



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: TRS Research

File: B-283342

Date: November 4, 1999

Robert G. Fryling, Esq., and Edward J. Hoffman, Esq., Blank Rome Comisky & McCauley, for the protester.

Col. Nicholas P. Retson and Maj. Ralph J. Tremaglio, III, Department of the Army, for the agency.

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DIGEST

Under small business set-aside, agency properly rejected quotation which indicated that the vendor would supply foreign-made end item because such set-asides are restricted to sources supplying domestically produced products.

DECISION

TRS Research protests the rejection of its quotation under request for quotations (RFQ) No. DABT51-99-Q-0193, issued by the Department of the Army for certain freight containers. The agency rejected TRS's quotation because it indicated noncompliance with the requirement that all end items furnished be manufactured or produced by a small business concern within the United States.

We deny the protest.

The RFQ was issued as a small business set-aside for 74 steel dry freight containers¹ under the streamlined commercial acquisition procedures set forth in Subpart 12.6 of the Federal Acquisition Regulation (FAR), using a combined synopsis/solicitation which was posted on the Commerce Business Daily Net on March 29, 1999. As

¹The solicitation contained detailed requirements regarding the containers including, for example, construction materials, dimensions, corner castings, floor, roof and side panel requirements, and paint and sealant requirements.

amended, the RFQ provided that the Buy American Act applied to the procurement and required that firms provide a unit and total price for the containers. RFQ amend. 3, at 2. The amended solicitation also incorporated the clause at FAR § 52.212-3, captioned "Offeror Representations and Certifications – Commercial Items," which requires the vendor to certify its status as a small business, and the provisions at Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7000, which implement the Buy American and Trade Agreements Acts.

The agency received 12 quotes, including 3 from TRS, by the amended July 2 due date. Contracting Officer's Statement at 1. TRS's first quote, dated May 25, offered 74 containers manufactured in China and its second quote, dated June 25, offered 74 containers manufactured in Turkey. The protester's third quote, also submitted on June 25 and labeled "Alternate Bid # 1," offered 24 containers manufactured in Turkey, with the remaining 50 containers manufactured at an unspecified location. This last quote stated that the 50 units of unspecified origin "shall be once used containers significantly transformed with more than 51% U.S. content and effort thus qualifying [as] domestic end units." Agency Report, Tab 6, TRS Quotation at 1.

By e-mail dated July 13, the agency requested that the protester certify that its overseas supplier was a small business and also requested information regarding TRS's statement that it would "significantly transform" 50 of the required 74 containers so that the units would qualify as domestic units. Agency Report, Memorandum from Agency to TRS 1 (July 13, 1999). The agency noted that for small business set-asides, such as this, FAR § 19.502-2(c) requires that any firm proposing to furnish a product that it did not itself manufacture must furnish the product of a small business manufacturer and referenced FAR § 19.102(f), which requires that nonmanufacturer suppliers in small business set-asides must furnish "the product of a small business manufacturer or producer, which end product must be manufactured or produced in the United States." FAR § 19.102(f)(1). Under the regulation, a manufacturer of the end item being acquired is defined as the concern which, with its own forces, transforms inorganic or organic substances including raw materials and/or miscellaneous parts or components into such an end item. Id.

By memorandum dated July 16, TRS responded that it purchased containers "originally manufactured in foreign countries" and shipped the containers to a U.S. small business remanufacturing facility. Agency Report, Tab 20, Memorandum from TRS to Agency 1 (July 16, 1999). TRS explained that:

The remanufacturing facility removes the previous [owner's] markings and decals, pre-masks the weight panels, serial numbers and all required [Industrial Standards Organization] ISO markings, straightens any possible dents, steam cleans [where] necessary, sand blasts any [possible] surface rust which may have occurred in transportation or handling, then paints the unit, thus providing TRS with a conforming, completed container pursuant to your specification in the solicitation which is a domestic end product. This end product consists of more

than 51% U.S. product, effort, and content inclusive of transportation from our source in the U.S. to the point of final assembly of this domestic end product.

Id.

