
United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Crewzers Fire Crew Transport, Inc.

File: B-406601

Date: July 11, 2012

Pilgrim Guinn for the protester.

Azine Farzami, Esq., Department of Agriculture, for the agency.

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DIGEST

1. GAO has jurisdiction to decide a protest of an agency's modification of the price evaluation formula stated in blanket purchase agreements (BPA) where the price evaluation scheme for the BPAs forms the basis for the placement of orders under them.

2. Protest of agency's corrective action to modify BPAs is denied where agency reasonably determined that the modification was necessary to correct an error in the price evaluation formula set forth in the BPAs.

DECISION

Crewzers Fire Crew Transport, Inc., of Apache Junction, Arizona, protests the modification of blanket purchase agreements (BPA) established by the Department of Agriculture, U.S. Forest Service, pursuant to request for quotations (RFQ) No. AG-8371-S-11-7001, for tents used in seasonal fire suppression efforts.

We deny the protest.

BACKGROUND

The RFQ, issued on November 8, 2010, under the BPA procedures of Federal Acquisition Regulation (FAR) subpart 13.3 and the commercial acquisition procedures of FAR part 12, contemplated the establishment of multiple BPAs for a 3-year period against which purchase orders for flame-retardant tents and canopies would be issued by federal and state agencies in the Forest Service's

Southwest Region. See RFQ amend. 7, § B. Vendors were required to submit quotations through the agency's Virtual Incident Procurement (VIPR) system.¹ See id. The quotations were to provide daily, weekly, and monthly prices for each of four tent sizes, including all equipment, transportation to and from a fire incident, setup, and disassembly. Id. The RFQ specified a dollar limitation of \$150,000 for any individual order, and advised vendors that, "[d]ue to the sporadic occurrence of Incident activity, the placement of any orders IS NOT GUARANTEED." Id. (emphasis in original). Vendors were also advised that BPAs would be established on a best value basis with those vendors whose quotations were found to be reasonably priced and technically acceptable. See id.

The RFQ provided that the BPAs would be ranked by price on dispatch priority lists--with the lowest-priced BPA ranked first--according to a cascading small business set-aside procedure, as well as by tent type and dispatch zone.² See id. Vendors were informed that dispatchers would place orders with the vendor ranked first on the dispatch priority list, that is, the vendor offering the lowest-priced tents; if that vendor is unable to fulfill the order, the dispatcher will proceed to the next lowest-priced vendor on the list until the requirement is filled.³ See id.; see, e.g., Crewzers' BPA at 35-36. In this regard, the RFQ provided a formula for evaluating vendors' prices, which was apparently intended to weight the daily and weekly prices more heavily than the monthly price. See RFQ amends. 2, 7, § D.6.2; Agency Report (AR) at 6. When the initial formula failed to capture the agency's intent, due to a typographical error, it was amended.⁴ See RFQ amend. 3, § D.6.2;

¹ VIPR is a web-based application used by the Forest Service to solicit, award, and manage preseason Incident BPAs, known as 'I-BPAs,' for all fire related equipment and services. See Forest Service Acquisition Regulation (FSAR) subpart 4G13.303 (2011), available at www.fs.fed.us/im/directives/fsh/6309.32/.

² The Forest Service's Southwest Region, or Region 3, comprises 11 host dispatch zones throughout Arizona, New Mexico, the Oklahoma panhandle, and parts of Western Texas. See RFQ amend. 7, exhib. L; www.fs.usda.gov/r3.

³ An exception permits dispatchers to order from the closest, locally-available resource in the event of an "initial attack" against a fire. See RFQ amend. 8, at 30.

⁴ The RFQ initially provided the following formula:
((Daily Rate + Weekly Rate/8) x **.07**) + ((Monthly Rate/30) x **.0.3**). RFQ amend. 2, § D.6.2 (emphasis added) (hereinafter, Formula A). As amended, the RFQ provided the following formula:
((Daily Rate + Weekly Rate/8) x **0.7**) + ((Monthly Rate/30) x **0.3**). RFQ amend. 3, § D.6.2 (emphasis added) (hereinafter, Formula B); but see amend. 7, § D.6.2. Formula B corrects the placement of the decimal point in the first multiplier (0.7 versus .07) and the inclusion of two decimal points in the second multiplier (0.3 versus .0.3).

