Bednarz

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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Deknatel Division, Pfizer Hospital Products Group, Inc.

File: B-243408

Date: July 29, 1991

William R. Mulford for the protester.
Dennis Giampietro for Atrium Medical Corporation, an interested party.
Louise Hansen, Esq., Defense Logistics Agency, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where the solicitation given to protester only solicited offers for a designated model manufactured by the protester and did not indicate that equal products would be acceptable, but award was made to another offeror for its model, the specifications misled and prejudiced the protester, who assertedly could have proposed less expensive models conforming to the agency's needs.

DECISION

Deknatel Division, Pfizer Hospital Products Group, Inc., protests the award of a contract for pleural cavity drainage devices to Atrium Medical Corporation under request for proposals (RFP) No. DLA120-91-R-1215, issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center, Philadelphia, Pennsylvania. The protester essentially contends that the agency, in failing to disclose that it would consider other than the brand name product specified in the RFP, misled Deknatel and prevented it from competing on an equal basis.

We sustain the protest.

The agency issued the RFP on February 26, 1991, to Deknatel and Atrium, the only firms that have supplied this item to DLA in the past 4 years. DLA limited competition under the RFP based upon a determination of unusual and compelling urgency

associated with Operations Desert Shield and Desert Storm.1/ 10 U.S.C. § 2304(c)(2) (1988). In the item description, the RFP called for three-chamber, plastic, disposable, pleural cavity drainage units, water-seal type, with a 2,300 milliliter (ml.) capacity. The specifications for these units in the RFP, which the agency provided to Deknatel, stated that the units "shall be" the Deknatel Pleur-Evac P/N A-8000. Conversely, in Atrium's copy of the RFP, DLA required the Atrium P/N 2000 to be supplied. The respective RFPs did not append an "or equal" designation to either the Deknatel or Atrium part numbers. On March 20, 1991, the agency awarded the contract to Atrium, because it submitted the low-priced, technically acceptable offer.2/ This protest followed.3/

Deknatel protests the issuance of an RFP that exclusively specified a particular Deknatel product, when the agency intended to award on the basis of the lowest priced, technically acceptable product, considering products "equal" to the specified product. The protester contends that it reasonably construed the RFP's specification of the Deknatel P/N A-8000 as requiring the supply of that item instead of its more competitive, alternate models, also meeting the government's requirements as identified in the RFP's item description.

The agency first argues that Deknatel is not an interested party because its offer took exception to the delivery schedule and bar coding requirements of the RFP. Under our Bid Protest Regulations, only an "interested party" may protest a federal procurement, i.e., an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1991). In order to be considered an interested party to protest an award, a protester must be in line for award if its protest were sustained. ISC Defense Sys., Inc.--Recon., B-236597.3, Apr. 5, 1990, 90-1 CPD ¶ 360. Thus, a technically unacceptable offeror is not eligible to

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1/ This finding also relieved the agency from the responsibility of synopsizing the acquisition in the Commerce Business Daily. Federal Acquisition Regulation (FAR) § 5.202(a)(2).

2/ Deknatel's offer took exception to the delivery schedule and bar coding requirements as to a portion of the shipment. Atrium's offer agreed to all terms of the RFP.

3/ Performance under the Atrium contract has been stayed pending our decision on the protest.

protest an award if there are other acceptable offers that would be in line for award if the protest were sustained. See Discount Mach. & Equip. Inc., B-240426.6, Jan. 23, 1991, 91-1 CPD ¶ 66.

In this case, there were no offerors other than Deknatel and the awardee. Moreover, since Deknatel's contention is that it construed the RFP as requiring the supply of a designated item manufactured only by Deknatel, Deknatel reasonably could believe that its relatively minor labeling and delivery schedule exceptions could be the subject of negotiations if DLA deemed the exceptions unacceptable, as is ordinarily the case in noncompetitive acquisitions. Also, Deknatel states that, while it had only begun to produce the specific model requested by DLA, the alternate models that Deknatel assertedly could have offered had been in production for some time. Thus, we consider Deknatel to have the requisite economic interest to protest that it was misled when it submitted its offer on the RFP.

The agency argues that the protester could not reasonably interpret the specification of a Deknatel P/N A-8000 as requiring the supply of that part since the RFP was not designated as noncompetitive. The agency argues that, because of its participation in an earlier procurement, Deknatel should have known that this procurement was competitive and that DLA could accept alternate products meeting the government's requirements. In any case, the agency justifies the issuance of different RFPs to the two competitors by stating that Deknatel was not entitled to know whether competition existed and who its competitor would be.

