



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Refinery Associates of Texas, Inc.

File: B-410911.2

Date: March 18, 2015

Ronald H. Uscher, Esq., and Nick R. Hoogstraten, Esq., Peckar & Abramson, P.C., for the protester.

David Nolte, Esq., and Kay Bushman, Esq., Defense Logistics Agency, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly evaluated offers for compliance with the Trade Agreements Act is denied where record demonstrates that firms were advised that such an evaluation would occur.
 2. Contention that agency misled protester during discussions into offering a product that was not compliant with the requirements of the Trade Agreements Act is denied where record shows that, throughout the acquisition, protester offered a product that was not compliant with the requirements of the Trade Agreements Act--and continued to do so notwithstanding the associated risk--even after being advised during discussions that its proposal might be found unacceptable on that basis.
-

DECISION

Refinery Associates of Texas, Inc. (RAOT), of New Braunfels, Texas, protests the award of a contract to Bahrain Petroleum Company, B.S.C. (BPC), of Awali, Kingdom of Bahrain, under request for proposals (RFP) No. SP0600-14-R-0077, issued by the Defense Logistics Agency--Energy (DLA) for a quantity of F76 diesel fuel.¹ RAOT maintains that the agency improperly evaluated proposals for

¹ RAOT's protest is confined to the award of contract line items 0001-0004 that, collectively, are for the provision of 101,800,000 gallons of fuel.

compliance with the Trade Agreements Act (TAA) and also misled the firm during discussions.

We deny the protest.

BACKGROUND

The RFP provided for award to the firm whose proposal was found technically acceptable and offered the “lowest laid-down price.”² Agency Report (AR), exh. 6, RFP Commercial Package, at C-20-21. The record shows that both the protester’s and the awardee’s proposals were determined technically acceptable. The record also shows that the protester and the awardee proposed, respectively, the lowest and second-lowest laid-down prices. There are no issues in the protest concerning the agency’s conclusion about the technical acceptability of the offerors’ proposals, nor are there any issues relating to the agency’s calculation of the offerors’ laid-down prices.³ The only issues in the protest relate to the agency’s application of the TAA, 19 U.S.C. § 2501, et seq., in making its award decision, and in its conduct of discussions with the protester.

Under the terms of the TAA and applicable implementing regulations, agencies generally are required to award contracts for products only to firms offering either United States products, or eligible products from countries that are identified as “designated countries” under the Act. See 19 U.S.C. §§ 2511, 2512. In addition, the Act contemplates that the head of a contracting agency may waive, on a case-by-case basis, the requirements of the TAA where he or she determines that it is in the national interest to do so. 19 U.S.C. § 2512(b)(2).

In addition to the statutory scheme described above, two provisions of the Defense Federal Acquisition Regulation Supplement (DFARS) that are pertinent here. The first provision, DFARS § 252.225-7020, provides, in relevant part, as follows:

² The RFP advised offerors that “lowest laid-down price” would be calculated using the agency’s bid evaluation model that considers a number of variables, such as proposed prices, fuel types, minimum and maximum award quantities, shipping locations, shipment mode capabilities, minimum cargo sizes, customer receipt locations and receipt mode capabilities. AR, exh. 6, RFP Commercial Package, at C-20-21.

³ RAOT filed an earlier protest alleging that the agency improperly had made award to BPC because it had offered fuel that did not meet the RFP’s requirements relating to sulfur content. In response to that protest the agency took corrective action, and we dismissed the protest as academic. B-410911, Dec. 15, 2014.

(b) Evaluation. The Government--

(1) Will evaluate offers in accordance with the policies and procedures of Part 225 of the Defense Federal Acquisition Regulation Supplement; and

(2) Will consider only offers of end products that are U.S.-made, qualifying country, or designated country end products unless—

(i) There are no offers of such end products;

(ii) The offers of such end products are insufficient to fulfill the Government's requirements; or

(iii) A national interest waiver has been granted.

The second provision, DFARS § 252.225-7021, provides, in relevant part, as follows:

(c) The Contractor shall deliver under this contract only U.S.-made, qualifying country, or designated country end products unless—

(1) In its offer, the Contractor specified delivery of other non-designated country end products in the Trade Agreements Certificate provision of the solicitation; and

(2)(i) Offers of U.S.-made, qualifying country, or designated country end products from responsive, responsible offerors are either not received or are insufficient to fill the Government's requirements; or

(ii) A national interest waiver has been granted.

