



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: American Material Handling, Inc.

File: B-406739

Date: August 14, 2012

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DIGEST

Agency properly terminated the protester's contract for a mobile crane for the Department of the Air Force and reopened the competition for the crane, where the solicitation omitted a mandatory Defense Federal Acquisition Regulation Supplement clause requiring the contractor to use U.S.-flag vessels to ship the crane.

DECISION

American Material Handling, Inc. (AMH), of Watkinsville, Georgia, protests the termination of its contract and resolicitation of the requirement by the General Services Administration (GSA) under request for proposals (RFP) No. 12RT005 for an all-terrain heavy duty mobile crane.

We deny the protest.

BACKGROUND

The RFP, issued by GSA on behalf of the U.S. Department of the Air Force, provided for award of a fixed-price contract for a commercial-off-the-shelf, 130-ton all-terrain mobile crane for Vandenberg Air Force Base, California. Offerors were informed that award would be made on a best value basis, considering (in descending order of importance) technical capabilities, price, and past performance. RFP at 9. With regard to the evaluation of technical capabilities, the RFP provided that proposals would be evaluated considering the minimum technical capabilities of

the crane, the overall capabilities of the crane (including the warranty), and proposed solutions for planning and the delivery schedule. Id. at 10.

As relevant here, the Cargo Preference Act of 1904 provides that “[o]nly vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps.”¹ 10 U.S.C. § 2631(a) (2006). The Act is implemented by Defense Federal Acquisition Regulation Supplement (DFARS) subpart 247.5--Ocean Transportation by U.S.-Flag Vessels. See DFARS § 247.570. In this regard, the DFARS requires that DFARS clause 252.247-7023 be included in all solicitations and contracts for the transportation of products that are intended for Defense Department use. DFARS § 247.574. This clause requires a contractor to use U.S.-flag vessels when transporting any supplies by sea under the contract, but also provides that a contractor may request that the contracting officer authorize shipment by a foreign-flag vessel if U.S.-flag vessels are unavailable or the freight charges are unreasonable. See DFARS clause 252.247-7023(b)(1), (c). The RFP did not include this clause.

GSA received five proposals in response to the RFP, including AMH's. Following the evaluation of proposals, contract award was made to AMH on March 13, 2012. GSA Statement of Facts at 2. Disappointed offerors were provided with debriefings, at which AMH's award price was revealed.

After award, GSA's contracting officer realized that the required DFARS clause had been omitted from the RFP. On March 23, GSA issued a stop work order to AMH. Id. at 3. AMH informed GSA that the crane, which it was obtaining from outside the United States, could not be shipped via a U.S.-flag vessel. AMH requested that GSA waive DFARS clause 252.247-7023. Agency Report (AR), Tab 8, Request for Waiver, Mar. 27, 2012. The contracting officer advised AMH that the agency intended to amend the RFP to include the required DFARS clause and request revised proposals.² Id.

¹ The Cargo Preference Act of 1904, which applies exclusively to entities of the Department of Defense (DoD), is more restrictive than the Cargo Preference Act of 1954, 46 U.S.C. § 55305, which applies to the federal government generally, including DoD. The RFP also did not include Federal Acquisition Regulation clause 52.247-64, which implements the Cargo Preference Act of 1954. Our references in the decision to the Cargo Preference Act are to the Cargo Preference Act of 1904, unless otherwise indicated.

² GSA made other amendments to the RFP that are not at issue in this protest. For example, GSA added an optional task for the vendor to provide crane-specific training. See RFP amend. 1, at 6.

The RFP was amended to include DFARS clause 252.247-7023. RFP amend. 1, at 48-52. On March 30, GSA requested AMH's revised proposal. AR, Tab 10, GSA Email to AMH, Mar. 30, 2012. AMH submitted a revised proposal and renewed its request that GSA waive the U.S.-flag vessel requirement.³ AR, Tab 11, AMH Revised Proposal Transmittal Letter, at 1. Following the receipt of revised proposals, GSA terminated AMH's contract for the convenience of the government. AR, Tab 12, Notice of Termination. GSA has not yet made a new source selection decision.

Following the termination of its contract, AMH protested to our Office.

DISCUSSION

AMH protests the termination of its contract and the reopening of the competition, arguing that GSA was required to grant it a waiver of the requirement for use of a U.S.-flag vessel to transport the crane. AMH also complains that GSA misled it with regard to the status of the procurement, and that the agency improperly refused to disclose AMH's competitors' prices where the agency disclosed AMH's price.

