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**Comptroller General
of the United States**

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

Decision

Matter of: Charleston Marine Containers, Inc.

File: B-299862

Date: August 30, 2007

Mike Szathmary, Charleston Marine Containers, Inc., for the protester.
Bob Loughery, for Sea Box, Inc., an intervenor.
Marlene Surrena, Esq., and Sharif T. Dawson, Esq., Defense Logistics Agency, for the agency.
Linda C. Glass, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's determination to approve successful vendor's product is denied where record shows that the agency's determination was reasonably based.

DECISION

Charleston Marine Containers, Inc. (CMCI) protests the issuance of a delivery order to Sea Box, Inc. under request for quotations (RFQ) No. SPM8ED-07-Q-0336, issued by the Defense Logistics Agency, Defense Supply Center Philadelphia, for Tricon II cargo containers. The protester principally maintains that the Sea Box container was improperly approved by the agency.

We deny the protest.

The RFQ, issued May 7, 2007, sought quotes from two qualified sources to supply 9 Tricon II containers to be delivered within 10 days of award.¹ Quotations were to be submitted by May 9. The RFQ listed products of Sea Box and CMCI with their respective part numbers as approved, and also permitted evaluation of alternate

¹ A Tricon II container is a cube-shaped container that has a set of doors on both ends. The agency reports that "Tricon" is a common generic term used in the container industry to refer to a specific type of cargo container. Agency Report (AR) at 2.

products if a complete data package was furnished. Award was to be made based on vendors' prices and scores derived from the Automated Best Value System (ABVS). RFQ at 13.² The ABVS is an automated system which collects and analyzes vendors' past performance history for a specific period and translates it into a numeric score; it is based on considerations of delivery and quality.

Sea Box and CMCI responded to the RFQ. Sea Box submitted a quote of \$38,637 for its containers with a 10 day delivery schedule. CMCI submitted a quote of \$46,039.77 with a 21 day delivery schedule. The contracting officer evaluated the quotes and the vendors' ABVS scores and issued an order to Sea Box on June 2. On June 8, CMCI filed this protest with our Office.

In its initial protest, CMCI argues that the salient characteristics listed in the RFQ for a Tricon II container were in fact the salient characteristics of a Tricon I container. The protester also argues that, while it does not question whether the Sea Box Tricon II container satisfies the RFQ requirements, it maintains that the Sea Box container does not meet the higher quality and performance standards of a Tricon II container.

To the extent the protester contends that the specifications for a Tricon II container were inaccurately listed in the RFQ or that the Sea Box container was improperly listed as an approved product, its protest is untimely. This Office's Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules require that protests based upon alleged improprieties in a solicitation which are apparent prior to the deadline for receipt of offers or quotations must be filed before that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2007). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.-Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Here, since the specifications were clearly stated and the Sea Box product was identified as approved in the RFQ, any argument that the specifications were inaccurate or that the Sea Box container should not have been listed as an approved product was required to be raised in a protest filed before the deadline for receipt of quotations. Since CMCI did not protest until after the delivery order was issued, these arguments are untimely and will not be considered.

In its comments submitted in response to the agency report, CMCI contends that the Sea Box product was not properly approved by the agency. Specifically, CMCI argues that the agency failed to follow the procedures for evaluating an "alternate product" in that Sea Box was not required to submit all drawings, specifications, or

² We recognize that this protest involves an RFQ; however, the agency throughout its procurement record uses award language. We will retain the award language for consistency with the underlying record.

other data necessary to clearly describe the characteristics and features of the alternate being offered.³

As a preliminary matter, we note that Sea Box was not offering an alternate product here. The Sea Box container was approved by the agency prior to issuance of the RFQ and was specifically listed in the RFQ as an approved product.

At best, the protester's arguments are limited to a challenge to the adequacy of the agency's review of the Sea Box product.⁴

A contracting agency has the primary responsibility for determining its minimum needs and for determining whether a previously unapproved product will satisfy those needs, since it must bear the burden of difficulties incurred by reason of a defective evaluation. Chromalloy Gas Turbine Corp., B-234272, May 17, 1989, 89-1 CPD ¶ 474 at 2. Whether a vendor seeking approval of its product has submitted sufficient information to convince the agency that it will meet the agency's minimum needs is essentially a technical judgment committed to the agency's discretion, id. at 3, which we will not disturb unless it is unreasonable. Service & Sales Inc., B-247673, June 29, 1992, 92-1 CPD ¶ 545 at 3. A protester's mere disagreement with an agency's technical judgment does not render the judgment unreasonable and does not provide a legal basis for sustaining a protest. Astrosystems, Inc., B-261673.2, Dec. 7, 1995, 95-2 CPD ¶ 267 at 4.

The agency reports that it reviewed the technical data package (TDP) submitted by Sea Box to determine if it was equal to the technical requirements set forth in the Purchase Item Description (PID) for the Tricon II container. AR., Tab 8, Declaration of Product Specialist. The agency's review consisted of comparing all physical and salient characteristics listed in the TDP with those set forth in the PID for exact conformance. The agency further reports that it compared the Sea Box Tricon II to

³ To the extent the protester argues that the Sea Box container violates the protester's patent, this issue is not for our consideration. Lab Prods., Inc., B-252452, Mar. 19, 1993, 93-1 CPD ¶ 250 at 4. A patent holder's remedy for any alleged government violation of its patent rights, resulting from a government procurement, is a suit for money damages against the government before the United States Court Federal Claims. See 28 U.S.C. § 1498(a) (2000); Diversified Technologies; Almon A. Johnson, Inc., B-236035, Nov. 6, 1989, 89-2 CPD ¶ 427 at 3.

⁴ We view CMCI's challenge to the adequacy of the agency's approval of the Sea Box container as timely since the protester indicates that this challenge is based on its examination of a photograph of the Sea Box container it received on June 10, 2007 that presumably indicates that the Sea Box container does not satisfy the requirements of a Tricon II container and on information contained in the agency report submitted in response to the protest.

the CMCI Tricon II from information available from both vendors. Specifically, the agency reviewed the Sea Box catalogue page which contained dimensional characteristics and data indicating the Sea Box container was manufactured to the latest International Organization of Standardization (ISO) standards applicable to these containers. The agency concluded that both containers were manufactured to the latest ISO standards, were dimensionally the same, and met or exceeded the government's minimum needs. On this basis, the agency concluded that the Sea Box container met all of the government's requirements, including the salient characteristics listed in the PID, and therefore that the container was properly included as an approved Tricon II container. Id.⁵

Here, we have no basis to question the agency's decision to grant approval for the Sea Box container. While CMCI challenges the adequacy of the documentation used by DLA in evaluating the acceptability of the Sea Box container, CMCI's concerns fall short of establishing that the agency's determination was unreasonable. At best, the protest arguments constitute technical disagreements which do not provide a basis for the protester to prevail on this matter.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁵ In fact, the protester in its comments to the agency report specifically states that its protest was not that the Sea Box product did not meet the salient characteristics of the purchase order, but rather that the RFQ mistakenly listed the salient characteristics for the Tricon I container instead of the Tricon II. As previously stated, any challenge to the solicitation is untimely. Moreover, both vendors submitted quotes for their respective Tricon II containers.