



## Decision

**Matter of:** Sea Box, Inc.

**File:** B-420440; B-420442

**Date:** April 5, 2022

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### DIGEST

1. Protester's argument that the solicitations are defective because they lack sufficient information for the protester to monitor whether its competitors have truthfully represented they are supplying domestic end products in their Buy American Act (BAA) certifications is dismissed for two reasons: first, because there is no requirement that an agency provide the information the protester seeks; and second, because the argument is speculative and premature where the protester merely anticipates improper, prejudicial action by potential vendors and the agency.

2. Protests that solicitations fail to provide sufficient information regarding how the agency will apply price preference requirements of the BAA are dismissed where the provisions are not unclear or ambiguous.

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### DECISION

Sea Box, Inc., a small business of East Riverton, New Jersey, protests the terms of two solicitations, request for quotations (RFQ) No. SPE8ED-22-Q-0250 and RFQ No. SPE8ED-22-Q-0251, issued by the Defense Logistics Agency (DLA) for freight containers. Sea Box challenges the terms of the solicitations, arguing that additional information is needed regarding the Buy American Act's (BAA) requirement for domestic end products.

We dismiss the protests.

## BACKGROUND

DLA issued both solicitations on December 23, 2021, as small business set-asides, for Tricon II freight containers.<sup>1</sup> Req. for Dismissal, encl. 1, RFQ at 1.<sup>2</sup> Using the commercial item acquisition procedures in parts 12 and 13 of the Federal Acquisition Regulation (FAR), each solicitation anticipates the issuance of a fixed-price purchase order to the responsible vendor whose quotation represents the best value to the government, considering price and past performance. *Id.* at 3.

As relevant here, each RFQ incorporated Defense Federal Acquisition Regulation Supplement (DFARS) provision 252.225-7000, Buy American Statute -- Balance of Payments Program Certificate, and DFARS clause 252.225-7001, Buy American and Balance of Payments Program.<sup>3</sup> *Id.* at 20, 41. 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.<sup>4</sup> DFARS provision 252.225-7000(c). A domestic

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<sup>1</sup> “Tricons” are modular shipping containers, manufactured such that three individual containers may be coupled together to create a unit with the same size profile as a standard twenty-foot shipping container. *Sea Box, Inc.*, B-420130, B-420130.2, Nov. 18, 2021, 2021 CPD ¶ 364 at 2, n.1. One RFQ seeks at least 42, and as many as 71, Tricon II freight containers. Req. for Dismissal, encl. 1, RFQ at 4-9. The other solicitation seeks at least 177, and as many as 295, Tricon II freight containers. Req. for Dismissal (B-420442), encl. 1, RFQ at 4-9.

<sup>2</sup> Although Sea Box filed separate protests challenging the terms of each solicitation, we have combined the protests for purposes of this decision because the issues raised are the same. Additionally, because the documents filed in each protest are essentially the same, all subsequent citations are to the record in B-420440.

<sup>3</sup> Generally, the Buy American Act restricts the purchase of supplies that are not domestic end products. FAR 25.101(a).

<sup>4</sup> An end product “means those articles, materials, and supplies to be acquired under this contract for public use.” DFARS clause 252.225-7001(a). For purposes of DFARS provision 252.225-7000, as well as the self-certification that it requires, the terms “commercially available off-the-shelf (COTS) item,” “component,” and “domestic end product,” have the meanings given in the Buy American and Balance of Payments Program--Basic clause of this solicitation (*i.e.*, DFARS provision 252.225-7000(a)). RFQ at 39. A “foreign end product” means an end product other than a domestic end product. DFARS clause 252.225-7001(a). A “qualifying country” means a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum of agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act, 22 U.S.C. § 2776,

end product is defined as an “end product manufactured in the United States if . . . [it satisfies the component test],<sup>5</sup> or . . . [t]he end product is a COTS item.”<sup>6</sup> DFARS clause 252.225-7001(a). When a vendor certifies that it is offering a domestic end product, it is not required to indicate if the domestic end product qualifies because it meets the component test, or because it is a COTS item. DFARS provision 252.225-7000; DFARS clause 252.225-7001. 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.<sup>7</sup> DFARS provision 252.225-7000(b)(1); see DFARS 225.502(c)(ii)(E). *Id.*

The deadline for submitting quotations was January 3, 2022. Req. for Dismissal at 4. On January 3, 2022, prior to the time set for receipt of quotations, Sea Box filed two protests with our Office challenging the terms of each solicitation.

## DISCUSSION

Sea Box argues that the RFQs improperly fail to provide information necessary for vendors to compete intelligently. In particular, Sea Box argues that the agency is required to provide clarification concerning the specific quantity of Tricons a vendor must have sold commercially to satisfy DLA’s definition of COTS. Protest at 6-7. The protester asserts that the omission of this information results in vendor uncertainty as to whether vendors have “mistakenly” represented that they are supplying domestic end products due to an incorrect belief that the end product they quote would qualify as a COTS item for evaluation under the solicitations. See Protest at 5 (“While any particular firm can represent in DFARS clause 252.225-7000 that its end product is domestic, believing that it meets the requirement that its item is sold in substantial quantities in the commercial marketplace, it may be incorrect.”). The protester also argues that omission

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and with 10 U.S.C. § 2457, Standardization of equipment with North Atlantic Treaty Organization members.

