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Decision

Matter of: Sea Box, Inc.

File: B-409963.3

Date: February 4, 2015

Kathryn V. Flood, Esq., Pamela J. Mazza, Esq., Julia di Vito, Esq., and Peter B. Ford, Esq., Piliro Mazza PLLC, for the protester.

Dennis J. Callahan, Esq., Rogers Joseph O'Donnell, for W&K Containers, Inc., an intervenor.

Shantay N. Clarke, Esq., and Nicole Franchetti, Esq., Defense Logistics Agency, for the agency.

Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that an agency's determination of noncompliance with the Trade Agreements Act was unreasonable is denied where the agency reasonably determined that the protester's foreign-sourced components would not be substantially transformed in the U.S. and thus the protester's item did not qualify as a U.S.-made end product.

DECISION

Sea Box, Inc. of East Riverton, New Jersey, protests the award of a contract by the Defense Logistics Agency (DLA) to W&K Containers, Inc. (W&K), of Mill Valley, California, under request for quotations (RFQ) No. SPE8ED-14-Q-0418 for large metal shipping containers known as Tricon Type I. The protester alleges that the agency erred in finding that Sea Box did not offer a U.S.-made end product in compliance with the Trade Agreements Act of 1979 (TAA), 19 U.S.C. § 2501 et seq. (2012).¹

We deny the protest.

¹ The TAA generally requires that end products be acquired from the U.S. or designated countries. 19 U.S.C. § 2512(a).

BACKGROUND

On June 2, 2014, DLA issued an unrestricted RFQ under the commercial item acquisition and simplified acquisition procedures of Federal Acquisition Regulations (FAR) part 12 and subpart 13.5. RFQ at 1. The RFQ contemplated the award of a fixed-price contract for 53 Tricon units on a best-value basis, considering price and past performance.² Id. at 3. The RFQ required that the Tricons be CSC [convention for safe containers]-certified, and manufactured to the latest International Organization for Standardization (ISO) standards. Id. at 4. The RFQ identified the containers by national stock number and described the containers as consisting of a heavy-duty steel floor, corrugated steel sides, roof, and swinging doors on one end. Id.

As relevant here, the solicitation incorporated Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7021, Trade Agreements (Oct. 2013), which requires that a contractor deliver only “U.S.-made, qualifying country, or designated country end products” unless such end products are not received or are insufficient to fill the government’s requirements.³ Id. at 13; DFARS § 252.225-7021. For an item to be considered an end product of the United States or a designated country it must be: (1) mined, produced, or manufactured in the United States or (2) substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. Id.

Three vendors, including Sea Box, submitted initial quotations. Agency Report (AR), Tab 3, Initial Award Decision, at 1. W&K’s quotation indicated that its container would be sourced in China and delivered via U.S. flag carrier. Id. Sea Box’s and the third vendor’s (“Vendor B”) quotations indicated that their items were sourced in China, delivered to the U.S. in kits, and assembled in the U.S. Id. Sea Box’s initial quotation also included a trade agreements certification pursuant to FAR § 52.225-5, Trade Agreements, indicating that the country of origin for the end products it intended to furnish was the United States.⁴ Protest at 3. The vendors’

² The RFQ stated that the past performance information retrieval system-statistical reporting (PPIRS-SR) may be used in evaluating past performance. RFQ at 3.

³ “Designated” and “qualifying” countries are listed at DFARS § 252.225-7021(a). China is not included in either list; therefore, to be considered for contract award, Sea Box’s Tricons were required to meet the definition for “U.S.-made end product.”

⁴ The agency asserts that this certificate was not applicable as the FAR Trade Agreements clause, 52.225-5, was not included in the solicitation. AR, Legal Memorandum at 3.

quotations were evaluated as follows:

	W&K Containers	Vendor B	Sea Box
Past Performance Delivery Score ⁵	65 ⁶	83	78
Price	\$219,897	\$233,571	\$243,482

AR, Tab 3, Initial Award Decision, at 1. On June 10, the contracting officer (CO) determined that all quotations offered non-designated country end products and that W&K's quotation represented the best value, based on price and past performance.⁷ Id.

