



Decision

Matter of: Sea Box, Inc.

File: B-400198

Date: August 25, 2008

Robert A. Farber for the protester.

Maj. William J. Nelson, Department of the Army, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Determination to cancel invitation for bids after bid opening was unobjectionable where all bids exceeded funding allocated for project, notwithstanding protester's challenge to validity of funding estimate and reasonableness of low responsive bid.

2. After cancellation of solicitation, agency decision to lease storage containers under Economy Act, without conducting a new competition, was unobjectionable where lease was consistent with requirements of act and applicable regulations require that agency use pre-existing contract for all such leases.

DECISION

Sea Box, Inc., protests the cancellation, after bid opening, of invitation for bids (IFB) No. W912L1-08-B-0001, issued by the Department of the Army, U.S. Property and Fiscal Officer, Texas, for supply of dry storage containers (connexes) for units of the Texas Army National Guard (TXARNG).

We deny the protest.

The IFB contemplated the award of a fixed-priced contract for 238 20-foot connexes for use at local armories throughout Texas and for use by the 36th Infantry Division in support of brigades mobilizing for service in both Iraq and Afghanistan. This is the second solicitation for this requirement. The prior solicitation, a request for proposals set aside for small businesses, resulted in a contract in the amount of \$624,750. Sea Box protested that award, challenging the awardee's small business status and its compliance with the Buy American Act (BAA). The agency took

corrective action--terminating the contract and resoliciting the requirement--and we dismissed the protest as academic (B-310562, Nov. 5, 2007).

Based on its experience in the prior procurement, the agency budgeted \$624,750 for the requirement here. The IFB was issued on an unrestricted basis but, as before, required compliance with the BAA. The agency received seven bids; five, including the low bid (\$634,500.86) offered connexes manufactured in China. Sea Box, with a bid of \$1,721,930, offered connexes from Turkey. None of the offered products--Chinese or Turkish--complied with the BAA. While the agency concluded that it could not award a contract for Chinese-made connexes, it determined that, in accordance with the World Trade Organization Government Procurement Act (WTOGPA), it could award a contract for connexes that were manufactured or substantially transformed in Turkey. In order to ensure compliance with the WTOGPA, the contracting officer requested that Sea Box (and another "Turkish" bidder) certify that their products met the applicable manufacturing country requirements. Sea Box certified that 100 of its connexes were manufactured or substantially transformed in Turkey, but indicated that, due to delays in the procurement, it could no longer obtain the remaining units from its source in Turkey. As a result, the other 138 units were to be manufactured in China. The other bidder, whose price was significantly higher than Sea Box's, certified that all 238 units would come from Turkey.

Because the prices of the Turkish products exceeded the budgeted amount, the contracting officer sought additional funds. However, she found that an increase of only \$323,600 was available, for a total of \$948,350.65. Subsequently, she became aware that the Army Intermodal Distribution Platform Management Office (AIDPMO) could lease the agency all the connexes it needed for approximately \$200,000. In this regard, the record shows that, under Army regulations, AIDPMO must approve all purchases of intermodal containers and all leases must be conducted through AIDPMO using the current Military Surface and Distribution Command (SDDC) container leasing contract. Army Regulation (AR) 56-4 ¶¶ 3-7a(3), 3-7b. The SDDC issued a master lease streamlining contract (MLSC) to Textainer Equipment Management Limited in 2003 and, in April 2004, the Army issued a message to all of its agencies--including the National Guard Bureau--mandating that all Army leasing requirements for intermodal distribution platforms (including connex containers) be processed using the MLSC. Army Message, ¶ 4. Based on the lack of sufficient funds to purchase the units, the contracting officer decided to cancel the IFB and to meet the agency's requirements with a lease, through AIDPMO. The contracting officer notified Sea Box and the other bidders that the IFB was canceled, and later advised Sea Box that all otherwise acceptable bids were at unreasonable prices. Sea Box then filed this protest.

Sea Box asserts that the agency improperly determined that the bid prices all were unreasonably high, and challenges the agency's determination that it lacked sufficient funds. The protester asserts that the original estimate of \$624,750 was not

based on proper market research and therefore was unrealistically low. Comments at 2. Sea Box concludes that, since its bid for non-Chinese-made connexes was low, the agency should have awarded it a contract instead of canceling the IFB.

