U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: W&K Container, Inc.

File: B-422234.2

Date: March 12, 2024

Dennis J. Callahan, Esq., Rogers Joseph O'Donnell, PC, for the protester.
Ron D. Seignious, for Intrepid Eagle Logistics, Inc., the intervenor.
Samantha L. Meyer, Esq., John P. Patkus, Esq., and Andrew T. McGuire, Esq., Defense Logistics Agency, for the agency.
Paula A. Williams, Esq., and Evan D. Wesser, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to rely on the awardee's certification in its proposal that the end products offered in its proposal are compliant with the Trade Agreements Act, 19 U.S.C. §§ 2501-2582, is denied where the agency had no reasonable basis prior to award to question the awardee's certification; whether the awardee will actually supply compliant end products is a matter of contract administration not subject to review by our Office.

DECISION

W&K Container, Inc. (W&K), a small business located in Mill Valley, California, protests the award of a contract to Intrepid Eagle Logistics, Inc. (Intrepid), of Bethesda, Maryland, under request for proposals (RFP) No. SPE8ED-23-R-0016, issued by the Defense Logistics Agency (DLA), DLA Troop Support, for a quantity of 20-foot transoceanic shipping containers. The protester contends that DLA should have rejected Intrepid's proposal as technically unacceptable for not complying with the requirements of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (TAA).

We deny the protest.

BACKGROUND

DLA issued the solicitation on August 28, 2023, under the procedures of Federal Acquisition Regulation (FAR) parts 12 and 15. The solicitation sought delivery of 20-foot transoceanic shipping containers, National Stock Number 8150-01-463-8553, to

various military depots in the United States. RFP at 3.[1] The solicitation provided for award of three fixed-price, definite-delivery contracts, each for a distinct lot identified by contract line item numbers. *Id.* at 7. This protest concerns the award of Lot No. 1 for the delivery of 1,200 shipping containers to three domestic military depots. *Id.* at 7-8.

The solicitation incorporated Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7021, Trade Agreements – Basic (Jan. 2023), which implements the TAA. *Id.* at 53. Relevant here, the TAA generally requires that end products be produced in the United States (U.S.), qualifying countries, or designated countries. DFARS clause 252.225-7021; FAR § 25.001(c)(2). The DFARS clause defines a designated country end product as "a [World Trade Organization Government Procurement Agreement (WTO GPA)] country end product, a Free Trade Agreement [FTA] country end product, a least developed country end product, or a Caribbean Basin country end product." DFARS clause 252.225-7021(a). An end product means those articles, materials, and supplies to be acquired under this contract for public use. *Id.*

The DFARS clause defined a WTO GPA country end product as an article that:

> (1) [i]s wholly the growth, product, or manufacture of a [WTO GPA] country; or
>
> (2) [i]n the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a [WTO GPA] country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

DFARS clause 252.225-7021(a).

The solicitation provided that offerors must deliver only U.S.-made, qualifying country, or designated country end products under this contract unless --

> (1) In its offer, the Contractor specified delivery of other nondesignated country end products in the Trade Agreements Certificate provision of the solicitation; and
>
> (2) (i) Offers of U.S.-made, qualifying country, or designated country end products from responsive, responsible offerors are either not received or are insufficient to fill the Government's requirements; or

[1] Citations to the RFP are to the copy provided in the agency report as Exhibit 1.

(ii) A national interest waiver has been granted.

DFARS clause 252.225-7021(c).

