



Office of the General Counsel

B-233643.2

August 16, 1989

W.J. Pollock
Capt., SC, USN
Director Contracts and Business Management
Military Sealift Command
Department of the Navy

Dear Captain Pollock:

This is in response to your request for our opinion regarding the merits of the protest by King's Bay Marine, Inc., which was previously filed in our Office under request for proposals (RFP) No. N00033-88-R-1207, issued by the Military Sealift Command (MSC) for a charter of four specialized tugboats to support the docking and movement of certain nuclear submarines at King's Bay, Georgia. The protest was dismissed under our Bid Protest Regulations, 4 C.F.R. § 21.3(k) (1988), because of King's Bay's failure to timely file comments on the agency report. While we have closed the protest file in this matter, for your information we believe that the protest allegations raised by King's Bay are without merit for the reasons which follow.

King's Bay's primary allegation is that the award to Edison Chouest Offshore, Inc., was improper because the Navy failed to evaluate the ability of offerors to meet the vessel substitution provision under the RFP. While the RFP required only four tugs, because of the uniqueness of the required vessels, King's Bay had proposed to construct a fifth tug which it felt was necessary to satisfy the substitution provision. None of the other eight offerors proposed a fifth, substitute vessel. King's Bay asserts that its cost was significantly increased because of its compliance with the substitution requirement, while MSC essentially waived the requirement with respect to other offerors because MSC did not evaluate proposed substitute vessels.

The substitution provision provides, in relevant part, that:

"In the event that any Tug is placed off-hire, and either Owner or Charterer reasonably expects that said off-hire period shall exceed four (4) hours, Charterer shall have the option to require Owner to substitute another tug"

The provision also contains a number of requirements pertaining to any tug nominated by the owner to be a substitute, including that it shall result in no cost increase, shall have substantially the same characteristics as the tug for which it is substituted, shall be similarly fitted, and shall meet the charterer's minimum requirements.

MSC contends that whether or not an offeror provides an acceptable substitute vessel, if required, constitutes a matter of contract administration, and that the offeror's proposed method of dealing with the substitution requirement did not have to be evaluated under the solicitation. We agree.

The RFP requirement is for four tugs and the evaluation criteria specifically refer to the four required tugs, without reference to any substitute vessels. The substitution provision merely provides the agency with an option to require the contractor to substitute under certain circumstances. The provision does not require exact compliance with the RFP specifications for the four tugs. Rather, it calls for substantial similarity, with the only specific requirement that the substitution will not result in a diminution of the aggregate pull or horsepower of the four tugs in service. That is, a less powerful tug will not be an acceptable substitute vessel. The substitution provision also explicitly indicates that the substitute tug may be proposed at the time that the need arises, and that information concerning the proposed substitute tug may be provided at that time. It also provides that the agency may reject the proposed substitute tug if it is unsuitable.

In our view, the provision merely provides MSC with the option to require the awardee to tender a substitute tug, the acceptability of which MSC will determine at the time that the proposed tug is tendered. Offerors were not required to nominate a substitute tug in their proposals, and there was no evaluation of possible substitute tugs. This is analogous to an offeror's substitution of personnel after award of a contract. In personnel substitution cases where, as here, agency approval of the qualifications of the substitute is required, we have held that evaluation on the basis of the offer as submitted (i.e., on the basis of specified nominees, not considering substitutes) is appropriate, and the question of the qualifications of the substitute is simply a matter of contract administration. Management Eng'g., Inc.; KLD Assocs., Inc., B-233085 et al., Feb. 15, 1989, 89-1 CPD ¶ 156; A.B. Dick Co., B-233142, Jan 31, 1989, 89-1 CPD ¶ 106. If, during the performance of the contract, MSC requires a substitute tug, the awardee is obligated to provide an acceptable substitute and its

compliance with the request would be considered at that time as a matter of contract administration. Under the RFP, MSC was not required to evaluate the substitute vessels which an offeror may have planned to nominate.

King's Bay next contends that its proposal should have been included in the competitive range because its price was high only because of its inclusion of the fifth, substitute, vessel for which it did not receive appropriate evaluation credit. MSC did not include King's Bay's proposal in the competitive range because it determined that the proposal was so much higher-priced relative to the three offers which were included in the competitive range, that King's Bay's proposal did not have any reasonable chance of being selected for award.

We agree that MSC properly determined to exclude King's Bay's proposal from the competitive range, even though the proposal was apparently technically acceptable, essentially because of King's Bay's high price. As indicated above, King's Bay's proposed method of satisfying the substitution requirement was not for evaluation under the RFP, therefore MSC reasonably did not give King's Bay credit in this regard. The competitive range consists of those proposals that have a reasonable chance of being selected for award. Consolidated Eng'g., Inc., B-228142.2, Jan. 13, 1988, 88-1 CPD ¶ 24. The decision in that regard is to be based on cost or price as well as on the technical considerations set out in the solicitation. Federal Acquisition Regulation § 15.609(a) (FAC 84-16). We therefore have held that even a technically acceptable proposal properly may be excluded from the competitive range where the price is so much higher than the other acceptable offeror's prices that the higher-priced offeror has no real chance of winning the competition. See Coastal Elect., Inc., B-227880.4, Feb. 8, 1988, 88-1 CPD ¶ 120; Media Int'l. Corp., B-233195, Dec. 20, 1988, 88-2 CPD ¶ 607. Here, King's Bay's evaluated price was almost 50 percent higher than the highest price of the three offers which were included in the competitive range. Under these circumstances, we agree that King's Bay's price was sufficiently high that MSC reasonably concluded not to include King's Bay in the competitive range on the basis that it had no reasonable chance of being selected for award.

King's Bay also alleges that the awardee's proposal was unbalanced because its rate was substantially higher during the base period than it was during the option periods. However, under our Bid Protest Regulations, we only will consider a protest by an interested party, *i.e.*, an actual or prospective offeror whose direct economic interest would

be affected by the award of a contract or the failure to award a contract. 4 C.F.R. §§ 21.0(a), 21.1(a) (1988). A party is not entitled to maintain a protest if it would not be in line for award if its protest were sustained. Here, the record establishes that King's Bay was properly excluded from the competitive range and there were two offerors other than the awardee which were included in the competitive range. Under these circumstances, King's Bay would not have been next in line for award even if we had determined that the awardee's bid was unbalanced; therefore, King's Bay is not interested to raise this protest issue. State Technical Institute at Memphis, 67 Comp. Gen. 236 (1988), 88-1 CPD ¶ 135; Dynalectron Corp.--PacOrd, Inc., B-217472, Mar. 18, 1985, 85-1 CPD ¶ 321. Accordingly, we will not address this allegation since we would not have considered it in our bid protest decision if King's Bay had timely commented.

Yours truly,



Seymour Efros
Senior Associate General Counsel