



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Alamo Aircraft Supply, Inc.; Merchants World Surplus Enterprises, Inc.; Associated Aircraft Manufacturing & Sales, Inc.; Blazer Surplus; Dixie Air Parts Supply, Inc.

File: B-278215.4

Date: March 11, 1998

John J. Fausti, Esq., and Stephanie L. Buser, Esq., for the protesters.
Robin Walters, Esq., and Michael J. Malone, Esq., Defense Reutilization and Marketing Service, Defense Logistics Agency, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency acted reasonably in amending a solicitation for the sale of surplus property, rather than canceling and reissuing the solicitation, where the nature and scope of the changes were not so substantial as to warrant the cancellation and reissuance of the solicitation.

DECISION

Alamo Aircraft Supply, Inc., Merchants World Surplus Enterprises, Inc., Associated Aircraft Manufacturing & Sales, Inc., Blazer Surplus, and Dixie Air Parts Supply, Inc. protest the decision of the Defense Reutilization and Marketing Service (DRMS), Defense Logistics Agency, to amend, rather than cancel, a solicitation for the sale of surplus property. The protesters, none of whom had submitted proposals in response to the solicitation, assert that the changes made by the amendment are so substantial that the agency must cancel the solicitation and issue a new one to afford all potential bidders an opportunity to compete for the contract.

We deny the protest.

The solicitation represents a pilot initiative under which DRMS will award a term sale contract, with a 5-year performance period, to the high bidder for five categories of surplus Department of Defense industrial property. The solicitation provides for a two-step approach, under which firms were required to submit technical proposals by September 30, 1997, in response to request for technical proposals (RFTP) No. 99-7005. Those bidders whose technical proposals are found by the agency to be technically acceptable, based upon the RFTP's evaluation criteria, will be invited to submit sealed bids in response to an invitation for bids, with award being made to the high bidder. DRMS estimates that the surplus

property that will be made available to the contractor during each year of the contract will have a market value of \$30 million.

The successful bidder, or "purchaser," will have the right and obligation (with certain limited exceptions) to remove, upon payment of its bid price, certain surplus property generated by the agency within the designated federal supply classifications set forth in the solicitation. The proposed contract provides that title to and risk of loss of the property will transfer from the government to the purchaser upon payment by the purchaser of its entire bid price for the property and the removal of the property from the agency installation. The proposed contract requires, among other things, that 80 percent of the "net proceeds" the purchaser obtains by any means from the surplus property, including the purchaser's sale or lease of the property, be paid to the United States Treasury.¹ Because of this feature--which entitles the government to 80 percent of the net proceeds, if any, realized by the purchaser from the property (in addition to the amount paid for the purchase of the property from DRMS)--the proposed contract has been referred to by the agency as a "proceeds sharing sale."

Alamo Aircraft and Merchants World filed protests with our Office on September 29 and 30, 1997, respectively, contending that this "proceeds sharing sale" solicitation is actually a solicitation for property disposal services, and that the solicitation is therefore flawed because it does not contain provisions of the Federal Acquisition Regulation (FAR) associated with service contracts. These protesters argued that because of the proposed contract's proceeds sharing feature and certain other provisions, DRMS will retain an ownership interest in the surplus property after its sale to the purchaser, and that the disposal of surplus property provisions of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 484 (1994 and Supp. I 1995), and the Federal Property Management Regulations, 41 C.F.R. Part 101-45 (1997), will therefore be applicable to any resale of the surplus property by the purchaser. Additionally, the protesters asserted that any contract awarded under the solicitation would result in the unauthorized sale of the surplus property on credit.

During the course of this protest, amendment No. 4 to the solicitation was issued, which, as discussed below, modified the proposed contract. In Alamo Aircraft Supply, Inc.; Merchants World Surplus Enters., Inc., B-278215, B-278215.2, Jan. 7, 1998, 98-1 CPD ¶ 5, we denied the protests, finding, among other things, that the

¹The proposed contract defines "net proceeds" as the purchaser's "gross proceeds" minus its "direct costs." "Gross proceeds" are defined as all proceeds obtained by the purchaser from the property, by sale, rental, or other means; "direct costs" are essentially all costs actually incurred by the purchaser solely for the management, preservation, improvement, and transportation of the property (not including the amount paid to DRMS for the purchase of the property).

proposed contract is one for sale, and that it would not result in the unauthorized sale of surplus property on credit. This decision took into account the changes made by amendment No. 4, as well as the protesters' protests of the revised terms in the amendment.²

Meanwhile, on January 5, 1998, Alamo Aircraft, Merchants World, Associated Aircraft, Blazer Surplus, and Dixie Air filed this protest asserting that amendment No. 4 changes the terms of the solicitation to such an extent that the agency is required to reopen the competition and allow "potential bidders" to submit proposals. Based on our review, we find no merit to this protest.