Also of relevance here, the RFP included DFARS clause 252.225-7020, Trade Agreements Certificate – Basic (Nov. 2014), which requires offerors to certify that their end products comply with the TAA and will deliver only U.S.-made, qualifying country, or designated country end products. RFP at 69. The RFP further required offerors to identify the country of origin, the location of the manufacturer of the final end products (*i.e.*, the shipping containers), the manufacturer's name, address, and point of contact, and stated that failure to provide this information could result in rejection of the proposal. *Id.* at 7. The RFP also cautioned that proposals offering end products that were not compliant with the requirements of the TAA might be rejected as technically unacceptable. *Id.*

For Lot No. 1, DLA received seven proposals by the submission due date, including those from Intrepid and W&K. Agency Report (AR) Exh. 4, W&K Unsuccessful Offeror Letter at 1. In its proposal, Intrepid represented that the final end products it would supply would be manufactured in the Republic of Korea (Korea)[2] and identified its Korean manufacturer. AR Exh. 2, Intrepid's Proposal at 8.[3] In addition, Intrepid listed none of its end items as "other nondesignated country end products" in the Trade Agreements Certificate included in its proposal. Contracting Officer's Statement (COS) at 3. Intrepid offered a total price of $8,602,000 for Lot No. 1.

In its proposal, W&K certified that it would provide shipping containers manufactured and assembled by a Korean company, in full compliance with the TAA. W&K offered a total price of $9,530,400 for Lot No. 1. Protest attach A, Decl. of W&K's Principal ¶¶ 9, 10.

On November 20, DLA issued the contract for Lot No. 1 to Intrepid at a total price of $8,602,000. COS at 3. On November 23, the agency emailed notice of the award to W&K. AR Exh. 4, W&K Unsuccessful Offeror Letter. On December 6, the agency concluded W&K's post-award debriefing after responding to its debriefing questions. AR Exh. 8, Agency Debriefing Addendum at 6.

Separately on December 6, DLA sent a letter to Intrepid regarding the firm's offer for Lot No. 2. AR Exh. 10, DLA Letter to Intrepid at 3. As to Lot No. 2, the agency asked Intrepid to provide: "a list of all the components of the containers, including the country of origin of each component. Please also provide a brief description of the manufacturing process for the containers, identifying the location of each step in the

[2] The FAR designates Korea as a WTO GPA country. FAR clause 52.225-5(a).

[3] Unless otherwise noted, citations to documents provided by the agency are to the Adobe PDF pagination numbers.

manufacturing process." *Id.* In its December 11 response, Intrepid provided, among other things, its bill of materials documentation that identified the [DELETED] as the country of origin for nearly every individual component, but these components would be assembled in [DELETED]. AR Exh. 11, Intrepid Response at 6-7.

W&K filed this protest with our Office on December 11. The next day, December 12, DLA issued a stop work order and informed the awardee that a protest had been filed. AR Exh. 9, Stop Work Order at 2.

While this protest was proceeding, DLA requested information from Intrepid regarding its TAA certification for the Lot No. 1 shipping containers. On December 13, the agency asked whether the Lot No. 1 shipping containers would be "manufactured in the same way, using the same sources of components and manufacturing source/processes" as described by Intrepid for the Lot No. 2 containers. AR Exh. 10, DLA Letter to Intrepid at 1.

On December 14, Intrepid responded: "Yes, the manufacturing source/processes are the same for Lot 1 as we submitted in our attached [December 11] Clarifications Letter response for Lot 2. All containers may be manufactured at different manufacturing plant facilities, but they are manufactured using the same components and procedures. Please refer to the attached file once again regarding our manufacturer's [ ] production process." AR Exh. 11, Intrepid's Response at 1.

DLA subsequently determined that Intrepid's response indicated that its Lot No. 1 containers were not compliant with the requirements of the TAA. The agency issued a Notice to Cure and Request for Adequate Assurances of Future Performance (Cure Notice) to Intrepid, stating, in relevant part that: "[DELETED] intermodal shipping container components from [DELETED] in a designated country, such as [DELETED], into an end product that the components were made to become (as their original and intended/anticipated use and purpose) does not satisfy the definition of 'substantial transformation' under the TAA and its implementing regulations."[4] AR Exh. 12, DLA Cure Notice at 4.

The cure notice goes on to represent as follows:

> Such containers cannot be accepted under the above referenced Contract. You specified designated country end products in the Trade Agreements Certificate of your proposal and offers of other TAA-compliant end products were received from responsive, responsible offerors in

[4] In other words, the agency explained that under the TAA, [DELETED] remains the country of origin for the [DELETED] even though they are assembled in another country.

