



## Decision

**Matter of:** Olympus America, Inc.

**File:** B-414944

**Date:** October 19, 2017

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Gary J. Campbell, Esq., Michael A. Hordell, Esq., Kelley P. Doran, Esq., and Kristopher Berr, Esq., Pepper Hamilton LLP, for the protester.

Michael F. Mason, Esq., Stacy M. Hadeka, Esq., William T. Kirkwood, Esq., and Thomas A. Pettit, Esq., Hogan Lovells US LLP, for GE Inspection Technologies, LP, an intervenor.

Colonel C. Taylor Smith, Colby L. Sullins, Esq., Erika Whelan Retta, Esq., Alexis J. Bernstein, Esq., and Charles R. Epperson, Esq., Department of the Air Force, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that awardee will not comply with the requirements of the Trade Agreements Act (TAA) is dismissed where solicitation did not include provisions relating to compliance with the TAA, neither offeror submitted a TAA certificate, and the agency did not evaluate proposals for compliance with the TAA, thus eliminating the possibility of any prejudice to the protester.

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### DECISION

Olympus America, Inc., of Waltham, Massachusetts, protests the award of a contract to GE Inspection Technologies, LP, of Skaneateles, New York, under request for proposals No. FA8533-17-R-5387, issued by the Department of the Air Force for a quantity of borescopes. Olympus argues that the agency should have rejected the GE proposal for failing to comply with the requirements of the Trade Agreements Act.

We dismiss the protest.

### BACKGROUND

The RFP contemplates the award of a fixed-price requirements contract on the basis of low price for a base year and four 1-year options to purchase three different models of

borescopes. Borescopes are devices used for remote visual examination of areas in airplanes that are difficult or impossible to view directly. Agency Report (AR), exh. 3, Market Research Report, at 1. The record shows that the agency received two proposals in response to the solicitation, submitted by the protester and the awardee; that the awardee offered the lowest price as between the two offerors; and that, consequently, the agency made award to GE on that basis. AR exh. 16, Price Competition Memorandum.

The issues in this case relate solely to the application of the Trade Agreements Act, 19 U.S.C. § 2501, *et seq.* (TAA). Olympus argues that the RFP required offerors to provide a TAA certification with their proposals, and maintains essentially that GE failed to provide that certification and the agency failed to give appropriate consideration to the question of whether or not the borescopes proposed by GE will be compliant with the requirements of the TAA, which principally requires that products furnished in connection with a government contract either be domestically made or made in a designated country under the terms of the TAA.

#### THE RFP

The protester maintains that the RFP required offerors to certify that the products to be provided would be TAA compliant, but that GE failed to make the required certification. For the reasons discussed below, we conclude that the RFP did not require firms to certify their offered products as TAA compliant when they submitted their proposals, and that this aspect of Olympus's protest amounts to an untimely challenge to an apparent solicitation ambiguity. We therefore dismiss this aspect of the protest.

The record shows that the agency did not include the provisions of either Federal Acquisition Regulation (FAR) § 52.225-5, or Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7021 in the solicitation. Those provisions include definitions relating to the application of the TAA, and are required to be incorporated into any solicitation to which the provisions of the TAA apply. FAR § 25.1101 (c)(1), DFARS § 225.1101 (6). The agency explains that it inadvertently failed to include either of these provisions in the RFP.<sup>1</sup> The RFP did include FAR § 52.225-6, Trade Agreements Certificate, but by its terms, it was not applicable to the acquisition. In this connection, the RFP provides as follows: "(5) Trade Agreements Certificate. (Applies only if the clause at FAR 52.225-5, Trade Agreements, is included in this solicitation.)" RFP at 44.

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<sup>1</sup> The RFP included FAR § 52.212-5, Contract Terms and Conditions Required to Implement Executive Orders--Commercial Items. That clause essentially is a checklist of other FAR provisions that agencies may use to incorporate particular requirements into a solicitation. Among the FAR provisions listed under FAR § 52.212-5, is FAR § 52.225-5, Trade Agreements. However, the agency neglected to check this clause for inclusion in the RFP. RFP at 24, 26. The agency also failed to include the corresponding DFARS § 252.225-7021 provision.