AR at 6. Vendors were advised that the agency would review BPAs annually, at which time vendors could adjust their prices, among other things. RFQ amend. 7, § B.

In May, 2011, BPAs were established with all vendors, including Crewzers, that submitted reasonably priced quotations for technically acceptable resources. Contracting Officer's (CO) Statement at 2. Inexplicably, the BPAs included the initial RFQ formula for evaluating vendor prices (Formula A), rather than the amended formula (Formula B). Compare RFQ amend. 3, § D.6.2 with Crewzers' BPA at 36 and RFQ amend. 7, § D.6.2; see AR at 8; CO's Supp. Statement at 1.

Despite the error in the BPAs, the VIPR system, however, used Formula B to calculate the vendors' prices and rank the BPAs on the dispatch priority lists for the 2011 fire season.⁵ See Agency Response to GAO Interrogatory at 1. On January 12, 2012, the agency discovered that Formula B contained errors, which the agency corrected in the VIPR system (hereinafter, Formula C) without notifying vendors or modifying BPAs.⁶ See id. at 1-2. In other words, the formula that appears in Crewzers' BPA is inconsistent with the actual formula used by the agency to evaluate Crewzers' prices and rank its BPA, and this inconsistency gives rise to this protest.

On February 2, 2012, the agency issued its first annual "rollover" modification notice to review BPAs for the impending 2012 fire season. See CO's Statement at 4; CO's Supp. Statement at 1. Despite the corrections made to the initial RFQ--and the need to use the correct formula in the VIPR system--the "rollover" modification notice again used the initially incorrect price evaluation formula (Formula A). See id.; Crewzers' BPA, mod. 3, at 23, 36. Crewzers submitted revised rates and its BPA was modified by the agency on March 13. CO's Statement at 4; see Crewzers' BPA, mod. 3, at 23. Like its initial BPA, Crewzers' modified BPA provides that its prices will be evaluated according to Formula A. Crewzers' BPA at 36; mod. 3, at 23.

⁵ The BPA estimates that tent resources will be used annually from April 1 to August 31, advises that emergency resource needs cannot be determined in advance, and warns that tent resources could be needed at any time. See Crewzers' BPA at 32-33.

⁶ Formula C, which the agency describes as the correct formula, provides: $((\text{Daily Rate} + \text{Weekly Rate})/8 \times .7) + ((\text{Monthly Rate}/30) \times 0.3)$. Response to GAO Interrogatory at 1-2; see AR at 5-6 (emphasis added). In Formula C, the sum of the daily and weekly rates is divided by 8, whereas in Formula B (as well as in Formula A), only the weekly rate is divided by 8.

On March 29, the agency posted dispatch priority lists for the 2012 fire season. CO's Supp. Statement at 1. Crewzers complained to the CO that, according to the protester's calculations, Crewzers should have ranked first on the dispatch priority lists for type-3 tents in the Tucson and Show Low dispatch zones in Arizona and the Silver City dispatch zone in New Mexico. See id.; Protest at 4-6; infra n.13.

It was in responding to this complaint that the CO discovered that the BPAs, as well as the 2012 "rollover" modification notices, were issued using the original incorrect formula (Formula A). See CO's Statement at 5-6; CO's Supp. Statement at 1-2. The CO, however, informed Crewzers that, despite the fact that the wrong formula was included in the firm's BPA, the correct formula (Formula C) had been used in the VIPR system to evaluate vendors' prices, and therefore the dispatch priority lists for 2012 were accurate. See id. The CO explained to Crewzers that the correct formula was designed to calculate a vendor's price by giving 70 percent weight to the sum of the daily and weekly rates and 30 percent weight to the monthly rate. See id.

Crewzers protested to our Office, arguing that the agency's modification improperly deviated from the price evaluation formula stated in the firm's BPA. See Protest at 1-3. Crewzers complained that the agency failed to notify vendors of the formula change.

