

#081672

ORIGINAL

FILED
NOV 30 2010
U.S. COURT OF
FEDERAL CLAIMS

**In the United States Court of Federal Claims
Bid Protest**

)
CREWZERS FIRE CREW)
TRANSPORT, INCORPORATED)
10662 East University Drive)
Apache Junction, Arizona 85220-4271)
)
Plaintiff,)
)
v.)
)
THE UNITED STATES,)
)
Defendant.)

10-819 C

No.
Judge

PRE-AWARD PROCUREMENT PROTEST COMPLAINT

Plaintiff, Crewzers Fire Crew Transport, Incorporated, 10662 East University Drive, Apache Junction, Arizona 85220-4271 (Crewzers), a Nevada Corporation and a qualifying Small Business, as and for its Pre-Award Procurement Protest Complaint against the Defendant, the United States, alleges as follows:

INTRODUCTION

1. This is a Pre-Award Procurement Protest, a Civil Action alleging unreasonable or irrational Agency action, and clear and prejudicial violations of Statute and Regulation, in connection with a Federal Agency Acquisition, Solicitation Number AG-024B-S-10-7000, the National Interagency Fire Center's Acquisition to obtain crew carrier buses for local, regional, and nationwide fire suppression and for all-hazard incidents (threats and hazards, both natural and human-caused), a Simplified Acquisition Procedure Solicitation for firm fixed-price Quotations for specific crew carrier buses and for multiple nationwide bilateral Preseason Incident Blanket Purchase Agreements, proposed multiple nationwide bilateral Preseason Incident Blanket Purchase Agreements against which unilateral Orders for specific crew carrier buses dedicated to specific Host Dispatch Zones will be issued to Awardees of these multiple nationwide bilateral Preseason Incident Blanket Purchase Agreements, a Federal Agency Acquisition over which this Court has jurisdiction under 28 U.S.C. § 1491-(b)(1).

2. The Solicitation is issued by Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, and by the United States Forest Service's National Interagency Fire Center, 3833 South Development Avenue, Boise, Idaho 83705-5354. Unilateral Orders to be placed under these proposed nationwide bilateral Preseason Incident Blanket Purchase Agreements will be issued on a competitive basis, first to HUBzone, 15 U.S.C. § 657a, and/or Service-Disabled Veteran-Owned, 38 U.S.C. §§ 8127-28, Small Business concerns, and if there are insufficient Quotations from HUBzone and/or Service-Disabled Veteran-Owned Small Business concerns for a specific Host Dispatch Zone, then issued on Quotations from Small Business concerns.

3. These unilateral Orders to be issued for specific crew carrier buses within specific Host Dispatch Zones will be limited to \$150,000. The crew carrier buses to be dedicated to specific Host Dispatch Zones under the proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements are specially modified school-bus type crew carrier buses with a carrying capacity of 22 passengers, and

these specially modified school-bus type crew carrier buses are used on unimproved roads, or off-road, or on regular roads, or on Interstate Highways, to transport firefighter crew personnel and a minimum of 5,300 pounds of firefighters and their gear to and from nationwide wildfires and all-hazard incidents. (<http://www.fs.fed.us/fire/contracting/buses/buses.htm>). The nationwide bilateral Preseason Incident Blanket Purchase Agreements proffered in Solicitation Number AG-024B-S-10-7000 will each be effective for a 3-year term. The total nationwide requirement of the Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, for unilateral Orders to be issued for specially modified school-bus type crew carrier buses dedicated to specific Host Dispatch Zones is estimated at \$5,000,000 to \$10,000,000 each fire season.

