



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Puerto Rico Marine Management, Inc.

File: B-247975.5

Date: October 23, 1992

Daniel R. Weckstein, Esq., and William M. Dozier, Esq., Vandeventer, Black, Meredith & Martin, for the protester. Paul Kirchner, Esq., Kurrus & Kirchner, for Blaesbjerg Marine Texas, Inc. and Alabama Shipyard, Inc., an interested party.

Joe S. Macey, Esq., and Jean K. Orenstein, Esq., Maritime Administration, Department of Transportation, for the agency.

Catherine M. Evans, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's rejection of proposal for ship is sustained where agency's overstatement of its minimum needs in the solicitation misled protester into offering unnecessary modifications and resulted in rejection of proposed ship for failure to meet requirements as is.

2. Absent any contrary policies of the U.S. Trade Representative, a civilian agency procurement for items indispensable to the national defense is not subject to the Trade Agreements Act of 1979. In such cases the Buy American Act applies.

DECISION

Puerto Rico Marine Management, Inc. (PRMMI), agent for Sun Leasing, Inc., protests request for proposals (RFP) No. DTMA91-92-R-200079, issued by the Maritime Administration, Department of Transportation (MarAd), for ships to be used in the Ready Reserve Force (RRF), and the rejection of its proposal submitted in response to that RFP.

We sustain the protest.

BACKGROUND

Under the Merchant Marine Act of 1936, 46 U.S.C. App. §§ 1101 et seq. (1988), and the Merchant Ship Sales Act of 1946, 50 U.S.C. App. §§ 1735 et seq. (1988), MarAd is charged with creating and maintaining a merchant fleet that can be converted to military use in times of national emergency. As part of this responsibility, MarAd owns and maintains a number of inactive vessels that can be activated in the event of an emergency; these vessels make up the RRF. Since the Navy's Military Sealift Command (MSC) assumes control of RRF vessels upon activation, MarAd works with that agency to develop the technical requirements for RRF vessel acquisitions.

In October 1991, the Department of Defense (DOD) and MarAd issued a joint report on the RRF, based in part on the fleet's performance during Operations Desert Shield and Desert Storm. The report concluded that, while the RRF's overall performance record was impressive, its size and condition were inadequate to ensure the same quality of performance under less favorable conditions than existed in the Persian Gulf. In particular, the report noted a shortage of roll-on/roll-off (RO/RO) vessels (ships with ramps that allow vehicles to be driven on and off board); the report recommended the priority acquisition of additional RO/ROs. In early 1992, DOD completed a congressionally mandated mobility requirements study. The study reconfirmed the immediate need for more RO/ROs to meet existing military sealift contingency requirements. The study recommended that, to meet those requirements within funding constraints, MarAd purchase 18 additional RO/ROs by 1996.¹

By the time the mobility requirements study was completed, MarAd had issued the protested RFP. The RFP contemplated the award of multiple firm, fixed-price contracts for different types of ships, including diesel-powered RO/ROs built since 1975. PRMMI protested the RFP, alleging that it was unduly restrictive of competition because it excluded older steam-powered vessels like the one it wished to offer. PRMMI also protested the RFP's failure to include an evaluation preference for domestic vessels under the Buy American Act, 41 U.S.C. §§ 10a-10d (1988), as required by Federal Acquisition Regulation (FAR) § 25.109.

¹As the mobility requirements study is a classified document, MarAd did not provide it as part of the written record in this protest. Our statements here are based on MarAd's testimony at the hearing regarding unclassified portions of the study.

In response to PRMMI's protest, MarAd amended the solicitation to allow offers of vessels either built or rebuilt since 1975, and to include steam vessels, although the amendment also established an evaluation preference for diesel vessels over steam vessels. The amendment further provided that offered vessels must meet the RFP requirements on the date of the offer; that is, that they be offered "as is." PRMMI filed another protest against the amended solicitation, alleging that (1) both the preference for diesel vessels and the "as is" requirement were restrictive of competition, and (2) the amendment improperly failed to include a Buy American Act preference for U.S. flag vessels.

