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Decision

Matter of: Africa Automotive Distribution Services, Ltd.

File: B-418246.6

Date: August 24, 2021

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Christopher R. Shiple, Esq., Randolph Law, PLLC, for US21, Inc., the intervenor.

Debra J. Talley, Esq., and Sean Daigle, Esq., Department of the Army, for the agency.

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DIGEST

Protest challenging the agency's reevaluation--after corrective action in response to an earlier protest--of transportation costs, which were used to assess the total evaluated price, is sustained where the record shows that the reevaluation was inconsistent with the terms of the solicitation.

DECISION

Africa Automotive Distribution Services, Ltd., of Gibraltar, United Kingdom, protests the award of a contract to US21, Inc., of Fairfax, Virginia, under request for proposals (RFP) No. W56HZV-19-R-0079, issued by the Department of the Army for the provision of commercial heavy duty vehicles. After the agency completed corrective action in response to a prior protest, the protester now challenges the agency's reevaluation of the offerors' estimated transportation costs.

We sustain the protest.

BACKGROUND

On August 8, 2019, the Army issued the RFP, seeking proposals for eight variants of these vehicles, including flatbed trucks, personnel carriers, water trucks, fuel trucks, and spare parts for all variants. Agency Report (AR), Tab 3, RFP at 3. The procurement was conducted under the Foreign Military Sales program, using the procedures of

Federal Acquisition Regulation (FAR) part 15, Contracting by Negotiation.¹ *Id.* The solicitation stated that the vehicles and spare parts were to be provided F.O.B. [free on board] origin to Somalia and Iraq.² *Id.*; AR, Tab 9, RFP amend. 5 at 2.

The solicitation anticipated award of a single fixed-price 3-year requirements contract, on a lowest-priced, technically acceptable (LPTA) basis, considering technical and price evaluation factors. RFP at 3.

This protest centers on the agency's evaluation of the offerors' estimated transportation costs for delivery of these vehicles and spare parts to Somalia and Iraq. As relevant here, offerors were instructed to submit a completed pricing spreadsheet, proposing prices for all of the vehicles and spare parts. RFP § L.4.2.3. The solicitation provided that the agency would evaluate the reasonableness and balance of offerors' prices. AR, Tab 9, RFP amend. 5 § M.4.2.³

The RFP stated that the Army would calculate the total evaluated price by adding:

- (a) the proposed prices for all CLINs [contract line item numbers] . . . ;
- [and] (b) the transportation costs determined by the ACC-WRN [Army Contracting Command--Warren] Transportation Office for all the FOB Origin CLINs. . . .

¹ The Foreign Military Sales (FMS) program is authorized by the Arms Export Control Act (AECA). 22 U.S.C. §§ 2751-2799aa-2. The AECA authorizes the Department of Defense (DOD), acting as an agent for a foreign country and using funds that the customer country has deposited in a trust fund account, to enter into contracts for the benefit of the customer country. *See, e.g., Alsalam Aircraft Co.--Costs*, B-401298.3, Nov. 5, 2009, 2009 CPD ¶ 208 at 1 (describing the FMS program).

² "Free on board," or "F.O.B.," is a "method of shipment whereby goods are delivered at a designated location, usually a transportation depot, at which legal title and thus the risk of loss passes from seller to buyer." *Litecubes, LLC v. Northern Light Prods., Inc.*, 523 F.3d 1353, 1358 n.1 (Fed. Cir. 2008). Generally, F.O.B. origin means that the buyer is responsible for the cost of shipping and risk of loss. FAR 2.101. In contrast, F.O.B. destination means that the seller is responsible for the cost of shipping and risk of loss. *Id.*; *see also Gold Line Refining, Ltd.*, B-248600, Sept. 3, 1992, 92-2 CPD ¶ 153 at 3 (differentiating between supplies purchased on F.O.B. origin and F.O.B. destination bases).

³ Throughout the decision, all references to section M of the solicitation are to amendment 5 of the RFP, which included the most recent version of section M. AR, Tab 9, RFP amend. 5 at 2; 7-10.

RFP § M.4.2.1. The solicitation also established that the “[g]overnment will apply the lowest evaluated transportation cost for the offerors proposed shipping characteristics to the proposed price.” *Id.* § M.5.1.2.

