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Washington, DC 20548

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## Decision

**Matter of:** Maersk Line, Limited

**File:** B-410280

**Date:** December 01, 2014

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Robert E. Korroch, Esq., and William A. Wozniak, Esq., Williams Mullen, for the protester.

Kelly E. Rogers, Esq., Gordon D. Ivins, Esq., and Robert M. Elwell, Esq., Department of the Navy; and John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.

Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that the agency unreasonably concluded that the provisions of Federal Acquisition Regulation part 19 applied to the procurement is denied where the agency reasonably determined that the contract will be performed within the United States and its outlying areas.
  2. Protest challenging the agency's decision to use a tiered evaluation approach for small business set-asides in its solicitation is denied where the agency's decision was reasonably based on its conclusion, prior to issuance of the solicitation, that the agency's market research was inconclusive regarding the likelihood the agency would receive proposals from two or more small business concerns.
  3. Protest that the agency should not have amended the solicitation to make it a total small business set-aside is denied where, consistent with the terms of the solicitation, the agency reasonably concluded that it received two or more offers from responsible small business concerns that are competitive in terms of price, quality, and delivery.
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### DECISION

Maersk Line, Limited, of Norfolk, Virginia, a large business, protests the terms of request for proposals (RFP) No. N00033-14-R-3201, issued by the Department of the Navy, Military Sealift Command (MSC), for multimodal cargo transportation services. Maersk challenges the agency's decision to conduct the procurement in

accordance with the small business set-aside requirements of Federal Acquisition Regulation (FAR) part 19, argues that the solicitation improperly utilizes a tiered evaluation approach, and contends that the agency improperly reserved the acquisition for small business concerns.

We deny the protest.

## BACKGROUND

On March 18, 2014, MSC issued a market survey requesting information on the cost and availability for two self-sustaining U.S. flag vessel alternatives.<sup>1</sup> Three large business concerns, including Maersk, and two small business concerns responded to the market survey. Agency Report (AR), Tab A2, Market Survey Response Table, at 1. Thereafter, due a potential change in the Army's requirement, MSC issued a second market survey on May 6, requesting information on the cost and availability of a single, larger vessel.<sup>2</sup> Contracting Officer (CO) Statement at 2. One additional small business concern responded to the second market survey, but proposed a vessel that was responsive to the requirement specified in the first market survey. Id. The Army requirement ultimately was for a smaller ship, similar to those described in MSC's initial market survey. Id.

The contracting officer evaluated the information in the responses to the market surveys, and concluded that "[t]he market research . . . was inconclusive with respect to the likelihood that two or more offers that are competitive in terms of market prices, quality, and delivery will be received from responsible small business concerns."<sup>3</sup> AR, Tab B1, Acquisition Plan, at 17. Based on this conclusion, the

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<sup>1</sup> Specifically, the market survey requested the following information regarding the following two vessel alternatives: (1) two self-sustaining, U.S. flag vessels capable of carrying a total of 4,800 ammunition laden 20-foot equivalent units (TEUs) with each vessel capable of carrying a minimum of 2,400 TEUs; or (2) two self-sustaining, U.S. flag vessels capable of carrying a total of 2,400 ammunition laden TEUs with each vessel capable of carrying a minimum of 1,200 TEUs. AR, Tab A1, Market Survey (Mar. 18, 2014), at 1.

<sup>2</sup> This survey contemplated a vessel capable of carrying a total of 3,000 ammunition laden TEUs. AR, Tab A4, MSC Market Survey (May 6, 2014), at 2.

<sup>3</sup> None of the small business concerns that responded to the market surveys were Historically Underutilized Business Zone (HUBZone) small business concerns, service-disabled veteran-owned small business (SDVOSB) concerns, or women-owned small business concerns. AR at 7. The contracting officer explains that, based on her experience, there are no such entities offering vessels of the required size for MSC time charters, and as such, she did not expect to receive any proposals from small disadvantaged businesses. CO Statement at 2.

contracting officer determined that the use of a tiered or cascading evaluation of offers would be appropriate in an effort to promote small business participation. Id. The agency's small business specialist agreed with this determination. CO Statement at 2-3.

