



Comptroller General
of the United States

4072712

Washington, D.C. 20548

Decision

Matter of: Bulk Barge Transport, Inc.

File: B-258285; B-258701; B-258702

Date: December 27, 1994

DECISION

Bulk Barge Transport, Inc. protests the award of contracts under request for proposals (RFP) Nos. 211-048-09, 211-048-12, and 211-048-15, issued by the U.S. Agency for International Development (AID) for delivery of bulk tallow to Nicaragua. The protester contends that AID improperly failed to follow statutory requirements for the transport of the tallow on U.S.-flag vessels, failed to award the contracts to small disadvantaged business (SDB) concerns pursuant to a regulatory requirement incorporated into the RFPs, and improperly awarded the contracts to firms lacking qualified vessel capacity and classification.

We dismiss the protests.

The RFPs, issued in August and September 1994, sought proposals to transport various shipments of bulk tallow to Corinto, Nicaragua. The RFPs were issued under Title III of the Agricultural Trade Development and Assistance Act of 1954, as amended, P.L. 480, pursuant to AID's agreement with the government of Nicaragua to provide donated agricultural commodities under a Food for Development Program to assist the rural poor in that country. AID received proposals in response to the RFPs offering both U.S.-flag and non-U.S.-flag vessels. Having determined that AID's statutory minimum U.S.-flag shipment requirements had been satisfied, the agency awarded a contract under each RFP to an offeror of a non-U.S.-flag vessel at prices substantially below that proposed by the offerors of U.S.-flag vessels. These protests followed.

Bulk Barge challenges the agency's awards to other than U.S.-flag vessels and contends that the protester should have received the awards since it offered a U.S.-flag vessel to meet the RFP's requirements. The protester challenges the agency's determination that AID's minimum U.S.-flag shipment requirements have been met. Principally, Bulk Barge believes the agency has incorrectly interpreted cargo preference laws applicable to these procurements as allowing

satisfaction of minimum U.S.-flag shipment requirements on a geographic area and yearly basis rather than on a country-by-country and transaction-by-transaction basis.

The Cargo Preference Act of 1954, 46 App. U.S.C. § 1241(b)(1) (1988), generally requires that at least 50 percent of the gross tonnage of shipments to any foreign nation of materials or commodities from the U.S. Government (without provision for reimbursement) be transported on privately owned U.S.-flag commercial vessels to insure a fair and reasonable participation of such vessels in those cargoes by geographic areas. Shipments of agricultural commodities made pursuant to Title III, P.L. 400, are also subject to a requirement for an additional 25 percent of the gross tonnage to be transported by U.S.-flag commercial vessels; such Title III shipments, as here, are therefore subject to a 75-percent U.S.-flag vessel shipping requirement.

AID contends that the statutory provisions requiring agencies to use U.S.-flag vessels for transport of at least 75 percent of the gross tonnage of commodities shipped pursuant to Title III, P.L. 480, do not, as the protester contends, require a breakdown of shipments for a 75-percent baseline to be met on a country-by-country or transaction-by-transaction basis. Instead, the agency states that it is required by statute, regulation, and agency procedure to report compliance with the stated cargo preference requirements on an annual basis by program, vessel type, and geographic area.

AID contends that it is in full compliance here with the statutory 75-percent U.S.-flag vessel shipping requirement. AID reports that, including each of the currently protested shipments, the agency has utilized U.S.-flag vessels for 75.7 percent of the gross tonnage shipped under the Title III program. As to annual tonnage reporting by vessel type, AID reports that, including these procurements, it has utilized U.S.-flag vessels for 90.8 percent of all tanker tonnage. Further, although the agency states that it is not required to report shipment tonnage on a country-by-country basis, the agency's internal records show that, including the protested procurements, 78.2 percent of Title III shipments to Nicaragua have been transported on U.S.-flag vessels this year. AID states that it expects its current overcompliance with the U.S.-flag vessel percentage requirements will insure annual compliance with the minimum 75-percent tonnage requirement.

