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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Intermarkets Global

File: B-400660.12; B-400660.13

Date: May 6, 2011

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Eric J. Marcotte, Esq., Scott Schipma, Esq., Bryant E. Gardner, Esq., and Ralph V. Pantony III, Esq., Winston & Strawn LLP, for Anham FZCO, LLC, an intervenor.
Jeremiah Kline, Esq., Gale Furman, Esq., and Catherine Kellington, Esq., Department of Defense, for the agency.
Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where protester's final proposal revision included statement effectively repudiating its price proposal, agency reasonably determined proposal was unacceptable.
 2. Protester's speculation that firm was in violation of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 is insufficient to meet burden of raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information.
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DECISION

Intermarkets Global (IMG), of Amman, Jordan, protests the Department of Defense, Defense Logistics Agency's (DLA) award of a contract to Anham FZCO, LLC, of Dubai, United Arab Emirates, under request for proposals (RFP) No. SPM300-08-R-0061, for the supply of a full service food line in Kuwait, Iraq, and Jordan. IMG challenges the conduct of discussions, evaluation of proposals, and award determination.

We deny the protest.

BACKGROUND

The RFP, issued May 2, 2008, provided for award of an indefinite-delivery, indefinite-quantity, fixed-price contract, for a base period of 18 months with four option periods, to serve as a full line food distributor responsible for the supply and delivery of semi-perishable and perishable items to the military and other federally funded customers within Kuwait, Iraq, and Jordan. Award was to be made on a “best value” basis, with technical factors significantly more important than price. Prices—including prices for products and distribution—were to be evaluated for completeness, reasonableness, and balance. In addition, the RFP advised that proposals found unrealistically low in price could be viewed as lacking understanding of the RFP’s requirements. RFP at 148.

After a number of amendments and three protests against the terms of the solicitation, IMG, Anham, and KGL, submitted proposals by the September 1, 2009 closing time.¹ Based on Anham’s higher technical rating and lower price, DLA awarded the contract to Anham on April 14, 2010. IMG and KGL protested the award, challenging the evaluation of proposals, conduct of discussions, and price realism analysis. On May 7, DLA executed an override of the resulting stay of contract performance based on urgent and compelling circumstances significantly affecting the interests of the government.

On July 20, GAO conducted an outcome prediction alternative dispute resolution (ADR) conference in which the cognizant GAO attorney indicated that GAO likely would sustain the protests on the basis that the agency’s price realism determination was unreasonable. The GAO attorney also raised concerns about several aspects of the solicitation requirements and related technical evaluation—including the force protection requirements and evaluation of warehouse capacity—but indicated that these concerns would not serve as additional bases for sustaining the protests. Based on DLA’s determination to take corrective action—reopening limited discussions on specific issues, requesting revised proposals, and making a new source selection decision—we dismissed the protests as academic (B-400660.4 *et al.*, July 22, 2010).

DLA initially limited the ensuing discussions to requesting a detailed explanation (with supporting documentation) as to how the offerors would satisfy the normal delivery requirements under their proposed prices. Subsequently, DLA issued an amendment to the RFP clarifying the assumed size of the required warehouse pallets (the estimated minimum number of which previously had been disclosed) and the extent of the RFP’s force protection requirements. RFP amend. 26. Offerors were

¹ A fourth offeror submitted a proposal but was eliminated from the competition after it was suspended from government contracting and placed on the Excluded Parties List System.

also advised that they could submit a final proposal revision (FPR) addressing these areas, but were cautioned that other revisions to their technical proposals were prohibited. Request for FPRs, Oct. 20, 2010, at 2. In addition, offerors were advised as follows:

Price revisions are prohibited unless you can provide documented evidence, including a narrative explanation, showing a direct link, with supporting cost-type information, between changes in your proposal resulting from these . . . clarifications and the proposed pricing.

Id.