Cancellation of a solicitation after bids have been opened and prices have been exposed is only permitted where a compelling reason exists to cancel. National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16 at 4; Federal Acquisition Regulation (FAR) § 14.404-1(a)(1). A contracting agency properly may cancel a solicitation when sufficient funds are not available, regardless of any disputes concerning the validity of the government estimate or the reasonableness of the low responsive bid price. National Projects, Inc., *supra*; J. Morris & Assocs., Inc., B-256840, July 27, 1994, 94-2 CPD ¶ 47 at 2 n.1; Armed Forces Sports Officials, Inc., B-251409, Mar. 23, 1993, 93-1 CPD ¶ 261 at 2-3, recon. denied, B-251409.2, May 24, 1993, 93-1 CPD ¶ 402.

Here, only two bids--Sea Box's and one other--offered products that met the solicitation's BAA requirements, and by the time the agency canceled the IFB, Sea Box was unable to supply 238 connexes that were BAA compliant. The agency determined that both bids exceeded the original budgeted funds and the additional funds identified by the contracting officer, and the protester has not shown otherwise. Under these circumstances, the agency had a compelling reason to reject all bids and cancel the solicitation.

Our conclusion is not changed by Sea Box's observation that the IFB allowed the agency to make multiple awards, meaning that award could be made for less than the entire requirement, and that the agency therefore could have purchased a quantity of connexes from Sea Box up to the available funding. Comments at 3-4. While the IFB allowed the agency to make multiple awards, it did not require the agency to do so. The management of an agency's funds generally depends on the agency's judgment concerning which projects and activities shall receive increased or reduced funding. National Projects, Inc., *supra* at 5; Armed Forces Sports Officials, Inc., *supra*, at 2. Thus, the failure to make award to Sea Box for a reduced quantity was not improper.

Sea Box asserts that obtaining the connexes by lease through the AIDPMO--rather than by competitively soliciting the lease requirement--was improper, because the agency has failed to justify acquiring the items under the Economy Act.

This argument is without merit. The Economy Act provides authority for placement of orders between major organizational units within an agency so long as the act's requirements are met. 31 U.S.C. § 1535(a) (2000); see Dictaphone Corp., B-244691.2, Nov. 25, 1992, 92-2 CPD ¶ 380 at 3-4, recon. denied, B-244691.3, Jan. 5, 1993, 93-1 CPD ¶ 2. Under the act, a major organizational unit within an agency may place an order with a major organizational unit within the same agency for goods or services if amounts are available; the head of the agency or unit decides the order is in the best interest of the government; the agency or unit to fill the order is able to provide or obtain by contract the ordered goods or services; and the agency head decides the

goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise. Id. Here, all four requirements were satisfied. The agency explains that it had sufficient funding to use the lease; it was in the best interests of the government to do so; the acquisition would be made under an existing contract, entered into before placement of the order, to meet the agency's requirements for the same or similar supplies; and the supplies could not otherwise be provided as conveniently or cheaply as with the lease. Agency Second Supp. Report at 4; see 31 U.S.C. § 1535(a)(1)-(4).

Sea Box asserts that the agency did not properly justify its last finding--that the supplies could not otherwise be provided as conveniently or cheaply as with the lease. However, the agency specifically states that use of the MLSC ensures that the government's acquisition of containers is more economical and efficient. Agency Second Supp. Report at 4. This conclusion is consistent with the results of the competition under the IFB, and Sea Box has not presented any evidence that the connexes could be acquired more conveniently or cheaply elsewhere. Moreover, we think this finding is implicit in the Army's award of the MLSC and its promulgation of AR 56-4, which requires use of the current MLSC contract for all connex leases, presumably based on convenience and cost savings. We conclude that the agency's lease of the connexes under the MLSC complied with the requirements of the act, and that it was not required to compete the lease requirement. The availability of the MLSC contract, which provides a significantly less expensive means for the agency to meet its needs, provides an independent basis for canceling the IFB. Colonial Lock Supply Co., Inc., B-265645, Sept. 27, 1995, 95-2 CPD ¶ 149 at 2.

Sea Box challenges the lease on a number of other bases. For example, it asserts that the agency has failed to demonstrate compliance with AR 56-4 requirements for an equipment lease checklist and funding documents; that there are discrepancies in the number and price of the connexes to be leased; and that the MLSC contract and Textainer do not conform to various IFB requirements (date of manufacture, color, BAA compliance). Second Supp. Comments 1-5.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2000 & Supp. IV 2004), only an "interested party" may protest a federal procurement. A protester is deemed an interested party where it is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2008). 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. Since we have determined that the agency's decision to meet its requirement through a lease is

unobjectionable, and its regulations do not permit it to lease connexes outside the MLSC or from other than its designated contractor, Sea Box cannot be in line for any lease award; thus, it is not an interested party to protest on these additional grounds.

The protest is denied.

Gary L. Kepplinger
General Counsel