The RFP here incorporated the second of these provisions, but did not include the first provision. AR, exh. 6, RFP Commercial Package, at C-14.

PROTEST

RAOT argues that the agency improperly evaluated proposals for compliance with the requirements of the TAA. According to the protester, because the RFP did not include DFARS § 252.225-7020, the agency was precluded from evaluating whether or not it proposed to furnish fuel from a non-designated country.⁴ The

⁴ The record shows that, for the line items being protested, RAOT offered to provide fuel from [deleted], which is not a designated country for TAA purposes. Agency Report (AR), exh. 40, RAOT Final Proposal Revision, at 2.

protester argues that DFARS § 252.225-7021 is a post-award provision, under which the agency can require a contractor that has been awarded a contract to provide fuel from a designated country. RAOT further contends that it could be awarded the contract, and could perform without violating the terms of DFARS 252.225-7021, provided the agency waived the requirements of the TAA.

We deny this aspect of RAOT's protest. In reviewing protests challenging an agency's evaluation of proposals, our Office does not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. SOS Int'l, Ltd., B-402558.3, B-402558.9, June 3, 2010, 2010 CPD ¶ 131 at 2.

Although the protester is correct that the RFP did not incorporate DFARS § 252.225-7020, all offerors were on notice that the agency intended to evaluate proposals for compliance with the terms of the TAA. In this connection, all firms were provided an identical letter when the agency requested final proposal revisions (FPRs). That letter included the following statement:

DFARS 252.225-7021 TRADE AGREEMENTS applies to this procurement unless the requirement is waived. The waiver decision will be determined after receipt of FPRs. Therefore, by submission of an offer, the offeror must either: (1) Certify that each end product to be delivered is a U.S.-made, qualifying country, or designated country end product; or (2) List, by country name, the non-U.S., non-qualifying country(ies), or non-designated country(ies) in paragraph (c)(2) of the provision and submit to the Contracting Officer for review. A listing of qualifying/designated countries may be found in DFARS Part 225. For those offerors who have proposed product sources from non-designated/non-qualifying countries, please be advised that a waiver may or may not be approved. Offerors are assuming a risk that these proposals may not be accepted upon final evaluation.

AR, exh. 33, Closing of Negotiations Letter, at 1 (emphasis supplied). Although this letter did not expressly incorporate DFARS § 252.225-7020, it nonetheless effectively advised offerors that the agency considered the acquisition to be subject to the requirements of the TAA; advised offerors that the agency intended to evaluate proposals for compliance with the TAA; and also advised offerors that firms proposing fuel from non-designated countries assumed the risk that their proposals could be found unacceptable. In light of these considerations, we

conclude that the agency properly could evaluate proposals for compliance with the TAA. We therefore deny this aspect of RAOT's protest.⁵

RAOT also argues that the agency misled it during discussions into believing that the agency had made a promise to request a waiver of the TAA requirements on RAOT's behalf.⁶ RAOT contends that, because the agency promised to request a waiver on its behalf, it believed that it could offer fuel from a non-designated country. RAOT therefore maintains that it was prejudiced during the competition by the agency's alleged promise. In support of its position, RAOT directs our attention to a statement appearing in a second letter included with the agency's request for FPRs. That letter was comprised of a series of statements that were intended to summarize the outcome of negotiations between the parties. The statement is as follows:

ISSUE 2: RAOT is offering product from countries not covered by current trade agreements with the U.S. per DFARS 252.225-7021 Trade Agreements (Oct 2013).

CURRENT STATUS: No issue. Trade Act Agreement (TAA) waivers will be required to award some of the offered products to RAOT. RAOT has acknowledged the requirement for TAA Waivers. TAA waivers will be requested after DLA Energy receives RAOT's Final Price Revision (FPRs).

AR, exh. 34, Letter to RAOT Closing Negotiations, at 3.

