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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: TransAtlantic Lines, LLC

File: B-296245; B-296245.2

Date: July 14, 2005

Brian A. Bannon, Esq., David A Leib, Esq., and Albert B. Krachman, Esq., Blank Rome LLP, for the protester.

Marc J. Fink, Esq., Anne E. Mickey, Esq., Heather M. Spring, Esq., and Christine Gollatz DeWitt, Esq., Sher & Blackwell, for Strong Vessel Operators, LLC, an intervenor.

Captain Joseph V. Fratarcangeli, Department of the Army, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's proposal failed to comply with requirement for self-sustaining refrigerated containers is denied where agency reasonably determined that proposal, which did not take exception to the container terms, provided sufficient information to demonstrate firm's intention and capability to meet the requirement.

2. Protest of omission of mandatory subcontracting limitation from solicitation is dismissed as untimely where issue is not raised until after award is made.

DECISION

TransAtlantic Lines, LLC (TAL) protests the award of a contract to Strong Vessel Operators, LLC (SVO) under request for proposals (RFP) No. W81G4E-04-R-0053, issued by the Department of the Army for regularly scheduled cargo transportation services to and from Jacksonville, Florida and Guantanamo Bay, Cuba. TAL contends that the awardee's proposal should have been rejected as technically unacceptable for failure to comply with the solicitation's requirement for self-sustaining refrigerated containers. TAL also contends that the award is improper because the solicitation failed to include a mandatory subcontracting limitation provision.

We deny the protest.

The RFP, issued on October 19, 2004, as a small business set-aside for commercial items/services, contemplated the award of a fixed-price requirements-type contract for a base year and two option years for regularly scheduled port-to-port cargo transportation services; award was to be made to the firm determined to have submitted the proposal deemed most advantageous to the government. RFP at 6, 21. The RFP set out three evaluation factors for award: technical capability (with subfactors for reliability of service, equipment, management approach, and electronic data interchange); past performance (with subfactors for quality of service, schedule, business relations, and management of key personnel); and price. The technical capability factor was more important than the past performance factor, and technical capability and past performance combined were approximately equal in importance to price. Id. at 8.

The RFP set out various generally-worded requirements to be met after award. For example, as relevant here, while the RFP contained a requirement for the contractor to provide “[s]elf-sustaining refrigerated containers, not more than two years old,” id. at 37, detailed design specifications for the containers, or details of how an offeror should propose to meet the self-sustaining aspect of the requirement, were not provided in the RFP. A glossary of terms provided as an attachment to the solicitation only generally defined the term “self-sustaining” as follows:

[a] refrigerated container which does not need an external power or fuel source, and upon which a self-contained power unit is mounted, either on the container or its accompanying chassis. The container is self-sustained only while the power unit and its fuel source are mounted.

Id. attach. 1 at 8.

Three proposals were received in response to the RFP, discussions were conducted, and revised proposals were received and evaluated. The proposal of TAL, the incumbent contractor of these services, was rated as very good under the technical capability factor and very good for past performance, for an overall rating of very good; TAL’s evaluated price was [deleted]. SVO’s proposal was rated very good under the technical capability factor and excellent for past performance, for an overall rating of very good; SVO’s evaluated price was \$16,118,157. (The third offeror’s proposal [deleted]; the proposal, therefore, was not considered further for award.) Noting the essential technical equality of the TAL and SVO proposals, the source selection official determined that price would necessarily become the determinative factor for award. Consequently, an award was made to SVO, the lower-priced offeror. This protest followed.

TAL contends that the agency must reject the awardee’s proposal for failure to comply with the RFP’s above-stated requirement for self-sustaining refrigerated containers. Specifically, TAL contends that SVO provided insufficient information

regarding how it intended to meet the requirement; according to TAL, it was inadequate for the awardee to merely identify the supplier and type of its containers, and state that it had leases with suppliers for the required equipment, including individual generator sets (gensets) to provide power to the containers in order to make them self-sustaining. TAL argues that SVO had to detail how it intended to provide self-sustaining containers, by specifying what types of gensets were proposed and how it intended to use the gensets during performance of the contract.¹

In a negotiated procurement, any proposal that fails to conform to material terms and conditions of the solicitation is unacceptable and may not form the basis for award. Alpha Tech. Servs., B-250878, B-250878.2, Feb. 4, 1993, 93-1 CPD ¶ 104 at 3. The procuring agency has primary responsibility for evaluating the technical information supplied by an offeror and determining the acceptability of the offeror's proposed item or service; we will not disturb such a determination unless it is shown to be unreasonable. Alpha Marine Servs., LLC, B-292511.4, B-292511.5, Mar. 22, 2004, 2004 CPD ¶ 88 at 4.