> quantities sufficient to fill the Government's requirements. Therefore, the Contract requires you to deliver only U.S.-made, qualifying country, or designated country end products.

Id.

The agency directed the awardee to cure these defects and to perform in accordance with the terms of its contract. In addition, the agency directed Intrepid to provide assurances that future contract performance will be in full compliance with the TAA sourcing restrictions. *Id.*

On January 2, 2024, Intrepid responded to the cure notice by outlining its corrected manufacturing and assembly processes for the Lot No. 1 shipping containers. AR Exh. 13, Response to Cure Notice at 7-40. The awardee indicated in relevant part:

> We certify that the detailed parts and process changes will be consistently applied to this contract as well as all future awards, ensuring full compliance with the DFARS 252.225-7021(a) clause. We categorically state that our containers are not, and will not be, manufactured from [DELETED] made in non-TAA compliant countries.

Id. at 9. DLA reviewed the documentation provided by Intrepid and concluded that its corrected method of performance was compliant with the TAA.[5] COS at 5.

DISCUSSION

W&K contends that the award was improper and contrary to the terms of the RFP, arguing that the agency unreasonably relied on Intrepid's TAA certification in its proposal that it would provide TAA-compliant shipping containers at its proposed price. W&K alleges that DLA erroneously accepted Intrepid's certification as to the country of origin for its shipping containers at a price approximately $1 million lower than its own which, in the protester's view, indicates that Intrepid would import container kits from China, a non-TAA designated country, for assembly in Korea. *See generally*, Protest at 5-8. The protester also argues that the agency impermissibly allowed Intrepid to change its method of performance without affording other offerors the chance to revise their respective proposals. In this regard, the protester points to the post-award cure notice issued by the agency to Intrepid to ensure compliance with the TAA, and the awardee's response indicating a change in the source of the raw materials to be used. *See generally,* Comments on DLA's Resp. at 1-3. For the reasons that follow, we find no basis on which to sustain the protest.[6]

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[5] The protester acknowledges that Intrepid's changed method of performance complies with the TAA requirements. Comments at 4 n.2.

[6] The protester raises a number of collateral arguments. While our decision does not specifically discuss each issue raised, we have considered all of W&K's allegations and find that they provide no basis on which to sustain the protest.

As noted above, this procurement was subject to the TAA sourcing restrictions as implemented by DFARS clause 252.225-7021. We have stated previously that when an offeror represents that it will furnish domestic, qualifying country, or designated country end products in accordance with the TAA, it is obligated to comply with that representation in any resultant contract. *See E.D.I., Inc.,* B-251750, B-252128, May 4, 1993, 93-1 CPD ¶ 364 at 5. However, if prior to award, an agency has reason to believe that a firm will not provide compliant end products, the agency should go beyond a firm's representation of compliance with the TAA. Where the agency has no information which would lead to such a conclusion, the agency may reasonably rely upon an offeror's representation without further investigation. *See*, *e.g.*, *Coast to Coast Computer Prods.,* B-419116, B-419116.2, Dec. 18, 2020, 2020 CPD ¶ 370 at 7; *Kipper Tool Co.*, B-409585.2, B-409585.3, June 19, 2014, 2014 CPD ¶ 184 at 5 (agency reasonably relied upon vendors' quotation sheets to determine quoted products were TAA-compliant); *Spectrum Sys., Inc.*, B-401130, May 13, 2009, 2009 CPD ¶ 110 at 3 (agency may accept a quotation's representation indicating compliance with the solicitation requirements, where there is no significant countervailing evidence reasonably known to the agency that should create doubt as to whether the vendor will or can comply with the requirement). When an agency has reasonably made award relying on an offeror's representation, whether the firm ultimately delivers end products in accordance with its TAA representations as required by its contract is a matter of contract administration, which our Office will not review. Bid Protest Regulations, 4 C.F.R. § 21.5(a); *see also*, C*oast to Coast Computer Prods., supra* at 8 n.12.