4. This Civil Action is brought to obtain a Declaration that Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements are illusory and unenforceable because the United States Forest Service's "Contract Re-

quirements” for these proposed nationwide bilateral Preseason Incident Blanket Purchase Agreements expressly provide that “[d]ue to the sporadic occurrence of Incident activity, the placement of any orders IS NOT GUARANTEED.” (Emphasis in original). Likewise, Crewzers seeks a Declaration that Defendant’s United States Forest Service, an Agency of the United States Department of Agriculture, proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements are illusory and unenforceable because Awardees of the proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements will make only an illusory promise to deliver specially modified school-bus type crew carrier buses in response to unilateral Orders for crew carrier buses to be issued for specific vehicles dedicated to specific Host Dispatch Zones, *viz.*, “the Contractor shall furnish the resources listed herein *to the extent the Contractor is willing and able* at the time of order.” (Emphasis added).

5. Defendant’s United States Forest Service, an Agency of the United States Department of Agriculture, Solicitation Number AG-024B-S-10-7000 lacks a rational

basis and is unreasonable or irrational, and thus arbitrary and capricious, because: (1) the proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements are invalid and unenforceable since they are based on a promise from each of the Awardees of the proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements made without a binding promise from the United States Forest Service in return; (2) Awardees of each one of the proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements have made only an illusory promise to deliver specially modified school-bus type crew carrier buses in response to unilateral Orders for specially modified school-bus type crew carrier buses to be placed for specific vehicles located within a specific Host Dispatch Zone; (3) Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, cannot comply with Federal Acquisition Regulation 13.106-3(a) because the United States Forest Service cannot make the required Price Reasonableness determination for each Quotation for specifically modified school-bus type crew carrier buses dedicated to specific Host Dispatch Zones when such a Price Reasonable-

ness determination would be based on an illusory promise and thus would proceed from an irrational assumption, *viz.*, that an Awardee could be bound to its Quotations of firm fixed-prices for specific specially modified school-bus type crew carrier buses dedicated to specific Host Dispatch Zones; (4) Defendant United States Forest Service, an Agency of the United States Department of Agriculture, violates 41 U.S.C. § 253(a)(1)(A) and 41 U.S.C. § 403(6) because the illusory and unenforceable promises contained within the proposed nationwide bilateral Preseason Incident Blanket Purchase Agreements preclude Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, ability to maximize this Competition limited to qualifying HUBzone, Service-Disabled Veteran-Owned, and Small Business Offerors; and (5) Defendant United States Forest Service, an Agency of the United States Department of Agriculture, is in breach of its obligations under Federal Acquisition Regulation 1.102(b)(3) and 1.102-2(c)(3) to act with integrity, fairness, and openness, and to treat Offerors fairly when it competes proposed nationwide bilateral

Preseason Incident Blanket Purchase Agreements which would impose only illusory and unenforceable promises.

6. This Civil Action seeks further a Permanent Injunction ordering Defendant United States Forest Service, an Agency of the United States Department of Agriculture, to conduct any further Competition for its local, regional, and nationwide requirements for specially modified school-bus type crew carrier buses with proposed bilateral Preseason Incident Blanket Purchase Agreements which impose enforceable obligations on both the United States Forest Service and on Awardees of the preferred bilateral Preseason Incident Blanket Purchase Agreements.

NATURE OF THE ACTION

7. Crewzers seeks a proper review of this Acquisition on the contemporaneous record, 5 U.S.C. § 706(2)(A), and meaningful relief for clear and prejudicial procurement process errors and clear errors of judgment.

8. Such a review will demonstrate that the nationwide bilateral Preseason Incident Blanket Purchase Agreements proposed by Solicitation Number AG-024B-S-

10-7000 are illusory and unenforceable, and thus arbitrary and capricious because they do not impose enforceable obligations on both the United States Forest Service and on Awardees of the proffered bilateral Preseason Incident Blanket Purchase Agreements, and this review will also demonstrate that Solicitation Number AG-024B-S-10-7000 thus violates both 41 U.S.C. § 253(a)(1)(A) and 41 U.S.C. § 403(6) and Federal Acquisition Regulation 13-106-3(a).

