



United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** Charleston Marine Containers, Inc.

**File:** B-283393

**Date:** November 8, 1999

---

David R. Wall for the protester.  
Capt. Richard P. Donoghue, Department of the Army, for the agency.  
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the  
General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

1. Buy American Act price differential should not be applied in evaluating proposal offering containers manufactured in Turkey because the Department of Defense has waived application of the Act to the acquisition of defense equipment manufactured in certain “qualifying countries,” one of which is Turkey.
2. Bases of protest which fail to allege improper conduct by the agency are dismissed. General Accounting Office will not conduct investigations for the purpose of establishing whether a protester may have a valid basis for protest.
3. General Accounting Office will not sustain protest objecting to agency’s failure to hold discussions where it is apparent from the record that protester could not have improved its proposal enough through discussions to be in contention for award.

---

### DECISION

Charleston Marine Containers, Inc. (CMCI) protests the award of a contract to Military Transport, Inc. (MTI) under request for proposals (RFP) No. DAMT01-99-R-9007, issued by the Department of the Army’s Military Traffic Management Command for the production of TRICON intermodal containers. CMCI contends that the agency failed to investigate adequately various aspects of MTI’s proposal and engaged in improper discussions with the awardee.

We deny the protest.

In accordance with Federal Acquisition Regulation (FAR) part 12.6 (Streamlined Procedures for Evaluation and Solicitation for Commercial Items), the Army Military Traffic Management Office posted notice of a combined synopsis/solicitation for the intermodal containers on the Commerce Business Daily Online (CBDnet) on June 3, 1999. The solicitation sought proposals for 681 new TRICON configured containers, to be constructed in accordance with Commercial Item Description A-A-65422B, Mar. 22, 1999; General Purpose Configuration Drawing Number 9-1-0533; and Shelf Configuration Drawing Number 9-1-0534. The RFP provided for award to the responsible offeror whose proposal represented the best overall value to the government based on an integrated assessment of technical capability,<sup>1</sup> past performance, and price, with technical capability of significantly greater importance than past performance, and technical capability and past performance, when combined, of greater importance than price. The RFP incorporated by reference FAR § 52.212-1, which provides at subsection (g):

The Government intends to evaluate offerors and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the contracting officer to be necessary . . . .

Of the three offers evaluated by the agency, MTI's was the most highly rated technically and the lowest in price.<sup>2</sup> The evaluators concluded that CMCI's offer contained a number of significant weaknesses, and that discussions would be required to determine compliance with the government's requirements. In particular, CMCI had failed to submit a complete package of technical drawings; had referenced an outdated Commercial Item Description; had described incorrect shelving and tie-down configurations; had failed to identify the forklift pocket dimensions, restraint locations, and marking requirements; and had failed to furnish detailed information regarding, and to identify the type of, coupler. Technical Evaluation Report, June 30, 1999, at 3. In addition, the protester had not demonstrated experience in the production of the same or similar items. *Id.* at 4. MTI's proposal, on the other hand, "present[ed] the highest probability that the requirements [would] be met or exceeded, in an effective and efficient manner with no weaknesses noted." *Id.* at 2. Moreover, its past performance under contracts for

---

<sup>1</sup>Subfactors to be considered under technical capability were ability to meet the specifications and delivery schedule.

<sup>2</sup>MTI's proposal received color scores of blue (highest probability that requirements will be met or exceeded/no weaknesses) for both technical capability and past performance, and its price was \$1,559,236. CMCI's proposal received a score of red (no probability that requirements will be met as reflected in major omissions and/or deficiencies) and was rated neutral for past performance; its price was \$1,741,310.

the same and similar items was excellent. Id. The contracting officer determined that opening discussions to allow CMCI to resolve the weaknesses in its proposal would not be in the government's best interest because it would jeopardize the ability of any offeror to meet the required delivery date. She further determined that MTI's proposal represented the best value to the government. Notice of Award, July 22, 1999. On July 14, the agency awarded a contract to MTI.

CMCI first contends that MTI intends to rely on a Turkish subcontractor for manufacture of the containers and that the provisions of the Buy American Act should therefore be applied in the evaluation of its offer.

The Buy American Act, 41 U.S.C. §§ 10a-10d (Supp. III 1997), which was enacted to establish a legal preference for domestic products over foreign products in government procurement, authorizes the head of a department or independent establishment to waive its application where he or she determines such application to be inconsistent with the public interest. 41 U.S.C. § 10a; see SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 at 4. Pursuant to this authority, the Department of Defense has determined it inconsistent with the public interest to apply restrictions of the Act to the acquisition of defense equipment which is mined, produced, or manufactured in certain "qualifying countries," one of which is Turkey. Department of Defense FAR Supplement (DFARS) § 225.872-1(a). Thus, although MTI did represent in its offer that it intended to furnish containers manufactured in Turkey, application of a Buy American evaluation factor to its offer would not have been appropriate.<sup>3</sup>

Next, the protester asks us to determine whether the TRICON containers delivered by MTI under a previous contract and/or the containers to be delivered under this contract "claim CSC [International Convention for Safe Containers] certification."<sup>4</sup> Protest at 3.

