



Comptroller General
of the United States

Washington, D.C. 20548

Benejam
144e91

Decision

Matter of: Admiral Towing and Barge Company
File: B-245600; B-245602
Date: January 16, 1992

Ronald C. Rasmus for the protester.
Thomas J. Touhey, Esq., Dempsey, Bastianelli, Brown & Touhey, for Zapata Gulf Pacific, Inc., an interested party.
Richard S. Haynes, Esq., and John M. Binetti, Esq., Department of the Navy, for the agency.
Aldo A. Benejam, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's decision to cancel request for proposals (RFP) for tugboat services after receipt of best and final offers is reasonable where a pre-award survey revealed that the RFP contained specifications that did not accurately describe the agency's actual minimum needs.
2. Protest challenging, as unduly restrictive of competition, a requirement in request for proposals for tugboat services that tugboats have a minimum specified pulling power is denied, since the agency demonstrates that the requirement is reasonably related to its minimum needs.
3. The General Accounting Office will not attribute fraud or bad faith to contracting agency on the basis of unsupported allegation, inference, or supposition.

DECISION

Admiral Towing and Barge Company protests the cancellation of request for proposals (RFP) No. N00033-91-R-1311 (No. 1311) and challenges as unduly restrictive certain terms of RFP No. N00033-91-R-1317 (No. 1317) subsequently issued by the Department of the Navy, Military Sealift Command, for the charter of five United States-flag tugboats to provide towing services in San Diego Harbor, California.

We deny the protests.

BACKGROUND

The agency issued RFP No. 1311 on April 16, 1991, seeking proposals for the tugboat services, with an initial closing date for receipt of proposals of May 16. The RFP contemplated award of a 17-month base charter period for each of the five tugboats, with up to two 17-month option periods. Section C2.7 of the RFP required each tugboat to have, among other things, a "minimum of 2,000 continuous shaft horsepower [SHP] and 45,000 [pounds (lbs.)] bollard pull," as verified by a recognized classification organization;¹ beneath-the-waterline fenders to prevent damage while assisting submarines; and a capstan or warping winch located on the bow and stern.

In a letter to the agency dated April 23, Admiral asked whether tugboats with bollard pull in excess of 45,000 lbs., but with presumably less than 2,000 SHP, would satisfy the 2,000 SHP requirement. Subsequently, in a May 6 letter, Admiral explained in detail why the RFP's 2,000 SHP requirement, in light of the bollard pull requirement, was redundant and unnecessary. Admiral stated that bollard pull is the measurement of a tugboat's power used by the recognized certifying organizations and insurance underwriters, and that a current draft version of a Navy standard uses bollard pull, rather than SHP, as the standard of measurement of a vessel's power. Admiral further asserted in its May 6 letter that the total required bollard pull can be achieved more efficiently with tugboats of lesser horsepower by means of deep-draft hull designs, "kort nozzle" technology and specially-designed propellers.² As examples in support of its position, Admiral stated that two of its tugboats equipped with kort nozzles and currently performing harbor towing services in Charleston, South Carolina, satisfy the 2,000 horsepower requirement. Yet, according to Admiral, one recognized classification society determined that the tugboats produce 53,720 lbs. of bollard pull; while another classification organization rated the tugboats as producing 55,000 lbs. of bollard pull. On May 2, in part in response to Admiral's concern, and over the objections of the

¹According to the agency, "bollard pull" is a measurement of the effective pulling power of tugboats. Organizations such as the American Bureau of Shipping and Lloyds of London conduct independent measurements and verify each vessel's "bollard pull."

²A "kort nozzle" is a shroud assembly affixed to a vessel's hull surrounding the screw which focuses the directional thrust of resulting water pressure.

requiring activity, the agency issued amendment No. 0002 to the RFP, which deleted the 2,000 SHP requirement.¹

Admiral and Zapata Gulf Pacific, Inc., the incumbent, were the only two offerors that responded to the RFP by the extended May 28 closing date. Admiral submitted the low offer and proposed tugboats with a verified bollard pull rating ranging from 45,000 to 55,000 lbs.; Zapata's proposed tugboat had a verified bollard pull rating ranging from 55,000 to 57,000 lbs. Although both initial proposals were found technically acceptable, the record shows that the Naval Station, San Diego (NSSD)--the requiring activity--expressed concerns about the capability of Admiral's tugboats to successfully perform the required tasks. NSSD's reservations notwithstanding, the contracting officer included both proposals in the competitive range, held oral discussions with both offerors, and requested best and final offers (BAFO) from the two firms. Following an evaluation of BAFOs, the contracting officer informed NSSD that Admiral was the apparent successful offeror.