Of particular importance, to evaluate the estimated transportation costs, the agency was to “use the lowest freight rates from the [t]ransportation [o]fficer” that were “in effect” and “on file or published” in calculating the costs for transportation of vehicles and spare parts to Somalia and Iraq. *Id.* § M.5, M.5.1. The RFP further provided that in the event there were no rates on file for the government’s selected method of shipment:

the ACC-WRN Transportation office shall request the lowest cost shipping method and price from United States Transportation Command (USTRANSCOM). Rates may include, but not be limited to, cargo moving under "One-Time-Only" contracts, Sea-Air Multi-modal contracts, Special Assignment Airlift Missions or Direct Bookings.

Id. § M.5.1.2. The solicitation also stated that “TACOM [Army Tank-Automotive and Armaments Command] Transportation will then apply the USTRANSCOM provided costs to the evaluation.”⁴ *Id.*

Additionally, the RFP provided the following guidance on the evaluation of transportation costs:

To determine the low offeror, the Government will evaluate . . . transportation costs . . . by using the methodology described in the [s]ection M FAR clause 52.247-47 entitled Evaluation FOB Origin, in addition to utilizing information the offeror provides in E.5. Inspection and Acceptance Points: Origin[;] the Government[']s required delivery schedule in accordance with FAR 52.211-8, Time of Delivery[;] dimensions provided in FAR 52.247-60, Guaranteed Shipping Characteristics for both vehicles and spare parts[;] F.2. Transportation Data for FOB Origin Offers[;] F.3. FOB Point, and Section M.5 Method of Evaluation for F.O.B. Origin Transportation Offers.⁵

⁴ Throughout the solicitation, the “ACC-WRN Transportation office” and “TACOM transportation office” are used interchangeably.

⁵ Under section E.5., Inspection and Acceptance Points: Origin, offerors were to provide “the exact name, address, and CAGE [commercial and government entity] [code] of the facility,” “at origin,” where the “inspection and acceptance of the supplies” should take place. RFP at 50-51. Section F.3. of the solicitation provided that the “[d]elivery on F.O.B. origin [] will be F.O.B. Carrier’s equipment, wharf, or freight station, at the Government’s option, at or near” a “contractor’s plant,” the address of which was to be provided by an offeror. *Id.* at 63-65.

Id. § M.5.2. Relevant here, FAR provision 52.247-47, Evaluation-F.O.B. Origin, provides that the government will evaluate “the cost of transportation between [an] offeror’s shipping point and destination,” and that “[t]his transportation cost will be added to the offer price to determine the Government’s overall cost.” FAR provision 52.247-47(b), (c).

The Army received eight proposals by the solicitation closing date of October 15, 2019, including those from US21 and Africa Automotive. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 3. Subsequently, after one of the offerors withdrew, the agency evaluated seven proposals. *Id.*

With respect to the evaluation of transportation costs, the Army requested assistance in establishing rates from USTRANSCOM. *Id.* at 3. Ultimately, USTRANSCOM concluded that there were no rates on file for the locations identified as acceptance points by US21 (Ukraine) and Africa Automotive (Spain). *Id.* at 3-4. Regarding US21, after having determined there were no rates on file for routes from Ukraine to Somalia and from Ukraine to Iraq, USTRANSCOM performed a one-time-only (OTO), door-to-door evaluation of transportation costs based on parallel routes from Turkey to Ghana, Turkey to Oman, and Bulgaria to Oman.⁶ *Id.* Accordingly, the agency estimated the transportation costs for US21 as \$16,721,917. AR, Tab 7, Amended Source Selection Decision (SSD) at 12. As to Africa Automotive, the estimated OTO transportation costs were calculated to be \$11,687,638. *Id.*

While US21 proposed the lowest price for these vehicles, amounting to \$52,698,079, after adding the estimated transportation costs discussed above, the agency assigned US21 a total evaluated price of \$69,419,996. *Id.* Applying the same methodology for calculating transportation costs, the agency assigned Africa Automotive a total evaluated price of \$68,538,682, and the Army awarded the contract to that firm. *Id.*; Protest at 5-6.