We have considered all of AMH's arguments, and conclude that they provide no basis to object to the agency's conduct of the procurement.

With regard to the termination of the AMH's contract, we generally decline to review challenges to the termination of contracts because such disputes are matters of contract administration that are for resolution by the boards of contract appeals and United States Court of Federal Claims under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13. See Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2012). We will, however, review the propriety of a contract termination where it flows from a defect that the contracting agency perceived in the award process. In such cases, we examine the award procedures that underlie the termination action for the limited purpose of determining whether the initial award was improper and, if so, whether the corrective action taken is proper. See Optimum Servs., Inc., B-401051, Apr. 15, 2009, 2009 CPD ¶ 85 at 2-3; see also Norfolk Shipbuilding & Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 CPD ¶ 667 at 3 (termination of a contract is permissible where an agency discovers subsequent to award that the solicitation did not adequately reflect the government's needs).

Here, GSA discovered after contract award that the RFP did not include a mandatory DFARS clause requiring the contractor to use a U.S.-flag vessel, and therefore the solicitation did not comply with the requirements of the Cargo Preference Act. Accordingly, the RFP did not adequately reflect the government's

³ In its revised proposal, AMH provided for transportation of the crane by U.S.-flag vessel. AR, Tab 11, AMH Revised Proposal, at 9.

needs. Although AMH contends that the agency should have waived the U.S.-flag vessel requirement under DFARS § 247.573-1(c)(3),⁴ rather than terminate the firm's contract and reopen the competition, the requirement was never included in AMH's contract. The parties' dispute as to whether or not this requirement should be waived concerns a matter of contract administration not subject to review by our Office. See 4 C.F.R. § 21.5(a); Hawker Eternacell, Inc., B-283586, Nov. 23, 1999, 99-2 CPD ¶ 96 at 3; Ingersoll-Rand, B-225996, May 5, 1987, 87-1 CPD ¶ 474 at 5. Disputes concerning application of the Cargo Preference Act and waiver of that Act are subject to the Contract Disputes Act of 1978, and are properly before boards of contract appeals and the United States Court of Federal Claims. See, e.g., Inter-Continental Equip., Inc., ASBCA No. 36897, Feb. 4, 1994, 94-2 BCA ¶ 26,708.

AMH also complains that the agency refused to disclose other offerors' prices to AMH, where GSA had disclosed AMH's price in debriefings provided to its competitors. AMH contends that GSA was required to disclose all offerors' prices to level the playing field. We find this complaint to be without merit.

Where, as here, the termination of an awardee's contract and reopening the competition are otherwise proper, prior disclosure of an offeror's price does not preclude resoliciting or reopening the competition. See Roxco, Ltd., B-277545, Oct. 27, 1997, 97-2 CPD ¶ 117 at 5. Here, in accordance with the post-award debriefing requirements of the Federal Acquisition Regulation (FAR), GSA properly disclosed AMH's price to disappointed offerors. See FAR § 15.506(d)(2). As a general matter, an agency is not required to equalize the possible competitive advantage flowing to other offerors as a result of the release of information in a post-award setting where the release was not the result of preferential treatment or other improper action on the part of the agency. See Nova Techs., B-403461.3, B-403461.4, Feb. 28, 2011, 2011 CPD ¶ 51 at 4. Moreover, any possible prejudice to the protester is mitigated by a number of factors, including that the agency informed AMH generally of its price standing vis-à-vis other offerors (that is, that its price was mid-range); that the basis for award is best value, and not price alone; and that the amendment of the RFP to include the U.S.-flag vessel requirement and

⁴ DFARS § 247.573-1(c)(3) provides that if the contractor notifies the contracting officer that the contractor considers the freight charges proposed by U.S.-flag carriers are excessive or otherwise unreasonable, the contracting officer "must" prepare a report for a determination as to whether the proposed freight charges are excessive or otherwise unreasonable.

the optional training task will result in different pricing. See Norvar Health Servs.-- Protest & Recon., B-286253.2 et al., Dec. 8, 2000, 2000 CPD ¶ 204 at 5, 6.

The protest is denied.⁵

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General Counsel

⁵ To the extent that AMH alleges that it was misled by GSA into believing that the agency would process its waiver, the record demonstrates otherwise.