



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Maersk Line, Limited

File: B-410445; B-410445.2

Date: December 29, 2014

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

Kelly E. Rogers, Esq., Robert M. Elwell, Esq., Scott S. Sheffler, Esq., Kimberly Foxx, Esq., and Gordon D. Ivins, Esq., Department of the Navy, Military Sealift Command, for the agency.

Matthew T. Crosby, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's decision to make reprocurement award on basis of second-lowest-priced offer is denied where record reflects relatively short time span between receipt of final proposal revisions and reprocurement award as well as agency's urgent need for performance after initial awardee defaulted.

2. Allegation that awardee's proposal was unacceptable because awardee submitted consolidated pricing data form for all performance periods instead of separate forms for each period is dismissed where record reflects another offeror would be in line for award if protest were sustained, and, therefore, protester is not interested party.

DECISION

Maersk Line, Limited, of Norfolk, Virginia, protests the award of a contract to Sealift, Inc., of Oyster Bay, New York, pursuant to a reprocurement by the Department of the Navy, Military Sealift Command (MSC), under request for proposals (RFP) No. N00033-14-R-3300 for the time charter of a vessel. Maersk alleges that the reprocurement was flawed because following the initial awardee's termination for default, the agency made award on the basis of Sealift's second-lowest-priced offer instead of reopening the competition on a full and open basis. Maersk also alleges that Sealift's proposal was technically unacceptable.

We deny the protest in part and dismiss it in part.

BACKGROUND

The solicitation, which the agency issued on October 4, 2013, contemplated the award of a time charter contract for a United States-flagged vessel to transport and preposition military cargo, including ammunition.¹ RFP at 1-2, 29. The solicitation was issued as a “cascading small business set-aside,” meaning it was unrestricted, but if two or more qualified small business concerns submitted offers, it would become a total small business set-aside. Id. at 106, 119. The period of performance included a base year and five one-year option periods. Id. at 3-7. Award was to be made based on the lowest-priced, technically acceptable offer. Id. at 119.

The solicitation included a lengthy performance work statement (PWS) that set forth vessel specifications and performance requirements. RFP at 21-52. As relevant to this protest, the solicitation also included a “crew complement” attachment that offerors were to complete with crew-related pricing data. Id., attach. C, Crew Complement. This attachment included six separate sheets, one for each of the six performance periods. Id. The only instructions provided for this attachment were: “The forms shall be duplicated as appropriate to accommodate the number of vessels being proposed.” RFP at 110.

As also relevant to this protest, the solicitation included a “vessel substitution” clause under which the agency, at its “sole discretion,” could approve a request by the successful offeror for a vessel substitution. RFP at 80.

The agency received five proposals by the solicitation’s closing date. Contracting Officer’s Statement ¶ 5. All five proposals were submitted by small businesses, including Sealift, and another firm, SeaChange Projects LLC, of Miami, Florida. Id. Maersk, a large business, did not submit a proposal. Since multiple proposals were received from small businesses and no proposals were received from large businesses, the agency conducted the procurement as a total small business set-aside. See id.; Agency Report (AR), Tab 1, Source Selection Documents, at 146.

After evaluating proposals, the agency opened discussions and requested and received final proposal revisions (FPR) from all five offerors. AR, Tab 1, Source Selection Documents, at 146. The agency then established a competitive range of four offerors and requested a second set of FPRs from those offerors. AR, Tab 1,

¹ As explained by the agency, a time charter is “the hiring of a vessel for a specific period of time [where t]he owner provides the crew and operation of the vessel, but the Charterer (here MSC) directs where the vessel will go.” Contracting Officer’s Statement ¶ 2 n.1. The type of requirement in this procurement is explained in greater detail in our decision in Maersk Line, Ltd., B-410280, Dec. 1, 2014, 2014 CPD ¶ ____.

Source Selection Documents, at 146. On March 10, 2014, the competitive range offerors submitted their second FPRs. Id. Based on these FPRs, the agency determined that three of the offers, including Sealift's and SeaChange's, were technically acceptable. Id. at 147. SeaChange's offer, with an evaluated price of \$55,293,647, was deemed the lowest-priced, technically acceptable offer. Id. at 147. Accordingly, on March 27, the agency made award to SeaChange. Contracting Officer's Statement ¶ 8.

In the months that followed, SeaChange was unable to obtain a necessary facility security clearance and failed to meet a series of dates for delivery of the vessel. Contracting Officer's Statement ¶¶ 11-12. By late August, the agency's need for delivery of the vessel became urgent. More specifically, and as documented at the time by the cognizant agency project officer, the vessel was needed to "ensure that warfighters on the ground have ammunition available to them" and because a strategic port was about to reopen. AR, Tab 4, Agency-Internal Correspondence, at 301. These circumstances rendered further delay "unacceptable." Id. As a result, on September 9, the contracting officer terminated SeaChange's contract for default. AR, Tab 1, Source Selection Documents, at 126.

