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## Decision

**Matter of:** Klinge Corporation

**File:** B-309930.2

**Date:** February 13, 2008

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Richard P. Rector, Esq., and Seamus Curley, Esq., with the law firm of DLA Piper, for the protester.

Robert A. Farber, for Sea Box, Ltd., the intervenor.

David P. Ingold, Esq., and James McCloskey, Esq., U.S. Marine Corps, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that awardee's proposed large field refrigeration system (LFRS) did not meet requirements of Trade Agreements Act is denied where agency, after requesting further information from awardee, reasonably determined that components of awardee's LFRS would be substantially transformed in U.S. and thus qualify as a U.S.-made end product.

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### DECISION

Klinge Corporation protests the U.S. Marine Corps's (USMC) award of a contract to Sea Box, Ltd., under request for proposals (RFP) No. M67854-07-R-5060, for large field refrigeration systems (LFRS). Klinge asserts that Sea Box's proposal should have been rejected as unacceptable.

We deny the protest.

The solicitation provided for award of an indefinite-delivery/indefinite-quantity contract for a base period of 1 year, with four 1-year options, to furnish up to 300 LFRSs, as well as spare parts and training. Each LFRS was to be comprised of two primary components: (1) a 20-x-8-x-8-foot insulated container, compliant with International Organization for Standardization (ISO) standards, with double doors at one 8-x-8-foot end, and (2) (to be installed at the opposite end of the container) an electrically-powered refrigeration/freezing/heater unit (RU).

The solicitation included a performance specification that divided the specified performance characteristics into Critical Performance Parameters that "must be met

for minimum acceptability,” and other parameters that were only objectives and were subject to tradeoff in the best value analysis. RFP at 1; Performance Specification §§ 1.0, 3.0, 3.1, 3.2. The solicitation also incorporated the standard Trade Agreements Act (19 U.S.C. § 2501 et seq.) clauses requiring (1) that offerors certify, “[f]or all line items subject to the Trade Agreements clause of this solicitation,” that “each end product to be delivered under this contract, except those listed in paragraph (c)(2) of this provision, is a U.S.-made, qualifying country, or designated country end product,” Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7020, Trade Agreements Certificate; and (2) that the contractor “deliver under this contract only U.S.-made, qualifying country, or designated country end products,” absent exceptions not applicable here, DFARS § 252.225-7021(c), Trade Agreements. In this regard, DFARS standard clause 252.225-7021(a)(12), Trade Agreements, incorporated in the solicitation, provided that:

U.S.-made end product means an article that --

- (1) Is mined, produced, or manufactured in the United States; or
- (2) Is substantially transformed in the United States 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.

Award was to be made to the offeror whose proposal represented the “best value” based on four evaluation criteria: operational effectiveness, past performance, supportability, and price. RFP, Federal Acquisition Regulation (FAR) § 52.212-2, Evaluation–Commercial Items. Sea Box, Klinge and three other offerors submitted proposals. Based on its evaluation of the initial proposals, the Corps determined that Sea Box’s proposal represented the best value and made award to that firm on July 16, 2007.

Klinge filed a protest with our Office challenging the award, asserting that (1) the agency had improperly determined Klinge’s proposal to be unacceptable for failure to satisfy a Critical Performance Parameter in the performance specification–the requirement that the RU start and operate in ambient temperatures from -25° Fahrenheit (F.) to +131° F, Performance Specification § 3.9.1, and (2) Sea Box’s proposal did not comply with the Trade Agreements provisions included in the RFP. In response to Klinge’s protest, the USMC determined to take corrective action; it suspended performance under Sea Box’s contract, established a competitive range of three offerors (including Klinge and Sea Box), and conducted discussions. We dismissed the protest as academic (B-309930, Aug. 27, 2007).

In its September 6 letters opening discussions, the agency requested that Klinge and Sea Box (1) “[p]lease provide specific test data or analysis that supports your claim of meeting the 131 degrees F. operating temperature Critical Performance Parameter”; and (2) “specifically identify the country of origin for each line item

number and . . . address your compliance with DFARS 252.225-7021,” Trade Agreements. Discussion Letters to Klinge and Sea Box, Sept. 6, 2007. Thereafter, the USMC requested final proposal revisions (FPR). Based upon its evaluation of FPRs, the agency again determined that Sea Box’s proposal offered the best overall value. In this regard, while both Sea Box’s and Klinge’s proposals received acceptable ratings for the operational effectiveness and supportability evaluation factors, Sea Box’s proposal was evaluated as offering four value added features and five exceptional attributes, while Klinge’s was evaluated as offering only two “value added” features and three exceptional attributes. Further, while Sea Box was rated low risk for past performance based on 57 outstanding, 4 satisfactory, 15 meets expectations, and 8 neutral past performance ratings from 12 references, Klinge was rated moderate risk for past performance based on 3 satisfactory, 3 meets expectations, 8 unsatisfactory, and 1 neutral rating from 3 references. Overall, Sea Box’s proposal was evaluated as technically superior to Klinge’s, and its evaluated price (\$[REDACTED]) was lower than Klinge’s (\$[REDACTED]). Upon learning of the resulting award to Sea Box, Klinge filed this protest with our Office.