---

<sup>3</sup>Moreover, it does not appear that application of an evaluation differential would have had any impact on the award decision in any event, because MTI's proposal was the only technically acceptable one. See ASOMA Instruments, Inc., B-251674, Apr. 13, 1993, 93-1 CPD ¶ 317 at 4.

<sup>4</sup>Paragraph (ix) of the RFP required offerors to demonstrate their ability to comply with CSC certificate requirements. Those requirements derive from the International Convention for Safe Containers, done at Geneva, Dec. 2, 1972, and ratified by the United States on Jan. 3, 1978. See 49 C.F.R. § 450.3 (1999). In this regard, in its proposal, MTI stated that it would comply with the CSC certificate requirements, and the agency found that MTI satisfied the RFP in this regard. Technical Evaluation Report, supra, at 1.

This request does not constitute a valid basis for protest because it contains no allegation of improper conduct by the agency. Swager Communications, Inc., B-220000.2, Nov. 21, 1985, 85-2 CPD ¶ 585 at 2, aff'd, B-220000.4, Dec. 23, 1985, 85-2 CPD ¶ 702. In this regard, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for protest, and that the grounds be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f) (1999). In other words, the protester must allege that the agency took particular actions and that these actions were contrary to law or regulation. Here, the protester has alleged neither. To the extent that the protester is under the impression that our Office will conduct investigations for the purpose of establishing whether a protester may have a valid basis for protest, it is mistaken. Our Office does not conduct investigations as part of our bid protest function.<sup>5</sup> Stabro Labs., Inc., B-256921, Aug. 8, 1994, 94-2 CPD ¶ 66 at 5; TSI Microelectronics Corp.-Recon., B-243889.2, Nov. 4, 1991, 91-2 CPD ¶ 423 at 2.

CMCI also asks us to investigate whether MTI has complied with the requirements of 38 U.S.C.A. § 4212 (West Supp. 1999) and FAR § 52.222-37, which require federal contractors to file annual reports with the Secretary of Labor summarizing (1) the number of disabled veterans and the number of veterans of the Vietnam era in the work force of the contractor by job category and hiring location, and (2) the total number of new employees hired during the period covered by the report, and of that total, the number of disabled veterans, and the number of veterans of the Vietnam era. The protester points out that both recent Department of Defense appropriations acts<sup>6</sup> and the DFARS<sup>7</sup> prohibit the obligation or expenditure of funds to enter into or

---

<sup>5</sup>In its comments on the agency report regarding this issue, CMCI states that “upon full investigation,” our Office would discover that MTI did not furnish CSC certificates under its prior contract for the containers, and that it will not do so under the challenged contract. Protester’s Comments, Sept. 16, 1999, at 2. To the extent that CMCI attempts to recast its initial request for an investigation by our Office into a valid basis for protest, the issue is untimely raised. 4 C.F.R. § 21.2(a)(2). In any event, at best CMCI’s statement constitutes a challenge to the agency’s determination that MTI is responsible (*i.e.*, that MTI is capable of furnishing compliant containers), or raises an issue of contract administration (*i.e.*, whether MTI in fact furnishes compliant containers under the contract). We do not review protests raising either of these issues. 4 C.F.R. § 21.5(a), (c). Moreover, we note that CMCI appears to take contradictory positions in its comments, arguing both that MTI will not furnish compliant containers, and that the containers to be furnished are exempt from the CSC certificate requirements. See Protester’s Comments, supra.

<sup>6</sup>Section 8096 of the Department of Defense (DOD) Appropriations Act for Fiscal Year 1999, provided that:

(continued...)

renew a contract with a contractor that is subject to the above reporting requirement, but has not submitted the most recent required report. The protester argues that if MTI had not filed its most recent report at the time of the July 14 award, the award was illegal.

Again, CMCI has failed to state a legally sufficient basis for protest. The protester maintains that if MTI failed to comply with the above reporting requirements, an award to it would be illegal; CMCI does not allege, however, that MTI in fact failed to file the required report. In other words, the protester has failed to allege improper conduct on the part of agency officials. Instead, it asks us to conduct an investigation to determine whether it has factual grounds for protest. As noted above, however, we will not conduct an investigation for the purpose of determining whether a protester may have a valid basis for protest.<sup>8</sup>

CMCI further argues that the agency treated offerors unequally by allowing MTI, but not other offerors, to provide additional information after receipt of proposals.

The agency concedes that it requested and received information from MTI, but not other offerors, after the closing date for receipt of proposals. Agency Report at 5. Specifically, the agency notes that it asked MTI to identify the type of coupler it would use to link the TRICON containers and to specify where the data plate would be placed on the door and where the vertical shelf supports would be located. The agency also asked MTI to provide a timeline for the prototype and a statement that deliveries would not be made after 3:30 p.m., and to identify the estimated sailing dates for the shipments from Turkey and the port of debarkation. The agency argues that its requests for information and MTI's responses to them were mere clarifications, not rising to the level of discussions, and, as such, were permissible pursuant to FAR § 15.306.