On October 13, 2020, US21 filed a protest with our Office, and on November 23, the protester filed its comments on the agency report and a supplemental protest. Protest (B-418246.4, B-418246.5) at 1; Comments & Supp. Protest at 1. Collectively, the protester argued that the Army’s evaluation of the protester’s transportation costs was unreasonable because the agency used shipping routes for the calculation that bore no resemblance to the actual shipping routes from Ukraine to Somalia and Ukraine to Iraq. *Id.* US21 also alleged that the contracting officer unreasonably relied on an improper transportation analysis provided by the transportation office and USTRANSCOM. *Id.*

⁶ Specifically, in response to the agency’s questions regarding section F.2 “FOB Origin Offers & F.3 FOB Point,” US21 identified [DELETED] as its manufacturing facility, located in [DELETED], Ukraine. Protest (B-418246.4, B-418246.5), AR, Tab 8, US21’s Response to Evaluation Notices at 1.

On December 22, after development of the protest record, the Government Accountability Office (GAO) attorney assigned to the protest conducted an “outcome prediction” alternative dispute resolution (ADR) conference.⁷ In the course of that ADR conference, the GAO attorney advised the parties that our Office would likely sustain US21’s protest, as the record failed to establish the reasonableness of the agency’s calculation of the transportation costs. The GAO attorney indicated that, based on the existing record, GAO would be unable to conclude that the Army reasonably relied on the calculation prepared by USTRANSCOM, and that there was no evidence that the agency performed its own independent analysis as to whether the USTRANSCOM’s transportation costs findings were reasonable. The GAO attorney further indicated that GAO was likely to recommend that the Army reevaluate the transportation costs and, if the Army was to rely on any USTRANSCOM analysis in the future, to document the basis of this decision, as well as make a new award.

On December 28, the Army advised our Office that it intended to take corrective action. Notice of Corrective Action & Req. for Dismissal at 1. Specifically, the agency stated that it would reevaluate the transportation costs for all offerors whose proposals were found technically acceptable; evaluate USTRANSCOM and TACOM-generated transportation cost estimates to determine whether they were reasonable, and document that decision; and make a new award. *Id.*

On the basis of the proposed corrective action, our Office dismissed the protest as academic. *US21, Inc.*, B-418246.4, B-418246.5, Dec. 29, 2020 (unpublished decision).

During its reevaluation, the Army calculated transportation costs on a port-to-port, rather than a door-to-door basis; we note the Army calculated transportation costs on a door-to-door basis in its original evaluation. COS/MOL at 5. The agency made this decision after learning from USTRANSCOM that there were no shipping rates in effect and on file for the inland shipping for some of the offerors, including US21. *Id.*; AR, Tab 25, Email Exchange between TACOM and USTRANSCOM at 5.

As a result of the reevaluation, the estimated transportation costs for US21 was now \$7,579,462, for a total evaluated price of \$60,277,541. AR, Tab 7, Amended SSD at 15. For Africa Automotive, the estimated transportation costs was \$6,453,187, for a total evaluated price of \$63,304,232. *Id.* On April 16, 2021, the Army selected US21’s proposal for award. Protest, exh. 1, Notice of Unsuccessful Offeror at 1.

⁷ In an outcome prediction ADR conference, the GAO attorney informs the parties what the GAO attorney believes will be the likely outcome of the protest and the reasons for that belief. A GAO attorney will engage in this form of ADR only if she or he has a high degree of confidence regarding the outcome. The outcome prediction reflects the view of the GAO attorney, but it is not an opinion of our Office and does not bind our Office should issuance of a written decision remain appropriate. *Inter-Con Sec. Sys., Inc.; CASS, a Joint Venture--Costs*, B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54 at 2 n.1.

After requesting and receiving a debriefing, Africa Automotive filed this protest with our Office.

DISCUSSION

Africa Automotive challenges the agency's evaluation of the transportation costs used to develop estimated total prices, arguing that by calculating only the port-to-port costs of shipment, the Army failed to capture a significant portion of the estimated total transportation costs. Protest at 5-7. As such, the protester contends that the Army failed to properly account for costs that the government would be responsible for paying during performance, asserting, in essence, that the agency failed to meaningfully consider the costs under competing proposals. *Id.*; Comments at 2.

