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Decision

Matter of: Marine Group Boat Works, LLC

File: B-404277; B-404277.2

Date: January 19, 2011

Peter B. Jones, Esq., and Brian J. Donovan, Esq., Jones & Donovan, P.C., for the protester.

Clinton D. Hubbard, Esq., for Pacific Maritime Freight, Inc., the intervenor.

Jeanne P. Ockerman, Esq., and Catherine Rubino, Esq., Department of the Navy, for the agency.

Louis A. Chiarella, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency's decision to not consider delivery price options in its price evaluation is unobjectionable, where the protester did not timely protest a patent ambiguity in the solicitation that did not state whether delivery options would be evaluated and failed to include either of the two standard Federal Acquisition Regulation (FAR) clauses that identify whether or not options would be evaluated.
2. Protest that, under a procurement conducted pursuant to Federal Supply Schedule (FSS) procedures, an agency accepted pricing information from the awardee for optional services not included on that vendor's FSS contract is denied, where the solicitation did not provide for evaluation of the option services and the option services were not ordered under the awardee's FSS contract.
3. Protest that an agency treated the protester and awardee unequally by allowing the awardee to reduce its price quotation after the closing date for receipt of quotations is denied, where the agency allowed both firms to submit quotation revisions after the closing date.
4. An agency's communications with vendors in an FSS procurement are governed by FAR subpart 8.4, which requires that the communications be fair and equitable.

DECISION

Marine Group Boat Works, LLC, of Chula Vista, California, protests the issuance of a delivery order by the Department of the Navy, Naval Sea Systems Command, to Pacific Maritime Freight, Inc., d/b/a Pacific Tugboat Services, of San Diego, California, under Pacific's General Services Administration (GSA) Federal Supply Schedule (FSS) contract pursuant to request for quotations (RFQ) No. N00024-10-T-2238 for two azimuthing stern-drive tugboats. Marine Group challenges the agency's evaluation of Pacific's quotation and source selection decision.

We deny the protest.

BACKGROUND

The RFQ, issued to holders of GSA FSS contracts for powered boats, provided for the issuance, without discussions, of a fixed-price delivery order for two 90-foot tugboats. Vendors were informed that the delivery order would be issued on a best value basis, considering the following evaluation factors in descending order of importance: technical merit of design; past performance and experience; and price. RFQ § M, at 36-37.

With respect to price, vendors were informed that they should provide their FSS standard craft pricing on a Requirements Matrix, which was an attachment to the solicitation. RFQ § L, at 34. The Requirements Matrix requested a unit price for each tugboat and option prices for delivery of one tugboat to Yokosuka, Japan, and another boat to Bremerton, Washington. See RFQ attach. 1, Requirements Matrix, at 1, 23. Elsewhere, vendors were informed that a delivery destination for each boat had not been determined and would be provided when a delivery order was issued. RFQ § F, at 13-14. Section F also informed vendors that delivery of the boats was an option and that vendors may be required to deliver one or both boats to Yokosuka and/or Bremerton. Id. at 14. The RFQ did not state whether or not the option prices would be evaluated.¹

Marine Group and Pacific submitted quotations, which were adjectivally evaluated

¹ The RFQ did not include either Federal Acquisition Regulation (FAR) clause 52.217-3, Evaluation Exclusive of Options, or clause 52.217-5, Evaluation of Options.

by the agency's technical review panel (TRP). The quotations were evaluated as follows:

	Marine Group	Pacific
Technical merit of design	Good	Good
Past Performance/experience	Good	Good
Price	\$20,095,236	\$19,934,000

Agency Report (AR), Tab 15, TRP Report, at 2; Tab 14, Price Evaluation Report, at 2.

The contracting officer (CO), who was the source selection authority, reviewed the vendors' quotations and the TRP's evaluation ratings and findings. The CO essentially determined that the Marine Group's and Pacific's quotations were technically equal, and selected Pacific's quotation for award on the basis of that firm's lower price.² *Id.*, Tab 16, Source Selection Decision, at 1-5. This protest followed.