The agency determined that TRS's quotations were unacceptable because TRS offered containers which were not manufactured or produced by a small business concern within the United States, as required by the small business set-aside regulations. The agency issued a purchase order to Sea Box as the low-priced acceptable vendor and this protest followed.

TRS complains that the procurement is "irretrievably flawed" since the Army issued the solicitation as a small business set-aside, and included the Buy American Act provisions in the RFQ, but failed to analyze the quotations in accordance with both the Buy American Act and the requirements of small business set-asides. Protester's Supplemental Comments at 5. TRS argues that the agency improperly rejected its quotation since it proposed to "remanufacture" 50 containers and this remanufacturing effort would transform the units into domestic products under the Buy American Act. Protester's Comments at 2. Thus, TRS contends that its quotation met the small business and the Buy American Act requirements of the solicitation.

The protester's argument is without merit. As noted above, the regulations require that only domestically produced products be furnished under all small business set-asides where a contract is awarded or a purchase order is issued to a non-manufacturer. FAR § 19.102(f)(1); Kaysam Worldwide, Inc., B-247743, June 8, 1992, 92-1 CPD ¶ 500 at 2; Bulloch Int'l, Inc., B-237369, Feb. 5, 1990, 90-1 CPD ¶ 153 at 3, recon. denied, B-237369.2, Apr. 10, 1990, 90-1 CPD ¶ 377. Consequently, a contracting activity may not properly purchase a foreign-made product from a domestic small business supplier under such a procurement vehicle. Kaysam Worldwide, Inc., supra.

Here, TRS properly was found to be ineligible for award because the three quotations that it submitted offered to supply freight containers which are foreign-made. Specifically, TRS's first two quotes offered containers from China and Turkey, respectively, and are unacceptable. The protester's third quotation offered 24 containers from Turkey and offered to "remanufacture" 50 containers, which as noted above, TRS stated were "originally manufactured in foreign countries." Agency Report, Tab 20, supra. The 24 containers from Turkey are foreign-made and unacceptable, and TRS's proposed "remanufacturing" of the 50 remaining foreign-made containers does not allow TRS to satisfy the definition of a manufacturer under FAR § 19.102(f)(1), which requires that a business concern transform inorganic or organic substances, including raw materials, and/or miscellaneous parts or components into the end item. Attaching corner protectors, steam cleaning, straightening dents, and repainting do not meet this requirement.

Moreover, although the RFQ referenced the Buy American Act and TRS argues that its remanufactured containers satisfy the domestic product definition under the Buy American Act, this does not constitute satisfying the relevant, more stringent requirement under this small business set-aside. As noted above, the small business set-aside restrictions do not permit an agency to issue an order for a foreign product. Thus, even though the Buy American Act was incorporated in the solicitation, the fact that the procurement was a small business set-aside put recipients on notice that only quotations providing domestically produced products could be considered for award. Accordingly, TRS's quotations were properly rejected as noncompliant by the agency.

TRS also challenges the evaluation of Sea Box's quotation, alleging that Sea Box's quote also did not comply with the small business set-aside restrictions and therefore should have been rejected. We will not consider this issue since, under our Bid Protest Regulations, a party is not interested to maintain a protest if it would not be in line to be issued a purchase order were the protest sustained. 4 C.F.R. §§ 21.0(a), 21.1(a) (1999); Peterson Constr. Co., B-256841, Aug. 3, 1994, 94-2 CPD ¶ 55 at 4. Since TRS's quotation was properly determined to be unacceptable and there is another acceptable vendor besides Sea Box² that would be issued the purchase order even if this protest ground were sustained, TRS is not an interested party to challenge the issuance of a purchase order to Sea Box.

The protest is denied.

Comptroller General
of the United States

²While TRS purports to challenge the acceptability of this second vendor, the protesters arguments lack the specificity required to form a valid basis of protest under our Bid Protest Regulations. 4 C.F.R. § 21.1(c)(4). Specifically, TRS argues only that this second vendor "may have been" unacceptable and that "there is no adequate support" for the agency's assertion that this second vendor would be issued the purchase order if Sea Box's quotation were unacceptable. Protester's Supplemental Comments at 3 n.1. This speculative general allegation provides no valid basis to call into question the agency's determination that this vendor submitted an acceptable quotation.