On September 12, the contracting officer made a reprocurement award to Sealift valued at \$60,822,259. AR, Tab 1, Source Selection Documents, at 128-30, 173. In her source selection decision document, the contracting officer stated that award was being made on the basis of Sealift's second-lowest-priced, technically acceptable offer, which Sealift had confirmed was still valid. Id. at 128. She further stated that delays associated with SeaChange's failure to perform had resulted in an urgent need for delivery of the vessel and that she had learned through consultation with agency contracting personnel that prices for United States-flagged time charter vessels had risen since the time the second FPRs were submitted. See id. at 128-29. For these reasons, she concluded that award to Sealift "minimizes additional cost to the government and minimizes future performance risk." Id. at 129.

On September 17, Sealift requested permission to substitute the vessel proposed in its FPR. AR, Tab 2, Agency-Sealift Correspondence, at 283. On the same day, the contracting officer approved this request pursuant to the contract's vessel substitution clause. Contracting Officer's Statement ¶ 29.

On September 22, Maersk filed a protest with our Office. On September 23, the agency overrode the automatic stay of performance triggered by the protest due to "urgent and compelling" circumstances involving "[s]pecific national security requirements and planning mak[ing] it necessary that this vessel depart . . . for its mission no later than mid-October." AR, Tab 5, Performance Stay Override Documents, at 303-05.

DISCUSSION

Maersk challenges the agency's decision to make the reprocurement award on the basis of the second-lowest-priced offer received in the initial procurement instead of reopening the competition on a full and open basis, thus allowing Maersk to compete.² Protest at 6-7; Comments at 2-5.

With regard to the repurchase of supplies or services not delivered under a contract terminated for default, Federal Acquisition Regulation (FAR) § 49.402-6(b) provides that a contracting officer "shall obtain competition to the maximum extent practicable." FAR § 49.402-6(b) further provides that if, as here, the repurchase is for a quantity not over the undelivered quantity, the contracting officer may "use any terms and acquisition methods deemed appropriate for the repurchase."

While recognizing, as a general rule, that the statutes and regulations governing regular procurements are not strictly applicable to reprocurements after default, our Office will review a reprocurement to determine whether the contracting agency acted reasonably under the circumstances. Derm-Buro, Inc., B-400558, Dec. 11, 2008, 2008 CPD ¶ 226 at 2; Adaptive Concepts, Inc., B-243304, June 25, 1991, 91-1 CPD ¶ 605 at 3. In this context, our Office has concluded that it is reasonable to award a reprocurement contract to the next-lowest-priced, qualified offeror under the original solicitation at its original price, provided the time span between the original competition and the default is relatively short, and there is a continuing need for the services. Adaptive Concepts, Inc., *supra* (five and one half months between receipt of offers and reprocurement); DCX, Inc., B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55 at 3 (four and one half months between receipt of offers and reprocurement). Under such circumstances, an agency reasonably can view the offers received under the original solicitation as an acceptable measure of what competition would bring, sufficient to satisfy the requirement of FAR § 49.402-6(b) for competition to the maximum extent practicable. Int'l Tech. Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102 at 3; VCA Corp.--Recon., B-219305.3, Oct. 11, 1985, 85-2 CPD ¶ 403 at 1.

Based on the record here, we conclude that the agency's decision to make the reprocurement award on the basis of the second-lowest-priced, technically acceptable offer was reasonable. In this regard, the record shows that delays resulting from the defaulted contractor's failure to perform resulted in an urgent need for delivery of the vessel. AR, Tab 1, Source Selection Documents, at 129, 139; AR, Tab 4, Agency-Internal Correspondence, at 301. The record also shows

² It is unclear why Maersk did not compete in the original competition. As stated above, the solicitation was issued as a cascading small business set-aside, meaning large businesses such as Maersk were eligible to submit proposals. RFP at 106, 119.

that this urgency implicated national security concerns, as reflected in the agency's decision to override the performance stay triggered by Maersk's protest. AR, Tab 5, Performance Stay Override Documents, at 303-05.

Additionally, the record shows that the time span between the submission of Sealift's FPR and the reprocurement award was relatively short--approximately six months. See AR, Tab 1, Source Selection Documents, at 128, 146. Finally, the record shows that after consulting with agency contracting personnel, the contracting officer determined that the market prices for United States-flagged time charter vessels had risen since the time FPRs were submitted. Id. at 128-29. For all of these reasons, we see no basis to question the agency's decision to make the reprocurement award on the basis of Sealift's second-lowest-priced offer rather than initiate a new procurement process.