Here, our review of the record, including the evaluation record and the awardee's proposal, confirms the reasonableness of the agency's position that SVO's proposal adequately met the self-sustaining requirement. As an initial matter, there is no indication in the record that SVO took exception to the requirement at any time. While an agency may not accept at face value an offeror's promise to comply with material requirements where there is significant countervailing evidence reasonably known to the agency that should create doubt whether the offeror will or can comply with the requirements, there is nothing in the record here that provides any basis to question the reasonableness of the agency's determination of the awardee's intention

¹ For instance, TAL contends that in order for the containers to be self-sustaining, only "clip-on" gensets (i.e., generator sets which attach directly to the reefer container) can be used during barge transportation if "underslung" gensets (i.e., attached to the chassis the reefer sits upon for surface transportation) are removed when the containers are loaded on the barge. The protester suggests that SVO will provide only underslung gensets because a photograph of containers in the SVO proposal fails to show any clip-on gensets on the containers, and SVO's contingency plan (submitted for review under a separate evaluation subfactor) does not reference the use of clip-on gensets. These arguments are not supported by the record. First, as discussed above, offerors were not required to describe in detail the power unit (or genset) they intended to meet the self-sustaining requirement. Second, the protester's reliance on the lack of evidence of clip-on gensets in the photographs in SVO's proposal and the absence of a reference to gensets in SVO's contingency plan is not persuasive, since the protester's proposal has the same omissions (the photographs in TAL's proposal do not show the use of clip-on gensets on the containers, and TAL did not provide a contingency plan referencing their use).

and capability to meet the self-sustaining requirement. See id. Contrary to TAL's suggestion, offerors were not required to detail the type of gensets they intended to use to power their containers, or how the firm intended to use the gensets it proposed.² In short, since SVO did not take exception to the requirement, it was not required to provide additional detail regarding its proposed approach, and otherwise set out in its proposal that it could and would provide containers and gensets to meet the self-sustaining requirement, the agency reasonably determined that SVO demonstrated the capability to meet the referenced requirement in accordance with the RFP's terms.³ See Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 3; Rockwell Elec. Commerce Corp., B-286201 et al., Dec. 14, 2000, 2001 CPD ¶ 65 at 10-11.

TAL also contends that the award to SVO is improper because the solicitation, a small business set-aside, failed to include a mandatory provision regarding limitations on subcontracting. Specifically, the RFP omitted the provision at Federal Acquisition Regulation § 52.219-14, applicable to small business set-aside procurements, that provides that in a contract for services (except construction), by submission of its offer and execution of a contract, the contractor agrees that at least 50 percent of the cost of contract performance incurred for personnel will be expended for the contractor's own personnel.

An unsuccessful offeror cannot wait until learning of an adverse award determination to file a protest of apparent solicitation improprieties; rather, under our Bid Protest Regulations, to be timely, a challenge to an apparent solicitation defect must be filed prior to the closing time for the receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2005). Accordingly, to the extent TAL challenges, post-award, the omission of the subcontracting limitation from the solicitation, the protest is

² We note that elsewhere in the RFP, regarding the agency's requirements for leased equipment, the agency only generally describes the required power units for refrigerated containers as gensets, without delineating any particular type of genset. RFP at 50.

³ TAL challenges a supplemental statement by the contracting officer in response to the protest, in which he refers to a photograph in SVO's proposal as support for the conclusion that SVO met the self-sustaining requirement through the use of gensets. According to TAL, the photograph in fact does not show the use of gensets. Regardless of this post-protest statement, it is clear from the record that the agency reasonably based its evaluation of SVO's proposal—including its intention to comply with the self-sustaining requirement—on SVO's proposal as a whole, including its listing of the containers it intended to supply and the supplier with whom it had leases for the gensets.

untimely.⁴ Lockheed Eng'g and Mgmt. Servs., Inc.--Recon., B-212858.2, Feb. 14, 1984, 84-1 CPD ¶ 193 at 1-2.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ In any event, we note that TAL has not demonstrated a necessary element of any viable protest—that it has been competitively prejudiced by the omission of the subcontracting limitation. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). TAL argues that, in order to comply with the subcontracting limitation, which had been required under its prior contract for these services, the firm purchased its own vessel and employed the crew, and that if TAL had not done so, it could have proposed a substantially lower price under the RFP, as it alleges SVO has done, by time-chartering a vessel and subcontracting its crew. In response, the agency asserts that TAL's purchase of the vessel and hiring of the crew in fact did not increase TAL's price under the RFP compared to using a time-chartered vessel and its subcontracted crew. Specifically, the contracting officer states that a comparison of TAL's proposed prices under the RFP (based on use of a vessel owned and operated by TAL) to its proposal for the same services under its incumbent contract (which was based on a time-chartered vessel and subcontracted crew), shows that, using current cargo projections, the protester was, in fact, able to reduce its proposed price under the RFP from its prior pricing. Contracting Officer's Statement of Facts at 2. The protester has not refuted the agency's position in this regard.