In the RFP's schedule B, Supplies or Services and Prices/Costs, certain of the contract line items (CLINs) included the phrase "Trade Agreement Act." For example, the CLIN 0001 description included several headings (for example, national stock number, place of inspection, place of acceptance, etc.). Under the heading "Quality Assurance," the phrase "Trade Agreement Act" appears. RFP at 3. The record shows that the CLIN descriptions for one of the three types of borescopes included the phrase "Trade Agreement Act" but the CLIN descriptions for the other two types of borescopes did not include this phrase. Compare RFP at 3 with RFP at 4. The protester maintains that inclusion of this phrase in some of the CLIN descriptions imposed all of the requirements of the TAA and the associated FAR provisions discussed above on offerors when submitting their proposals. We disagree.

As discussed above, the agency inadvertently failed to include either the FAR or DFARS provisions that are required to be included in a solicitation in order for those requirements to apply. It follows that, to the extent the protester believed that the requirements of the TAA applied by virtue of fact that the phrase "Trade Agreement Act" appeared in some (but not all) of the RFP's CLIN descriptions, this presented a patent ambiguity that was clear from a reading of the solicitation. While the phrase appears in certain of the RFP's CLIN descriptions, none of the clauses required to implement the TAA were included in the RFP.<sup>2</sup>

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), require protests based on alleged improprieties that are apparent on the face of a solicitation to be filed prior to the deadline for submitting proposals. Here, as discussed, the RFP includes a patent ambiguity, but Olympus did not file its protest until after the agency made award to GE. Under the circumstances, we dismiss this aspect of Olympus's protest as untimely.

## PROPOSAL EVALUATION

As noted, the protester also argues that an examination of the GE proposal would have led the agency to conclude that GE did not intend to furnish TAA compliant products. In support of its position, the protester argues that the GE proposal did not include information showing its compliance with the TAA.

We also dismiss this aspect of Olympus's protest. The record shows that neither firm submitted a trade agreement certificate, and there is no contemporaneous evidence in

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<sup>2</sup> As pointed out above, in those CLINS where the phrase "Trade Agreement Act" appears, it is under the heading "Quality Assurance." Elsewhere the RFP includes a quality assurance provision relating to the inspection and acceptance of goods furnished pursuant to orders placed under the contract. RFP at 39. Our reading of the RFP as a whole leads us to conclude that the phrase "Trade Agreement Act" where it appears in the CLIN descriptions relates to ensuring that the products actually delivered during contract performance conform to the requirements of the TAA.

the record to show that the agency actually evaluated either offer for compliance with the TAA prior to making award.<sup>3</sup> Under the circumstance, in light of the fact that neither firm submitted a trade agreements certificate, and both firms were treated the same for purposes of evaluating their respective compliance with the requirements of the TAA, we conclude that Olympus was not prejudiced by the agency's actions. Because prejudice is an essential element of every viable protest, where none is shown or is otherwise evident, we will not sustain a protest even if an agency's actions arguably may be improper. Computer World Services Corp., B-410567.2, B-410567.3, May 29, 2015, 2015 CPD ¶ 172 at 7. We therefore dismiss this aspect of Olympus's protest.<sup>4</sup>

The protest is dismissed.

Susan A. Poling  
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<sup>3</sup> Both firms submitted the page from the solicitation that included the trade agreements certificate, but neither firm filled it out. AR, exh. 13, Olympus Proposal, at 45; exh. 14 GE Proposal, at 45. Olympus did provide a separate page with its proposal where it wrote the words "TAA Certificate" and listed below that phrase the three borescopes it intended to furnish, along with a notation that they were from Japan. AR, exh. 13, Olympus Proposal, at 56. This separate page, however, did not constitute a trade agreements certificate because it lacks any of the required certifying language that is included in the standard FAR trade agreement certificate. See FAR § 52.225-6.

<sup>4</sup> As a final matter, we point out that the Air Force concedes that the TAA is applicable to the instant acquisition and that GE will be required to provide TAA compliant borescopes during contract performance. To that end, the record shows that, on August 11, 2017, GE provided the agency with an executed TAA certificate. GE's Comments Responding to the Agency Report, exh. B. The agency's acceptance of GE's post-award certificate is an unobjectionable act of contract administration since, as we conclude above, the RFP did not require submission of a trade agreements certificate as part of the proposals, and the agency did not evaluate proposals for compliance with the requirements of the TAA.