---

(...continued)

None of the funds made available in this Act may be obligated or expended to enter into or renew a contract with a contractor that is subject to the reporting requirement set forth in subsection (d) of section 4212 of title 38, United States Code, but has not submitted the most recent report required by such subsection for 1998 or a subsequent year.

DOD Appropriations Act, 1999, Pub. L. No. 105-262, 112 Stat. 2279, 2319 (1998).

<sup>7</sup>The relevant DFARS clause is § 222.1304.

<sup>8</sup>Similarly, we will not conduct an investigation to determine whether MTI can be expected to comply with the required delivery date, as requested by the protester.

“Clarifications” are limited exchanges between the government and offerors that may occur when award without discussions is contemplated. FAR § 15.306(a). Such communications with offerors before establishing a competitive range are not to be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. FAR § 15.306(b)(2). Discussions, on the other hand, occur when a contracting officer indicates or discusses with each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to enhance materially the proposal’s potential for award. FAR § 15.306(d)(3); Wellco Enters., Inc., B-282150, June 4, 1999, 99-1 CPD ¶ 107. If a procuring agency holds discussions with one offeror, it must hold discussions with all offerors whose proposals are in the competitive range. FAR § 15.306(d)(1); Strategic Analysis, Inc., B-270075, B-270075.4, Feb. 5, 1996, 96-1 CPD ¶ 41 at 4.

Here, we need not determine whether the exchanges with MTI constituted discussions--and thus whether the agency should have established a competitive range and conducted discussions with other offerors in it--because it is clear from the record that CMCI was not prejudiced by the agency’s failure to hold discussions with it. In this regard, competitive prejudice is an essential element of every viable protest, Lithos Restoration, Ltd., B-247003.2, Apr. 22, 1992, 92-1 CPD ¶ 379 at 5, and we will not sustain a protest for failure to hold discussions where it is apparent from the record that the protester could not have improved its proposal enough through discussions to be in contention for award. Schleicher Community Corrections Center, Inc., B-270499.3 et al., Apr. 18, 1996, 96-1 CPD ¶ 192 at 6, recon. denied, B-270499.6, Aug. 15, 1996, 96-2 CPD ¶ 68; Strategic Analysis, Inc., supra, at 5; Northrop Worldwide Aircraft Servs., Inc., B-262181, Oct. 27, 1995, 95-2 CPD ¶ 196 at 8-9, recon. denied, B-262181.3, June 4, 1996, 96-1 CPD ¶ 263. Such is the case here. The solicitation provided for award based on an integrated assessment of technical capability, past performance, and price; MTI received ratings of blue for both technical capability and past performance, and its price was lower than CMCI’s. It appears that CMCI would not have been able to improve its past performance rating of neutral, which was based on its lack of experience in manufacturing the same or similar items, through discussions (presumably if the protester had such experience, it would have mentioned it in its initial proposal), nor has the protester alleged that it would have lowered its price if given the opportunity. Thus, even assuming that the protester could have resolved all of the technical deficiencies in its proposal through discussions and improved its technical capability rating to blue, it would still not have been in line for award based on an integrated assessment of technical capability, past performance, and price. Accordingly, we find that CMCI was not prejudiced by the agency’s failure to hold discussions with it.<sup>9</sup>

---

<sup>9</sup>Similarly, to the extent that the protester objects to the contracting officer’s decision to award on the basis of initial proposals rather than conducting discussions, we will not consider the argument because, as noted above, the

(continued...)

Finally, CMCI alleges that the Department of Defense has a policy of “forwarding TRICON container manufacturing contracts to Turkey.” The protester concedes that it has no hard evidence that this is the case, but argues that the following circumstances raise suspicion:

- (1) issuance of this and a previous solicitation for the containers near the end of the fiscal year (which, according to the protester, suggests that the agency had “assurances that a factory was standing by to fill the bill,” Protest at 4); and
- (2) selection of other than the lowest-priced offeror last year, but the lowest-priced this year.

We see nothing suspicious in either of the circumstances cited by the protester. With regard to the first, neither solicitation was in fact issued particularly late in the fiscal year (both were issued in early June, approximately 4 months prior to the end of the fiscal year), and even had they been, we do not see how issuance of a solicitation late in the fiscal year implies that the agency already has a particular contractor lined up. With regard to the second, where award is to be made on a best value basis, and price is one of several factors to be considered in determining best value, it is to be expected that the lowest-priced proposal will sometimes, but not always, be selected.

The protest is denied.

Comptroller General  
of the United States

---

(...continued)

protester suffered no prejudice as a result of the agency’s decision not to conduct discussions with the protester.