We have considered each of Klinge’s arguments and find that they are without merit. We discuss Klinge’s primary arguments below.

## TRADE AGREEMENTS REQUIREMENTS

### LFRS

Klinge asserts that Sea Box’s proposal should have been rejected for failure to demonstrate compliance with the Trade Agreements requirement in the solicitation requiring that the offeror provide “only U.S.-made, qualifying country, or designated country end products.” DFARS § 252.225-7021(c).<sup>1</sup> We find Klinge’s protest in this regard to be without merit.

Both Sea Box and Klinge proposed to utilize insulated containers manufactured (by the same company) in China, which is neither a qualifying country, nor a designated country. However, both proposals as revised included the DFARS § 252.225-7020 Trade Agreements Certificate in which, by inserting “NA” or “None,” Sea Box and Klinge certified that “each end product to be delivered under this contract, except those listed in paragraph (c)(2) of this provision, is a U.S.-made, qualifying country, or designated country end product.” DFARS § 252.225-7020(c)(1).

Klinge proposed to ship the Chinese containers to the U.S., where a special chemical agent resistant coating (CARC) paint would be applied and U.S.-made Klinge RUs would be mounted onto and integrated into the containers to form the LFRS end

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<sup>1</sup> Designated countries are listed at DFARS § 252.225-7021(a)(3); qualifying countries are listed in DFARS § 225-872-1. China is not included on either list.

products. In contrast, Sea Box stated in its discussion response that it would (1) acquire RUs made (by a subsidiary of United Technologies) in Singapore, a designated country; (2) ship the RUs to China; (3) there, the RUs “will ultimately be mechanically and electrically integrated within the basic ISO container structure”; (4) “[f]ollowing integration,” ship the containers to the U.S.; (5) and there, perform “all additional and necessary manufacturing processes (e.g., electrical, CARC . . . painting, finishing) and parts integration as well as quality assurance testing and preparation for inspection and final shipment to the government.” Sea Box Discussions Response, Sept. 12, 2007, at 3.

As discussed above, the solicitation required an offeror either to (1) produce an item in the United States (or other designated or qualifying country), or (2) show that the item was substantially transformed in the U.S. DFARS § 252.225-7021(a)(12). Since one of the two primary components of Sea Box’s proposed LFRS—the insulated container—was manufactured in China, which is neither a designated nor a qualifying country, and the two components were first joined in China before being shipped to the U.S., it is clear that, for Sea Box’s proposed LFRS to be compliant with the Trade Agreements requirements in the solicitation, the LFRS must qualify as a U.S.-made end product through a substantial transformation of the Chinese-made insulated container in the U.S.

The record indicates that the USMC determined that, under Sea Box’s proposed approach, a substantial transformation would occur in the U.S. such that its LFRS would qualify as a U.S.-made end product. Klinge challenges that determination, asserting that, under Sea Box’s proposal, the Chinese insulated container was to be substantially transformed into the LFRS in China, not in the U.S. In support of its position, Klinge primarily relies upon the language in Sea Box’s discussion response stating that the Singapore refrigeration unit would be “mechanically and electrically integrated within the basic ISO container structure” in China.<sup>2</sup>

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<sup>2</sup> Klinge also asserts that because Sea Box indicated in its FPR that testing would occur in China, the LFRS must have been essentially complete by that time. Sea Box’s FPR, however, also provided for substantial testing to occur in the U.S., including 6 days of “Contractor Testing,” after the 10 days allotted to “Install[ing] Interior components.” Sea Box FPR, Work Breakdown Structure, at 1-2. In any case, Klinge’s additional, testing argument was raised for the first time in Klinge’s December 20, 2007 submission, which was filed more than 1 month after counsel for Klinge had received a copy of Sea Box’s FPR on November 16 (and after Klinge had made a filing responsive to the November 16 document distribution and the agency had filed its report). As a general matter, under our Bid Protest Regulations, protests based on other than solicitation improprieties must be filed within 10 calendar days of when the protester knew or should have known their bases. 4 C.F.R. § 21.2(a)(2) (2007). Moreover, where a protester initially files a timely protest, and later supplements it with independent grounds of protest, the later-raised allegations must (continued...)