After PRMMI filed its second protest, MarAd proceeded to accept proposals on the established closing date. MarAd rejected PRMMI's proposal as technically unacceptable, stating that its proposed vessel, the S.S. Ponce, did not have "the required ramps." In this regard, the RFP required "RO/RO vessels with port and starboard side port ramps capable of being raised for sea and lowered for cargo operations without shore assistance." PRMMI had proposed to modify the Ponce to add, among other things, a second side ramp so that the vessel would meet the stated requirement for port and starboard side ramps. The proposed modifications, however, would take several months; PRMMI's proposal therefore did not meet the "as is" requirement. PRMMI filed a third protest against the rejection.

After PRMMI filed its third protest, we held a hearing in part to address the agency's basis for the "as is" requirement for port and starboard side ramps. At the hearing, PRMMI pointed out that it had read the solicitation to require ramps on both the port and starboard sides of the vessel. The agency responded that it was reexamining the solicitation in terms of its actual requirements, stating that "it may be that our intent was that a ship could have a ramp on either side, not both."

After the hearing, MarAd filed its report on PRMMI's third protest. In the report, MarAd asserted that the RFP clearly required only one side ramp. MarAd argued that it was PRMMI's own misinterpretation of the ramp requirement, not any improper action by the agency, that caused PRMMI to submit a proposal that did not comply with the "as is" requirement.² In response to this argument, PRMMI filed a

²MarAd also argued that PRMMI is not an interested party to challenge the rejection of its proposal, since its failure to meet the "as is" requirement rendered it ineligible for award. To the contrary, since PRMMI has asserted that it could have submitted a proposal that met the "as is" requirement if it had known what the agency's actual

fourth protest, alleging that the solicitation clearly required both port and starboard side ramps, and that the agency had improperly changed its requirements without amending the RFP to reflect them.'

RFP STATEMENT OF AGENCY'S NEEDS

When an agency discovers, after receipt of proposals, that the competition has been based on defective specifications, it should either resolicit or amend the solicitation to reflect its actual needs. Chromatics, Inc., B-224515, Feb. 17, 1987, 87-1 CPD ¶ 171. We will sustain a protest where the agency failed to notify offerors of its actual requirements, and the protester was prejudiced by the agency's failure. Applied Mathematics, Inc., 67 Comp. Gen. 32 (1987), 87-2 CPD ¶ 395.

As noted above, MarAd's response to PRMMI's protest of the RFP requirement for "port and starboard side port ramps" was that the agency has always required only one side ramp, and that the RFP was clear in that regard. MarAd argues that PRMMI should have known that this was the case because there are no RO/ROs in "as is" condition that have ramps on both sides; it asserts that PRMMI was the only offeror that construed the solicitation to require them. MarAd dismisses PRMMI's reliance on the conjunctive "and" in the stated requirement for port and starboard ramps as a "grammarian approach to procurement law."

We are unpersuaded by MarAd's arguments. The solicitation language requiring "port and starboard side port ramps" clearly expressed a need for at least one ramp on each side of the vessel. We think PRMMI's interpretation of this provision was the only reasonable one; the fact that no other offeror proposed to add a second ramp to its vessel

requirements were, it clearly is an interested party to protest the rejection of its proposal.

MarAd argues that PRMMI's last protest should be dismissed because PRMMI failed to furnish a copy of the protest to the contracting officer within 1 day after filing the protest in our Office, as required by our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1992). We will only dismiss a protest on this basis, however, where the protester's noncompliance prejudiced the agency's ability to respond to the protest allegations. 4 C.F.R. § 21.1(f). Here, we telephoned the contracting officer upon receipt of the protest to request an expedited report responding to the new allegations; at the same time, we sent him a facsimile copy of the protest. We therefore find that the agency was not prejudiced by the protester's omission.

does not establish that PRMMI misread the requirement. Similarly, the fact that there are no "as is" RO/ROs with ramps on both sides does not establish that the RFP did not, by its terms, require them; one of the reasons PRMMI had protested the "as is" requirement was that it restricted competition to vessels that already had ramps on both sides. We conclude that the RFP was defective because it overstated the agency's actual minimum need for only one side ramp.