<sup>5</sup> 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[] 50 percent of the cost of all its components.” DFARS clause 252.225-7001(a).

<sup>6</sup> A commercially available off-the-shelf (COTS) item is 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).

<sup>7</sup> 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).

of this information creates vendor uncertainty regarding how quotations will be evaluated for price

The agency requests that we dismiss Sea Box's protests, maintaining that the arguments raised are legally and factually insufficient to provide a valid basis of protest. In this regard, the agency contends there is no requirement to provide the information Sea Box seeks. The agency also argues that the factual underpinning for Sea Box's contentions are speculative. We agree and dismiss the protests as discussed below.

Our Bid Protest Regulations require that a protest include a sufficiently detailed statement of the grounds supporting the protest allegations. 4 C.F.R. §§ 21.1(c)(4), 21.1(f), and 21.5(f). That is, a protest must include sufficient factual bases to establish a reasonable potential that the protester's allegations may have merit; bare allegations or speculation are insufficient to meet this requirement. *Ahtna Facility Servs., Inc.*, B-404913, B-404913.2, June 30, 2011, 2011 CPD ¶ 134 at 11. Unsupported assertions based on speculation on the part of the protester do not provide an adequate basis for protest. *Science Applications Int'l Corp.*, B-265607, Sept. 1, 1995, 95-2 CPD ¶ 99 at 2-3.

The common thread through Sea Box's arguments is that the agency is required to provide information in the solicitations clarifying how many Tricons must be sold commercially for the items to qualify as COTS items, and thus be considered domestic end products.

As noted above, these solicitations incorporate the requirements of the BAA, which mandate the application of a preference for domestic end items over foreign end items in the price evaluation. RFQ at 20, 41. As relevant here, the BAA regulations require a certification from each vendor as to whether its quoted items are domestic, qualifying, or foreign country end products. DFARS provision 252.225-7000(c). In addition, Sea Box does not dispute that a contracting officer is entitled to rely on a vendor's self-certification during the evaluation unless there is specific cause for concern about the accuracy of the representation. Resp. to Req. for Dismissal at 8.

The protester alleges, however, that vendor uncertainty regarding whether quoted end products are domestic end products creates risk that in their BAA certifications, vendors will inaccurately represent that they are supplying domestic end products. Protest at 5.

In support of its argument, Sea Box presumes that in order to certify Tricons as a domestic end item, vendors must base their certifications on the COTS exception.<sup>8</sup> *Id.*

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<sup>8</sup> Sea Box bases its arguments on the premise that every U.S. manufacturer of Tricons uses predominantly foreign components manufactured in a "non-qualified" country such as China. Resp. to Req. for Dismissal at 8. Thus, Sea Box contends that any quotation from a U.S. manufacturer of Tricons that certifies its end products as domestic must, of necessity, be replying on the COTS definition in making their certification. *Id.* For

Based on this assumption, the protester contends that “[i]n the absence of a relevant disclosure” by DLA, “different [vendors]” may have “different opinions, some valid and some invalid,” as to the quantity of commercial sales required to satisfy the “substantial sales” metric of the COTS definition. Resp. to Req. for Dismissal at 8. In the protester’s view, DLA’s confirmation of the quantity of sales necessary to qualify as substantial under the COTS definition is necessary to “commit[ ] the [vendor] to a truthful certification” and prevent vendors from incorrectly representing that their quoted products are COTS items/domestic end products in their BAA certifications. *Id.* at 11.

We find the protester’s argument--that DLA must confirm the quantity of Tricon commercial sales required to qualify as substantial under the COTS definition in order to assure that Sea Box’s competitors will accurately certify their products are domestic-- fails to state a valid basis of protest. In this regard, Sea Box contends that the information it requests is necessary for vendors--other vendors, not Sea Box--to represent accurately that they are supplying domestic end products in their BAA certifications; Sea Box acknowledges that it has “*no difficulty* in certifying its products as domestic end products AND identifying them as COTS items.” *Id.* at 10.

Despite Sea Box’s contention that it can truthfully and accurately certify its products as COTS items and domestic end products without any additional information in the solicitation, the protester nonetheless contends that other vendors cannot do the same. *Id.* The protester, however, fails to provide any rationale or explanation for this assertion. Instead, the protester complains that the agency has “repeatedly afforded COTS eligibility to certain awardees over the past several years, if not longer” without revealing “its relevant criterion” for TRICONS. Protest at 6.

In addition, we see no basis to accept Sea Box’s preemptive assertion that competing vendors will present untruthful or mistaken certifications, which will, in turn, lead the

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example, Sea Box asserts that DLA “has known and acknowledged for many years that under a small business set-aside, every U.S. manufacturer of [Tricons] uses predominantly foreign components manufactured in a ‘nonqualified’ country such as China,” and that “the cost of such components represents far more than 50% of the total cost of all [Tricon] components.” Protest at 4, 5.