When a bidder or offeror represents that it will furnish end products of designated or qualifying countries (including domestic end products) in accordance with the Trade Agreements Act, it is obligated under the contract to comply with that representation. If prior to award an agency has reason to believe that a firm will not provide compliant products, the agency should go beyond the firm's representation of compliance with the Act; however, where the contracting officer has no information prior to award that would lead to such a conclusion, the contracting officer may properly rely upon an offeror's representation without further investigation. Leisure-Lift, Inc., B-291878.3; B-292448.2, Sept. 25, 2003, 2003 CDP ¶ 189 at 8. Where an agency is required to investigate further, we will review the evaluation and resulting determination regarding compliance with the requirements of the Act to ensure that they were reasonable. See Pacific Lock Co., B-309982, Oct. 25, 2007, 2007 CPD ¶ 191 at 4; cf. General Kinetics, Inc., Cryptek Div., B-242052, B-242052.2, May 7, 1991, 91-1 CPD ¶ 445 at 7 (GAO reviews the evaluation and resulting determination of country of origin under the Buy American Act to ensure they were reasonable).

The agency's evaluation and resulting determination of compliance was reasonable. As we noted in a recent decision, Pacific Lock Co., *supra*, at 3, neither the FAR nor DFARS provides guidance or examples to illustrate the circumstances under which an article is "substantially transformed" into a new and different item. Here, the contracting agency, in determining whether under Sea Box's proposal there would be a substantial transformation in the U.S., looked to whether significant work or processes necessary to the functioning as a refrigerated container system would occur in the U.S. Agency Supplemental Report, Jan. 24, 2008, at 13.

In this regard, our review of the record supports the agency's determination that the information available to contracting officials concerning Sea Box's production process indicated that significant production activity would take place in the U.S. before Sea Box's LFRS could be delivered to the agency. Specifically, as noted by the agency, while the work breakdown structure included in Sea Box's FPR allotted

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(...continued)

independently satisfy the timeliness requirements. FR Countermeasures, Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 at 9. Likewise, where a protester raises a broad ground of protest in its initial submission but fails to provide details within its knowledge until later, so that a further response from the agency would be needed for us to adequately review the matter, these later, more specific arguments and issues cannot be considered unless they independently satisfy the timeliness requirements under our Regulations. Planning and Development Collaborative Int'l, B-299041, Jan. 24, 2007, 2007 CPD ¶ 28 at 11; Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 12-13. Accordingly, Klinge's additional argument, filed more than 10 days after it learned the basis for the argument, is untimely.

5 days for “Final Assembly” after the Chinese manufacturer of the containers received the first 3 refrigeration units, 10 days were allotted to “Install[ing] Interior components” after the joined refrigeration units and containers were received at Sea Box’s facility in the U.S. (in New Jersey). Sea Box FPR, Work Breakdown Structure, at 1-2. Likewise, as noted above, Sea Box’s discussion response stated that once the joined refrigeration units and containers were received in the U.S., Sea Box would perform “all additional and necessary manufacturing processes (e.g., electrical, CARC . . . painting, finishing) and parts integration as well as quality assurance testing and preparation for inspection and final shipment to the government.” Sea Box Discussions Response, Sept. 12, 2007, at 3. Further, Sea Box estimated in its discussion response that “[t]he parts, materials and labor for those manufacturing processes which Sea Box performs in New Jersey so as to render the end item into a fully-functioning LFRS,” accounted for a significant portion of the overall cost of LFRS, amounting to approximately [REDACTED] percent, with the cost of the Singapore refrigeration unit accounting for another [REDACTED] percent of overall cost and the “cost of the basic [Chinese] ISO container” itself accounting for [REDACTED] percent of the overall cost. Id.

Finally, the record indicates that the agency verified with Sea Box prior to award that significant, essential production activity remained to take place in the U.S. In this regard, agency counsel contacted Sea Box’s director of contracts, who had prepared the firm’s discussion response, to reconcile the detailed information showing substantial production activity in the U.S. with the general reference in Sea Box’s discussion response to the Singapore RU’s being “mechanically and electrically integrated within the basic ISO container structure” in China. The record indicates that counsel for the agency was advised by Sea Box’s director of contracts, apparently after verification by the company’s president, that, in fact, no work other than bolting the refrigeration unit in place onto the container was to be accomplished at the Chinese container factory. Declaration of Agency Counsel, Jan. 24, 2008.<sup>3</sup> Agency counsel advised the contracting officer of this clarification. Declaration of Contracting Officer, Jan. 29, 2008. The agency ultimately concluded that the joined unit subsequently shipped to the U.S. amounted to only two components bolted together, and not an LFRS, since, absent the significant work performed at the Sea Box facility in New Jersey, the two components could not perform as a refrigerated container system. Agency Report, Jan. 24, 2008, at 13.