On July 9, the agency conducted a pre-award survey of Admiral in Pensacola, Florida, where some of Admiral's tugboats could be observed performing. Agency officials, including the contracting officer's technical representative (COTR), NSSD's Chief Harbor Pilot, the contracting officer, and the contracting officer's representative, attended the pre-award survey. The pre-award survey consisted of an inspection of one of Admiral's tugboats, the NEW MEXICO, including underway operations demonstrating the tugboat's speed, maneuverability, and pushing power. The agency also conducted interviews with the Commanding Officer of the aircraft carrier USS LEXINGTON and the Charleston Naval Station's Port Captain, individuals familiar with Admiral's tugboat operations.

In his report of the pre-award survey, the COTR concluded that, although Admiral's tugboats were adequate for their current Pensacola operations, the proposed tugboats had

¹On May 10, in response to the protester's specific request for additional lead time to modify and deliver the proposed tugboats if it were awarded the contract, the agency issued amendment No. 0003, extending the closing date to May 28, and extending the date for delivery of the tugboats to August 30. On May 15, in response to another request from Admiral for additional lead time, the agency issued amendment No. 0004, extending the delivery date of the tugboats until October 31. The gist of each of Admiral's requests was that the manufacture and installation of the specialized fenders and capstans required a 17-week lead time following award.

insufficient power and inadequate configuration to successfully meet the demands of San Diego Harbor operations. The COTR stated that Admiral's tugboats "simply cannot do the work"; that due to their insufficient power, the tugboats would be overwhelmed by the conditions at San Diego Harbor; recommended that award not be made to Admiral; and suggested that RFP No. 1311 be canceled and be reissued with revised specifications that accurately reflect the power required for the tugboats to successfully perform the contract.

By notice dated August 30, the agency canceled RFP No. 1311 and issued RFP No. 1317 with a September 13 closing date for receipt of proposals, a November 7 delivery date for the tugboats, and revised specifications. The revised specifications included an increased bollard pull requirement to 55,000 lbs.; a separate 40,000 lbs. reverse bollard pull requirement; a requirement that tugboats travel a specified distance without creating "excessive wake;" and additional deck fittings, capstans and special fendering. On September 11, Admiral filed its protests against the cancellation of RFP No. 1311, challenging as unduly restrictive the revised terms of RFP No. 1317, including the new closing date for receipt of proposals.⁴

Admiral argues that since RFP No. 1311 accurately reflected the Navy's actual minimum requirements, and since Admiral submitted the low, technically acceptable proposal under RFP No. 1311, the Navy should have awarded the contract to the firm. Admiral further alleges that certain terms of RFP No. 1317 are unduly restrictive of competition and were written to favor the incumbent and to eliminate Admiral from the competition.

⁴Pursuant to Federal Acquisition Regulation (FAR) § 33.104(b), the Navy informed our Office on November 6, 1991, that it would proceed with award to Zapata under RFP No. 1317, notwithstanding the protests in our Office. Although Admiral objects to the Navy's determination and finding of urgent and compelling circumstances, where an agency makes a determination to award a contract during the pendency of a protest in our Office, the agency's only obligation is to inform us of that decision, as the Navy has done here. See 31 U.S.C. § 3553(d) (1988); FAR § 33.104(b). There is no requirement that a protester be allowed to rebut the agency's finding, nor do we review such a determination. See, e.g., The Taylor Group, B-234294, May 9, 1989, 89-1 CPD ¶ 436.

DISCUSSION

Cancellation of RFP No. 1311

Admiral states that it is one of the largest harbor towing companies in the United States, operating over 50 tugboats similar to those it proposed under the RFP, in over 40 ports in 11 states and Canada, and that some of its tugboats are currently chartered by the Navy to perform services similar to those that were required under RFP No. 1311. The protester argues that its proposed tugboats met all of RFP No. 1311's requirements, which it considers to be reasonable, and asserts that its tugboats are capable of performing the services required under that RFP.

In a negotiated procurement, an agency need only have a reasonable basis to cancel a solicitation after receipt of proposals, as opposed to the cogent and compelling reason required for cancellation of an invitation for bids after receipt of sealed bids. See Federal Acquisition Regulation (FAR) §§ 15.608(b), 14.404-1; ACR Elecs., Inc., B-232130.2; B-232130.3, Dec. 9, 1988, 88-2 CPD ¶ 577. The standard differs because in procurements using sealed bids, competitive positions are exposed as a result of the public opening of bids, while in negotiated procurements, there is no public opening. Id.

