Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: P&R Water Taxi, Ltd.

File: B-279014

Date: April 23, 1998

Devon E. Hewitt, Esq., Shaw Pittman Potts & Trowbridge, for the protester.
George L. Sogor, for Admiral Towing and Barge Company, an intervenor.
Alan W. Mendelsohn, Esq., Samuel A. Novello, Esq., and Michelle C. Simms, Esq., Department of the Navy, for the agency.
Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General solicitation provision requiring offerors to comply with United States Coast Guard (USCG) regulations did not require that an offeror's proposed tugs be USCG-inspected prior to award in order to be eligible for award; rather, compliance with this general provision is a matter of contract administration.

DECISION

P&R Water Taxi, Ltd. protests the award of a contract to Admiral Towing and Barge Company under request for proposals (RFP) No. N00033-97-R-1005, issued by the Department of the Navy, Military Sealift Command, for the charter of three tractor-like tugs[1] to provide ocean towing services. P&R maintains that the low-priced proposal of Admiral was not eligible for award.

We dismiss the protest.

The RFP, issued on July 23, 1997, provided that the award would be made to the responsible offeror whose technically acceptable proposal represented the best overall value to the government. In determining the best value, the RFP stated that an offeror's evaluated price would be considered more important than technical merit. In determining technical acceptability, the RFP stated that proposals would be evaluated based on the minimum technical requirements as contained in the solicitation.

Section C of the RFP contained the statement of work and specifications. Section C3 provided that the tug "[o]wner warrants that the Tug performing under

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[1]A "tractor-like tug" is a tugboat equipped with a special propulsion system allowing the tug to push or to pull other vessels in all directions.

this Charter shall be in full conformity with the following specifications, in addition to all other requirements of this Charter from the time of delivery and during the currency of this Charter." Among the listed specifications, under section C3.1(a), the owner was to warrant that the tug was as described in Attachment J2, captioned "Tug Particulars." Under section C3.1(c), the owner was to warrant that the tug "shall be in full compliance with . . . all applicable laws, regulations, and other requirements of the United States including all U.S.C.G. [United States Coast Guard] regulations." The RFP, as initially issued, required tugs to be capable of transporting a maximum of 16 persons.[2]

In amendment No. 0002, in response to an offeror's question concerning the issue of tug inspection at the time of award for newly constructed tugs, the agency stated that the tug characteristics submitted in an offeror's technical proposal would be reviewed to ensure that they met the RFP requirements. Referencing section H1.1 of the RFP, the agency stated that "these submissions are warranties of the tug['s] performance and must be met when the tug is delivered. . . . Upon completion of the tug['s] construction, and at any time after delivery, the Government may elect to conduct an inspection of the tugboat to ensure its compliance with the warranties offered." This amendment also directed offerors to contact the appropriate Officer in Charge of Marine Inspection to ensure that the proposed tugs satisfied USCG requirements.

Amendment No. 0003, section C3.1(e)2, required that "[t]ugs shall be USCG inspected vessels." The basis for this inspection requirement was a USCG memorandum stating that the carriage of 16 persons would require the use of USCG-inspected tugs. Subsequently, amendment No. 0005 reduced the personnel carriage requirement from 16 to 12 persons and removed the USCG inspection requirement. Amendment No. 0005 now required that proposed tugs be classed by a recognized classification society and reminded offerors of the regulatory compliance requirement in section C3.1(c) (offeror's warranty that the tug shall be in full compliance with all applicable USCG regulations).

Several firms, including P&R and Admiral, submitted proposals. P&R proposed newly constructed, USCG-inspected tugs. Admiral proposed newly constructed tugs which would not be USCG-inspected. The proposals of P&R and Admiral received overall highly satisfactory technical ratings for meeting the minimal technical requirements of the RFP; their respective management plans were determined adequate; and each firm received an outstanding past performance rating. Admiral submitted the low evaluated price and P&R submitted the second low evaluated price. The agency determined that the proposals of Admiral and P&R were essentially technically equal. Because price was more important than technical merit under the RFP, the agency determined to award a contract to Admiral, the

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[2]This number excludes the tug master and crew.

responsible offeror whose low-priced, technically acceptable proposal was deemed to represent the best value to the government.