In response, the agency maintains that there were no shipping rates "in effect" and "on file" for all offerors, including US21, and hence, calculating transportation costs on a door-to-door basis, as argued by the protester, was "not reasonably quantifiable." COS/MOL at 5. The Army further asserts that the contracting officer, after receiving input from transportation experts, "exercised his best judgment" in making the decision to use port-to-port rates, in accordance with section M.5 of the solicitation. *Id.* at 9 (citing AR, Tab 13, April 2021 Transportation Evaluation; AR, Tab 14, Contracting Officer's Memo for Record regarding Reasonableness of Transportation Estimate).

Agencies are required to consider cost or price to the government in evaluating competitive proposals. 10 U.S.C. § 2305(a)(3)(A)(ii); see *Kathpal Techs., Inc.; Computer & Hi-Tech Mgmt., Inc.*, B-283137.3 *et al.*, Dec. 30, 1999, 2000 CPD ¶ 6 at 9. While the agency may choose an appropriate method for evaluation of cost or price in a given procurement, the agency must use an evaluation method that provides a basis for a reasonable assessment of the cost of performance under competing proposals. *Alliant Techsys., Inc.*, B-410036, Oct. 14, 2014, 2014 CPD ¶ 324 at 10. When evaluating transportation costs, an agency may rely on the information provided by a transportation rate specialist, as long as that information does not lead to an improper or unreasonable evaluation of the F.O.B. origin offers. *Fiber-Lam, Inc.*, B-237716.2, April 3, 1990, 90-1 CPD ¶ 351 at 3.

On the record before us, we do not find the agency's reevaluation of the transportation costs reasonable. Here, as mentioned previously, the solicitation provided that the agency would "use the lowest freight rates" from the transportation office that were in effect and on file to calculate the transportation costs. RFP §§ M.5., M.5.1.2. The solicitation further instructed that in case there were no rates in effect and on file, the transportation office was required to request the lowest shipping method and price from USTRANSCOM, using, for example, "cargo moving under 'One-Time-Only' contracts, Sea-Air Multi-modal contracts, Special Assignment Airlift Missions or Direct Bookings." *Id.*

The agency asserts that after it learned that there were no rates on file, it sought input from USTRANSCOM, which provided the Army with alternative rates. COS/MOL at 5.

This input ultimately led the agency to use its port-to-port analysis as part of the reevaluation. *Id.* On this basis, the agency maintains that its evaluation was reasonable and consistent with the solicitation. We find, however, that the record does not support the agency's conclusions.

Specifically, while the record contains e-mail discussions between the Army and USTRANSCOM, there is no evidence that the agency actually received a calculation of shipping rates from USTRANSCOM for routes for which there were no established rates on file.⁸ In fact, during these discussions, an USTRANSCOM analyst explained that it could be difficult to estimate those rates for all offerors. AR, Tab 25, Email Exchange between TACOM and USTRANSCOM at 3-4. Nevertheless, the USTRANSCOM analyst offered to estimate the inland shipping costs "for US21's routes," using methods identified in section M of the solicitation, discussed above, including "SAAM [Special Assignment Airlift Missions] estimates," and "OTO estimates," but the Army declined the offer. *Id.*

Instead, it appears that the Army resorted to using "port-to-port" rates so that the agency could use "common booking term[s]" for all offerors. AR, Tab 26, Corrective Action Minutes at 1; AR, Tab 25, Email Exchange between TACOM and USTRANSCOM at 1. In our view, by adopting this approach, the agency failed to follow the specific terms of the solicitation regarding the evaluation of transportation costs.

As discussed above, the RFP provided detailed guidance as to what type of "lowest cost shipping method and price" the agency was to request from USTRANSCOM in the event there were no established published shipping rates. See RFP §§ M.5., M.5.1.2. In this situation, the solicitation did not contemplate the agency's transportation team to determine how to assess the transportation costs. Rather, the solicitation required the agency to request the calculation of transportation costs from USTRANSCOM and evaluate each offeror based upon that offeror's specific shipping characteristics.⁹ *Id.*

⁸ The record shows that in its initial email to USTRANSCOM, the transportation specialist requested assistance with the evaluation of the shipping costs, stating:

If there are no rates on file to support the moves listed in the attached spreadsheet[,] please provide rates for all of the following:

- 1) A double booking (and define/justify the route) if available;
- 2) Special Assignment Airlift Mission (SAAM) costs;
- 3) One-Time-Only (OTO) cost.