As initially issued, the draft contract stated that the purchaser would be required to pay 20 percent of the purchase price it bid to the government for the property. As explained by the agency in its October 31 report in response to the initial protests filed by Alamo Aircraft and Merchants World, the solicitation's reference to the payment by the purchaser of 20 percent of the purchase price was a misnomer because the solicitation did not require that the purchaser ever pay a remaining 80 percent of its purchase price to the government. The agency explained that the reference to a required payment of 20 percent of the purchase price was intended to highlight the proposed contract's requirement that 80 percent of the net proceeds the purchaser obtains by any means from the property be paid to the U.S. Treasury.

Amendment No. 4 deleted the reference to the purchaser's payment of 20 percent of its purchase price to the government, and clarified that the purchase price (i.e., the amount of the successful bidder's high bid) paid to the government for the property was the only amount owed by the purchaser unless net proceeds were realized from the purchased property through its sale, lease, or by other means.

The second change made by amendment No. 4 involved the proposed contract's risk of loss provision. As initially issued, the proposed contract's risk of loss provision specified that the "[p]urchaser bears the risk for loss, theft, destruction, or damage to [p]roperty" after the property has been purchased from the agency and removed from the relevant agency installation, and required that the purchaser "pay the Government the full [p]urchase [p]rice for any and all property that is lost, stolen, destroyed, or damaged." To facilitate this, the draft contract required that the purchaser maintain insurance coverage for the property, that is, "'All-Risk' coverage for fire and other property perils for all property owned by [the] [p]urchaser with aggregate coverage of [\$5 million]."

Amendment No. 4, while retaining the draft contract's language that the purchaser would bear the risk of loss of the property and the requirements pertaining to the

²Some protests of these terms were dismissed because they failed to state a basis for protest.

insurance of the property, deleted the requirement that the purchaser make any payment directly to the government for any property that is lost, stolen, or destroyed. As such, under amendment No. 4, the purchaser bears the risk of loss and must insure the property, and any recovery from insurance for lost, stolen, or destroyed property would be paid to the purchaser and would count as a gross proceed obtained from the property.³

The third change made by amendment No. 4 involved the draft contract's wind-up provision. As initially issued, the solicitation provided for a 6-month "wind-up" period to follow the contract's 5-year performance period. The draft contract provided that during the wind-up period the agency would not make any surplus property available to the purchaser for purchase, and added that the agency, among other things, could in certain circumstances direct the disposition of the property.

Amendment No. 4 to the solicitation deleted in total the specific draft contract provision detailing the parties' respective obligations during the wind-up period and the period's length, and substituted a new wind-up provision. The new wind-up provision does not set forth any time period for the duration of the wind-up, and deletes any reference to the agency's ability to control the disposition of any of the purchaser's assets during the wind-up period.⁴

The magnitude of the changes made to a solicitation governs whether the solicitation should be amended (with only the firms whose proposals are under consideration entitled to receive the amendment and continue to compete for the contract), or canceled and reissued. See Afftrex, Ltd., B-231033, Aug. 12, 1988, 88-2 CPD ¶ 143 at 10; Burroughs Corp., Inc., B-207660.3, May 16, 1983, 83-1 CPD ¶ 508 at 4. Our review of agency decisions in this regard is limited to whether the

³As mentioned previously, the proposed contract requires that 80 percent of the "net proceeds" the purchaser obtains by any means from the surplus property, including the purchaser's sale or lease of the property, be paid to the U.S. Treasury.

⁴Amendment No. 4 also provided additional detail regarding the amount of property that the agency estimates will be made available to the purchaser under the contract resulting from the solicitation, and clarified that the solicitation's reference to a dispute resolution panel to resolve any disputes which may arise during contract performance was "intended to be elective and not supplant any Contract Disputes Act rights of any party." The protesters did not assert in their protest that these changes are so substantial as to require that the solicitation be canceled and reissued.

decision to amend the solicitation, or cancel and reissue the solicitation, was reasonable.⁵ Burroughs Corp., Inc., supra.

The protesters contend that the solicitation must be canceled and reissued because the purchaser's obligations "regarding up-front payment" have changed, and the requirement that insurance proceeds for lost, destroyed, or damaged property be paid directly to the agency has been eliminated. The protesters contend that because of the changes made to the solicitation's "purchase price" and "risk of loss" provisions, "it is logical to assume that there will be wide variation as to costs due to insurance, since although all offerors must provide the minimum required amount, many offerors may reasonably elect to purchase insurance levels above and beyond the minimum."

The protesters fail to provide any support for their arguments. They do not, for example, explain how the purchaser's obligations "regarding up-front payment" have changed to such an extent as to require cancellation, rather than amendment, of the solicitation. To the extent the protesters are referring here to the deletion of the reference in the solicitation to the purchaser's payment of 20 percent of its purchase price, it is clear from the solicitation that this reference was a misnomer, and considered in the context of the solicitation, would have no practical effect on bid prices because, as explained previously, the solicitation never required that the purchaser pay the remaining 80 percent of its purchase price.

