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Decision

Matter of: TransAtlantic Lines, LLC

File: B-411846.2

Date: December 16, 2015

Brian S. Gocial, Esq., Harrison H. Kang, Esq., and Jared M. DeBona, Esq., Blank Rome LLP, for the protester.

Michael G. McCormack, Esq., Department of the Air Force, Peter Ries, Esq., and Robert Bowers, Esq., U.S. Transportation Command, for the agency.

Pedro E. Briones, Esq., and Nora K. Adkins, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of a solicitation for award of indefinite-delivery, indefinite-quantity contracts to both U.S. flag and foreign flag ocean carriers for international, intermodal cargo transportation is denied where the terms of the solicitation and its performance requirements meet the agency's legitimate need for timely delivery of cargo and are consistent with the Cargo Preference Act of 1904.

DECISION

TransAtlantic Lines, LLC, a small business located in Greenwich, Connecticut, protests the terms of request for proposals (RFP) No. HTC711-15-R-W002, issued by the U.S. Transportation Command (TRANSCOM) for international cargo transportation. TransAtlantic contends that the RFP's process for booking shipping orders, as well as the RFP's price evaluation criteria, do not comply with the Cargo Preference Act of 1904. The protester also objects that the solicitation does not permit ordering officials to set aside bookings for small businesses.

We deny the protest.

BACKGROUND

The Cargo Preference Act of 1904, as amended, (CPA) provides that:

[o]nly vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the

Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons.

10 U.S.C. § 2631(a).¹ The Act is implemented by DFARS subpart 247.5, Ocean Transportation by U.S. Flag Vessels, and section 247.5 of the DFARS Procedures, Guidance, and Information (PGI). See DFARS § 247.573(b)(2); PGI § 247.573(b)(2). PGI section 247.5 requires that solicitations for contracts that are principally for ocean transportation must provide a preference for U.S. flag vessels in accordance with the CPA. PGI § 247.573(b)(2)(iii)(A). PGI section 247.5 also prohibits the award of such contracts to a foreign flag vessel carrier, unless the agency has determined that: U.S. flag vessels are not available; the U.S. flag carrier proposed freight charges to the government that are higher than it charges to private persons for transportation of like goods; or the proposed freight charges for U.S. flag vessels are excessive or otherwise unreasonable. PGI § 247.573(b)(2)(iv).

The RFP was issued on May 12, 2015, using the commercial item procedures of Federal Acquisition Regulation (FAR) part 12, and provides for the award of indefinite-delivery, indefinite-quantity (IDIQ) contracts (for a base year and 2 option years) to U.S. and foreign flag ocean carriers for international transportation of DOD-related cargo. See RFP at 4-7, 10, 62, 251; Contracting Officer Statement at 4; Agency Report (AR), Tab 2, Acquisition Plan, at 10 (stating that the procurement is a FAR part 12 acquisition).² The RFP states that multiple awards will be made on a lowest-priced, technically acceptable basis using FAR § 15.101-2 procedures and that proposals will be evaluated under four evaluation factors:

¹ The Cargo Preference Act of 1904, which applies exclusively to entities of the Department of Defense (DOD), is more restrictive than the Cargo Preference Act of 1954, 46 U.S.C. § 55305, which applies to the federal government generally, including DOD. In general, the 1904 Act requires that 100 percent of military cargo be transported on U.S. flag vessels, whereas the 1954 Act requires that at least 50 percent of civilian agency cargo be transported on U.S. flag vessels. DOD considers its compliance with the 1904 Act to exceed the requirements of the 1954 Act. See Defense Federal Acquisition Regulation Supplement (DFARS) § 247.570(b). Our references in this decision to the Cargo Preference Act, CPA, or the Act, are to the 1904 Act, unless otherwise indicated.

² The RFP was amended eight times. Our references are to the conformed version of the solicitation provided by the agency, unless otherwise indicated.

technical, past performance, small business proposal, and price.³ See RFP at 62-64. The solicitation instructs offerors to submit separate proposals for each evaluation factor, and states that the non-price factors will be evaluated on an acceptable/unacceptable (i.e., pass/fail) basis. Id. at 57.