The record shows that PRMMI was prejudiced by the defective solicitation and the agency's failure to correct it. As noted above, PRMMI proposed to modify the Ponce to add a second side ramp so that the vessel would meet the stated requirement for both port and starboard side ramps. Because PRMMI proposed to modify its ship to meet the RFP's technical requirements, the ship did not meet the "as is" requirement. Upon learning at the hearing of the agency's actual need for only one ramp, PRMMI testified that the Ponce could have met this requirement in its existing configuration. Hearing transcript at 396-7. PRMMI also submitted an affidavit stating that any necessary modifications to the existing ramp could have been completed prior to proposal submission, and at a significant reduction from its proposed price.

MarAd challenges PRMMI's assertion that it could have met the RFP requirements had it known that only one ramp was required, arguing that the Ponce's existing ramp would not meet the requirements without the proposed modifications. This argument is without merit. Since the basis for PRMMI's proposal for extensive modifications to the Ponce was the RFP's stated requirement for two ramps, we do not think that the proposal establishes that its existing ramp cannot meet the RFP requirements without the proposed modifications. Moreover, the real issue here is whether the Ponce could have met the agency's actual requirements at the date of the offer. PRMMI maintains that, had it known that only one ramp was required, it could have completed any modifications it wished to make to the existing ramp before proposals were due. However, since the RFP stated that two ramps were required, PRMMI proposed to make more extensive modifications to the PONCE; its proposal then was rejected for failure to have "the required ramps" on the date of the offer. MarAd has not shown that any modifications necessary to bring the existing ramp into compliance with RFP requirements--if any--could not have been made prior to the offer date. We conclude that PRMMI's proposal was rejected based on a solicitation requirement that overstated the agency's actual minimum needs, and that PRMMI could have submitted a conforming offer had the RFP reflected the agency's actual

requirements. We therefore sustain the protest.⁴ See Chromatics, Inc., supra.

As to PRMMI's objection to the RFP's stated preference for diesel vessels over steam, we find that the preference is reasonably related to the agency's needs, and therefore does not unduly restrict competition. In this regard, the agency has explained that steam vessels are no longer being built and the number of operating steam ships therefore has declined over the years. As a consequence of the industry shift to diesel power, the number of shipboard personnel qualified to operate steam vessels has also declined. While PRMMI has established that there currently are many steam vessels that still perform very well, and plenty of steam-qualified personnel available to run them, we think MarAd is justified in its concern about the age and declining number of steam vessels, and a possible future personnel shortage. We therefore find no basis to object to the preference provision (which, the protester acknowledges, comprises only a maximum of 7 percent of the available technical evaluation points). See Blaesbjerg Marine (Texas), Inc., and Alabama Shipyard, Inc., B-247975.2, Aug. 11, 1992, 92-2 CPD ¶ 95; CardioMetrix, B-234620, May 1, 1989, 89-1 CPD ¶ 415.

BUY AMERICAN ACT

The Buy American Act generally requires that agencies purchase only domestic end products for use within the U.S. 41 U.S.C. § 10a. One exception is where the agency head determines the cost of domestic end products to be unreasonable. 41 U.S.C. § 10d. Under the FAR, price reasonableness of domestic end products is determined by adding an evaluation differential to offers of foreign products. FAR § 25.105. PRMMI alleges that the agency failed to either provide for a Buy American Act evaluation preference for domestic offers as required by FAR § 25.105, or execute a determination under FAR § 25.102(b)(2) not to apply the Act to this acquisition.

MarAd explains that it was not required to evaluate offers in accordance with Buy American Act requirements because the Trade Agreements Act of 1979 (TAA), 19 U.S.C. § 2503 et seq. (1988), exempts this procurement from the Buy American Act. The TAA, in pertinent part, approves the Agreement on Government Procurement, H.R. Doc. No. 96-153, Part I (1979),

⁴Given the agency's actual requirement for only one side ramp, and the protester's assertion that it could have met the requirement at the time of proposal submission, PRMMI's allegation that the RFP should have allowed offerors until the delivery date to complete modifications to their ships is academic.

part of the General Agreement on Tariffs and Trade, April 12, 1979. In general, and subject to certain exceptions, the Agreement provides for equality of treatment of foreign and domestic products in federal procurements. To this end, the TAA authorizes the President to waive discriminatory purchasing requirements (such as the Buy American Act) for "eligible products" from certain foreign countries. Executive Order 12260 delegates to the U.S. Trade Representative the authority both to interpret the Agreement on Government Procurement and to waive purchasing restrictions; the Trade Representative has waived the restrictions. 46 Fed Reg. 1657 (1981). Currently, products valued at more than \$176,000 are "eligible products" exempt from application of the Buy American Act. 56 Fed. Reg. 66117 (1991).