⁵The protesters cite FAR § 15.206(e) (FAC 97-02), which is only applicable to procurement solicitations issued on or after January 1, 1998, as the appropriate provision that should govern in deciding whether this amendment requires resolicitation. Cf. FAR § 15.606(b)(4) (June 1997) (predecessor provision). Section 15.206(e) provides:

If, in the judgment of the contracting officer, based on market research or otherwise, an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

Although the FAR is not applicable to sales contracts, Sandia Die and Cartridge Co., B-218011, Mar. 13, 1985, 85-1 CPD ¶ 308 at 2-3, our Office, where appropriate, will refer to it for guidance in reviewing protests involving sales contracts. See B-164851, Oct. 17, 1968 at 3. As indicated by our discussion below, even assuming FAR § 15.206(e) (FAC 97-02) were applicable, we do not believe that the amendment is so substantial as to require resolicitation.

Nor do the protesters explain why the changes to the solicitation's provision regarding the payment of insurance proceeds are so substantial as to require the cancellation and reissuance of the solicitation, or provide any support for this argument. As noted, the draft contract has always required substantial insurance to be provided on the property, and the only real difference made by amendment No. 4 that would affect this coverage is that the purchaser is now only obligated to pay the government 80 percent of the net proceeds obtained from insurance payments rather than the "full purchase price." The protesters have not provided any analysis or data as to what insurance levels (above the minimum required levels) may be reasonable, or the increase in costs (and presumed decrease in bid prices) associated with obtaining such additional coverage.⁶ Given the size of the contract to be awarded under the solicitation in terms of dollar amount--the agency estimates that the surplus property that will be made available to the contractor during each year of the contract will have a market value of \$30 million--and the significant insurance requirements that continue to be imposed by the solicitation, we fail to see how the changes to the solicitation's "purchase price" and "risk of loss" provisions are so substantial with regard to their effect on the prospective insurance costs that the agency's decision to amend the solicitation (as opposed to cancellation and reissuance) was unreasonable.

The protesters also argue that the amended wind-up provision allows the purchaser "to keep property that remains unsold at wind-up . . . essentially handing the [purchaser] a 'license to steal.'" The protesters argue that because of this, "the amended solicitation should at least be re-opened to allow all--dare we say it--'potentially unscrupulous opportunists' with the opportunity to bid." The protesters argue that, in any event, the obligations of the purchaser have been "substantially changed" such that the cancellation and reissuance of the solicitation is required.

This aspect of the protest is based upon, among other things, the protesters' misunderstanding of the solicitation's provisions. Contrary to the protesters' assertion, and as explained in our prior decision, the amended wind-up provision does not allow the purchaser to keep the property after wind-up; no property will remain unsold at completion of wind-up because wind-up is completed only after it has been determined that all property has been sold or disposed of. In this regard, although the agency has no input into the manner in which the purchaser operates during the contract's wind-up period, the agency believes that its interests in sharing in the proceeds obtained from such property and a timely wind-up will be protected

⁶The protesters' position regarding the amount of insurance required is also somewhat unclear, given that they asserted in their protest that because of the changes to the solicitation made by amendment No. 4, the purchase of "additional insurance is no longer necessary," and then apparently abandoned this argument without explanation in their comments by asserting that "many offerors may reasonably elect to purchase insurance levels above and beyond the minimum."

by the purchaser's incentive to maximize its investment. That is, because the purchaser will continue to incur costs in maintaining and storing property remaining after the contract's performance period, and will only make money if it obtains net proceeds from the remaining property, the purchaser has economic incentives to dispose of the property promptly and in a manner that maximizes net proceeds.

The agency adds that "throughout the pre-proposal process, no bidder ever brought up any question suggesting that [6] months would be too short or otherwise problematic," and that the agency's initial decision to specify a wind-up period of 6 months was based upon a "pre-marketing analysis . . . that [6] months would be more than sufficient for the [p]urchaser to wind up its operations."

Accordingly, because the protesters' argument here is based upon their misunderstanding of the solicitation, and the record demonstrates that the wind-up provision as amended (which does not require that the wind-up be completed in 6 months or permit the agency to direct the disposition of the property) will have little practical effect on the manner in which the purchaser will operate during the wind-up, the changes to the wind-up provision cannot be considered so substantial as to render the agency's decision to amend the solicitation, rather than cancel and reissue it, unreasonable.

In sum, although we agree with the protesters that the amendment made changes to the solicitation with regard to the obligations of the contracting parties, the protesters have failed to explain why the changes were so substantial, individually or in total, as to render the agency's determination to amend the solicitation, rather than cancel and reissue it, unreasonable. The protesters' assertion that cancellation is appropriate because this is a pilot project provides no reasonable basis to cancel and resolicit the requirement.

The protest is denied.⁷

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⁷It is not clear, in any event, that the agency's actions prejudiced the protesters, since the protesters never state in any of their submissions that any intend to submit a proposal if the solicitation were canceled and reissued. The protesters only state, for example, that "potential bidders--such as the five protesters--should all be afforded the opportunity to submit proposals by requiring DRMS to cancel the pending solicitation and issue a new one to which all prospective bidders might submit technical proposals."