



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

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: Areaka Trading & Logistics Company

File: B-413363

Date: October 13, 2016

David T. Ralston Jr., Esq., Frank Murray, Esq., Anna S. Ross, Esq., and Micah Zomer, Esq., Foley & Lardner LLP, for the protester.
Matthew Vasquez, Esq., Department of Defense, for the agency.
Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency's solicitation unreasonably failed to include definitive responsibility criterion requiring offerors show specific authorization to sell jet fuel is denied where agency provides reasonable basis to require compliance during contract performance and the record provides no basis to deviate from the general principle that this Office does not permit a protester to use the protest process to advocate for more restrictive government requirements.

DECISION

Areaka Trading & Logistics Company, of Amman, Jordan, protests the terms of request for proposals (RFP) No. SP0600-16-R-0214, issued by the Department of Defense, Defense Logistics Agency (DLA), for the delivery of various types of fuel, including jet propulsion 8 (JP8) aviation fuel, to locations in Jordan and the Arab Emirates. The protester asserts that the RFP terms are defective because the solicitation does not require an offeror to demonstrate, as a precondition of award, that the offeror is authorized by the Royal Jordanian Air Force (RJAF) to sell JP8 fuel in Jordan.

We deny the protest.

On June 30, 2015, DLA issued the solicitation to contractors with current Basic Ordering Agreements (BOAs) issued under Solicitation No. SP06-15-R-0210. Agency Report (AR), Exh. 1, Combined Synopsis/Solicitation. The solicitation contemplates the award of one or more requirements-type, fixed-price with economic price adjustment contracts to the responsible offeror or offerors offering

the lowest price for a variety of fuels, including JP8, an aviation fuel, for delivery to locations in Jordan and the Arab Emirates. RFP at 2, 80. The performance period is from the date of award through May 31, 2017, or January 31, 2019, depending on the type of fuel. Id. at 1. Areaka is the incumbent contractor for some of the fuels being procured. AR at 2. The total estimated value of the contract is \$14,584,732. Id. at 4 citing RFP at 2, 7-9.

Areaka, which holds the required BOA, challenges the failure of the solicitation to include a requirement that an offeror demonstrate, as a precondition of award, that the offeror is authorized by the RJAF to sell JP8 fuel in Jordan. Protest at 14-15. Specifically, the protester asserts that the sale of JP8 fuel to U.S. and U.S.-friendly forces in Jordan requires authorization by the RJAF, and failure to have this authorization is contrary to Jordanian law and thus the terms of the solicitation. Id. at 14 citing Federal Acquisition Regulation (FAR) clause 52.212-4 (requiring contractor compliance with local law). Because the terms of the RFP require immediate contract performance, and obtaining the required RJAF authorization is a lengthy process, Areaka claims that only a contractor that has the authorization prior to award will be able to begin immediately. Id. at 14-15. Here, Areaka argues that the agency should view the RJAF authorization as a definitive responsibility criterion, and that the RFP's failure to require offerors to obtain the RJAF authorization prior to award is arbitrary, capricious, and contrary to procurement law. Id. at 16.

A definitive responsibility criterion is a specific and objective standard, qualitative or quantitative, that is established by a contracting agency in a solicitation to measure an offeror's ability to perform a contract. An agency may include definitive responsibility criteria in a solicitation so long as the criteria used reflect the agency's legitimate needs. Software City, B-217542, Apr. 26, 1985, 85-1 CPD ¶ 475 at 2.

Here, the agency states that it did not include the requirement in its prior solicitation for JP8 fuel and that in the absence of prior problems with performance, the contracting officer acted reasonably in deciding not to include this term in its solicitation. AR at 8. The agency also explains that the solicitation requires the awardees to comply with local law, and, in any event, the protester has failed to identify the specific law that imposes the requirement for the RJAF authorization. Id. Finally, the agency argues that the protester's attempt to seek more restrictive requirements is inconsistent with our Office's role in reviewing bid protests. Id.