On June 20, Sea Box filed its initial protest with our Office, alleging that the agency's TAA evaluation was flawed. The agency proposed taking corrective action, including suspending W&K's purchase order, reevaluating quotations, and making a new award decision. Our Office dismissed the protest as academic. Seabox, Inc., B-409963, July 10, 2014. On July 15, Sea Box filed a second protest, arguing that the agency's implementation of the proposed corrective action was improper because it exceeded the actions the agency had proposed, to Sea Box's prejudice. Thereupon, the agency clarified that negotiations would be opened for the sole purpose of obtaining information to assess compliance with the TAA, i.e., that no changes to price or past performance information would be permitted. Dismissal Request at 1. This rendered Sea Box's second protest academic, and we dismissed it. Sea Box, Inc., B-409963.2, Aug. 5, 2014.

⁵ DLA evaluated past performance using PPIRS-SR, a government-wide application that collects a contractor's past performance information, such as quantifiable delivery and quality information, to create a numerical delivery score. Defense Logistics Acquisition Directive (DLAD) § 52.213-9005(a)(1), (3); AR, Tab 13, DLA Evaluation of Past Performance, at 1. The PPIRS-SR delivery score ranges from 0 (low) to 100 (high), and is based on the total number of contract line items received, and weighted late deliveries. DLAD § 52.213-9005(a)(6)(iv); AR, Tab 13, DLA Evaluation of Past Performance, at 1.

⁶ Based on a review of the PPIRS-SR, the agency determined that W&K's past performance delivery score was not reflective of their true score and could be estimated to be in line with the scores of other vendors offering quotations. AR, Tab 3, Initial Award Decision, at 1.

⁷ In making its initial award decision, the agency stated that it relied on a size determination by the Small Business Administration (SBA) which determined that the overseas source of the components, rather than the domestic assembler, was the "manufacturer" of Tricons. Id. at 1.

As part of its corrective action and reevaluation of quotations, the agency contacted the three vendors for additional information; Sea Box was contacted on three separate occasions. AR, Tab 11, Questions and Answers regarding Sea Box, at 1-4. The agency's first contact reminded Sea Box that the "substantial transformation" test under FAR § 25.001(c)(2) would be used to determine country of origin and requested that Sea Box complete the Trade Agreements Certificate (DFARS § 252.225-7020), identify the country of origin of the item being offered, and provide a brief description of its manufacturing process. Id. at 4. The second contact requested additional details on Sea Box's assembly process, such as a cost breakdown, and the manhours required to perform each step in the process. Id. at 3. The third contact requested the country of origin of the parts and components that would be used in Sea Box's end item. Id. at 2-3.

In response, Sea Box submitted documentation that included a completed Trade Agreements Certificate, DFARS § 252.225-7020, indicated that the country of origin of the item was the United States, provided a list that delineated either China or the U.S. as the country of origin for the component parts, and described its manufacturing process in narrative and chart form. AR, Tab 9, Sea Box Manufacturing Description, 2-5. As relevant here, the protester's list indicated that the wall panels, doors, roof, and floor of the container were sourced from China, while items such as the coating materials, container vents, sealants, and decals were sourced in the U.S. Id. at 5. Additionally, the protester's documentation indicated that the parts, materials, and components necessary for the manufacture of Tricons were sourced and ordered in bulk from vendors throughout the U.S. and abroad to establish and maintain an inventory that Sea Box would then use to build the Tricons as needed. Id. at 2. The protester's description of its manufacturing process states that the individual components, such as the sidewalls, doors, end panels, roof, and floors, would be moved to a staging area where they would be positioned within a steel fixture, which had been pre-tested and periodically checked for ISO dimensional tolerance compliance, and welded along the horizontal and vertical surfaces. Id. Next, after the structure was removed from the steel fixture, the sidewalls, doors, end panels, roof, and floor would be welded to each other along twelve dimensional lengths. Id. at 3. Then, the welded surfaces would be ground down to an acceptable finish, before being primed and painted. Id. The final step included various processes, such as affixing decals, installing vents, and performing the final quality assurance inspection. Id. at 8. The process included quality control and staging, among other things. Id. at 3.