Here, we find that the Navy had a reasonable basis to cancel the RFP. The record shows that as originally issued, RFP No. 1311 reflected the Navy's reliance, based upon its experience, on horsepower as a measure the tugboats' power. Amendment No. 0002 deleted the SHP requirement, leaving only the 45,000 lbs. of bollard pull as the sole criteria by which to measure the power of the required tugboats. By the amended RFP requiring tugboats that satisfied only the 45,000 lbs. of bollard pull, the agency explains that offerors were erroneously permitted to propose tugboats with less power than actually needed. Consequently, although Admiral's proposed tugboats were rated technically acceptable under the RFP's specifications, that rating was based solely on the erroneous bollard pull requirement. The Navy cites numerous examples illustrating the potential adverse effect of using the underpowered tugboats required under the RFP.

The COTR explains, for example, that one tugboat is needed to control the sideways motion of several classes of ships with sonar domes mounted in the bow.⁵ According to the COTR, several experienced harbor pilots, including one

⁵The agency states that San Diego is the home port to approximately 15 ships with sonars mounted in their bows.

familiar with Admiral's operations, recommended against using kort-nozzled tugboats on ships with bow-mounted sonars, because they lack sufficient power to pull back against a head line, potentially causing damage to the ships' sonars. The record also shows that the commanding officer of the USS LEXINGTON indicated during the pre-award survey of Admiral that he routinely uses four tugboats for mooring, and strongly advised that six tugboats of the type that Admiral proposed should be used to moor the larger ships identified in the RFP. As a result of using underpowered tugboats, most, if not all, of the five tugboats required under the defective RFP would be required to move the larger classes of ships identified in the RFP. This is an unacceptable result to the agency because it would preclude other simultaneous moves. As for berthing submarines, the COTR explains that the underpowered tugboats that could be proposed under the RFP lack the necessary maneuverability and speed to safely berth submarines in the tight quarters of the San Diego Harbor submarine piers. The record thus clearly shows that the agency realized during the pre-award survey that the 45,000 lbs. bollard pull standard was not an accurate translation of the 2,000 SHP previously used standard, and did not reflect the Navy's actual minimum needs.

Except for expressing disagreement with the agency's bollard pull/shaft horsepower conversion analysis, Admiral does not rebut any of the agency's reasons for canceling RFP No. 1311. In its comments on the agency's report, Admiral merely asserts that since its proposed tugboats met the requirements of RFP No. 1311--an issue which the agency does not dispute--Admiral should have been awarded the contract. In light of the agency's explanation, however, that the RFP contained specifications that allowed offerors to propose tugboats with insufficient power to safely carry out the tasks required under the RFP--specifically, that the RFP's bollard pull requirement did not accurately reflect the agency's actual needs--we find that the agency's decision to cancel RFP No. 1311 and issue a new solicitation with revised specifications was reasonable.

The fact that the Navy discovered the deficiency during the pre-award survey, after receipt of BAFOs, does not preclude cancellation of the RFP. An agency properly may cancel a solicitation, regardless when the information precipitating the cancellation arises, even if that is not until after proposals are submitted and the protester has incurred costs. See System-Analytics Group, B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57.

Admiral's allegation that the cancellation was motivated by bad faith is similarly without merit. To show bad faith, a protester must submit convincing proof that the contracting

agency directed its actions with the specific and malicious intent to hurt the protester. WBM Maint., Inc., B-238049, Apr. 20, 1990, 90-1 CPD ¶ 405. We will not attribute unfair or prejudicial motives to a contracting activity on the basis of unsupported allegations, inference, or supposition. See System-Analytics Group, supra. Nothing in the record supports Admiral's assertions.

Requirements of RFP No. 1317

Admiral argues that the revised specifications in RFP No. 1317 are unduly restrictive of competition and biased in favor of the incumbent. The protester does not contend that it cannot meet the RFP's specifications, but Admiral objects to the increased bollard pull requirement to 55,000 lbs., and to the inclusion of a separate 40,000 lbs. reverse bollard pull requirement in the RFP. In this regard, Admiral argues that it routinely performs without incident Navy and commercial towing services, similar to the services required under the RFP, with tugboats that have the lower bollard pull (45,000 lbs.) specified in RFP No. 1311. The protester further asserts that it is unaware of any other Navy or commercial procurement for harbor towing which includes the unique and allegedly restrictive requirements for ahead bollard pull, and that with one exception, it is unaware of any Navy or commercial harbor towing procurement that includes a separate reverse bollard pull requirement.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition. 10 U.S.C. § 2305(a)(1)(i) (1988), and include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. 10 U.S.C. § 2305(a)(1)(B)(ii). Where a protester alleges that a requirement is unduly restrictive, we review the record to determine whether the requirement has been justified as necessary to satisfy the agency's minimum needs. See, e.g., PHH Homequiety Corp., B-240145.3; B-241988, Feb. 1, 1991, 91-1 CPD ¶ 100. Here, based on the record, we find that RFP No. 1317's revised specifications are reasonably related to the agency's minimum needs.