We find the agency's decision not to include this restriction as a definitive responsibility criterion unobjectionable. Additionally, we agree that this aspect of the protest essentially is an allegation that the solicitation should be more restrictive of competition. The role of our Office in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to protect any interest a protester may have in more restrictive specifications. Supreme Foodservice GmbH, B-405400.1, B-405400.2, Oct. 31, 2011, 2011 CPD ¶ 244

at 14; Virginia Elec. & Power Co.; Baltimore Gas & Elec. Co., B-285209, B-285209.2, Aug. 2, 2000, 2000 CPD ¶ 134 at 7-8. This Office does not generally permit a protester to use a protest to advocate for more restrictive, rather than more open, competitions for government requirements. DNC Parks & Resort at Yosemite, Inc., B-410998, Apr. 14, 2015, 2015 CPD ¶ 127 at 13; Virginia Elec. & Power Co.; Balt. Gas & Elec. Co., *supra*, at 8 (noting that our Office “will not consider contentions that specifications or other terms and conditions should be made more restrictive”); Loral Fairchild Corp.--Recon., B-242957.3, Dec. 9, 1991, 91-2 CPD ¶ 524 at 3 (noting that our Office “will not review a protest that an agency should have drafted additional, more restrictive specifications in order to meet the protester’s perception of the agency’s minimum needs”).

The protester cites several of our decisions that grant an agency discretion to include such requirements in a solicitation. Protest at 15-16 citing The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164 at 3; Caswell Int’l Corp., B-278103, Dec. 29, 1997, 98-1 CPD ¶ 6 at 2; Indus. Maint. Servs., Inc., B-261671, Oct. 3, 1995, 95-2 CPD ¶ 157 at 2; Comments at 20-21 citing Louis Berger Servs., Inc., B-410024, Oct. 10, 2014, 2014 CPD ¶ 303 at 3. However, discretion to include a requirement does not mean that an agency must include the requirement. *See, e.g.,* New Mexico State Univ., B-409566, June 16, 2014, 2014 CPD ¶ 228 at 5 (denying protest challenging an agency’s decision to not require pricing for certain components); Honeywell Tech. Solutions, Inc., B-407159.4, May 3, 2012, 2013 CPD ¶ 110 at 3 (denying protest that the solicitation should have included more stringent minimum relevance levels under the past performance evaluation factor).

Areaka also challenges the agency’s decision to terminate for convenience the protester’s existing contracts and resolicit the requirements. Comments at 9. Under the Competition in Contracting Act, GAO’s bid protest jurisdiction extends to protests concerning the alleged violation of procurement statutes or regulations in connection with the award of a contract. 31 U.S.C. §§ 3551-3552; Sea Box, Inc., B-401523, B-401523.2, Sept. 25, 2009, 2009 CPD ¶ 190 at 4 (noting that our “Office considers bid protest challenges to the award or proposed award of contracts”). In exercising its bid protest authority, GAO does not review matters of contract administration. 4 C.F.R. § 21.5(a); Petro Star, Inc., B-401108, Apr. 29, 2009, 2009 CPD ¶ 92 at 2-3. An agency’s decision to terminate a contract for convenience is generally a matter of contract administration that falls outside GAO’s bid protest jurisdiction. American Material Handling, Inc., B-406739, Aug. 14, 2012, 2012 CPD ¶ 234 at 3. As a limited exception to that rule, GAO will only consider the termination of a contract where the agency’s decision to terminate arises from a defect or impropriety in the award of the contract. *See* Optimum Servs., Inc., B-401051, Apr. 15, 2009, 2009 CPD ¶ 85 at 2; Freedom Graphic Sys., Inc., B-277305, Sept. 22, 1997, 97-2 CPD ¶ 82 at 2.

Here, it is undisputed that the agency's planned termination of the protester's contracts and the resolicitation of the requirements is not based on a defect or impropriety in the award of the contracts. Protest at 10-12 (noting that there has been no finding that the contracts inaccurately reflect the agency's needs or that there was any impropriety in the procurement or award of the contracts); Comments at 6 (noting that "DLA has openly acknowledged that the resolicitation of the Areaka Incumbent Contracts was not based on a defect in the original award of the contracts"), citing AR at 5. Because the agency's termination of the protester's contracts does not fall within the limited exception to the rule that we will not consider the agency's decision to terminate a contract, this protest allegation is dismissed as failing to state a valid basis of protest. See Bid Protest Regulations 4 C.F.R. § 21.5(f).

The protest is denied.

Susan A. Poling
General Counsel