9. Such a review will demonstrate that Solicitation Number AG-024B-S-10-7000 violates Federal Acquisition Regulation 1.102(b)(3) and 1.102-2(c)(3) because Defendant United States Forest Service, an Agency of the United States Department of Agriculture, is in breach of its obligations to act with integrity, fairness, and openness, and to treat Offerors fairly when it competes proposed nationwide bilateral Preseason Incident Blanket Purchase Agreements which impose only illusory and unenforceable promises.

10. Crewzers, a responsible Contractor, a qualifying Small Business, and an actual Offeror whose Quotations are in a position to receive an Award of the proposed na-

tionwide bilateral Preseason Incident Blanket Purchase Agreements, is an appropriate “interested party” under 28 U.S.C. § 1491(b)(1), and, as an actual Offeror, Crewzers has a direct economic interest in the outcome of this Pre-Award Procurement Protest.

11. Crewzers is a proper party for purposes of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(B)(ii), i.e., Crewzers is a private party and a Corporation which at the time this Pre-Award Procurement Protest is filed has not more than 500 employees and whose net worth does not exceed \$7,000,000 averaged over the past three years.

12. This Pre-Award Procurement Protest is timely filed. Crewzers on Thursday, November 18th, 2010 filed an Agency Protest challenging the terms of Solicitation Number AG-024B-S-10-7000, and the United States Forest Service Contracting Officer received this Agency Protest on Friday, November 19th, 2010. On Tuesday, November 23rd, 2010 Crewzers submitted revised Quotations in response to Solicitation

Number AG-024B-S-10-7000. The United States Forest Service Contracting Officer has not responded to Crewzer's Agency Protest.

13. Defendant United States Department of Agriculture is an Executive Department of the United States, 10 U.S.C. § 101; and Defendant United States Forest Service, an Agency of the United States Department of Agriculture, and Defendant United States Department of Agriculture, are both instrumentalities of the United States. Defendant United States Department of Agriculture and its Agency United States Forest Service is an "Agency" just as this term is defined in 28 U.S.C. § 451, and thus Defendant United States Department of Agriculture and its Agency United States Forest Service is also a "Federal agency" as is required by 28 U.S.C. § 1491(b)(1).

14. Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, unreasonable or irrational Agency action, and Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, clear and prejudicial violations of procurement Statute and Regulation have had a direct and immediate effect on Crewzers. Crewzers will be denied a proper evalua-

tion of its Quotations for specific specially modified school-bus type crew carrier buses dedicated to specific Host Dispatch Zones, and Crewzers has asked for, but has not received, a reasoned judgment which can support the illusory and unenforceable promises of the proposed nationwide bilateral Preseason Incident Blanket Purchase Agreements. As a result of Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, breaches of the implied-in-fact Contract of good faith, fair dealing, and honest consideration, Crewzers is wasting time and Quotation preparation costs. Ultimately, Crewzers is being unfairly denied the opportunity to compete on its Quotations for specific specially modified school-bus type crew carrier buses dedicated to specific Host Dispatch Zones.

FACTUAL ALLEGATIONS

15. The United States Forest Service's Crew Carrier Bus Acquisition, Solicitation Number AG-024B-S-10-7000 was issued on November 18th, 2009, and several rounds of Quotations have since been submitted. In an electronic message issued to Offerors

on Tuesday, November 16th, 2010, the United States Forest Service's Contracting Officer announced:

In addition, due to all of the delays surrounding this solicitation you are now authorized to make ANY changes to your quote at this time, (ie. [Sic] prices, dispatch locations, equipment). Please submit your revised quotes no later than November 23, 2010.

(Emphasis in original).

16. United States Forest Service Solicitation Number AG-024B-S-10-7000 announces, among other things, these "Contract Requirements" for the proposed nationwide bilateral Preseason Incident Blanket Purchase Agreements:

This solicitation will result in multiple agreements. The dollar limitation for any individual order is \$150,000.00. Since the needs of the Government and availability of Contractor's resources during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the Government, the Contractor shall furnish the resources listed herein to the extent the Contractor is willing and able at the time of order. Due to the sporadic occurrence of Incident activity, the placement of any orders IS NOT GUARANTEED.