AR, Tab 25, Email Exchange between TACOM and USTRANSCOM at 6. There is no evidence, however, that USTRANSCOM provided the requested rates.

⁹ As noted above, the solicitation stated that the "[g]overnment will apply the lowest evaluated transportation cost for the offerors *proposed shipping characteristics* to the proposed price." *Id.* § M.5.1.2 (emphasis added).

Here, the record shows that the agency did not obtain estimated inland rates from USTRANSCOM that were based on the offerors' specific shipping characteristics. AR, Tab 25, Email Exchange between TACOM and USTRANSCOM at 3-4. The record also demonstrates that the agency did not otherwise attempt to account for an offeror's particular shipping location in its evaluation of estimated transportation costs. While we recognize the agency's desire to use a similar basis for all offerors in its calculation, we find this argument unavailing here. The fact that there were no published rates for some inland routes does not mean that USTRANSCOM could not reasonably estimate or quantify them. Indeed, here, the USTRANSCOM analyst offered to estimate inland shipping costs, but the agency declined to accept the offer to develop these estimates.

We find that by using the described approach (*i.e.*, evaluating only the estimated port-to-port rates), the agency failed to estimate the cost of transporting the vehicles from an offeror's manufacturing facility--F.O.B. origin--to the port of embarkation. Thus, by declining to evaluate a distinct component of the offerors' estimated transportation costs--a component that would likely vary between the offerors--the Army failed to meaningfully assess the cost of performance between the competing proposals, as required by the RFP. Accordingly, we conclude that the agency's evaluation was not consistent with the solicitation.¹⁰

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was competitively prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *XPO Logistics Worldwide Gov't Servs., LLC*, B-412628.6, B-412628.7, Mar. 14, 2017, 2017 CPD ¶ 88 at 15. In this regard, Africa Automotive notes that the costs of shipping its vehicles from its manufacturing facility in [DELETED], Spain, to the port in [DELETED] are much lower than the costs of shipping US21's vehicles from [DELETED], Ukraine, to the port in [DELETED], because of the significant difference in weight between the vehicles proposed by US21 and the protester. Protest at 8-12 (arguing that US21's vehicles are [DELETED] percent heavier). Additionally, the protester argues that because of the unstable political situation in Ukraine, any ground transportation there might require security guards and security convoy, further increasing the transportation costs. *Id.* at 12.

The agency fails to rebut or present any evidence that contradicts or substantively addresses the protester's assertions related to competitive prejudice. While our Office cannot ascertain, with certainty, the merit of Africa Automotive's specific assertions about factors that are likely to result in a difference in shipping costs, we generally

¹⁰ As explained by the agency, the solicitation did not provide for using the final destination cities for the vehicles to calculate shipping costs, but instead, only identified the countries of Iraq and Somalia as the intended destinations. COS/MOL at 8. As such, our analysis above is limited to the shipping costs from the acceptance point, as indicated by each offeror, *i.e.*, the manufacturing facility, to the port of embarkation within the identified countries.

resolve doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See *Supreme Foodservice GmbH*, B-405400 *et al.*, Oct. 11, 2012, 2012 CPD ¶ 292 at 14; *Kellogg, Brown & Root Servs., Inc.--Recon.*, B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5. Accordingly, we conclude that Africa Automotive has established the requisite competitive prejudice and sustain the protest.

RECOMMENDATION

We recommend that the agency reevaluate the estimated transportation costs for the offerors. Before the reevaluation, however, we recommend that the Army review the terms of the solicitation describing the process the agency intends to use for evaluation of the transportation costs, and amend the solicitation, as necessary, to reflect the agency's intended process. In the event the agency amends the solicitation, we recommend that the agency request revised proposals. We further recommend that, upon the completion of this reevaluation, the agency prepare a new source selection decision. We also recommend that the agency reimburse the protester its costs associated with filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel