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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Chenega Management, LLC

File: B-290598

Date: August 8, 2002

Lewis R. Ivers for the protester.

Janis P. Rodriguez, Esq., Maritime Administration, for the agency.

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DIGEST

Compelling reason existed to cancel invitation for bids (IFB) after bid opening where IFB required performance of services that would be impossible to perform within the required time period.

DECISION

Chenega Management, LLC protests the decision of the Maritime Administration (MARAD) to cancel invitation for bids (IFB) DTMA1B01009, for layberthing services in the U.S. Pacific Northwest region. Chenega asserts that it met the IFB requirements and that the cancellation resulted from agency bad faith.

We deny the protest.

MARAD maintains and operates the ready reserve force (RRF), a U.S. government-owned fleet of commercially designed ships of various configurations and capabilities that must respond, with 4, 5, 10, or 20 days' notice, to national emergency sealift requirements, particularly the movement of military unit equipment. The berthing of inactive RRF ships may be either at an outported layberth or a reserve fleet anchorage site. "Outporting" is the berthing of RRF ships at or near initial loadout or industrial activation sites. The IFB was issued to obtain outported layberthing services for two roll-on/roll-off vessels, the Cape Intrepid and the Cape Island, on the coast of the Pacific Northwest.

Chenega, a small disadvantaged business, was the apparent low bidder, but during the preaward survey the agency found Chenega incapable of performing two support service requirements. Specifically, the IFB identified five services that "must be

available within a four hour notice.” IFB ¶ C.4(C). MARAD found that Chenega could not timely provide the following two services: “[t]here shall be commercial bunkering [refueling] services for the vessel(s)”; and “[t]here shall be 24 hour tug services, with adequate number of tugs of sufficient horsepower to safely dock/undock the vessel(s) simultaneously, and move the ships to a safe anchorage, or another berth, including maneuvering the ships within navigable turning basin and shipping channels.” The contracting officer determined Chenega to be nonresponsive, rejected its bid, and referred the matter to the Small Business Administration (SBA) for a certificate of competency (COC) review. Based on discussions between SBA and MARAD, the two agencies concluded that the first of the specifications in question was impossible to perform, and that the second was ambiguous. MARAD thus canceled the solicitation with the intention of revising the specifications and resoliciting the requirement. This protest followed.

Chenega asserts that the agency’s decision to cancel the solicitation was unreasonable because its bid “clearly addressed and met the stated intent of the Agency, notwithstanding the lack of specificity in the [solicitation].” Comments at 1. Specifically, Chenega observes that its bid was based on an acceptable method of timely fueling the vessels and providing the necessary tug service, in accordance with the terms of the IFB.

A contracting agency must have a compelling reason to cancel an IFB after bid opening because of the potential adverse impact on the competitive bidding system of resolicitation after bid prices have been exposed. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1); HDL Research Lab, Inc., B-254863.3, May 9, 1994, 94-1 CPD ¶ 298 at 5. Where a solicitation contains inadequate or ambiguous specifications, or otherwise does not contain specifications that reflect the agency’s actual needs, the agency has sufficient reason to cancel. FAR § 14.404-1(c)(1); Days Inn Marina, B-254913, Jan. 18, 1994, 94-1 CPD ¶ 23 at 2. Contracting officials have broad discretion to determine whether a compelling reason to cancel exists, and our review is limited to considering the reasonableness of their decision. American Consulting Servs., Inc., B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37 at 4.

MARAD had a compelling reason to cancel the IFB. With regard to the requirement for commercial bunkering service, the IFB simply stated that it must be “available within a four hour notice.”¹ The agency explains that it intended the 4-hour notice

¹ According to MARAD, the 4-hour notice requirement was the latest version of the services requirement that had been included in prior solicitations. Earlier solicitations had required that offered layberthing be in locations where services (e.g., repairs, refueling) would be available within a radius of 10 nautical miles. Contracting Officer’s Statement (COS) at 3. However, this resulted in some firms bidding locations that nominally had the services within the prescribed radius, but that for other reasons would not have the services available when needed by

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requirement to mean the maximum transit time between the fuel facility and the layberth, by tug and bunker barge.² Agency Report (AR) at 4. It was because the nearest fuel facility to Chenega's layberth was more than 4 hours away by barge that MARAD initially found Chenega nonresponsible. Thereafter, MARAD realized—as confirmed by Chenega's fuel supplier—that it takes more than 4 hours just to load a barge with enough fuel to bunker the vessels, let alone to actually transport the fuel to the ships. Consequently, MARAD (and SBA) concluded that the specification as written was impossible for any bidder to perform, and warranted cancellation. COS at 7. We find no basis to question MARAD's explanation and resulting determination to cancel the IFB.

Chenega's claim that it is indeed possible to meet the agency's needs under the IFB as written, and that there thus is no basis for canceling the IFB, is unpersuasive. Chenega asserts that the agency's actual requirement can be met through a combination of barge and truck bunkering in less than 24 hours; based on its understanding that 4 days typically are allotted for bunkering, crewing, and otherwise making the ships ready for sailing, it believes this would meet the agency's needs. Comments at 2. However, even if Chenega is correct as to the agency's actual needs (in fact, nothing in the record indicates that a 24-hour refueling time meets the agency's needs), the IFB still would be defective because it required only that fueling services be available within "a four hour notice," with no mention of a requirement that fueling be completed within 24 hours. Moreover, Chenega's approach of beginning the fueling process using trucks would be inconsistent with the agency's intent that refueling be performed solely by barge. Even though, as asserted by Chenega, some marine vessels apparently are fueled by truck, the agency reports, and Chenega does not dispute, that it is not industry practice to fuel vessels such as the two here by truck, since they require large quantities of heavy fuel oil. Supplemental Agency Comments at 2, n.4. We note in this regard that, while Chenega asserts that combination truck/barge bunkering would meet the agency's needs, its COC application referred to the use of trucks only "upon request," and further stated that "[i]t should be clearly understood that the commercial bunkering service to be utilized by Chenega will deliver fuel oil to the RRF vessels by barge." COC Letter, Mar. 25, 2002, at 2, n.1.

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MARAD; for example, a ship repair company within the specified radius might not maintain the workforce necessary for MARAD's repairs. Consequently, over a period of years, MARAD refined this "services proximity" requirement, successively calling for availability within an 8-hour transit time, within 8 hours of notice to activate and, since 1995, within a 4-hour notice.

² According to the agency, "'commercial' bunkering in the industry means fueling the vessel by barge [which is] . . . the accepted manner of fueling large vessels." COS at 6.

We conclude that MARAD reasonably determined that the bunkering requirement could not be met as it intended—by barge, within a 4-hour transit time to the layberth—and, therefore, that the agency had a compelling reason to cancel the IFB. See Champion Structure Co., B-198863, Oct. 17, 1980, 80-2 CPD ¶ 291 at 2 (cancellation proper where award would result in a contract impossible to perform).³

Chenega asserts that MARAD's decision to cancel the IFB was motivated by bad faith, as evidenced by a number of actions by agency personnel. For example, Chenega alleges that the agency improperly shared the protester's proprietary information with its competitors, caused it unnecessary expense in responding to the preaward survey (when MARAD never intended to award it the contract), and allowed a biased employee to influence the responsibility determination.

We will not attribute bias to an agency on the basis of inference and supposition, Five-R Co., B-288190, Sept. 10, 2001, 2001 CPD ¶ 163 at 4; without strong evidence to support such a conclusion, we will not find that agency employees acted in bad faith. Communication Techs., Inc., B-283491, B-283491.2, Nov. 30, 1999, 99-2 CPD ¶ 104 at 7. Here, the record contains no evidence—beyond the protester's speculation—of bias or bad faith. Specifically, there is no basis to conclude that the agency's decision to cancel the IFB resulted from anything but the agency's good faith judgment that the solicitation contained deficient specifications.

More specifically, as to the alleged sharing of information with competitors, Chenega points to two alleged releases concerning its mooring plans: one to a consultant associated with the incumbent layberth contractor, and one to the contractor responsible for managing the ships. With regard to the consultant, there was no improper disclosure; the consultant stated that the information he obtained on Chenega was from the public bid opening. Protest exh. D. In addition, although the contracting preaward surveyor received written input from the consultant when investigating Chenega's responsibility, the contracting officer reviewed the material and informed the preaward surveyor of the consultant's ownership interest in the

³ We reach the same conclusion with regard to the tug requirement. While the IFB specified "an adequate number of tugs of sufficient horsepower" to accomplish the simultaneous movement of both ships, the IFB did not specify a minimum horsepower or the number of tugs, leaving open the question of what a contractor must be able to provide. While the protester asserts that its proposed arrangements with various tug companies meet the more specific requirements the agency identified during the preaward survey, the agency maintains that the protester's solution will not meet its needs. Even to the extent Chenega meets the agency's minimum needs, other prospective bidders are entitled to know the agency's requirements and to submit responsive bids based on them. Accordingly, the lack of specificity in this specification also provides a compelling basis for canceling the IFB. Neals Janitorial Serv., B-276625, July 3, 1997, 97-2 CPD ¶ 6 at 5.

incumbent. COS at 5. With regard to the second release, the agency admits that a contracting officer's technical representative (COTR) shared information about Chenega's mooring plans with the ship manager contractor. The agency acknowledges that the protester's information should not have been shared with this contractor, but notes that Chenega did not mark the information as proprietary, that the ship manager is not a competitor for the layberth contract, and that, in view of the ship manager's responsibility for safe mooring of the vessels and its contractual entitlement to a mooring analysis, it was reasonable for the COTR to consult with that contractor.⁴ We find the agency's explanation credible, and conclude that these disclosures do not establish that the cancellation was motivated by agency bad faith.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ Further, because the agency ultimately approved Chenega's mooring plans, the protester was not prejudiced by the release of the information.