DISCUSSION

Marine Group protests that the Navy's price evaluation improperly failed to consider the vendors' proposed delivery prices. The protester contends that its delivered price is lower than Pacific's. The Navy responds that the RFQ informed vendors that the delivery location for each tugboat had yet to be determined and provided that the price evaluation would not include the delivery options. In this regard, the Navy states that it requested delivery prices for budgetary purposes and to "aid in the Government's decision for the shipping location" AR at 11; Tab 14, Price Report at 1-2. Marine Group disagrees with the Navy that delivery of the tugboats was an option and argues that the agency was required to consider delivery prices in its price evaluation. Protester's Comments at 2-4; Protester's Supplemental Comments at 1-5.

We find that the RFQ, read as whole, informed vendors that delivery of the tugboats was an option.³ Although, as the protester points out, the solicitation, variously

² The Navy's price evaluation did not consider the vendors' quoted delivery charges to either Yokosuka or Bremerton.

³ Where a dispute exists as to the actual meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all its provisions; to be reasonable, an

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stated that delivery would be determined when the delivery order was issued and that the vendor would be responsible for preparing the boats for shipment and for delivering them, the solicitation also identified delivery as an option. See, e.g., RFP § E, at 12 (inspection and acceptance of the boats at Yokosuka and Bremerton identified as options); see also id. § F, at 14 (delivery of boats to Yokosuka and Bremerton identified as options). In particular, the Requirements Matrix, on which the vendors submitted their quotation prices, identified packaging and delivery to be an option. See id. attach. 1, Requirements Matrix, at 23.

We also find that, although the RFQ required vendors to provide prices for these delivery options as part of their quotations and identified price as an evaluation factor, the RFQ was silent as to whether the delivery prices would be evaluated. Because the RFQ did not include either FAR clause 52.217-3, Evaluation Exclusive of Options or clause 52.217-5, Evaluation of Options, or otherwise inform vendors whether options would be evaluated, we find that that the RFQ was patently ambiguous as to whether the agency's price evaluation would include vendors' delivery prices. Under our Bid Protest Regulations, protests of alleged apparent solicitation improprieties must be filed prior to the closing time for receipt of quotations. See 4 C.F.R. § 21.2(a)(1) (2010); Allied Tech. Group, B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 9 n.10. Since Marine Group did not timely challenge this patent ambiguity prior to the closing time, it may not now object that the agency is required to consider the delivery price options in its price evaluation. See Kiewit Louisiana Co., B-403736, Oct. 14, 2010, 2010 CPD ¶ 243 at 2 (protest that agency failed to conduct discussions is dismissed where protest did not timely challenge solicitation's failure to include one of two mandatory clauses to inform offerors whether or not discussions would be conducted).

Marine Group protests that the delivery order could not be issued to Pacific, because that firm's FSS contract did not include delivery charges. Protester's Comments at 4-5.

We find no merit to this argument, given that the Navy did not consider vendors' delivery prices as part of its award decision and did not issue to Pacific a delivery order containing items not on its FSS contract. Non-FSS products and services may not be purchased using FSS procedures. Instead, their purchase requires compliance with applicable procurement laws and regulations, including those requiring the use of competitive procedures. See Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 4. Where an agency announces its intention to purchase using FSS procedures, all items evaluated and ordered are generally required to be within the scope of the vendor's FSS contract. See, e.g., Rapiscan

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interpretation of a solicitation must be consistent with such a reading. See The Boeing Co., B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 35.

Sys., Inc., B-401773.2, B-401773.3, Mar. 15, 2010, 2010 CPD ¶ 60 at 6; Tarheel Specialties, Inc., B-298197, B-298197.2, July 17, 2006, 2006 CPD ¶ 140 at 4. We are unaware of any law or regulation that precludes an agency in a FSS procurement from requesting pricing information for non-FSS items where the non-FSS items are not considered as part of the agency's evaluation and are not ordered.

Marine Group also objects that the Navy treated the vendors unequally by allowing Pacific to revise its quotation after the RFQ's closing date. Specifically, the protester contends that after the closing date Pacific submitted a revised quotation in which it lowered its price, and that that the Navy did not provide it with the same opportunity to revise its quotation.

The RFQ required the submission of vendors' quotations by August 9, 2010. The solicitation also stated that vendors "may submit revised quotes only if requested or allowed by the Contracting Officer." RFQ § L, at 35. Pacific submitted its original quotation by the August 9 closing date in which its tugboat pricing totaled \$19,984,000.⁴ AR, Tab 2, Pacific Quotation, at 2. On September 17, Pacific submitted an unsolicited revised quotation in which it lowered its total price to \$19,934,000. Id., Tab 7, Pacific Letter to Navy, Sept. 17, 2010, at 1-2. The Navy based its evaluation on Pacific's lower revised quotation. Id., Tab 14, Price Evaluation Report, at 2.