The agency evaluated the Trade Agreements certificates and the documentation offered by the three initial vendors and, in accordance with DFARS § 225.403(c)(i), determined that no quotation offered a U.S.-made, or designated-country, end product. AR, Tab 12, Revised Award Decision, at 1. As relevant here, the agency explained that the awardee indicated that its items were sourced in Asia, while Sea Box and the remaining vendor offered containers for which the agency determined that all the major components, including the front and side walls, doors, floor and

roof, were manufactured in China and then shipped to the U.S. for assembly into this specific item. Id. at 2. In explaining this determination, the agency stated that Sea Box's and Vendor B's assembly process in the U.S. did not constitute substantial transformation because the components sourced from China had no other use than to be assembled into the Tricon. Id.

Having concluded that all of the quotations received were for non-designated-country end products, the contracting officer considered all three quotations in the source selection. Id. The agency determined that W&K offered the best value to the government when considering price and past performance. Id. After receiving a debriefing, Sea Box protested to our Office.

DISCUSSION

Sea Box argues that the agency erred in determining that Sea Box was not compliant with the TAA, and that Sea Box, as the only compliant TAA vendor, was entitled to award. We have reviewed Sea Box's arguments and find that none provides a basis to sustain the protest.

When a vendor or offeror represents that it will furnish end products of designated or qualifying countries (including domestic end products) in accordance with the Trade Agreements Act, it is obligated under the contract to comply with that representation. If, prior to award, an agency has reason to believe that a firm will not provide compliant products, the agency should go beyond the firm's representation of compliance with the Act; however, where the contracting officer has no information prior to award that would lead to such a conclusion, the contracting officer may properly rely upon an offeror's representation without further investigation. Leisure-Lift, Inc., B-291878.3, B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 8. Where an agency is required to investigate further, we will review the evaluation and resulting determination as to whether the item offered is a domestic end product to ensure that they were reasonable. Klinge Corporation, B-309930.2, Feb. 13, 2008, 2008 CPD ¶ 102 at 5; See Pacific Lock Co., B-309982, Oct. 25, 2007, 2007 CPD ¶ 191 at 4.

Sea Box first argues that the agency should have accepted the country listed on the protester's Trade Agreements Certificate (DFARS § 252.225-7020) because the agency had no reason to question the information. Protest at 9. We disagree.

Contrary to the protester's assertion, the record shows that Sea Box's documentation, provided to DLA during the corrective action process and reevaluation, indicated that China was the source of various components used in the protester's manufacturing process. AR, Tab 11, Questions and Answers regarding Sea Box, 1, 5. Thus, the record shows that the agency had information prior to its revised award decision that provided a basis to question the certification.

Next, Sea Box argues that DLA used the wrong standard for determining whether Sea Box would comply with TAA qualifications, and that DLA should have relied on previous determinations by other agencies. Specifically, the protester alleges that DLA should have used SBA's test for determining whether a concern is a manufacturer of an end item for size purposes, which examines whether a concern performed the primary activities in transforming inorganic or organic substances into the end item being acquired. Protest at 13; See 13 C.F.R. § 121.406(b)(2). Sea Box also asserts that the agency should have relied on an SBA size determination concluding that Sea Box was a manufacturer of Tricon containers, and a Defense Contract Management Agency (DCMA) pre-award survey finding that Sea Box could perform contracts to manufacture Tricons. Protest at 11, 13; See Protest, Attach. O, DCMA Survey; Attach. L, SBA Size Determination.

In response, the agency notes that the purposes of the SBA and DCMA determinations (and the standards to make the determinations) differ from a review of compliance with the TAA. The SBA's standard, although similar to the TAA substantial transformation test, does not turn on the origin of the component parts used to assemble end items. In addition, Customs and Border Protection (CBP), rather than SBA or DCMA, has the authority to make country of origin determinations relating to government procurements under the TAA.⁸ AR, Legal Memorandum at 13-14; 19 C.F.R. § 177.21 et seq.

We agree with the agency. The SBA test for size determinations, SBA's resulting determinations, and DCMA pre-award surveys do not determine the country of origin of an end product for TAA purposes. Rather, as indicated by the agency when it requested additional information from Sea Box, the test to determine country of origin in the context of trade agreements is "substantial transformation," i.e., whether an article is transformed into a new and different article of commerce, with a name, character, or use distinct from the original article. AR, Tab 11, Questions and Answers regarding Sea Box, at 4; See FAR § 25.001(c)(2); DFARS § 252.225-7021.