As MarAd points out, the RRF vessels to be acquired here exceed the \$176,000 threshold, and therefore are "eligible products" under the TAA. FAR § 25.403(d)(2), however, exempts from TAA coverage purchases by civilian agencies "indispensable for national security or for national defense purposes, subject to policies established by the U.S. Trade Representative."⁵ MarAd asserts that, even though the RRF vessels might well qualify for the exemption from TAA coverage as indispensable to the national defense, the exemption is "subject to policies established by the U.S. Trade Representative"; MarAd maintains that it therefore must submit a request to the Representative before applying the FAR exemption. MarAd maintains that the exemption for national defense purchases does not apply to this procurement because the agency did not submit a request for the exemption.

The authority to exempt purchases indispensable to the national defense from TAA coverage comes from Article VIII:1 of the Agreement on Government Procurement, which provides:

"Nothing in this agreement shall be construed to prevent any Party (i.e., signatory country) from taking any action . . . which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes."

FAR § 25.403(d)(2) implements this article for civilian agencies by exempting all procurements that are indispensable to national defense or national security, "subject to policies established by the U.S. Trade Representative." The U.S. Trade Representative has not

⁵Department of Defense procurements have a separate exemption in FAR § 25.403(d)(1).

issued policies in this regard or provided specific guidance in this case.⁶ In the absence of some policy established by the U.S. Trade Representative, we are left with an interpretation of the plain language of FAR § 25.403(d)(2), which provides that purchases indispensable to the national defense are exempt from TAA provisions. MarAd's interpretation of the exemption--that it does not apply if the agency does not submit a request to the Trade Representative--is unsupported in the language of the provision itself.

The record here leads to a conclusion that the ships to be acquired for the RRF are indispensable to the national defense. The procurement clearly is defense-related; as noted above, the mobility requirements study found that immediate buildup of the Force is necessary in order to maintain adequate U.S. sealift capacity. MarAd itself states that the exemption, but for Trade Representative agreement, "would seem to apply." We also note that the Department of Defense (DOD) considers all ships to be war material, and excludes ship purchases from Trade Agreements Act coverage. See DOD FAR Supplement (DFARS) § 225.403-70. See also Hung Myung (USA) Ltd., Inc.; Contianertechnik Hamburg GmbH & Co., 71 Comp. Gen. 64 (1991), 91-2 CPD ¶ 434 (items that are listed in DFARS § 225.403-70 are not "war materials"). On this record, and in the absence of any policy or specific guidance in this case from the U.S. Trade Representative, we conclude that what is being purchased here is indispensable to the national defense under FAR § 25.403(d)(2). That being so, this procurement is not exempt from the restrictions of the Buy American Act.

CONCLUSION

We sustain the protest. By letter of today to the Secretary of Transportation, we are recommending that MarAd amend the RFP to reflect its actual need for only one side ramp. MarAd should also amend the solicitation to reflect the applicability of the Buy American Act (see FAR § 25.109), unless it obtains a determination of the U.S. Trade Representative that the procurement is subject to the TAA or obtains a waiver of the Buy American Act as provided in FAR § 25.102(a)(3). MarAd should then accept revised proposals from all offerors (except those that have been eliminated from the competition for failure to meet other

⁶Although MarAd states that Trade Representative policy requires an agreement between MarAd and the Trade Representative that the exemption applies, the record does not reflect such a policy.

requirements).⁷ We also find PRMMI entitled to the costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d).

The protest is sustained.

for James F. Hendon
Comptroller General
of the United States

⁷The record shows that at least two other ships were rejected because they did not have "the required ramps."