We do not find that the Navy treated the vendors unequally or otherwise acted improperly. The record shows that Marine Group also revised its quotation after the August 9 closing date. Specifically, on August 19, Marine Group submitted an unsolicited revised quotation in which it shortened its tugboat delivery schedule. See id., Tab 13, Marine Group E-mail to Contracting Officer, Aug. 19, 2010, at 1. As with Pacific, the Navy allowed Marine Group to revise its quotation. Id., Tab 15, TRP Report, at 3.

In any event, the record does not show that Marine Group was prejudiced by the Navy's consideration of Pacific's lower revised quotation price. Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain a protest. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). Here, Pacific's quotation was lowered-priced than Marine Group's even before Pacific revised its price. Pacific's price revision only increased the price differential between the vendors' quotations and did not alter their relative ranking. Although Marine Group complains that it was not provided with an opportunity to revise its price, it does not state that it would have submitted a lower price if given the opportunity to do so.

⁴ As noted above, Marine Group's price for the tugboats was \$20,095,236. AR, Tab 3, Marine Group Quotation, attach. 1, Pricing Matrix, at 1.

Finally, Marine Group protests that the Navy conducted discussions with Pacific, allowing Pacific to allegedly cure a “deficiency” in its quotation regarding the awardee’s proposed delivery schedule, and did not provide Marine Group with an opportunity to submit a final revised quotation, as required by FAR § 15.307. See Protester’s Supplemental Comments at 6.

The record shows that the Navy asked Pacific to explain how its proposed delivery schedule was achievable. See AR, Tab 6, Navy E-mail to Pacific, Sept. 16, 2010. Based upon this communication, the Navy concluded that the awardee’s delivery schedule was reasonable and achievable even though it greatly exceeded the RFQ requirement. Id., Tab 15, TRP Report, at 2. The record also shows that the Navy had multiple exchanges with Marine Group in order to determine that the protester’s proposed tugboat design would meet the stated RFQ requirements. See id., Tab 4, NAVSEA E-mail and Marine Group Response, Aug. 18, 2010; Tab 5, NAVSEA E-mail and Marine Group Response, Aug. 30, 2010. Based on these additional submissions, the Navy TRP concluded that Marine Group’s quotation met all RFQ design requirements and had no weaknesses or deficiencies. Id., Tab 15, TRP Report, at 2-7.

The procedures of FAR part 15 governing contracting by negotiation do not govern competitive procurements under the FSS program. FAR § 8.404(a). Where an agency handles the selection of a vendor for an FSS order like a competition, and a protest is filed challenging the outcome of the competition, we will review the agency’s actions to ensure that the evaluation and source selection were reasonable and consistent with the terms of the solicitation. Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4-5. In this regard, there is no requirement in FAR subpart 8.4 that an agency, when soliciting vendor responses prior to issuing an order under an FSS contract, conduct discussions with vendors in accordance with FAR § 15.306 regarding the content of those responses. See USGC Inc., B-400184.2 et al., Dec. 24, 2008, 2009 CPD ¶ 9 at 3; Avalon Integrated Servs. Corp., B-290185, July 1, 2002, 2002 CPD ¶ 118 at 4. However, exchanges that do occur with vendors in a FAR subpart 8.4 procurement, like all other aspects of such a procurement, must be fair and equitable. See COMARK Fed. Sys., B- 278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 5.

Here, the Navy had communications with both Pacific and Marine Group concerning their technical responses to the solicitation and allowed both vendors an opportunity to address the agency’s concerns. Although it is true that the Navy did not establish a common cutoff date and obtain final revised quotations, there is no requirement under FAR subpart 8.4 that an agency must set a common cutoff date and obtain a final proposal revision. See, e.g., Kavouras, Inc., B-220058, Dec. 23, 1985, 85-2 CPD ¶ 703 at 3. In any event, the protester does not demonstrate that it was prejudiced. That is, Marine Group does not state what, if anything, it would have changed in its

quotation that would have improved its competitive standing, had the Navy established a common cutoff date and asked for “final revised quotations.”

The protest is denied.

Lynn H. Gibson
General Counsel