⁸ To the extent the protester argues that the agency's revised evaluation should have relied on an SBA size determination particular to Sea Box in evaluating Sea Box's TAA compliance, as it did in its initial evaluation, we disagree. The agency states in its legal memorandum that the rationale for its initial award is no longer relevant as a result of the agency's corrective action, and that DLA did not rely on any SBA decisions in its revised award decision. AR, Legal Memorandum at 9 n.3. Additionally, as a general matter, a protest against an evaluation completed prior to a revised source selection decision is academic. Platinum Servs. Inc.; WIT Assoc., Inc., B-409288.3 et al., Aug. 21, 2014, 2014 CPD ¶ 261 at 2 n.1.

Sea Box acknowledges that CBP is the agency responsible for making final determinations of country of origin and substantial transformation in response to written requests by non-government parties; there is no evidence in the record, however, showing that Sea Box requested a country of origin final determination from CBP. Instead, Sea Box argues that DLA's evaluation of Sea Box's manufacturing process was unreasonable because DLA did not use the "totality of the circumstances" standard that CBP applies as part of its evaluations.⁹ Comments at 2. We find this argument unpersuasive. As set forth below, neither the solicitation, nor the FAR or the DFARS required the agency to use this particular approach in its analysis.

First, neither the DFARS, nor the FAR provide additional guidance or examples to illustrate the circumstances under which an article is "substantially transformed" into a new and different item. Pacific Lock Co., *supra*, at 3. Accordingly, the agency looked to the protester's descriptions of the origin of the components and the protester's manufacturing process. Additionally, the agency relied on a CBP decision regarding when assembly of parts or materials constitutes substantial transformation. See CBP HQ Ruling 559432, Apr. 19, 1996. In that decision, CBP concluded that the imported components of a steel split sleeve repair clamp were not substantially transformed as a result of U.S. operations such as finishing, assembly, and painting, because the foreign items had a predetermined use at the time of importation and the U.S. operations did not change the character of the item.¹⁰

Moreover, the agency considered the protester's documentation on the country of origin of the item and its individual components, and determined that the major components, *i.e.*, front and side walls, doors, floor and roof, were sourced in China. The agency also considered the protester's manufacture and assembly process, including a cost breakdown and the manhours required for performance, and

⁹ The "totality of the circumstances" review primarily considers whether a process renders a product with a new name, character and use, but also looks to additional factors such as the resources expended on product design and development; the extent and nature of post-assembly inspection; and testing and worker's skills required for manufacture, where no one factor is determinative. See CBP HQ Ruling H0909115, Aug. 2, 2010.

¹⁰ Our Office generally considers post-protest explanations, such as the agency's application of the CBP decision, as long as those explanations are credible and consistent with the contemporaneous record. Athena Technology Group, Inc., B-409984, Sept. 11, 2014, 2014 CPD ¶ 273 at 5. Here, we find that the agency's first mention of its use of a CBP decision in the legal memorandum is consistent with the revised award decision, which states that the agency determined that the components have no other use than to be assembled as a Tricon container.

determined that while those processes added value to the end item, they did not substantially transform the components into a new and different article, as the predetermined use for each component part was its inclusion in the assembly of the finished Tricon. While Sea Box disagrees with the agency's analysis and conclusions, without more, it has not provided a basis for us to determine that the agency's judgment was unreasonable. Based on this record, we conclude the agency reasonably determined that the protester's manufacturing process did not constitute substantial transformation of those components into new and different articles of commerce with a use distinct from the original articles. Accordingly, we find no basis to sustain the protest.¹¹

The protest is denied.

Susan A. Poling
General Counsel

¹¹ Although we only discuss the protester's primary arguments, we considered all of the protester's arguments in resolving the protest. For example, although Sea Box contends that its manufacturing process substantially transforms each individual component into a component eligible for inclusion in an ISO-approved, CSC-certified end product, we fail to see how the agency could have determined the importance of this connection when the record shows that Sea Box's description of its manufacturing process focused on configuring and welding the components in a steel structure, followed by priming, painting, and finishing, with only a brief mention of the role of ISO-approval and no mention of CSC-certification.