Of significance here, the RFP states that U.S. flag service will not be considered when rates are evaluated for contract award, but that U.S. flag service and compliance with the Cargo Preference Act will be considered at the booking, or task order, level.⁴ Id. at 64. According to the RFP, “[t]his will be done because offerors with accepted rates will have the ability to change the flag of service in their vessel schedules at any time during the life of the contract.” Id. The RFP states that all bookings will be issued in accordance with the CPA (with priority given to IDIQ carriers that are enrolled in the VISA program),⁵ and the solicitation provides a “Fair Opportunity Process” for booking shipments, as discussed below. Id. at 64, 251.

With regard to offerors’ rates, the RFP instructs offerors to propose fixed-price rates for the shortest transit time that the carrier can offer between origin and destination for any of the trade areas, geographic zones, or global routes identified in the solicitation’s performance work statement (PWS).⁶ Id. at 60; see exh. 3, PWS at 120-27 (trade areas and zones), 220-23 (route information). Offerors can also propose separate rates for drayage (ground transportation for relatively short distances in or around the port), linehaul (ground transportation further inland), and accessorial services (such as cargo handling, washing, stop-off services, etc.). See RFP at 60, 102-9, 156-62. Offerors were to submit their proposed rates electronically using the Carrier Analysis & Rate Evaluation (CARE II) System,

³ The technical evaluation factor includes three subfactors: vessel profile, electronic data interchange (EDI), and information assurance and cyber security. RFP at 62.

⁴ The RFP states that a booking is an order, and defines booking as an offer by the agency and acceptance by the contractor for the transportation of goods pursuant to the applicable rates, terms and conditions of the contract. RFP at 130.

⁵ The VISA (Voluntary Intermodal Sealift Agreement) program is a partnership between the federal government and the maritime industry to provide DOD with “assured access” to commercial sealift and intermodal capacity to support the emergency deployment and sustainment of U.S. military forces. 79 Fed. Reg. 64462 (Oct. 29, 2014); see www.marad.dot.gov/ships-and-shipping/strategic-sealift/voluntary-intermodal-sealift-agreement-visa/.

⁶ The PWS states that many of the routes were structured into zones so that countries/ports can be grouped to best reflect market conditions and minimize the number of rates that a carrier must propose. PWS at 120.

which is part of the agency's integrated booking system (IBS).⁷ Id. at 60. To be eligible for award, an offeror must propose at least one ocean (i.e., port to port) rate. See id. at 64, 156 (basic ocean freight rate).

The RFP provides that price proposals will be evaluated for fairness and reasonableness in accordance with FAR § 15.404-1, and that reasonableness may be determined based on a comparison to other offerors' prices or to the government's estimate, current market conditions, or any other price analysis technique under FAR § 15.404-1(b)(2). Id. at 64. The RFP states that an offeror's ocean rates will be evaluated on a by-lane basis under various ocean routes (e.g., U.S. East Coast to Pakistan and West Coast of India), therefore an offeror's prices may be determined fair and reasonable on some lanes, but not others.⁸ See id. The solicitation also states that a price proposal will not be considered fair and reasonable if it proposes rates that are above the highest commercial service contract rate, or that are clearly and substantially in excess of the rates stated in comparable commercial service contracts (to which the offeror is a party) for the same trades and similar services. Id. Moreover, any rate that appears excessive will be further evaluated in accordance with DFARS § 247.573.⁹ Id. The RFP provides that the agency may accept some or all rates or services without conducting discussions, but that if discussions are held, they may be limited to certain rates or services.¹⁰ Id. Offerors are eligible for contract award if any one of their proposed rates is determined fair and reasonable on at least one lane. Id.