Prior to submitting a report in response to the protest, the agency took corrective action by re-issuing the modification notice with the correct formula (Formula C) to allow vendors to submit revised prices, and stated that the agency would issue new 2012 dispatch priority lists for Region 3. See Request for Dismissal at 1-3; exhib. 6, Email to Region 3 Tent Vendors, Reissuance of Rollover Modifications, Apr. 11, 2012; CO's Statement at 5. The agency requested that our Office dismiss the protest as academic. See Request for Dismissal at 1-3.

Because the protester did not agree that the agency's corrective action rendered its protest academic, our Office left the protest open to resolve the dispute about the corrective action--and to do so within the initial protest's 100-day timeframe. Crewzers complains that allowing vendors to submit revised prices after the agency has already posted vendors' 2012 prices will inappropriately subject all BPA holders to "another bidding war" and require Crewzers to lower its rates further to compete for the highest BPA rankings.⁷ Protester's Response to Request for Dismissal at 2.

The agency has stayed execution of the 2012 BPA rollover modifications pending resolution of the protest.

⁷ The BPAs and dispatch priority lists are posted at www.fs.fed.us/business/incident/dispatch.php.

DISCUSSION

Jurisdiction

As a preliminary matter, the Forest Service questions our jurisdiction to decide the protest, arguing that the modification of a BPA concerns a matter of contract administration that is beyond the scope of our bid protest function. See AR at 6-7. The agency contends that our jurisdiction in this regard is limited to whether a modification triggers competition requirements where there is a material difference between the modified contract and the contract as originally awarded. Id., citing, inter alia, DOR Biodefense Inc.; Emergent BioSolutions, B-296358.3, B-296358.4, Jan. 31, 2006, 2006 CPD ¶ 35 at 6. The Forest Service maintains that not only is a BPA not a contract, but that the protested modification does not change the scope of work and only represents a foreseeable, annual change in price rankings. See id. at 7, citing, inter alia, Crewzers Fire Crew Transport, Inc., v. United States, 98 Fed. Cl. 71, 79 (2011) (BPA not a contract but merely framework for future contracts).

Under the Competition in Contracting Act of 1984 (CICA) and our Bid Protest Regulations, we review protests of alleged violations of procurement statutes and regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such awards.⁸ 31 U.S.C. §§ 3551, 3552 (2006); 4 C.F.R. § 21.1(a) (2012). We have found our jurisdiction to encompass objections to agency actions that result in the “award” of instruments that are not in themselves contracts, such as blanket purchasing agreements, which give rise to a binding contract when an order is placed, or rate tenders, which become binding when a government bill of lading is issued. See C&B Constr., Inc., B-401988.2, Jan. 6, 2010, 2010 CPD ¶ 1 (BPA protest);⁹ Abba Int'l, Inc. et al., B-311225.4, Feb. 2, 2009, 2009 CPD ¶ 28 at 4 (rate tender protest); Humco, Inc., B-244633, Nov. 6, 1991, 91-2 CPD ¶ 431 at 3, recon. denied, Department of State--Recon., B-244633.2, Apr. 2, 1992, 92-1 CPD ¶ 339 at 3 (CICA’s broad authority extends to protests of procurements and encompasses acquisition of tenders of service).

⁸ Contrary to Crewzers’ assertion, Comments at 7-8, GAO’s jurisdiction to decide bid protests is not governed by provisions of the Tucker Act, 28 U.S.C. §§ 1346(a), 1491 (2006).

⁹ In C&B Constr., we sustained a protest of the issuance of a task order under a BPA. In that case, we found that the statutory limitation on GAO’s bid protest jurisdiction to review protests of task or delivery order contracts did not apply to the protest of a task order issued under a BPA, because a BPA is not a task or delivery order contract. C&B Constr., supra, at 4-5.