Both KGL and IMG protested the agency’s corrective action. KGL’s protest was dismissed based on our finding that DLA’s approach of addressing price realism before clarifying the agency’s requirements did not demonstrate undue delay, bad faith, or otherwise furnish a basis to question the corrective action (B-400660.9, Dec. 14, 2010). We denied IMG’s protest that offerors should have been given the opportunity to generally revise their proposals, finding that DLA’s limits on technical and price revisions during the corrective action were appropriate to remedy the concerns identified during the prior ADR conference.² Intermarkets Global, B-400660.10, B-400660.11, Feb. 2, 2011, 2011 CPD ¶ 30 at 3.

The agency evaluated the offerors’ revised proposals, including conducting a price realism analysis, resulting in the following consensus ratings:

Factor	IMG	Anham	KGL
Overall	Fair	Good	Good
Distribution System	Good	Good	Good
Experience/Past Performance	Poor	Fair	Fair
Customer Support	Fair	Good	Excellent
Surge/Sustainment	Fair	Excellent	Excellent
Socioeconomic Goals (Rank)	3	1	2
AbilityOne Support (Rank)	2	1	3
Proposed Price (in billions)	\$2.69	\$2.15	\$2.38

Although KGL’s proposal was rated higher under the customer support factor, the source selection authority (SSA) considered KGL’s proposal to be relatively equal to Anham’s, and he determined that paying the price premium associated with the

² IMG’s protest also asserted that DLA conducted unfair and unequal discussions with Anham and improperly allowed Anham to change the membership of its proposed contract team. Our decision did not address these issues because we viewed them as premature.

proposal was not in the government's best interest. With regard to IMG, the SSA noted that its price was the highest and its technical rating was the lowest of the three offerors. In addition, the SSA agreed with the evaluators' finding that IMG's proposal was unacceptable because the offeror had withdrawn its prior pricing proposal without submitting a replacement. In these circumstances, the SSA determined that Anham's proposal represented the best value. Upon learning of the resulting award to Anham, and after a debriefing, IMG filed this protest.

DISCUSSION

IMG protests the conduct of the procurement and award to Anham on numerous grounds, including challenges to the evaluation of Anham's and IMG's proposals, unequal discussions, and an alleged, improper change in Anham's proposed team.

Interested Party Status

The agency requests dismissal of the protest, asserting that IMG withdrew or qualified its price proposal thereby rendering IMG's proposal unacceptable. As such, it maintains that IMG would not be an interested party to pursue its remaining protest grounds. IMG denies that it withdrew or qualified its price proposal, and asserts that, in any case, it would remain an interested party because it has also protested the conduct of discussions and KGL's responsibility.

In order for a protest to be considered by our Office, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. Bid Protest Regulations, 4 C.F.R. §§ 21.0(a)(1), 21.1(a) (2010); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A protester is an interested party to challenge the agency's evaluation of proposals where there is a reasonable possibility that the protester's proposal would be in line for award if its protest were sustained. Ridoc Enter., Inc., B-292962.4, July 6, 2004, 2004 CPD ¶ 169 at 9. As discussed below, the record shows that IMG is ineligible for award for failing to offer the required firm fixed-price proposal, and that there is another proposal besides the awardee's eligible for award. Thus, IMG is not an interested party to challenge the award. See Advanced Health Sys.-Recon., B-246793.2, Feb. 21, 1992, 92-1 CPD ¶ 214 at 3.

IMG's Withdrawal of its Price Proposal

As an initial matter, we find that the agency reasonably evaluated IMG's proposal as unacceptable. In this regard, the RFP provided for the award of a fixed-price contract including fixed distribution prices and product prices which were subject to economic price adjustment. RFP at 71-72, 179. Where, as here, a solicitation requires fixed prices, a proposal that fails to offer fixed prices cannot be considered for award. Philips Healthcare Informatics, B-400733.8 et al., Dec. 2, 2009, 2009 CPD ¶ 246 at 2 (no fixed-price proposed where offeror included line items priced at zero

with qualifications); Optical Sys. Tech., Inc., B-292743.2, Nov. 12, 2004, 2004 CPD ¶ 231 at 6 (no fixed price where offeror included price contingencies).