With regard to the fair opportunity process for booking orders, the RFP provides that bookings will be made on a best-value basis considering three factors: (1) technical; (2) U.S. flag and VISA priorities; and (3) domestic shipyard preference. Id. at 251. With regard to the technical factor, the ordering officer will evaluate potential carriers on a pass/fail basis to determine which carrier can meet five technical requirements for the particular shipment, including, as relevant here, whether the carrier can meet or exceed the required delivery date based on the contractor's IBS vessel schedules, and whether the carrier has approved rates for all the required services and accessorials. Id.; see infra n.13 (PWS schedule

⁷ The PWS states that IBS is the primary means through which the contractor will receive and accept shipment booking requests. PWS at 83, 87-88.

⁸ The agency explains that an ocean route may contain more than one lane.

⁹ DFARS § 247.573, as discussed above, specifies procedures, pursuant to the CPA, that contracting officers must follow when, as here, direct purchase of ocean transportation services is the principal purpose of the contract.

¹⁰ Offerors are further advised that any unreasonably priced lanes are subject to removal from the competitive range on the basis that the offeror does not understand the requirement for that lane. RFP at 64.

requirements). With regard to the U.S. flag/VISA factor, the RFP specifies an order of preference for flag service, and states that carriers offering a higher U.S. flag priority, and that are also VISA participants, will be given the highest preference.¹¹ See id. With regard to the domestic shipyard preference factor, contractors are to be evaluated using a specified formula for calculating the amount of money and time spent on U.S. shipyard repairs. Id. If two or more carriers met all requirements, additional steps were specified for calculating a “best value number” to determine the carrier that offers the best value. Id. at 251-2. If no carrier met the requirements, the fair opportunity process provides that the booking officer will issue a request for quotations (RFQ) to all IDIQ carriers. See id. at 253.

Initial Protest

On July 31, TransAtlantic filed a protest with our Office challenging the terms of the RFP and arguing, as it does here, that the solicitation provisions described above do not comply with the CPA.

On August 15, TRANSCOM advised the parties that it intended to take corrective action in response to the protest by reviewing the RFP, and amending it as necessary, in order to comply with the CPA.

On August 21, our Office dismissed the protest as academic. TransAtlantic Lines, LLC, B-411846, Aug. 21, 2015 (unpublished).

Corrective Action

On August 25, TRANSCOM executed a deviation from the DFARS and PGI requirements, described above, to provide for the CPA award preference for U.S. flag vessels at the task order level, rather than the IDIQ contract level. See AR, Tab 14, Deviation. The deviation explains in detail that compliance with the DFARS and PGI provisions, as currently drafted, would reduce the number of ocean carriers (U.S. or foreign flagged) that are eligible to receive contract awards under the RFP, and that limiting awards to U.S. flag carriers would frustrate DOD missions. Id. at 2-3. The deviation states that permitting multiple awards to both U.S. flag and foreign flag vessels at the IDIQ contract level provides the government with flexibility to accommodate changes in vessel schedules and flag service, among other things. Id. at 2. Moreover, the agency provides that the deviation will not affect its compliance with the CPA and will permit TRANSCOM to ensure the required ocean transportation capability to the warfighter. Id. at 3. By way of example, the agency points to three prior contracts for international cargo transportation that also provided

¹¹ The order of flag service preference is: (P1) U.S. flag service; (P2) combination of U.S. flag and foreign flag services; and (P3) foreign flag service. RFP at 251.

for evaluating flag service at the task order level, to demonstrate that their ordering procedures, like the ones here, provided maximum operational capacity to DOD shippers and maximum operational flexibility to carriers.¹² See id. at 3. The deviation was approved by a number of agency contracting officials, including the head of contracting activity. Id. at 8.

On that same date (August 25), TRANSCOM issued an amended RFP that extended the proposal due date, among other things, but reflected no substantive changes to the disputed provisions. Compare RFP (conformed) at 56-65, 251-52 with RFP amend. 6, at 3-12, 87-89. (The RFP was subsequently amended twice to further extend the proposal due date. See RFP amends. 7 & 8).

DISCUSSION

TransAtlantic again protests the RFP, arguing that the process for booking orders, including the schedule and ground transportation requirements, and the price evaluation criteria do not comply with the CPA. TransAtlantic also objects that the RFP does not permit ordering officials to set aside bookings for small businesses. While we do not specifically address each of TransAtlantic's various arguments, we have considered all of the protester's contentions and find none furnishes a basis to sustain the protest.