(Emphasis in original).

17. United States Forest Service Solicitation Number AG-024B-S-10-7000 requires that specific specially modified school-bus type crew carrier buses be dedicated to specific Host Dispatch Zones. The United States Forest Service Contracting Officer refers to this Solicitation requirement as the “one equipment per zone rule.” In *Crew-ers Fire Crew Transport, Inc.*, B-402530, B-402530.2, May 17th, 2010, this requirement of United States Forest Service Solicitation Number AG-024B-S-10-7000 for firm fixed-price Quotations for unilateral Orders for specially modified school-bus type crew carrier buses to be issued for specific vehicles dedicated to specific Host Dispatch Zones was characterized in the United States Forest Service Contracting Officer’s Report, 4 C.F.R. § 21.3(d) (2008), as a promise from each of the Awardees of the proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements, a promise which would benefit the United States Forest Service “in order to ensure that a sufficient number of equipment would be available in each dispatch zone or geographic area,” 2010 *U.S. Comp. Gen. LEXIS* 98, *9. There is no promise from the United States Forest Service in return.

FIRST CLAIM FOR RELIEF

18. Crewzers herewith incorporates and re-alleges paragraphs numbers 1. through 17. hereinabove as if fully set forth herein.

19. Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements are illusory and unenforceable because the United States Forest Service's "Contract Requirements" for these proposed nationwide bilateral Preseason Incident Blanket Purchase Agreements expressly provide that "[d]ue to the sporadic occurrence of Incident activity, the placement of any orders IS NOT GUARANTEED." (Emphasis in original).

20. United States Forest Service Tender Agreements similar to the proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements here were before the United States Court of Appeals for the Federal Circuit in *Ridge Runner Forestry v. Ann M. Veneman, Secretary of Agriculture*, 287 F.3d 1058 (Fed. Cir. 2002). These United States Forest Service Tender Agreements which were before

the Court contained almost identical exculpatory provisions excusing the United States Forest Service from any obligations under these United States Forest Service Tender Agreements, *viz.*, “Award . . . does not guarantee there will be a need for the equipment offered nor does it guarantee orders will be placed against the awarded agreements.” *Id.*

21. These exculpatory provisions, the Federal Circuit held, made the United States Forest Service Tender Agreements which were before it invalid and unenforceable because the United States Forest Service had the option to obtain firefighting equipment from any source, and this whether or not that source had signed a Tender Agreement. *Id.*, 287 F.3d, at 1061-62. The nationwide bilateral Preseason Incident Blanket Purchase Agreements here proffered by United States Forest Service Solicitation Number AG-024B-S-10-7000 contain the same illusory promises as did the United States Forest Service Tender Agreements which were before the Federal Circuit, and they are likewise invalid and unenforceable, just as the United States

Forest Service was told by the Federal Circuit in 2002. But the United States Forest Service has not heeded this admonishment from the Federal Circuit.

SECOND CLAIM FOR RELIEF

22. Crewzers herewith incorporates and re-alleges paragraphs numbers 1. through 17. hereinabove as if fully set forth herein.

23. Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements are illusory and unenforceable because Awardees of the proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements will make only an illusory promise to deliver specially modified school-bus type crew carrier buses in response to unilateral Orders for crew carrier buses to be issued for specific vehicles dedicated to specific Host Dispatch Zones, *viz.*, "the Contractor shall furnish the resources listed herein *to the extent the Contractor is willing and able* at the time of order." (Emphasis added).

24. Language identical to this quoted language from the United States Forest Service's "Contract Requirements" for Awardees of the proffered nationwide bilateral Preseason Incident Blanket Purchase Agreements under the United States Forest Service's Solicitation Number AG-024B-S-10-7000 was held by the Federal Circuit in *Ridge Runner Forestry* to be an illusory promise which rendered the proposed United States Forest Service Tender Agreements at issue there invalid and unenforceable, *Id.*, 287 F.3d, at 1062. So too now.