The fundamental issue regarding the specifications is whether, and at what level, bollard pull is the appropriate method of measuring a vessel's power, and how the traditional concept of "shaft horsepower" translates to "bollard pull." The agency explains that the traditional standard applied in San Diego Harbor had been a minimum of 2,000 SHP. The record shows that this standard was promulgated based upon the agency's experience with local requirements, operational conditions, and based upon the Navy's experience with its own "YTB" tugboats.

The agency states that although the 45,000 bollard pull standard was equated to the average pulling power of a 2,000 SHP open screw tugboat, the Navy's expert analysis revealed that average bollard pull cannot be directly applied to tugboats fitted with kort nozzle technology. According to the agency, while kort nozzles increase a vessel's effective bollard pull in forward thrust vectors, kort nozzles produce only 50 to 75 percent of their forward pull in reverse thrust vectors. Accordingly, in order to maintain a uniform bollard pull equivalent to the required 2,000 SHP standard, the agency needed to abandon a single average bollard pull standard and adopt a bifurcated forward/reverse bollard pull criteria. The agency explains that the reverse pull requirement ensures that the proposed tugboats can perform safely in the limited pier spaces characteristic of San Diego Harbor.

The record shows that the protester apparently agrees with the Navy's decision to use bollard pull, rather than SHP, as a measure of the vessel's power. Admiral has not presented any evidence, however, in support of its general objections to the agency's conversion of the traditional 2,000 SHP measure of a vessel's power, to the 55,000/40,000 lbs. separate bollard pull requirement. Nor has Admiral presented any evidence disputing the Navy's conclusion that RFP No. 1317's specifications are more precise, and a preferable measurement of actually required power over the previously used "average" 45,000 lbs. bollard pull requirement. The determination of the agency's minimum needs and the best method of accommodating them are primarily within the agency's discretion, and, therefore, we will not question such a determination unless the record clearly shows that it was without a reasonable basis. See CardioMetrix, B-234620, May 1, 1989, 89-1 CPD ¶ 415. Admiral has simply failed to show that the bollard pull requirement is not reasonably related to the agency's minimum needs.

As for Admiral's objection to the separate forward/reverse bollard pull requirement, Admiral does not explain, and we fail to see why the Navy, based upon its experience with local conditions and given the agency's familiarity with tugboat operations, should be precluded from requiring tugboats that meet separate bollard pull requirements. The protester's blanket statement alone--that it knows of no other Navy harbor towing procurement that includes a separate astern bollard pull requirement--does not make the requirement here unreasonable or unduly restrictive, especially where the agency has a reasonable, unrebutted

explanation for its inclusion.⁶ Accordingly, we conclude that the RFP's specifications reflect the Navy's actual current needs and are unobjectionable.

We also find without merit Admiral's argument that the 14-day deadline for submitting proposals under RFP No. 1317 indicates bias in favor of the incumbent. The revisions to the solicitation were specifically identified by the agency and required no extensive revisions to the proposal Admiral had recently prepared in response to RFP No. 1311. Except for its objection to the new closing date, Admiral does not explain how the firm was precluded from submitting a timely proposal by the new closing date. In view of the agency's urgent requirement to have uninterrupted tugboat services, and the fact that offerors were not required to extensively alter their recently-prepared proposals, we find the agency's decision to require proposals in less than 30 days unobjectionable.

The protests are denied.


for James F. Hinchman
General Counsel

⁶As for Admiral's contention that a requirement that tugboats travel a specified distance without "excessive wake" is vague, the agency explains that the requirement is based upon NSSD's experience with local conditions and its need for a reasonable response time from the tugboats, without causing a public hazard. In any event, while specifications must be free from ambiguities and must accurately describe the minimum needs of the procuring activity, there is no requirement that the solicitation be so detailed as to completely eliminate all performance uncertainties. See Tameran, Inc., B-232126, Oct. 31, 1988, 88-2 CPD ¶ 416. We will not consider Admiral's other objections concerning additional deck fittings, capstans, and fendering, since the protester concedes that these are only minor modifications that it can meet.