Here, the record reflects that Intrepid provided a completed TAA certificate with its proposal, as required by the RFP. COS at 3; AR Exh. 2, Intrepid Proposal at 8. As stated previously, the awardee's TAA certificate indicated that the final end products would be manufactured in the country of Korea and identified a Korean manufacturer as its manufacturing source of supply. *See* AR Exh. 2, Intrepid's Proposal at 8. Since Korea is on the TAA designated country list, there was nothing patent on the face of the awardee's TAA certificate that would put the agency on notice that Intrepid would not supply compliant products from a TAA designated country. Under such circumstances, DLA's reliance on Intrepid's certification without further investigation would generally be reasonable. *See Leisure-Lift, Inc.*, B-291878.3, B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 8 (agency properly may rely upon a firm's representations/certification of TAA compliance without further investigation unless the agency has reason to believe that the firm will not provide a compliant product). Ultimately, whether Intrepid delivers end products in accordance with its TAA representations is a matter of contract administration, which, as noted above, our Office will not review.

Notwithstanding Intrepid's apparent compliant certification, however, W&K insists that, prior to award, DLA nevertheless should have had reason to question Intrepid's TAA representations. Among other things, the protester alleges that it filed a 2022 agency-level protest of an award to Intrepid for the supply of 8-foot shipping containers. In that agency-level protest, W&K raised the identical concern as here; *i.e.*, that Intrepid's very low price could only be explained by Intrepid's use of Chinese container kits for

assembly in Korea. Protest Exh. 5, Agency-Level Protest at PDF 82-84; Comments at 7-8; Comments on DLA's Resp. at 3-4.

In this regard, W&K asserts that the solicited shipping containers are made almost entirely of corrugated steel and that the price of steel is a large factor in determining the pricing of shipping containers. Protest attach. A, Decl. of W&K's Principal at ¶ 5. The protester also asserts that China is the lowest cost producer of industrial steel products, including shipping containers and China supplies about 95 percent of the shipping container market. Additionally, the protester states that Chinese companies sell container kits that include the majority of the required shipping components that are flat packed and shipped to buyers' facilities in other countries for assembly. *Id.* at ¶¶ 5, 6. DLA dismissed the protest as a challenge to the agency's affirmative determination of Intrepid's responsibility and to matters of contract administration. In doing so, the agency noted that it would take "additional steps to confirm that the supplies offered by Intrepid are TAA-compliant." Protest Exh. 6, Agency-Level Protest Decision at PDF 86.

DLA responds that W&K's 2022 agency-level protest did not provide a basis for the agency to believe that Intrepid would not provide TAA compliant shipping containers. The agency explains that the award to Intrepid in 2022 involved a different size, shape, style, and quantities of shipping containers than this procurement. The agency also states that the contracting officer involved with the 2022 procurement left the agency approximately 18 months prior to issuance of the current solicitation. COS at 5 (*citing*, AR Exh. 14, Intrepid's 2022 Contract). In any event, the agency contends that each procurement stands on its own and any decisions or evaluations made by a different contracting officer in prior procurements do not necessarily govern the agency's decisions in the instant acquisition. *Id.*; *Shertech Pharmacy,* B-419069, Oct. 29, 2020, 2020 CPD ¶ 336 at 3.

The protester also contends that Intrepid's allegedly low price should have alerted the contracting officer to the probability that the awardee would provide containers made with Chinese raw materials. *See* Comments at 6-8. In this regard, W&K contends that the probability that Intrepid would provide Chinese containers should be viewed in the context of China's dominant position in the transmodal container marketplace. According to the protester, "a reasonably vigilant contracting officer should have been on the lookout for any signs that an offer may have been based on using Chinese container kits." *Id.* at 7. The protester further argues that based on the awardee's proposed delivery of Korean containers and proposed price the contracting officer should have investigated whether Intrepid would use container kits from China, the world's predominate container manufacturer, and a neighbor of Korea. *Id.*