Here, IMG's FPR discussed at length how the agency's clarification of pallet sizes would impact its storage capacity and requested leave to change its proposed [deleted]. FPR Technical Addendum at I-7. IMG noted that such changes would likely impact its distribution pricing, but conceded that it had "not analyzed thoroughly the impact" of the changes on its previously submitted price and thus, could not predict whether its revised price would be higher or lower. Id. at I-8. Believing that adding new [deleted] would be outside the parameters of the agency's limited discussions/proposal-price revisions, IMG included the following statement in its FPR:

IMG considers that any award made on the cost proposal that IMG submitted in February/March 2010 is invalid as IMG price due to [deleted] changes will have to be revised to take into consideration those changes.

Id. We agree with DLA that IMG's FPR statement effectively repudiated its prior price proposal and removed it from consideration. Thus, in the absence of a firm-fixed-price proposal, the agency reasonably determined that IMG's proposal was unacceptable.³

IMG, however, asserts that, even if its proposal was unacceptable, DLA was required to conduct discussions with it because the agency had conducted more expansive discussions with Anham and had failed to conduct discussions regarding the RFP's estimated dollar values. Since reopened discussions would provide it with an opportunity to revise its proposal, IMG asserts that it would thus remain an interested party. See Veco/Western Alaska Constr., B-243978, Sept. 9, 1991, 91-2 CPD ¶ 228 at 4 (protester is considered interested party where remedy, in case of sustain, would include revised proposals). As discussed below, we find that these arguments do not render it an interested party to challenge the award to Anham.

³ Our conclusion is not changed by IMG's submission of its price analysis response in October 2010. Contrary to IMG's assertion, IMG's October submission explained how IMG would satisfy normal delivery requirements, including pricing assumptions, but it did not replace or serve as a revision to its February/March 2010 pricing proposal. Likewise, the fact that IMG's withdrawal of its price proposal appeared in IMG's "technical submission" does not make it any less a repudiation of IMG's previously proposed price. See Potomac Elec. Corp., B-311060, Apr. 2, 2008, 2008 CPD ¶ 63 at 3 (proposal containing cover letter information that conflicted with offer rendered proposal ambiguous and thus, unacceptable).

Asserted Discussions with Anham

Based on “press reports” and its “understand[ing],” IMG alleges that once Anham began performance of the contract, the contracting officer (accompanied by the SSA, and other high-ranking DLA representatives) made site visits and conducted face-to-face discussions with the awardee on a variety of issues including corporate structure; mobilization status; security operations; warehousing; handling and transportation of pork products; force protection; transportation; and delivery dates. Protest at 17; IMG Comments, Dec. 13, 2010, at 9. IMG asserts that, in contrast, its limited discussions with the agency were unequal. According to the protester, if it had had the opportunity for broader discussions, it could have significantly improved its ratings. Protest at 18.

We find IMG’s position unpersuasive. At the time of the alleged unequal discussions, Anham was the performing contractor. DLA explains that its meetings with Anham concerned matters of contract administration—such as invoice payment, deliveries to forward operating bases, storage of government furnished material, and the roles and responsibilities of personnel involved. Agency Report, Dec. 1, 2010, at 21. The agency also denies that anything discussed concerned Anham’s proposal or the corrective action then underway. *Id.* IMG has furnished no basis for us to question the agency’s explanation that the communications with Anham concerned matters of contract administration. In these circumstances, we find that IMG’s speculation regarding possible unequal discussions does not serve to establish its interested party status.

Estimates

IMG asserts that the agency improperly failed to conduct discussions regarding the solicitation’s estimated dollar values. Specifically, IMG notes that the RFP provided an estimated dollar value for the base and each option period, and included the following note:

The above estimated dollar values were developed using current contract data adjusted by troop strength projections as a result of the Status of Forces Agreement (SOFA), effective January 01, 2009. They are subject to be increased or decreased based on the actual conditions on the ground. The estimated dollar values will be verified by the government prior to award of any contract resulting from this solicitation. Upon verification, if there is a substantial change to any of the stated estimated dollar values, the solicitation will be amended. In such an event, offerors will be notified and provided an opportunity to make appropriate proposal revisions.