Because the price evaluation formula here forms the basis for the placement of orders under the terms of the BPA, our Office will consider the protest of the agency's modification of the BPA's formula. In this respect, although the BPA itself is not a contract, the terms of the BPA and the agency's ordering procedures provide that the vendor that submits the lowest evaluated price will be the vendor first in line to receive orders. Crewzers' BPA at 35-36; see also Department of State, supra, at 3 (jurisdiction to decide protest of award of tender of service agreement where offeror submitting lowest-price will be first carrier in line for issuance of government bills of lading under solicitation's source selection criteria and agency procedures); Abba Int'l, Inc. et al. supra at 4-5 (considering protest of request for competitive rate tenders that will form basis for placement of government bills of lading); Biblia, Inc., B-403006, Sept. 13, 2010, 2010 CPD ¶ 203 at 3 (jurisdiction over protest of issuance of government bill of lading for one-time shipment where agency issues formal solicitation, provides evaluation factors, and makes best value source selection decision).

Merits of Crewzers' Protest

With regard to the merits of Crewzers' protest, FAR § 13.303-6(b)(1) requires contracting officers to review BPAs at least annually and, if necessary, update BPAs at that time. In this regard, contracting officers are directed to maintain awareness of changes in market conditions, sources of supply, and other pertinent factors that may warrant making new arrangements with different suppliers or modifying existing arrangements. FAR § 13.303-6(b)(2). Moreover, the Forest Service's own procedures provide that the agency will republish BPAs in a timely manner as changes are made to agreements that will affect those documents. See FSAR § 4G13.303-71(5)(h) (2011).

The agency does not dispute that the February 2, 2012, "rollover" modification notice soliciting revised prices from BPA holders, including Crewzers, identified a price evaluation formula that was in fact not used in the agency's price evaluation. See Request for Dismissal at 1-3; CO's Statement at 4.

It is generally improper for an agency to solicit offers on one basis and then make award on a materially different basis. See, e.g., Cross Match Tech., Inc., B-293024.3, B-293024.4, June 25, 2004, 2004 CPD ¶ 193 at 6 (agency's intent to subsequently modify BPA to remove improper pricing does not alter fact that BPA as issued included noncompliant pricing inconsistent with basis upon which RFQ was issued), citing Cellular One, B-250854, Feb. 23, 1993, 93-1 CPD ¶ 169 at 4 (while small purchases under FAR part 13 are not governed by normal competition procedures, all procurements, including small purchases, must be conducted consistent with concern for fair and equitable competition and protest sustained where agency solicited quotations on one basis but made award on a materially different basis). Here, the record shows that, contrary to the FAR and FSAR, the Forest Service altered the formula for evaluating BPA prices on January 12, 2012,

without modifying Crewzers' BPA, updating the formula in the February solicitation, or otherwise informing the protester (or apparently any other BPA holder) of the formula change.¹⁰

Corrective Action

It is in response to these procurement errors that the agency proposes to take corrective action. As discussed above, the agency has re-issued the modification notice with the correct pricing formula (Formula C), will allow vendors to submit revised prices, and will issue new 2012 dispatch priority lists for Region 3.

As a general rule, agencies have broad discretion to take corrective action when they determine that such action is necessary to ensure a fair and impartial competition. Northrop Grumman Info. Tech., Inc., B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3; Greentree Transp. Co., Inc., B-403556.2, Dec. 7, 2010, 2010 CPD ¶ 293 at 2. The details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. KNAPP Logistics Automation, Inc.-- Protest and Costs, B-404887.2, B-404887.3, July 27, 2011, 2011 CPD ¶ 141 at 3; Partnership for Response and Recovery, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 at 3. Moreover, we will not object to an agency's corrective action where the agency discovers an obvious error in the evaluation of offers and corrects the error by reassessing offers. See Mid Pacific Env'tl., B-283309.2, Jan. 10, 2000, 2000 CPD ¶ 40 at 6.