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<sup>3</sup> As further explained by Sea Box in response to the protest, the Chinese container is manufactured with one end open; the refrigeration unit is seated in a metal panel and the panel is simply bolted to the end of the container so as to close off the container and thereby facilitate shipment to the U.S. According to Sea Box, no work is performed in China other than bolting the panel to the container for shipment purposes; all other required work, including the addition of all other necessary parts and all mechanical and electrical labor operations and integration, is performed at Sea Box’s facility in the U.S. Sea Box Comments, Dec. 24, 2007, at 3-4.

Thus, it appears from the record that the information available to the contracting agency prior to award concerning Sea Box's contemplated production process indicated that the Singapore refrigeration units would be simply bolted to the Chinese containers in China, and that the work and processes necessary to combine the two components into a functioning refrigerated container systems, which would be substantial in terms of effort (whether measured by time required or cost), instead would first occur in the United States. Based on this information, the USMC determined that the components of Sea Box's LFRS would be substantially transformed in the U.S. and thus meet the U.S.-made end product requirement. Given the information available to the agency, the agency's ultimate determination that there was no basis on which to question Sea Box's Trade Agreement Certificate of compliance with the Trade Agreements requirements was reasonable.<sup>4</sup>

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<sup>4</sup> Klinge asserts that the communications between agency counsel and Sea Box's director of contracts, which occurred after the closing time for receipt of FPRs, amounted to discussions such that the agency was required to reopen discussions with Klinge as well. Klinge states that, had it been provided further discussions, "this would have included another opportunity to potentially revise its pricing and, perhaps more importantly, to address past performance, which was an area where the agency raised a concern and essentially discredited all explanatory information supplied in Klinge's written discussion responses." Klinge Comments, Jan. 28, 2008, at 19. Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. Trauma Serv. Group, B-254674, B-254674.2, Mar. 14, 1994, 94-1 CPD ¶ 199 at 6; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). Here, the protester's general contention that it might have "potentially revise[d] its pricing" during further discussions is insufficient to show competitive prejudice. M & M Investigations, Inc., B-299369.2, B-299369.3, Oct. 24, 2007, 2007 CPD ¶ 200 at 5 n.3; see Myers Investigative and Sec. Servs., Inc., B-286971.2, B-286971.3, Apr. 2, 2001, 2001 CPD ¶ 59 at 3. In this regard, we note that Klinge, having already reduced its initial pricing in its FPR by [REDACTED] percent, makes no claim that it would have proposed during reopened discussions the still larger further reduction (approximately [REDACTED] percent absent a further reduction by Sea Box) required to displace Sea Box's low price. Likewise, Klinge had already been afforded an opportunity to address the very significant reported deficiencies in its past performance, and the protester has made no showing that there was additional, previously unavailable information that it could have furnished that would have shown the reports of unsatisfactory performance to be erroneous so as to overcome Klinge's significant evaluated disadvantage in this area.

## Spare Parts

Klinge asserts that language in Sea Box's proposal also called into question Sea Box's commitment to provide "only U.S.-made, qualifying country, or designated country" end products under Contract Line Item Number (CLIN) 0003, under which offerors were to propose and price a parts support package sufficient to support the LFRSs for a period of up to 2 years operation at a rate of 600 hours per year. DFARS § 252.225-7021(c). Klinge notes that Sea Box stated in its discussion response that its package "is comprised of 32 discrete parts or items, substantially every one of which is manufactured in the United States." Sea Box Discussions Response, Sept. 12, 2007, at 4. Klinge asserts that each individual part in the support package was required to be U.S.-made, or the product of a qualifying or designated country, and that the "substantially every one of which" language called into question Sea Box's commitment to furnish only compliant parts.