RFP at 70. Based primarily on the award to Anham at a proposed price approximately 30% lower than the RFP estimate of \$3.145 billion, IMG asserts that either DLA did not “validate” its estimate as required by the RFP, or the agency knew its needs and estimate had changed, but failed to revise the RFP or to disclose that information to offerors. IMG Response to Motion to Dismiss at 11. As support for its assertion that the estimates were flawed, IMG points to news reports indicating that the government intended to remove all troops from Iraq by the end of December 2011, and notes that DLA had recently canceled another Kuwait warehousing solicitation because its needs had changed. Supplemental Protest at 6-7; Comments on Agency Response at 8 n.3.

DLA denies that the agency’s needs have changed substantially such as to require an amendment to the RFP to reflect changed estimates. Under the terms of the RFP, there was no requirement to amend the solicitation unless there was a substantial change. RFP at 70. According to DLA, the 2009 estimates were based on the anticipated changes in troop strength as a result of the January 1, 2009 SOFA, Iraq Security Agreement. DLA reports that since their inclusion in the RFP, there have been no significant changes to the reduced troop strength projections used to develop the estimates. Declaration of Integrated Supplier Team Chief, Apr. 20, 2011, ¶ 6. As further support for the accuracy of the RFP’s estimates, the agency explains that from November 2010 to March 2011, the monthly quantities of items being ordered and the number of troop personnel being fed were consistently in line with the RFP’s estimates. *Id.* ¶ 7. In addition, we note that the RFP covers food distribution services for other federally funded entities and not just military personnel. RFP at 47. In this regard, in support of its need to override the stay of contract performance, DLA advised that “it is imperative that [there be] no interruption to subsistence support in Iraq [due to] a devastating effect on approximately 50,000 troops and 60,000 contractors at more than 70 locations throughout the area of responsibility.” Memorandum for DLA-Troop Support, Philadelphia, Pennsylvania, Mar. 24, 2011.

We need not decide whether the agency’s needs have changed substantially since IMG’s assertion that the RFP’s estimates were overstated, such as to require revision, is untimely. A protest based on alleged improprieties in a solicitation must be filed no later than the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Where alleged improprieties which do not exist in the initial solicitation are subsequently incorporated into the solicitation, they must be protested by the next closing time for receipt of proposals. *Id.*

Here, the record shows that IMG knew or should have known of this basis of protest prior to the closing date (November 17, 2010, as extended) for receipt of FPRs. In this regard, the RFP put IMG on notice that the revised, 2009 solicitation estimate was based on the January 2009 SOFA. RFP at 70. Further, one of the press reports relied upon by IMG as evidence of an expected change in DLA’s requirements is dated July 21, 2010 (<http://www.defense.gov/news/newsarticle.aspx?id=60110>).

Furthermore, when DLA amended the RFP concerning force protection and pallet sizes, it informed offerors that revisions to their technical and price proposals were restricted to “these specific areas”; that “upon receipt of [their FPRs], discussions on [the RFP were] concluded”; and that the agency “intends to make an award decision without obtaining further revisions.” Request for FPRs, supra. Since neither the RFP amendments nor the FPR request identified any changes in the estimates, IMG was on notice that DLA did not intend to revise the estimates but instead would use them in making the new source selection. Thus, any protest of the estimates’ accuracy should have been filed not later than the closing time for receipt of FPRs, and IMG’s post-award protest raising this issue is untimely.⁴

KGL’s Responsibility

IMG asserts that, notwithstanding any unacceptability of its proposal, it nevertheless is an interested party because neither of the two other offerors was eligible for award.