On July 8, the agency issued the solicitation with a tiered evaluation approach, seeking a time charter of one U.S. flag containership for the transportation and/or prepositioning of cargo for the Army, Air Force and U.S. Marine Corps. RFP at 123; AR, Tab B1, Acquisition Plan, at 5. The solicitation anticipates the award of a fixed-price charter, with cost reimbursable elements, for a base period of 4.5 months, with four 12-month options, and one 6.5-month option. RFP at 8, 119. The total estimated value of the procurement is \$[DELETED]. CO Statement at 1.

The RFP provides for award on a lowest-priced, technically-acceptable basis, considering the following three factors: (1) technical, (2) past performance, and (3) price. RFP at 124. The solicitation includes a Voluntary Intermodal Sealift Agreement (VISA)<sup>4</sup> priority preference in accordance with Department of Defense (DOD) Instruction 4500.57, and states that: "Where two or more offers meeting the requirements of the solicitation and representing fair and reasonable price are in the same VISA priority category, award will be made to the lowest priced offer among them." Id. at 123.

With regard to the tiered evaluation scheme, the RFP explains the tiered evaluation process as follows:

If the government receives offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery; no offers received from other than small business concerns will be considered for award. In such event, FAR provision 52.219-6 (Notice of Total Small Business Set-Aside) shall be considered incorporated by reference.

If the Government does not receive offers from two or more responsible small business concerns that are competitive in terms of market price, quality, and delivery; all offers, including offers from other than small business concerns, will be considered for award.

Id. at 123.

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<sup>4</sup> The VISA program is a partnership between the U.S. government and the maritime industry to provide the DOD with assured access to commercial sealift and intermodal capacity to support the emergency deployment and sustainment of U.S. military forces through the contractual pledges by carriers of their vessels and intermodal systems capacities, in return for priority for DOD peacetime business. DOD Instruction 4500.57, Enclosure 5, Sea Transportation, E5.3.

As relevant here, the solicitation requires that the vessel be capable of carrying a minimum of 2,350 20-foot equivalent units (TEUs), with 1,350 TEUs stowed under an air conditioning/dehumidification system that provides climate control. Id. at 35. The RFP also states that the vessel is to be delivered to Sunny Point, North Carolina for loading. Id. at 8. Thereafter, the vessel will move to selected ports outside the continental U.S., and then sail to its prepositioning location which, although subject to change based on the Army mission, the contracting officer states may be Saipan in the U.S. territory of the Northern Mariana Islands. CO Statement at 1. The vessel will also move cargo around the Pacific theatre, including the terminal at Concord, California. Id. At the end of the contract, the vessel will offload at Sunny Point, North Carolina. Id.

On July 25, prior to the RFP's closing date, Maersk filed an agency-level protest with MSC challenging the applicability of FAR part 19 to the procurement, as well as the solicitation's tiered evaluation process.<sup>5</sup> AR, Tab H, Agency Protest Response, at 4. The agency denied Maersk's protest. On August 23, Maersk filed the instant protest with our Office.

Thereafter, MSC received timely proposals from [DELETED] offerors, including Maersk and [DELETED] small business concerns, by the RFP's closing date of August 29. CO Statement at 5. After reviewing the proposals, the contracting officer concluded that [DELETED] of the proposals received by small business concerns are competitive in terms of price, quality, and delivery. AR, Tab G, CO Memo to File (Sept. 11, 2014), at 2. Based on this conclusion, and in accordance with the RFP, the agency issued an amendment to the solicitation on September 11, advising that, "[t]he Contracting Officer has determined that two or more offers have been received from responsible small business concerns that are competitive in terms of price, quality, and delivery," and therefore, "FAR Clause 52.219-6 (Notice of Total Small Business Set Aside) is hereby incorporated 'By Reference' into the RFP." RFP, amend. 0007, at 2.