THIRD CLAIM FOR RELIEF

25. Crewzers herewith incorporates and re-alleges paragraphs numbers 1. through 17. hereinabove as if fully set forth herein.

26. Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, cannot comply with Federal Acquisition Regulation 13.106-3(a) because the United States Forest Service cannot make the required Price Reasonableness determination for each Quotation for specifically modified school-bus type crew carrier buses dedicated to specific Host Dispatch Zones when such a Price Rea-

sonableness determination would be based on an illusory promise and thus would proceed from an irrational assumption, *viz.*, that an Awardee could be bound to its Quotations of a firm fixed-price for specific specially modified school-bus type crew carrier buses dedicated to specific Host Dispatch Zones.

FOURTH CLAIM FOR RELIEF

27. Crewzers herewith incorporates and re-alleges paragraphs numbers 1. through 17. hereinabove as if fully set forth herein.

28. Defendant United States Forest Service, an Agency of the United States Department of Agriculture, violates 41 U.S.C. § 253(a)(1)(A) and 41 U.S.C. § 403(6) because the illusory and unenforceable promises contained within the proposed nationwide bilateral Preseason Incident Blanket Purchase Agreements preclude Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, ability to maximize this Competition limited to qualifying HUBzone, Service-Disabled Veteran-Owned, and Small Business Offerors.

FIFTH CLAIM FOR RELIEF

29. Crewzers herewith incorporates and re-alleges paragraphs numbers 1. through 17. hereinabove as if fully set forth herein.

30. Defendant United States Forest Service, an Agency of the United States Department of Agriculture, is in breach of its obligations under Federal Acquisition Regulation 1.102(b)(3) and 1.102-2(c)(3) to act with integrity, fairness, and openness, and to treat Offerors fairly when it competes proposed nationwide bilateral Preseason Incident Blanket Purchase Agreements which impose only illusory and unenforceable promises.

PRAYER FOR RELIEF

WHEREFORE, premises considered, Crewzers respectfully requests the Court to grant Judgment for Crewzers in this Civil Action, and to Order the following relief:

1. a Declaration that Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, proffered nationwide bilateral Preseason

Incident Blanket Purchase Agreements are illusory and unenforceable, lack a rational basis, are unreasonable or irrational, and thus are arbitrary and capricious; and

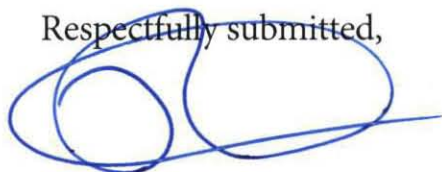
2. a Permanent Injunction ordering Defendant United States Forest Service, an Agency of the United States Department of Agriculture, to conduct any further Competition for its local, regional, and nationwide requirements for specially modified school-bus type crew carrier buses with proposed bilateral Preseason Incident Blanket Purchase Agreements which impose enforceable obligations both on the United States Forest Service and on Awardees of the proffered bilateral Preseason Incident Blanket Purchase Agreements; and

3. a Declaration that Crewzers is entitled to equitable relief, and money damages, for Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, breaches of the implied-in-fact Contract of good faith, fair dealing, and honest consideration that Defendant's United States Forest Service, an Agency of the United States Department of Agriculture, entered into with Crewzers when

the Competition under the nationwide Crew Carrier Bus Acquisition, United States Forest Service Solicitation Number AG-024B-S-10-7000, commenced; and

4. such further and other relief as the Court may deem just and proper.

Respectfully submitted,



Cyrus E. Phillips IV
Virginia State Bar Number 03135

November 30th, 2010

Colonial Place I
2111 Wilson Boulevard, Suite 700
Arlington, Virginia 22201-3052

Telephone: (703) 351-5044
Facsimile: (703) 351-9292
Mobile: (703) 819-5944
Electronic Mail: lawyer@procurement-lawyer.com

Attorney of record for Plaintiff,
Crewzers Fire Crew Transport, Incorporated.