We find no merit to the protester's claims. As discussed above, Intrepid's proposal, on its face, demonstrated that it did intend to comply with the requirements of DFARS clause 252.225-7021. Despite the "series of data points" identified by W&K that should have caused DLA to question Intrepid's self-certification prior to award of the contract, *see* Comments at 8, the agency's decision not to question or otherwise investigate Intrepid's TAA certification was reasonable where nothing on the face of the proposal

reasonably indicated the possibility of non-compliance. *See Sea Box, Inc.*, B-420130, B-420130.2, Nov. 18, 2021, 2021 CPD ¶ 364 at 4 ("Unsupported allegations that a competitor's product is not in compliance with its Buy American Act certification do not impose an obligation on the contracting officer to conduct a detailed investigation behind that certification."). Moreover, we agree with the agency that it was prohibited from making any assumptions based on Intrepid's low-priced proposal. In this regard, absent a price realism evaluation criterion, there is no prohibition against an agency accepting below-cost prices on a fixed price contract. *Louis Berger Power, LLC*, B-416059, May 24, 2018, 2018 CPD ¶ 196 at 8.

Lastly, W&K also argues the agency's post-award communications with the awardee constituted improper and unequal discussions.

Discussions, when conducted, must be meaningful; that is, they may not mislead offerors and must identify proposal deficiencies and significant weaknesses that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. FAR § 15.306; *Unisys Corp.*, B-406326 *et al.*, Apr. 18, 2012, 2012 CPD ¶ 153 at 5. In connection with the requirement for meaningful discussions, offerors may not be treated unequally; that is, offerors must be afforded equal opportunities to address the portions of their proposals that require revision, explanation, or amplification. *Id.* at 7. As discussed below, we find no basis to conclude that DLA's post-award communications with Intrepid constituted discussions.

After receiving the agency report, W&K argues that it was prejudiced by the agency sending the awardee a post-award cure notice, which provided an opportunity for Intrepid to change its method of performance from supplying shipping containers made from [DELETED] to supplying these products manufactured from [DELETED] steel assembled in [DELETED]. *See generally*, Comments at 2, 4; Comments on DLA's Resp. at 1-3. In doing so, the protester alleges, the agency impermissibly allowed "Intrepid alone to materially alter its bid." Comments at 5.

The agency counters that its post-award communications with the awardee were not prejudicial to the competing offerors, but, rather, constituted matters of contract administration not for GAO's consideration as part of our bid protest function. *See* 4 C.F.R. § 21.5(a). The agency states that the cure notice neither allowed Intrepid to modify its proposal to supply non-TAA compliant shipping containers nor to materially alter its proposal or pricing. DLA Resp. to Comments at 1. As DLA explains, Intrepid had certified that it would supply TAA compliant products from the country of [DELETED] at a fixed-price lower than that of W&K and the only change Intrepid made in response to the cure notice was to conform the awardee's manner of performance with the representations in its TAA certificate. *Id.* DLA further explains that despite W&K's claims that the agency should have rescinded Intrepid's award based on its defective TAA certificate, the agency was obligated to give Intrepid an opportunity to cure its performance even if the agency subsequently decided to terminate Intrepid's contract. *Id.* at 2; *see* FAR 49.402-3 (requiring, prior to a termination for default based on other than failing to deliver supplies within the specified time, that "the contracting

officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure").

On this record, we find no basis to conclude that the agency's post-award communications with Intrepid ensuring that the awardee met its contractual obligations to deliver TAA compliant products amount to impermissible or unequal discussions. As addressed above, following award, whether an offeror does in fact furnish a foreign end product in violation of its certification is a matter of contract administration. *Sea Box*, *supra* at 4; C*oast to Coast Computer Prods., supra* at 8 n.12. The agency's post-award cure notice ensuring Intrepid's compliance with its certification therefore squarely presents a question of the agency's administration of its contract, and therefore fails to state a legally or factually sufficient on which to sustain the protest.

The protest is denied.

Edda Emmanuelli Perez
General Counsel