In its comments in response to the agency's reports, the protester generally challenges the agency's interpretation of the applicable cargo preference laws as not requiring delineation of agency compliance with the 75-percent gross

tonnage U.S.-flag vessel transport requirements on a country-by-country and transaction-by-transaction basis.¹ We need not address the issue of the agency's interpretation of its cargo preference reporting requirements since the agency has affirmatively provided information from its internal agency records demonstrating its compliance with the 75-percent standard on the bases requested by the protester, and the protester has failed to provide any factual shipping data to persuasively rebut the factual findings presented by AID.²

In its comments in response to the agency reports, Bulk Barge, for the first time, contends that the agency improperly failed to apply certain "Fix American-flag Tonnage First" regulations to these procurements; the protester specifically contests the agency's determination that the quantities of tallow to be transported under each RFP constitute less than full shiploads. The agency, in its response to the protester's comments, states that this protest basis is untimely filed. We agree.

Our Bid Protest Regulations contain strict timeliness requirements for filing protests, i.e., protests must be filed no later than 10 working days after the basis for protest is known or should have been known, whichever is earlier, and protests based on an alleged impropriety in the

¹The protester refers to a letter dated November 10, 1993, in which the Maritime Administration questioned AID's compliance with cargo preference requirements for a period from early 1992 to early 1994. AID responded to this letter explaining that it believes it fully complied with the cargo preference laws. There is no evidence that AID's compliance was other than acceptable and, in any event, these protests concern a new reporting period.

²Bulk Barge also contends that the agency's compliance with the cargo preference tonnage percentage requirements must be determined on a transaction-by-transaction basis. AID points out that the protester has offered no legal basis for its contention. In any event, the record shows that the agency considered each of the protested procurements individually in concluding that even after making the non-U.S.-flag vessel awards protested here, the agency still exceeds the applicable 75-percent compliance requirements. We also dismiss Bulk Barge's challenge of the awards on the basis of each awardee's failure to meet vessel capacity or classification requirements. The protester merely alleges this protest basis without providing any evidentiary support; due to this lack of factual information, the protest challenge does not constitute a valid basis of protest warranting further review.

solicitation must be filed prior to bid opening or the time established for receipt of proposals, 4 C.F.R. § 21.2(a)(1)-(2) (1994); ACCESS for the Handicapped, 68 Comp. Gen. 433 (1989), 89-1 CPD ¶ 458. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Request for Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. To ensure meeting these long-standing timeliness requirements, a protester has the affirmative obligation to diligently pursue the information that forms the basis for its protest. Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177; B-231177.2, July 26, 1988, 88-2 CPD ¶ 86.

Although Bulk Barge knew at the time it filed its protests of the award determinations that the tallow quantities listed in the RFPs were substantially less than general tanker capacity and that the RFP stated that smaller quantities than stated could be required to be shipped, the protester did not seek information regarding the application of the challenged regulations to the RFPs. Since the possibility of a protest of this application issue was apparent at the time of issuance of the RFPs, the protester should have earlier inquired about the matter rather than have waited for the agency report which mentioned the now challenged regulations. A protester who is challenging an award on one ground should diligently pursue information which may reveal additional grounds of protest. See Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63. Where, as here, the protester has not diligently or expeditiously pursued the information that forms the basis for its protest, we will not view the protest as timely filed. Illumination Control Sys., Inc., B-237196, Dec. 12, 1989, 89-2 CPD ¶ 546.

Bulk Barge next contends that since the RFPs incorporated Federal Acquisition Regulation § 52.219-8, concerning business opportunities for SDB concerns, the agency erred in failing to make award to the protester, an SDB. The regulatory provision cited by the protester, however, merely requires certain government prime contractors to establish and maintain adequate small business subcontracting plans providing business opportunities for SDB concerns under potential subcontracts to be awarded by the prime contractor. The RFPs here were not set aside for SDB competition and no preference for award for SDB concerns was provided in the RFPs for consideration by the agency in making the award determinations. This contention therefore

provides no reason to question the reasonableness of the award determinations. See Omni Elevator Co., 71 Comp. Gen. 308 (1992), 92-1 CPD ¶ 264.

The protests are dismissed.

Michael R. Golden

Michael R. Golden
Assistant General Counsel