⁵ To the extent that RAOT believed the terms of the RFP precluded evaluation of proposals for compliance with the TAA, the letter quoted above--as well as statements made during earlier discussions conducted with RAOT that are detailed below--was facially inconsistent with any such understanding. The letter effectively amounted to an amendment of the RFP; it was in writing, signed by the contracting officer and provided to all offerors, notwithstanding that it was not issued as a formal solicitation amendment. Energy Eng'g & Consulting Servs., LLC, B-407352, Dec. 21, 2012, 2012 CPD ¶ 353 at 3. As a result, RAOT was required to have protested the patent ambiguity created between its alleged understanding of the RFP and the terms of the letter prior to the deadline for submitting FPRs. 4 C.F.R. § 21.2(a)(1) (2014).

⁶ The agency explains that it did not request a waiver in order to accept RAOT's proposal because it had adequate supplies, proximately located, to meet its requirements, from firms offering to supply fuel from TAA designated countries. Agency Report at 22.

We find no merit to this aspect of RAOT's protest. When an agency engages in discussions with an offeror the discussions must be meaningful, that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. Hanford Env'tl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8. An agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency's actual concerns, or otherwise misinform the offeror concerning a problem with its proposal. Metro Mach. Corp., B-281872 et al., Apr. 22, 1999, 99-1 CPD ¶ 101 at 6.

As an initial matter, we point out that RAOT was at all times during the acquisition offering to supply fuel from non-designated countries.⁷ AR, exh. 13, RAOT's Initial Proposal, at 4. It therefore is clear that, from the outset, RAOT made a business decision to propose providing fuel from non-designated countries.

The record also shows that, during discussions, the agency brought the fact that RAOT had proposed supplying fuel from non-designated countries to the firm's attention; advised the firm that a TAA waiver might not be granted in light of the firm's proposal; and specifically asked whether RAOT would be willing to make delivery of the required quantity from a different country that was a designated country. RAOT specifically declined to change its proposal based on the agency's question. The exchange between the parties was as follows:

RAOT is advised that a waiver of the Trade Agreements Act (TAA) will be required for offers from Non-designated Countries. Please confirm whether RAOT will accept an F76 award at only [deleted] in the event that a TAA waiver is not granted for the [deleted] port.

RAOT's Response: RAOT will not accept an F76 award at only [deleted] in the event that a TAA waiver is not granted for the [deleted] port.

AR, exh. 31, RAOT's Discussion Responses, at 2. It is clear from this exchange that RAOT understood that there was a possibility that it would not be granted a waiver from the requirements of the TAA, and that the firm continued to assume the

⁷ As noted, the record shows that for the protested line items, line items 0001-0004, RAOT proposed to provide fuel from [deleted]. AR, exh. 13, RAT's Initial Proposal, at 4. In addition for line items 0005-0012, RAOT proposed to provide fuel from either [deleted], or [deleted], at the firm's option. Id. [deleted] is a TAA designated country, while [deleted] is not.

risk associated with its initial business decision to propose fuel from non-designated countries.⁸

Finally, as noted above, the agency sent two letters to RAOT to close negotiations with the firm and request its FPR. While one of these letters included the statement RAOT relies on in alleging that the agency made a promise to the firm to request a TAA waiver, the other letter clearly advised the firm that such a waiver might not be approved, and that the firm's proposal could be found unacceptable based on the lack of a waiver. That same letter specifically advised offerors that they assumed the risk that a waiver might not be granted.

In the final analysis, RAOT's position essentially is that it relied to its detriment on a promise from the agency to request a waiver of the TAA requirements, and that this detrimental reliance induced the firm to offer fuel from non-designated countries. However, as discussed, the record as a whole demonstrates that, throughout the acquisition, RAOT made a business decision to accept the risk associated with offering fuel from non-designated countries. Moreover, even if, as RAOT alleges, the agency had made a promise to request a waiver, such a promise offered the firm no assurances that a waiver actually would be granted. It follows that any such reliance by RAOT on the agency's alleged promise in preparing its FPR would have been unreasonable.

The protest is denied.

Susan A. Poling
General Counsel

⁸ The discussion question quoted above related to RAOT's proposal in connection with line items 0005-0012, which are not the subject of the protest. It appears the agency asked the question in connection with these line items because RAOT had proposed alternative sources, one of which was a TAA designated country, and one of which was not. Nonetheless, it was made clear to the firm through this exchange, both that the agency would evaluate proposals for compliance with the TAA, and that there was the possibility that a TAA waiver would not be granted to the firm based on its offer to provide fuel from non-designated countries.