Sea Box, however, has not provided evidence that substantiates its claim that the agency has made such an acknowledgement. The agency also denies that it has ever made such an acknowledgment. Req. for Dismissal at 13-14. Without more, the assumption that every U.S. manufacturer of Tricons uses predominantly foreign components manufactured in a “nonqualified” country is speculative. A protest allegation that relies on speculation is legally insufficient because our Office will not find improper agency action based on conjecture or inference. *Triple Point Sec., Inc.- Recon.*, B-419375.2, Feb. 11, 2021, 2021 CPD ¶ 80 at 5 (dismissing protester’s allegation as legally insufficient because it was based upon conjecture and unsupported by a factual basis); *Nova Techs.*, B-403461.3, B-403461.4, Feb. 28, 2011, 2011 CPD ¶ 51 at 5 n. 5 (same).

agency to erroneously accept the certifications. In this regard, protests that merely anticipate allegedly improper agency action are speculative and premature, and will not be considered by our Office. See *GC Servs. Ltd. P'ship*, B-416443, B-416443.2, Sept. 5, 2018, 2018 CPD ¶ 313 at 9; *Booz Allen Hamilton, Inc.*, B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 4.

Moreover, as relevant here, when a vendor represents that it will provide domestic end products in compliance with the Buy American Act, it is obligated to comply with that representation. See *Sea Box, supra* at 2. Accordingly, to the extent Sea Box argues that potential vendors will fail to perform in accordance with their representations and certifications, such allegations are a matter of contract administration, which is also not subject to review by our Office. 4 C.F.R. § 21.5(a); see *The Galveston Aviation Weather Partnership*, B-252014.2, May 5, 1993, 93-1 CPD ¶ 370 at 3.

Sea Box also argues that the solicitations are deficient because DLA's failure to provide sufficient information for vendors to determine if their items qualify as COTS will result in vendor uncertainty regarding how quotations will be evaluated for price. See Resp. to Req. for Dismissal at 11 ("Other offerors may be incorrectly selected, and the contract opportunity denied to us, if others have no fear of penalties for misrepresentation if this undisclosed factor is never revealed.").

As previously noted, the BAA provides for a preference for domestic end items over foreign end items when an agency conducts its price evaluation. Sea Box does not assert that the agency is required to evaluate vendor eligibility for application of the BAA's price preference. Rather, the protester contends that, without knowing the agency's criteria for when an item qualifies as COTS, vendors do not know whether their competitors' quoted end products will qualify as domestic end products. In the protester's view, such a scenario results in a price evaluation that is based on an "undisclosed evaluation criterion" because vendors do not know whether their competitors' prices will qualify for the domestic end product preference or be subject to the price premium for foreign end products during the agency's price evaluation. Protest at 9. Sea Box contends that because of this deficiency, "Sea Box has been required to . . . formulate its quotation pricing without full knowledge of how the [a]gency will evaluate its competitor[s]' prices." *Id.*

We find that this allegation fails to clearly state a legally sufficient ground of protest to establish the likelihood that the agency in this case violated applicable procurement laws or regulations. 4 C.F.R. § 21.5(f). We view the protester's argument as, in essence, alleging that in order to compete intelligently, vendors need to know whether their competitors will have a valid basis to certify their quoted product as a domestic end item, so that the vendors can determine in advance the resulting impact of the price evaluation on their competitors. Sea Box, however, fails to cite any regulatory requirements that entitle vendors to this type of information. Nor does Sea Box allege an inability to compete resulting from the provisions of the RFQs.

Rather, contrary to Sea Box's contention, the RFQ clearly instructs all potential vendors precisely how quotations will be evaluated within the requirements of the regulations, as explained previously. See RFQ at 3 (quoting DFARS provision 252.225-7000(b)). In essence, Sea Box's complaint is not that the RFQ is unclear, but that Sea Box does not know whether its competitors are appropriately being considered for the evaluation preference.

Here, although Sea Box argues that it, along with other vendors, may face challenges in pricing their quotations without knowing whether their competitors' prices will qualify for the domestic end product preference or be subject to the price premium for foreign end products, the protester does not cite any procurement law or regulation that obligates the agency to disclose such information.<sup>9</sup> Sea Box's argument fails to establish that the solicitations violate any procurement law or regulation, and thus, does not provide a legally sufficient ground of protest. 4 C.F.R. § 21.5(f).

The protests are dismissed.

Edda Emmanuelli Perez  
General Counsel

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<sup>9</sup> To the extent Sea Box's dissatisfaction with the terms of the solicitations is based on disagreement with the policies of the BAA, such disagreement does not render the terms of the solicitations, improper. See *Veterans Healthcare Supply Sols., Inc.*, B-418038 *et al.*, Dec. 23, 2019, 2019 CPD ¶ 431 at 7.