231841.2, Oct. 27, 1988, 88-2 CPD ¶ 397. Here, while the time allowed for proposal revision after incorporation of the section J clauses was short, MSC reports, and the record confirms, that it provided as much time as it could afford, given the military contingency situation in Haiti and the imminent need for these services.[9] We also note that MSC gave Crowley another opportunity and more time to address the section J clauses when it reopened discussions and requested BAFOs. Moreover, there is no indication that Crowley was prejudiced by the agency's failure to provide more time, given that Crowley in fact submitted a revised offer that declined to accept any of the section J clauses in any case. See MCII Generator and Elec. Serv., B-242204.2, Apr. 4, 1991, 91-1 CPD ¶ 351.

The protest is denied.

Ronald Berger

for Robert P. Murphy
General Counsel

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[8](...continued)
store them in a secure area in the event large quantities of containers beyond the physical constraints of the facilities in Haiti must be stored or maintained, MSC reports that if the physical constraints of the Haiti facilities made available by the government (with which Crowley is fully cognizant) inhibit contract performance, additional arrangements will be made.

[9]While Crowley disputes the urgency, asserting that the agency could have obtained the services under existing contracts with carriers, we have found that MSC has established its need for the section J clauses that were not in those contracts.