Regarding KGL, IMG asserts that the contracting officer failed to consider relevant information reflecting KGL’s lack of responsibility. This information concerns KGL’s activities and relationships which allegedly violate the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, (Act), 50 U.S.C. § 1701, Pub. L. No. 111-195, and would prevent KGL from meeting the Act’s requirements to certify that it conducts no sanctionable activities. Specifically, IMG alleges that KGL has been involved in a joint venture with an Iranian shipping concern (designated by the Treasury Department as engaging in activities related to the proliferation of weapons of mass destruction (Executive Order 13382)) and that, if KGL is engaged in delivering refined petroleum products to Iran, it would be ineligible for government contracts under the Act’s provisions. Congressional Letter to Secretary of Defense, July 14, 2010 (Protest attach. 1 at 1); KGL Mar. 2011 e-mails (Protest, attach. 2).

Our Office does not review affirmative determinations of responsibility, except where the protest alleges that definitive responsibility criteria in the RFP have not been met or identifies evidence “raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information.” 4 C.F.R. § 21.5(c); MD Helicopters, Inc.; AgustaWestland, Inc., B-298502 et al., Oct. 23, 2006, 2006 CPD ¶ 164 at 41, n.40. Here, the agency maintains that KGL is responsible (Motion to Dismiss at 5) and the only negative responsibility information alleged by IMG concerns KGL’s supposed activities with certain Iranian entities. We conclude that IMG has not met its burden

⁴ While IMG filed a protest and a supplemental protest concerning the corrective action prior to the extended closing date of November 17, it did not protest the lack of any change to the estimates.

of showing that the contracting officer unreasonably failed to consider relevant information.

While the Act prohibits the government from procuring or entering into a contract for procuring any goods or services from a sanctioned person (Act § 6(a)(5)), IMG has submitted no evidence that KGL has been sanctioned under the terms of the Act.⁵ Further, only certain activities may be sanctioned. For example, with regard to delivery of refined petroleum products to Iran, an entity must sell or provide refined petroleum products with a fair market value of \$1 million or more or an aggregate value of \$5 million during a 12-month period. Act § 5(a)(3)(i). IMG has furnished no evidence that KGL has engaged in activities of this magnitude. In addition, the requirement that a prospective government contractor certify that it has not engaged in sanctionable activities does not apply to this procurement. In this regard, the Act's requirement that the Federal Acquisition Regulation (FAR) be revised to provide for such certifications (Act § 6(b)(1)) only applies to contracts for which solicitations are issued on or 90 days following the Act's July 1, 2010 enactment (*Id.*, § 6(b)(7)). Here, the RFP was issued more than 2 years before the applicable date.

IMG, however, asserts that apart from whether KGL's alleged activities would warrant sanctions under the Act, they demonstrate a lack of responsibility that would preclude award to KGL. Response to Motion to Dismiss at 16; FAR § 9.103(b). DLA, however, reports that KGL has made public representations that it has terminated any relationships that would violate the Act. Motion to Dismiss at 6. While DLA has provided KGL's e-mails to the cognizant Department of Defense activity for investigation, until the allegations are shown to reflect negative responsibility information, IMG's speculation is insufficient to meet its burden of showing that the contracting officer failed to consider relevant information.

Under these circumstances, there is no basis to question the contracting officer's conclusions regarding KGL's responsibility and its position as next-in-line for award

⁵ Under the terms of the Act, upon receipt by the United States of credible information indicating that an entity is engaged in activity described in section 5(a) of the Act, the President is required to initiate an investigation into the possible imposition of sanctions. Act § 4(e)(1). Not later than 180 days after an investigation is initiated, the President is required to determine if the entity is engaged in a sanctionable activity and notify the appropriate congressional committees of the basis for the determination. *Id.* § 4(e)(2). Sanctionable activities include specified assistance in developing Iran's petroleum resources, production of refined petroleum products in Iran, exporting refined petroleum to Iran, and assistance to Iran in developing weapons of mass destruction. *Id.* § 5(a)-(b).

if Anham were found ineligible. Thus, IMG is not an interested party to question the evaluation of Anham.

The protest is denied.

Lynn H. Gibson
General Counsel