## DISCUSSION

Maersk contends that MSC unreasonably concluded that this procurement would be performed within the United States and its outlying areas, and therefore, improperly conducted this acquisition in accordance with FAR part 19. The protester also challenges the agency's decision to use a tiered evaluation approach in the solicitation. Finally, Maersk asserts that, even if the use of a tiered evaluation approach was appropriate, the agency should not have reserved this procurement

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<sup>5</sup> Maersk also argued that the solicitation improperly failed to give priority to participants in the VISA program. In response, the agency revised the solicitation to provide a VISA priority preference in accordance with DOD Instruction 4500.57. See RFP, amend. 0002.

for small business. Based on these alleged errors, the protester asserts that MSC should conduct the procurement on a full and open basis. For the reasons discussed below, we find reasonable the contracting officer's decisions to conduct the procurement under FAR part 19, to use a tiered evaluation, and to set aside the solicitation for small business concerns.<sup>6</sup>

Under FAR § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000 must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns, and award will be made at a fair market price. While the use of any particular method of assessing the availability of small businesses is not required, the agency must undertake reasonable efforts to locate responsible small business competitors. ViroMed Labs., B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3-4. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer's discretion, our review is limited to determining whether that official abused his or her discretion. Vox Optima, LLC, B-400451, Nov. 12, 2008, 2008 CPD ¶ 212 at 5.

#### Applicability of FAR Part 19

Maersk first contends that MSC should not have conducted this procurement in accordance with FAR § 19.502-2(b) because the contract was to be performed outside of the United States and its outlying areas. FAR § 19.000(b) states: "This part [FAR part 19] applies only in the United States or its outlying areas." FAR § 19.000(b). As relevant to this procurement, the Northern Mariana Islands are included within the FAR's definition of outlying areas. FAR § 2.101.

Here, the record reflects that the time charter involves initial delivery of the vessel in the United States, loading of cargo in the United States, and at the end of the contract, offloading in the United States. RFP at 8, 32; AR, Tab B1, Acquisition Plan, at 5; AR at 1-2. In addition, the agency states that, while the vessel will visit ports world-wide during performance of the contract, these locations will depend upon the needs of national security and circumstances, but will likely include Concord, California, as well as the Northern Mariana Islands, a U.S. territory, which may also be the prepositioning location for the vessel. Id. Based on this

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<sup>6</sup> The protester also contends that the agency's decision to set aside the solicitation for small business violates the VISA program because priority is given to small businesses before the VISA priority is applied. DFARS § 247.573-2 states only that applicable solicitations must provide an "evaluation criterion for offeror participation in the [VISA]." Here, the solicitation, as required, contains an evaluation factor based on the VISA program. See RFP at 123. The protester's argument provides no basis to sustain the protest.

information, the agency concluded the procurement would not be performed “outside the United States.”<sup>7</sup> AR at 2.

Maersk contends that “[i]t is nonsensical to conclude that this vessel would perform this requirement within the United States” because “the purpose of this contract is to provide munitions capability to the U.S. military anywhere in the world.” Protest at 6. The protester acknowledges, however, that, because “this . . . [is] a procurement for transportation services, the place of performance will change,” and will include performance locations inside the U.S. as well. Id. The protester’s argument also fails to account for the outlying areas, such as the Northern Mariana Islands, which as mentioned above, are considered U.S. territories by the FAR. Finally, the protester does not point to any authority or provision that prohibits using a set-aside in instances where the procurement will be partially performed in the U.S. and partially performed overseas.

Despite the protester’s argument to the contrary, this case is consistent with our decision in Latvian Connection Gen. Trading & Constr. LLC, B-408633, Sept. 18, 2013, 2013 CPD ¶ 225. In Latvian, the procurement was conducted outside the United States and the work was to be performed outside the United States. We concluded, under those circumstances (and prior to the issuance of the SBA’s regulations on the topic), that the agency acted reasonably in relying upon FAR § 19.000(b) to determine that it was not required to set aside the RFQ for small business concerns. Our decision here finds that MSC’s determination regarding the place of performance was reasonable in light of the absence of specific guidance in the FAR defining the percentage of performance that must take place within the U.S. or its outlying territories in order for FAR part 19 to apply. As noted above, SBA concurs with this view. See SBA Comments at 6-8.

Accordingly, on this record, we find no basis to conclude that the agency unreasonably concluded that this procurement would be performed, at least in part, in the United States and its outlying areas for purposes of FAR part 19.