Maersk also challenges the contracting officer's conclusion that market prices for United States-flagged time charter vessels had risen since the submission of FPRs. Comments at 4-5; Supp. Comments at 1-2. More specifically, Maersk argues that the contracting officer considered the wrong type of maritime market data and that a market analysis that Maersk itself undertook shows that prices would have been lower, had the agency reopened the procurement. Comments at 4-5.

This argument provides no basis to disturb the award. As stated above, our Office previously has concluded that in a reprocurement where there is a relatively short time span between the original competition and the default, such as this one, an agency reasonably can view the offers received under the original solicitation as a measure of what competition would bring. See Int'l Tech. Corp., supra; VCA Corp.--Recon., supra. Further, the record here reflects that a significant factor in the contracting officer's determination to reprocure on the basis of the second-lowest-priced offer was urgency resulting from the defaulted contractor's failure to perform, and the attendant national security concerns. See AR, Tab 1, Source Selection Documents, at 129; AR, Tab 4, Agency-Internal Correspondence, at 301. For these reasons, this ground of protest is denied.

Next, Maersk contends that the agency's approval of Sealift's request for a vessel substitution reflects that the agency's requirements have changed, and, therefore, the agency was required to conduct a new competition. Protest at 6-7; Comments at 3-4; Supp. Comments at 2.

As a general rule, where an agency's requirements materially change such that the solicitation no longer reflects the agency's actual requirements, the appropriate course of action is for the agency to cancel the original solicitation and issue a new one (or amend the original solicitation) to reflect the agency's actual requirements, and make a new selection decision. See Naval Sys., Inc., B-407090.3, Nov. 20, 2012, 2012 CPD ¶ 326 at 3; Freedom Graphic Sys., Inc., B-277305, Sept. 22, 1997, 97-2 CPD ¶ 82 at 3.

As discussed above, the solicitation here included a lengthy PWS that set forth the vessel specifications and performance requirements. RFP at 21-52. Maersk has offered nothing to show that those requirements have changed. Instead, Maersk only has shown that the agency exercised its right to grant a vessel substitution request under the contract's vessel substitution clause. As stated above, this clause was included in the solicitation. RFP at 80. To the extent Maersk believed its inclusion was somehow improper, Maersk could have, but did not, file a protest prior to the solicitation's closing date. At this juncture, such a claim is untimely, and the agency's decision to grant Sealift's request under the clause constitutes a matter of contract administration, which we do not review. See 4 C.F.R. §§ 21.2(a)(1), 21.5(a) (2014). Maersk's claim related to the vessel substitution is dismissed.

Maersk also alleges that Sealift's proposal was technically unacceptable because Sealift submitted a consolidated crew complement form for all performance periods instead of six separate crew complement forms. Comments at 6-7; Supp. Comments at 3. As related to this claim, the record reflects that Sealift's crew complement form included an annotation stating that it was for "All [Performance] Periods." AR, Tab 6, Sealift Proposal, attach. C, Crew Complement, at 312.

As stated above, the crew complement form in the solicitation included six separate sheets, one for each performance period. RFP, attach. C, Crew Complement. As also stated above, the only instructions in the solicitation regarding this form were: "The forms shall be duplicated as appropriate to accommodate the number of vessels being proposed." RFP at 100. While we view it as unlikely that the manner in which Sealift prepared its crew complement form compelled the contracting officer to find the firm's proposal unacceptable, we need not address this issue on the merits because Maersk is not an interested party to raise it.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2012), only an "interested party" may protest a federal procurement. That is, a protester must be 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)(1), 21.1(a). A protester is not an interested party where it would not be in line for contract award if its protest were sustained. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2.

Here, the record reflects that a third offeror submitted a proposal that was evaluated as technically acceptable. AR, Tab 1, Source Selection Documents, at 147, 150. Maersk has not challenged the evaluation of this offeror's proposal. Further, as discussed above, we find the agency's decision to make the procurement award on the basis of the next-lowest-priced offer to be reasonable. Thus, even assuming for the sake of argument that Maersk's claim regarding the acceptability of Sealift's proposal had merit, the third offeror would be in line for award. Accordingly, we dismiss this claim.

The protest is denied in part and dismissed in part.³

Susan A. Poling
General Counsel

³ Maersk raises other allegations in addition to those discussed in this decision. While we have not discussed every allegation raised, instead focusing on what we see as Maersk's strongest arguments, we have considered all of Maersk's allegations, and we find, based on the record, that none provides a basis on which to sustain the protest.