P&R argues that Admiral's proposal for newly constructed, uninspected tugs was not eligible for award because USCG inspection of tugs was a mandatory minimum technical requirement based on language in section C3.1(c) of the RFP which requires compliance with USCG regulations. More specifically, P&R notes that Admiral completed Attachment J2, submitted with its proposal, by stating that the gross tonnage for each uninspected tug would be 99 gross tons. With reference to specific USCG regulations which were not included in the RFP, P&R points out that towing vessels need not be USCG-inspected if they are 100 gross tons or over, for which they may carry up to 12 persons, or if they are less than 100 gross tons, for which they may carry up to 6 persons. In light of these specific regulations, P&R maintains that Admiral's proposed uninspected tugs, at 99 gross tons apiece, will not be able to carry 12 persons as required by the RFP. P&R maintains that Admiral's proposal therefore is technically unacceptable because Admiral's proposed tugs do not comply with the 12-person minimum technical requirement of the RFP.

The agency's position is that while the RFP required proposed tugs to be able to carry 12 persons, there was no specific requirement for USCG inspection (as noted above, such a requirement was included in amendment No. 0003 for the carriage of 16 persons, but was deleted in amendment No. 0005 when the requirement was reduced to 12 persons) and section C3.1(c), requiring compliance with general USCG requirements, involves a matter of contract administration for which our Office does not have jurisdiction. We agree with the agency.

A solicitation provision which generally requires that offerors comply with federal, state, and local laws and regulations places responsibility for obtaining necessary licenses and permits upon the contractor. This is not a matter of technical acceptability or responsibility and the agency need not consider whether such licenses or permits have been obtained in determining an offeror's eligibility for award. Rather, the need for a license or permit to perform the contract is left to be resolved by the offeror and the licensing authority. Jekyll Towing and Marine Servs. Corp., B-199199, Dec. 2, 1980, 80-2 CPD ¶ 413 at 6.[3] Thus, an allegation that an awardee might provide nonconforming items based on a general solicitation provision requiring regulatory compliance is a matter of contract administration,

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[3]Where, however, there is an express solicitation requirement that an offeror hold a particular license or permit, compliance therewith is a matter of an offeror's responsibility. Jekyll Towing and Marine Servs. Corp., supra.

which is within the discretion of the contracting agency, not our Office. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (1997); see Impact Instrumentation, Inc., B-217291, Feb. 26, 1985, 85-1 CPD ¶ 240 at 3.

Here, section C3.1(c) of the RFP constitutes a general requirement which merely charges the contractor with responsibility for complying with USCG regulations, including USCG inspection requirements. The RFP, as amended, requires that proposed tugs be able to carry 12 persons, but contains no specific provision requiring USCG-inspected tugs prior to award. An offeror, like Admiral, was not required to propose USCG-inspected tugs in order to be eligible for award, and no evidence of USCG inspection was required at the time of award. While Admiral's proposal, based on information included in its Attachment J2 and when read in conjunction with specific USCG regulations, may have indicated that the firm's proposed uninspected tugs could not carry 12 persons, Admiral's ultimate compliance with the general regulatory compliance language in section C3.1(c) is not necessary until the time of contract performance.[4] In other words, at the time of contract performance, if Admiral's newly constructed tugs are 99 gross tons, then in accordance with USCG regulations, Admiral's tugs would have to pass USCG inspection in order to be able to legally carry 12 persons. This will be a matter for the agency to resolve as part of its administration of Admiral's contract.

Accordingly, we have no basis to disturb the award to Admiral, the low-priced, technically acceptable, responsible offeror.

The protest is dismissed.[5]

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[4]This view is consistent with RFP language contemplating post-award compliance, for example, section C3 of the initial RFP which requires an offeror's compliance with the specifications "from the time of delivery and during the currency" of the contract, and amendment No. 0002 which requires proposal submissions to be met "when the tug is delivered."

[5]There also is a question whether the RFP requires the carriage of cargo and therefore the use of USCG-inspected tugs. The agency's position is that the carriage of cargo is not contemplated by the terms of the RFP, and therefore, USCG-inspected tugs are not required. However, reading P&R's argument in the most favorable light--that the terms of the RFP do require the carriage of cargo--whether Admiral's proposed uninspected tugs will, in fact, be able to legally carry cargo is also a matter of contract administration for which the above analysis is equally applicable.