



Decision

Matter of: Sea Box, Inc.

File: B-420737

Date: July 25, 2022

Robert A. Farber, Esq., for the protester.
Andrew T. McGuire, Esq., Defense Logistics Agency, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation fails to provide information regarding how the agency will determine whether an offered item qualifies as a commercially available off-the-shelf item is dismissed where the protester does not cite any procurement law or regulation requiring the agency to include such information in the solicitation.

DECISION

Sea Box, Inc., a small business of East Riverton, New Jersey, protests the terms of request for quotations (RFQ) No. SPE8ED-22-Q-0520, issued by the Defense Logistics Agency (DLA) for freight containers. Sea Box argues that the solicitation should provide additional information regarding The Buy American Act's (BAA) requirement for domestic end products.

We dismiss the protest.

On April 29, 2022, DLA issued the RFQ as a small business set-aside under the commercial item and simplified acquisition procedures of Federal Acquisition Regulation (FAR) parts 12 and 13, seeking quotations for 31 freight containers called "Tricon II" containers. Req. for Dismissal at 3; Req. for Dismissal, encl. 1, RFQ at 1. The solicitation contemplates the issuance of a fixed-price purchase order to the vendor offering the quotation representing the best value to the government considering price and past performance. RFQ at 3, 22. The RFQ includes Department of Defense FAR Supplement (DFARS) provision 252.225-7000, Buy American-Balance of Payments Program Certificate, and DFARS clause 252.225-7001, Buy American and Balance of Payments Program. *Id.* at 17, 33.

On May 6, prior to the time set for receipt of quotations, Sea Box filed this protest with our Office. Sea Box argues that the RFQ fails to provide information necessary to compete. Protest at 4, 6-7. Specifically, Sea Box argues that the agency is required to disclose the specific quantity of Tricon II containers a vendor must have sold commercially to satisfy DLA's definition of commercially available off-the-shelf (COTS) items. *Id.* at 6-7. DLA asks our Office to dismiss the protest for failing to state a valid basis of protest. Req. for Dismissal at 1. As explained below, we dismiss the protest.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

The DFARS provision at 252.225-7000 requires vendors to certify that their end products are one of the following: domestic, from a qualifying country, or foreign. DFARS provision 252.225-7000(c). A domestic end product is defined as an "end product manufactured in the United States if . . . [it satisfies the "component test"], or . . . [t]he end product is a COTS item." DFARS clause 252.225-7001(a). For an item to satisfy the component test, "[t]he cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States [must] exceed[] 55 percent of the cost of all its components." DFARS clause 252.225-7001(a). A COTS item is defined as any item of supply that is a commercial item, sold in substantial quantities in the commercial marketplace, and offered to the government in the same form in which it is sold in the commercial marketplace. DFARS clause 252.225-7001(a).

If an end product is identified as a foreign end product, the agency must evaluate the quotation in accordance with part 225 of the DFARS, which instructs the agency to apply a 50 percent evaluation factor to price, unless the quotation is otherwise exempt from application of the price evaluation factor under the Buy American or Balance of Payments Program.¹ DFARS provision 252.225-7000(b)(1); see DFARS 225.502(c)(ii)(E). *Id.*

The RFQ includes two evaluation factors: past performance and price. RFQ at 3, 22. Sea Box's protest relates to the price factor. Essentially, Sea Box argues that it is unable to compete intelligently for the task order because, based on the information in the RFQ, the firm is unable to certify whether or not its offered Tricon II container qualifies as a domestic end product as defined by the BAA. Protest at 5-8.

¹ An "evaluation factor of 50 percent" refers to application of a price premium determined by multiplying the vendor's quoted price by 50 percent and adding the result to the vendor's quoted price to determine its total price. DFARS 225.105(b); FAR 25.105(b); See DFARS 225.504 (Evaluation examples).

In order to avoid its product being identified as a foreign end product subject to the 50 percent price evaluation factor, Sea Box would like to identify its Tricon II container as a COTS item. Protest at 6. The protester argues that without knowing the specific quantity of Tricon II containers a vendor must have sold commercially to satisfy DLA's definition of COTS, and thus qualify as a domestic end product, it is unsure as to whether or not the agency will apply the price premium evaluation factor to its quotation. *Id.* at 4, 6-7.

DLA explains that the applicable regulations require "self-certification on the part of quoters and offerors" as to whether their offered product is a domestic, qualifying, or foreign end product as defined by the BAA. Agency Supp. Briefing at 1 (citing DFARS 225.1101(1)-(2), 252.225-7000, and 252.225-7001). The agency further explains that the evaluation of quotations is conducted on the basis of vendors' self-certifications, and "in the vast majority of acquisitions, the Agency relies on BAA self-certifications from offerors[.]" *Id.* at 1-2. The agency states that in cases where a contracting officer is required to reach a determination as to whether an offered item is a COTS item, such a determination is made during the evaluation of quotations on a case-by-case basis for the products proposed by each offeror, and is a matter left to the contracting officer's discretion. *Id.* at 2-3. Absent a basis to question those self-certifications, the contracting officer is entitled to rely on them to evaluate price. *Id.*; compare *Pacific Lock Co.*, B-405800, Dec. 27, 2011, 2011 CPD ¶ 286 (contracting officer's reliance on vendor's self-certification was reasonable), with *Sea Box, Inc.*, B-405711.2, Mar. 19, 2012, 2012 CPD ¶ 116 (blanket statement of compliance was not acceptable where solicitation contained minimum technical requirements and requested the submission of technical information from vendors).

Sea Box contends that, prior to issuing a solicitation for a product, the agency must determine whether the product has been sold in substantial quantities in the commercial marketplace, and to advise the prospective offeror of that determination. See Protest at 9. The protester does not identify any relevant statute or regulation that requires the agency to make and disclose a COTS determination in the manner sought by the protester. The protester also does not identify any relevant statute or regulation that prohibits an agency from relying on an offeror's certification of the COTS status of its product, and to rely on that self-certification. Because Sea Box has not alleged the agency violated a procurement statute or regulation, the protester has failed to state a valid basis of protest and we therefore dismiss the protest. 4 C.F.R. §§ 21.1(c)(4), (f); 21.5(f); see *Sea Box, Inc.*, B-420440, B-420442, Apr. 5, 2022, 2022 CPD ¶ 83 at 4-7.

The protest is dismissed.

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