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<sup>7</sup> The Small Business Administration (SBA), which submitted comments to our Office in response to the protest, agrees that the agency reasonably considered the procurement to be within the United States and its outlying areas, and additionally notes that, “[i]n this case, the solicitation and contract will be issued in the United States.” SBA Comments at 7. We also note, however, that SBA also asserts that FAR part 19 applies “regardless of the place of performance.” See id. at 2-6 (discussing revised 13 C.F.R. § 125.2; 78 Fed. Reg. 61,114 (Oct. 2, 2013)). We need not address this issue here given our conclusion, as discussed above, that the agency reasonably found the procurement to be performed, at least in part, in the United States.

## Tiered Evaluation

Next Maersk challenges the agency's decision to use a tiered evaluation approach in the solicitation. Specifically, Maersk argues that the agency's market research conclusively showed that the agency was not likely to receive proposals from at least two small business concerns that were competitive in terms of market prices, quality, and delivery, and therefore, that the agency unreasonably concluded that the market research was inconclusive.<sup>8</sup>

Defense Federal Acquisition Regulation Supplement § 215.203-70, which was incorporated into the RFP, provides for the tiered evaluation of proposals when, after conducting market research, the contracting officer cannot determine whether the criteria for setting aside the acquisition for small business has been met.

Here, as discussed above, the contracting officer issued and evaluated the results of two market surveys. AR at 4. The contracting officer evaluated the information in the responses to the market surveys, and concluded that "[t]he market research . . . was inconclusive with respect to the likelihood that two or more offers that are competitive in terms of market prices, quality, and delivery will be received from responsible small business concerns." AR, Tab B1, Acquisition Plan, at 17. Specifically, the contracting officer found that all [DELETED] of the small business concerns are "proposing vessels that will require reflagging, which raises concern[s] about the small businesses[]" capability of meeting the mission on time and without excessive reflagging costs." *Id.* at 18. In addition, the contracting officer further explained the following concern regarding classified information:

The market research responses do not indicate with adequate reliability that offers received from small businesses would be competitive in terms of price, quality, and delivery; particularly because the RFP will contain a classified requirement that could not

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<sup>8</sup> Maersk also asserts that the agency's use of a tiered evaluation approach is improper because the agency did not expect to receive offers from more than one category of small business concern, e.g., from 8(a) small business concerns, HUBZone small business concerns, and SDVOSB concerns. The protester, however, provides no support for its position that the tiered evaluation approach requires different tiers of small business concerns. Rather, as the agency points out, DFARS § 215.203-70 states only that "[t]he tiered or cascading order of precedence used for tiered evaluation of offers shall be consistent with FAR part 19," and that "[c]onsideration shall be given to the tiers of small businesses (e.g. 8(a), HUBZone small businesses, [SDVOSBs], small business) before evaluating offers from other than small business concerns." AR at 6. The protest ground provides no basis to sustain the protest.

be distributed with the market survey and which may well result in fewer offers or increased difficulty in performance of the resulting contract.

Id.

Based on the information available, the contracting officer concluded that the market research was inconclusive. Specifically, the contracting officer explained: “[While] [i]t is quite possible that two or more offers that are competitive in terms of market prices, quality, and delivery will be received from small business concerns[,] [i]t is also quite possible, particularly with the classified requirement, that they will not.” AR, Tab E, CO Memo to File (July 16, 2014), at 1. Accordingly, based on this rationale and the government’s policy to “provide maximum practicable opportunities in its acquisitions to small businesses in accordance with FAR 19.201,” we conclude that the contracting officer reasonably determined that “the use of a tiered or cascading evaluation of offers would be appropriate” in an effort “to promote small business participation.”<sup>9</sup> Id. at 2.

#### Small Business Set-Aside

Next, Maersk challenges the agency’s decision to set aside this procurement for small business concerns after receiving proposals.

In questions and answers responding to the solicitation, the agency explained that it would assess whether initial offers received from small business concerns are “competitive in terms of market price, quality, and delivery” by “examin[ing] each offer.” RFP, Q&A, at 1. Specifically, the agency explained that “[t]his examination will not be a full evaluation as described in RFP Section M-2-1[;] [r]ather, it will be an evaluation similar in scope to market research conducted for making a determination under FAR 19.502-2(b).” Id. The agency further stated that “[t]he

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<sup>9</sup> Maersk contends that the small business market survey responses upon which the contracting officer relied in concluding that the market survey was inconclusive “clearly demonstrated that [the] small business offerors were not prepared to fulfill MSC’s requirements.” Protester’s Comments at 5. Specifically, the protester argues that the small business market survey responses show that the small businesses cannot meet the solicitation’s requirements. In making this argument, the protester compares the market survey responses to the solicitation’s requirements, not to the market survey requirements. The market surveys, however, listed more requirements, including alternatives, than were ultimately included in the solicitation. See AR, Tab A1, Market Survey (Mar. 18, 2014), at 1-3; Tab A4, Market Survey (May 6, 2014), at 1-2. The protester does not allege, nor does the record reflect, that the small business market survey responses failed to adequately respond to the market survey requirements. Accordingly, we find no merit to the protester’s argument.