Booking Process

TransAtlantic argues that the RFP's process for booking shipments precludes compliance with the CPA, because, according to TransAtlantic, the process excludes U.S. flag carriers from receiving bookings if they do not provide regularly scheduled ocean liner service or local ground transportation.¹³ In TransAtlantic's view, the CPA requires that every time DOD books a shipment, the booking officer must assess the availability of U.S. flag vessel carriers and determine whether their

¹² The contracts are known as Universal Service Contracts (USC). See AR, Tab 2, Acquisition Plan. The instant procurement is referred to as the USC-8 contract. The USC-7 IDIQ contracts expired on August 31. Id. at 3.

¹³ Under the PWS, carriers, including contract carriers, must offer regularly scheduled commercial liner service for all approved ocean routes/rates, and keep updated schedules in the agency's IBS software for at least 45 days prior to sail date. PWS at 80, 82. The carrier must also be able to provide "door-to-door" delivery, which may include intermodal transportation and related delivery services, although the principal purpose of the contract is ocean transportation. Id. at 80; AR, Tab 2, Acquisition Plan, at 3. The RFP defines intermodal services as transportation requiring two or more modes of transportation (such as rail, truck, barge, and/or sealift) to move cargo from origin to destination. See RFP at 132-33.

rates are excessive or unreasonable--regardless of whether the carriers maintain a regular schedule or provide ground transportation for the particular shipping route. In this respect, TransAtlantic maintains that the RFP establishes a de facto preference for P2 or P3 flag service (see supra n. 11), giving priority to foreign flag carriers simply if they maintain a regular schedule for the required route or were able to propose ground transportation rates during the IDIQ competition.¹⁴ TransAtlantic states that it merely wants to be advised of TRANSCOM's shipping needs as they arise before a shipment is booked with a foreign flag carrier.

TRANSCOM argues that the RFP's fair opportunity process fully complies with the CPA, as well as FAR subpart 16.5. The agency contends that it requires carriers to offer regularly scheduled sailings and door-to-door intermodal service in order to meet DOD's critical need for timely, reliable, and effective worldwide delivery of military equipment and supplies. According to TRANSCOM, it cannot exclude foreign flag vessels from the competition because the availability of U.S. flag vessels fluctuates on a daily basis. TRANSCOM states that it expects that carriers will set schedules based on commercial practices. In the agency's view, the protester essentially wants TRANSCOM to exclude foreign flag vessels from the IDIQ competition, and split the ocean and ground transportation requirements into different acquisitions to fit TransAtlantic's business preference.

In preparing a solicitation, a contracting agency is generally required to specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 10 U.S.C. §§ 2304(a)(1), 2305(a)(1)(A). A solicitation may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs or as authorized by law. 10 U.S.C. § 2305(a)(1)(B)(ii). To the extent that a protester challenges a specification as unduly restrictive, that is, it challenges both the restrictive nature of the requirement as well as the agency's need for the restriction, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. Nova Constructors, LLC, B-410761, Jan. 21, 2015, 2015 CPD ¶ 51 at 3. Once the agency establishes support for the provision, the burden shifts to the protester to show that the requirement is clearly unreasonable. J. Squared Inc., d/b/a Univ. Loft Co., B-408388, Aug. 27, 2013, 2013 CPD ¶ 201 at 5; Outdoor Venture Corp; Applied Cos., B-299675, B-299676, July 19, 2007, 2007 CPD ¶ 138 at 5. Our Office will examine the adequacy of the agency's justification

¹⁴ TransAtlantic claims that the RFP unreasonably requires small U.S. flag carriers to maintain regular schedules for economically unsustainable ocean routes in order to be considered for a booking. TransAtlantic also claims that it is unreasonable to expect that small domestic carriers like TransAtlantic propose rates, for over 1,000 routes, that include ground transportation.

for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. Air USA Inc., B-409236, Feb. 14, 2014, 2014 CPD ¶ 68 at 5.