The Forest Service explains that it is correcting its price formula because the incorrect formula gives improper weight to vendors' daily and weekly rates. AR at 6; see Request for Dismissal at 1-3. The agency also contends that reissuing the rollover modification with the correct formula will provide fairness to vendors who may have relied on the incorrect formula. See id.; exhib. 6, Email to Region 3 Tent Vendors, Reissuance of Rollover Modifications, Apr. 11, 2012. The Forest Service argues that modifying the price evaluation formula will not prejudice Crewzers, but puts all tent vendors on a level playing field, allowing them to reconsider their prices to try to improve their respective BPA rankings. See AR at 9; CO's Statement at 6. The agency also points out that all vendors have access to their competitors' rates. AR at 9; see supra n.7. Moreover, the Forest Service contends that, as provided by FAR part 13 and FSAR § 4G13.303-70(3)(g), as well as the terms of the BPA,

¹⁰ In contrast, the record shows that the agency issued an amendment on April 4, 2011, after BPAs were established, notifying BPA holders of several changes to the requirements and stating that the "changes will be pending for all awarded agreements, and will be incorporated into the next modification issued by the Contracting Officer." See RFP amend. 8, at 19.

vendors were on notice of the potential modification at issue and that it was foreseeable that vendor rates and BPA rankings would change. See AR at 7. The agency also argues that Crewzers knew or should have known that the formula in Crewzers' BPA was inconsistent with the formula in the amended RFQ and that Crewzers had an affirmative duty to inquire about the inconsistency.¹¹ See id. at 8.

We find that the agency's decision to amend the BPAs to correct the price evaluation formula was well within the broad discretion afforded to contracting agencies to take corrective action to ensure a fair and impartial competition. To the extent that Crewzers protests the modification of its BPA after the agency has already posted vendors' 2012 prices, an agency's request for revised price offers is not improper merely because the protester's price has been exposed where the corrective action taken by an agency is otherwise unobjectionable.¹² See, e.g., Jackson Contractor Group, Inc., B-402348.2, May 10, 2010, 2010 CPD ¶ 154 at 2. The protester fails to show how it is unreasonable or improper to correct the pricing formula here and permit vendors to submit new price quotations. Moreover, all of the BPA holders here will be afforded the same opportunity to revise their prices.

In sum, although Crewzers objects to the agency's corrective action, it has not shown that amending the BPA is contrary to procurement law or regulation. The possibility that a contract may not have been awarded based on a fair determination of the most advantageous proposal has a more harmful effect on the integrity of the

¹¹ The agency maintains that using the .07 multiplier as suggested by Crewzers, Protest at 7, assigns an improper weight to the daily and weekly rates, and is unworkable. See AR at 9; Request for Dismissal at 2.

¹² In its comments, the protester argues for the first time that the agency may not modify Crewzers's BPA based on FAR § 52.212-4(c), which the BPA incorporated by reference and provides that changes in contract terms and conditions may only be made by written agreement of the parties. Comments at 1-2, citing Protester's BPA at 1. This argument is not only untimely, but also lacks merit. Under our Regulations, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2012). Where a protester initially files a timely protest, and later supplements it with independent protest grounds, the later-raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. See, e.g., Crewzers, B-402530.4, Nov. 9, 2010, (dismissing protest because Crewzers' piecemeal arguments disrupt procurement process). Moreover, as discussed above, a BPA is not a contract, and FAR § 52.212-4(c) is more appropriately viewed as applying to orders placed under the BPA, rather than the BPA itself. See, e.g., Crewzers, 98 Fed. Cl. at 80 (FAR provision governs in event order is issued).

competitive procurement system than does the possibility that the original awardee, whose price has been properly disclosed, will be at a disadvantage in the reopened competition.¹³ See id. at 3; see also Hyperbaric Tech., Inc., B-293047.2, B-293047.3, Feb. 11, 2004, 2004 CPD ¶ 87 at 4-5 (agency properly decided to amend a solicitation evaluation scheme to remedy defect in scoring methodology's weighting of evaluation factors since it is fundamental that offerors be advised of the bases upon which their proposals will be evaluated).

The protest is denied.

Lynn H. Gibson
General Counsel

¹³ Crewzers also urges that the agency limit its corrective action to recalculating Crewzers prices in the three protested dispatch zones based, not on the correct formula (Formula C), but using a formula that Crewzers modifies to its own benefit based on Crewzers' selective interpretation of the agency's intended formula. Protester's Response at 2; Protester's Supp. Response at 2, 5; Comments at 12. We have considered all of the protester's arguments in this regard and find that they lack merit.