KO's determination that an offer is a small business concern will be based on the offeror's self-certification," and that "[a]fter examining the offers, the KO will determine if there are two or more proposals from responsible small business concerns that are found to be competitive in terms of market price, quality, and delivery." Id. In addition, the agency provided this follow-up response:

**QUESTION 3:** To fully meet this quality and delivery standard, would it not be necessary for the offer to be "technically acceptable" under the provisions of the RFP Section M?

**ANSWER 3:** An offer need not be fully technically acceptable to be considered by the KO in their decision above (in Question 2).

Id. at 1-2.

As discussed above, after receiving proposals, the contracting officer issued an amendment to the solicitation which advised that, "[t]he Contracting Officer has determined that two or more offers have been received from responsible small business concerns that are competitive in terms of price, quality, and delivery," and therefore, "FAR Clause 52.219-6 (Notice of Total Small Business Set Aside) is hereby incorporated 'By Reference' into the RFP." RFP, amend. 0007, at 2.

Maersk challenges the contracting officer's determination that the agency received at least two offers from responsible small business concerns that are competitive in terms of price, quality, and delivery. In support of this argument, the protester points out that MSC received offers from [DELETED] small business concerns, and notes that the contracting officer determined that [DELETED]. AR, Tab G, CO Memo to File (Sept. 11, 2014), at 2. Maersk contends that [DELETED] small business concerns' proposals also [DELETED]. Specifically, the protester asserts: "Although only [the offeror's] price has been disclosed, combined with [the offeror's] response to the market survey, the available facts show that [the offeror's] price is unreasonably low and demonstrates a lack of commitment to comply with the Solicitation's requirements." Protester's Comments at 8.

Even if the protester's arguments here were based on more than speculation, we conclude that the agency's review of the small business offerors' proposals was adequate to justify a set-aside under the terms of the RFP. As our office has held, in determining whether to set aside an acquisition for small business concerns, an agency must make reasonable efforts to ascertain whether at least two small businesses are capable of performing the work. Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 4.

Here, the record reflects that the agency evaluated the proposals as required. Specifically, the contracting officer stated that "MSC currently has contracts with all [DELETED] offerors," and "I have confirmed that they have all performed satisfactorily and present no apparent responsibility deficiencies." AR, Tab G, CO

Memo to File (Sept 11, 2014), at 2. Accordingly, the contracting officer found that “all [DELETED] small business concerns presently appear responsible.” Id.

Next, the technical evaluation team chairperson reviewed the proposals and determined that all offers are competitive, and reported that he did not identify anything that would prevent further evaluation by the technical evaluation team. Id. Based on this, the contracting officer concluded that all [DELETED] small business offers “are competitive in terms of quality.” Id.

In addition, the contracting officer reviewed the offerors’ statements with respect to the required delivery date for the vessels, finding that all [DELETED] agreed to the delivery dates stated in the RFP. Id. The contracting officer “found nothing in [the] offers that cause[d] [her] to doubt their ability to deliver,” and therefore concluded that all [DELETED] offers “are competitive in terms of delivery.” Id.

Finally, the price evaluation team chairperson conducted a preliminary evaluation of prices, and concluded that [DELETED] offers received from small business concerns are competitive in terms of market prices. Id. Based on this overall, summary evaluation, the contracting officer found that [DELETED] offers received from small business concerns are competitive in terms of price, quality, and delivery, and subsequently amended the solicitation to incorporate FAR § 52.219-6 (Notice of Total Small Business Set Aside), as specified by the RFP. We find nothing unreasonable about this evaluation or the contracting officer’s decision.

The protest is denied.

Susan A. Poling  
General Counsel