We have no reason to question the agency's determination that the reference in Sea Box's FPR, when discussing the parts support package, to "substantially every one of which is manufactured in the United States," did not call into question Sea Box's commitment to furnish a compliant parts support package as reflected in Sea Box's overall certification that "each end product to be delivered under this contract . . . is a U.S.-made, qualifying country, or designated country end product." Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7020, Trade Agreements Certificate. Not only did the "substantially every one of which" language not clearly evidence an intention to take exception to Sea Box's overall certification of compliance, but, in addition, Sea Box specifically stated in its discussion response that "one hundred percent (100%) of the CLIN 0003 2-Year Parts Support Package cost represents manufacturing efforts performed in the U.S." Sea Box Discussions Response, Sept. 12, 2007, at 4.<sup>5</sup>

## AMBIENT TEMPERATURE REQUIREMENT

Klinge asserts that the agency unreasonably determined that Sea Box's proposed LFRS satisfied a Critical Performance Parameter in section 3.9.1 of the performance

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<sup>5</sup> In contrast, as noted by the agency, Klinge's proposed list of 23 spare parts (appendix F to its proposal), included two parts that were described in a separate list in its proposal (appendix B) as being "Non-Designated Country" parts and non-U.S. parts, which would appear to render its proposal not compliant with the Trade Agreements Act. Klinge Comments, Jan. 23, 2008, at 3. In response to questions from GAO during this protest, Klinge explained that while it intended to use two Chinese-made parts in the LFRSs it would deliver to the agency, the two parts when included in the CLIN 0003 parts support package instead would be made in the U.S. or Mexico (a designated country). Klinge Comments, Jan. 23, 2008, at 3. Klinge's claimed intention was not apparent from its proposal.



specification—the requirement that the RU “start and operate in ambient external temperatures from -25° F. to +131° F.” Specifically, Klinge questions whether the agency had a basis for determining that Sea Box’s LFRS could start and operate in ambient temperatures up to 131° F.

In this regard, market research conducted by the agency prior to issuance of the solicitation led the agency to conclude that it was “uncertain” whether Klinge and Sea Box could meet the ambient temperature requirement with a commercial product. Market Research, LFRS, at 12. However, Sea Box included in its initial proposal a specification matrix indicating “[f]ull compliance” with respect to the ambient temperature requirement. Sea Box Initial Proposal, Specification Matrix. In its discussion letter to Sea Box (after the agency undertook discussions as part of its corrective action in response to Klinge’s initial protest), the USMC referred to a Carrier specification for the Carrier refrigeration unit proposed by Sea Box that had not been included in Sea Box’s proposal. Agency Report, Dec. 10, 2007, at 3-4. Noting that this specification indicated an “Ambient Range” of -22° F. to +130° F., Carrier Container Refrigeration Unit Technical Specifications, ThinLine Model 69NT40-541, the agency requested that Sea Box, “[p]lease provide specific test data or analysis that supports your claim of meeting the 131 degrees F. operating temperature Critical Performance Parameter.” Discussion Letter to Sea Box, Sept. 6, 2007. (The agency likewise asked in its discussion letter to Klinge that it “[p]lease provide specific test data or analysis that supports your claim of meeting the 131 degrees F. operating temperature Critical Performance Parameter.” Discussion Letter to Klinge, Sept. 6, 2007.) In response, Sea Box furnished a letter from Carrier stating that the refrigeration unit it was supplying to Sea Box had the ability to maintain the required temperatures in an ambient temperature of up to 132° F. because Sea Box’s proposed container had a better “heat leakage” rate than a standard container. Sea Box Discussion Response, Letter from Carrier to Sea Box, Sept. 10, 2008. Sea Box’s proposal was found to be compliant with the ambient temperature requirement.

Klinge asserts that the Carrier letter did not furnish a reasonable basis for finding Sea Box’s proposal compliant with the ambient temperature requirement. We disagree. Although Klinge maintains that Sea Box was required to support its stated compliance with test data (similar to the data Klinge supplied in its own proposal), the language in the discussion letter on which Klinge relies did not establish a solicitation requirement for an offeror to furnish test data in support of its proposal such that failure to furnish such data required rejection of the proposal as unacceptable. Instead, as noted above, the agency’s discussion letter simply requested that Sea Box (and Klinge) “[p]lease provide specific test data or analysis.” Discussion Letters, Sept. 6, 2007. Here, consistent with the request, Sea Box furnished an analysis supporting its statement of compliance with the ambient temperature range requirement. In this regard, we conclude that, given that the Carrier standard commercial specification for Sea Box’s proposed refrigeration unit had indicated an ambient range of up to 130° F., only 1 degree below that required,

Carrier's explanation that because Sea Box's proposed container had a better "heat leakage" rate than a standard container, the resulting LFRS would have a higher (and thereby compliant) ambient temperature range than otherwise, provided the agency with a reasonable basis for finding Sea Box's proposed LFRS compliant with the ambient temperature requirement.

The protest is denied.

Gary L. Kepplinger  
General Counsel