We find the RFP's booking process reasonable and, contrary to TransAtlantic's arguments, the schedule and ground transportation requirements are not overly restrictive of competition. TRANSCOM, in our view, has established a legitimate need for requiring carriers to provide regularly scheduled commercial liner service and intermodal transportation services. The agency explains that it typically books over 25,000 shipments annually and argues, persuasively, that the schedule and ground transportation requirements are necessary to ensure that DOD receives reliable and consistent door-to-door international delivery of military cargo.¹⁵ Moreover, TRANSCOM asserts--and TransAtlantic does not rebut--that splitting a cargo shipment into separate ocean and ground transportation orders could potentially require five different contractors to meet the linehaul, drayage, and ocean transportation requirements, as well as multiple DOD officials to oversee each cargo transfer. TRANSCOM also points out that under the contract, carriers may change their route schedules, the services that they offer, and the flag registry of their vessels.

We also disagree with TransAtlantic that the RFP's booking process precludes compliance with the Cargo Preference Act. As discussed above, the RFP's fair opportunity process explicitly provides for consideration of U.S. flag carrier availability and compliance with the Act at the booking level. In this respect, the RFP specifies detailed procedures that a booking officer must follow to determine which carrier provides the best value to DOD. Those procedures include, among other things, a specified order of preference that provides the highest order of preference to U.S. flag vessels, and a process for issuing a RFQ to all IDIQ carriers where no one carrier meets all of the agency's requirements.

In short, we find the solicitation's booking process unobjectionable and consistent with the CPA. See, e.g., Sea-Land Service, Inc., B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47 at 6-7 (RFP for military cargo transportation does not alter carriers' normal commercial service because DOD recognizes that it is only one of many shippers purchasing cargo space on a carrier's vessels, and the agency reasonably seeks to

¹⁵ Indeed, the protester essentially concedes that U.S. flag vessels operate regularly scheduled service for certain ocean routes, and states that TransAtlantic "certainly can provide ground transportation rates in response to any particular requirement at the time of booking[.]" See Protest at 18; Comments at 4; see also TransAtlantic Lines, LLC, B-411242, B-411242.2, June 23, 2015, 2015 CPD ¶ 204 at 8 (TransAtlantic competing, and protesting award to another carrier, under RFP requiring carriers to propose liner schedule with frequency of service every 14 calendar days).

ship cargo on carriers' regular commercial sailings and allow them to freely select their routes, port itinerary, sailing frequency, vessels, vessel rotation, and type of cargo to be carried); Dock Express Contractors, Inc., B-223966, Dec. 22, 1986, 86-2 CPD ¶ 695, aff'd on recon., B-223966.2, Mar. 4, 1987, 87-1 CPD ¶ 243 (Military Sealift Command has a legitimate requirement for regular scheduled service and can require carriers to commit to providing regular predictable service so DOD can provide for the orderly planning and booking of cargo);¹⁶ Sea-Land Service, Inc., B-270504, Mar. 15, 1996, 96-1 CPD ¶ 155 at 3-4 (challenge to an RFP's leasing clause for ocean and intermodal transportation that requires carriers to furnish specified equipment for land and ocean transportation denied); see also TransAtlantic Lines, LLC, supra.

The fact that the RFP's requirements may be burdensome or even impossible for TransAtlantic to meet does not make them objectionable, if, as here, the requirements properly reflect the agency's needs. See JBG/Naylor Station I, LLC, B-402807.2, Aug. 16, 2010, 2010 CPD ¶ 194 at 4; Sea-Land Service, Inc., B-270504, supra, at 4 (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); Dock Express Contractors, Inc., B-227865.2, Nov. 13, 1987, 87-2 CPD ¶ 481 at 5-6 (The fact that RFP provision may cause some contract carriers not to submit proposals does not make the provision overly restrictive of competition, since the government is entitled to impose reasonably based conditions that may cause the competition to be somewhat restricted). Although TransAtlantic objects to the RFP's booking provisions, the protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. See Dynamic Access Sys., B-295356, Feb. 8, 2005, 2005 CPD ¶ 34 at 4.

Price Evaluation Criteria

TransAtlantic also claims that the RFP's price evaluation criteria are contrary to the Cargo Preference Act because they do not provide for consideration of U.S. flag service when rates are evaluated for contract award. The protester asserts that TRANSCOM must apply the U.S. flag preference at the IDIQ award level in order to determine whether carriers' rates are excessive or unreasonable. TransAtlantic also maintains that the solicitation does not require booking officers to conduct any price analysis.

¹⁶ Although we sustained the protest in Dock Express Contractors, we sustained it on the basis that the RFP in that case restricted contract carriers from the competition altogether, in violation of CICA. Dock Express Contractors, Inc., supra, at 3-6. We otherwise found the RFP's scheduling requirement unobjectionable. Id.

We find the solicitation's price evaluation criteria reasonable and consistent with the CPA. As noted above, the RFP provides that an offeror's proposed ocean rates will be evaluated for fairness and reasonableness, and that reasonableness may be determined based on a comparison to other offerors' prices or to the government's estimate, current market conditions, or any other price analysis technique under FAR § 15.404-1(b)(2). RFP at 64. The RFP also states that a price proposal will not be considered fair and reasonable if it proposes rates that are above the highest commercial service contract rate, or that are clearly and substantially in excess of the rates stated in comparable commercial service contracts (to which the offeror is a party) for the same trades and similar services. Id. Significantly, the RFP provides that any rate that appears excessive will be further evaluated in accordance with DFARS § 247.573. Id.

The CPA and its implementing regulations, as quoted above, prohibit U.S. flag carriers from charging DOD rates that are higher than the carrier charges to private persons for transportation of like goods. Thus, the solicitation's price reasonableness provisions establish ceiling prices necessary to comply with the CPA and DOD regulations. See RFP at 71 (Cargo Preference Act has the effect of establishing a ceiling price so that charges to the U.S. Government may not be higher than the charges for transporting like goods for private persons). Moreover, the evaluation of an offeror's ceiling prices, at the IDIQ level, is particularly reasonable here where, as noted above, the RFP permits carriers to change, at any time, their schedules, offered services, and flag registry, as well as propose new services and additional routes. See id. at 71, 81, 83. The RFP also permits offerors to update their rates annually. Id. at 71.

Accordingly, we find the solicitation's price evaluation methodology unobjectionable. See, e.g., Sea-Land Service, Inc., B-278404.2, supra, at 8-10 (nothing inherently unreasonable about conducting procurements which parallel commercial sector service contracts, and it is not unduly restrictive of competition for an agency to predesignate pricing ceilings in order to protect legitimate government interest; protest denied where RFP pricing provisions reflect CPA requirement that government not pay rates higher than a carrier's comparable commercial shipping rates); Sea-Land Service, Inc., B-270504, supra (protest of RFP clause reflecting CPA mandate restricting shippers to charges not higher than those charged private persons is denied where the clause merely establishes a price ceiling for such services, and shifts some of the responsibility for assuring that this ceiling is not breached to the potential offeror who is in the best position to be aware of its own commercially available rates).

Small Business Set-Aside for Bookings

Finally, TransAtlantic challenges the RFP's failure to include FAR clause 52.219-13, which would permit the booking officer to set aside bookings for small businesses. We have no basis to object to TRANSCOM's decision not to insert this clause in the

RFP or require that bookings be set aside for small businesses. As TRANSCOM correctly points out, the FAR grants contracting officers discretion whether to set aside for small business participation task orders placed under multiple-award contracts.¹⁷ AR at 39, citing FAR § 16.505(b)(2)(i)(F); see Edmond Scientific Co., B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336 at 7 (by its plain language, FAR § 16.505(b)(2)(i)(F) grants discretion to a contracting officer about whether to set aside for small business participation task orders placed under multiple-award contracts).

The protest is denied.

Susan A. Poling
General Counsel

¹⁷ TransAtlantic does not argue that TRANSCOM was required to set aside the solicitation for small businesses.