We disagree. We think Deknatel reasonably could construe the RFP it received as requiring offers for the designated item manufactured only by Deknatel as opposed to offers for "equal" products. In this regard, the RFP did not advise Deknatel that the agency was also soliciting another manufacturer under an RFP that specified only that manufacturer's brand name, and that it would make a single award to the acceptable offeror who proposed the lowest price. Nor did the RFP indicate that Deknatel could offer "equal" products that met the item description requirements. Under the circumstances, we find reasonable Deknatel's assertion that the RFP's failure to indicate that the agency would accept products other than Deknatel's specified model misled Deknatel in the submission of its offer, as it could have offered alternate models that met the government's requirements or adjusted its competitive

pricing. See 48 Comp. Gen. 605, 611 (1969); MTS Sys. Corp., B-238137, Apr. 27, 1990, 90-1 CPD ¶434; Sargent Indus., B-216761, Apr. 18, 1985, 85-1 CPD ¶ 442; see also General Projection Sys., B-241418.2, Mar. 21, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 308; Instrumentation Mktg. Corp., B-182347, Jan. 28, 1975, 75-1 CPD ¶ 60.

Contracting officers are required to furnish identical information concerning a proposed acquisition to all prospective contractors. FAR § 15.402(b). In addition, under the FAR, in cases where the agency will accept products equal to the specified products, the purchase description should generally, at a minimum, identify the requirement by use of the brand name followed by the words "or equal." FAR § 10.004(b)(3); U.S. Technology Corp., 68 Comp. Gen. 16 (1986), 86-2 CPD ¶ 383. In this case, we find the agency violated the FAR by not providing the same specifications to both offerors or designating that equal products were acceptable. Contrary to the agency's position, offerors have a right to know whether or not competitive offers are being solicited; indeed, the government reaps the benefits if offerors are aware that offers are being competitively solicited. See 48 Comp. Gen. 605, supra at 611.

There are situations where a solicitation omitting the "or equal" designation is not ambiguous if, when read in its entirety, it is clear that the acquisition is to proceed on a brand name or equal basis, or if the agency has otherwise notified the offeror that the procurement is competitive. See Environmental Tectonics Corp., B-222568, Sept. 5, 1986, 86-2 CPD ¶ 267; Galbraith-Pilot Marine Corp., 56 Comp. Gen. 183 (1976), 76-2 CPD ¶ 488. This RFP does not fall under either of these exceptions. Not only does the RFP fail to indicate that the acquisition is being conducted on a brand name or equal basis, but DLA does not claim that it advised Deknatel that competitive quotes were being solicited.

DLA and Atrium contend that Deknatel must have known that competitive quotes were being solicited and that "equal" products could be offered, since the protester proposed an alternate model in response to an earlier RFP's specific request for pricing on the Deknatel P/N A-8000 and since the agency made multiple awards under that RFP to Atrium and Deknatel. That earlier RFP, issued December 26, 1990, was similarly redacted to reflect only the Deknatel and Atrium part numbers to the respective parties. However, that earlier RFP expressly stated that the government would consider exceptions to the specifications; the RFP that is the subject of this protest contained no similar invitation.

The record further indicates that the omissions in the RFP prejudiced Deknatel. Deknatel produces six different models of plastic, disposable, pleural cavity draining units, which are "water-seal type, three-chamber, 2,300 ml. capacity," as called for in the RFP's item description. Had the protester known that the agency contemplated competition on a less restrictive basis than that provided in its RFP, which exclusively specified model P/N A-8000, Deknatel states that it would have submitted a proposal for one of its lower cost, alternative models. Deknatel offered such a lower cost, alternative model to the P/N A-8000 under the December RFP and received award on the basis of such an offer. There is competitive prejudice under these circumstances, since the brand name manufacturer also had an "equal" product, which it assertedly would have offered if the agency had advised of the competition. See Flow Technology, Inc., 67 Comp. Gen. 161 (1987), 87-2 CPD ¶ 633; Sargent Indus., B-216761, supra; Instrumentation Mktg. Corp., B-182347, supra.

We sustain the protest.

We recommend that DLA amend the solicitation to reflect its minimum requirements and obtain revised offers. In the event that Atrium is not the successful offeror, its contract should be terminated and award made to the low-priced, acceptable offeror. Under the circumstances, Deknatel is entitled to costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1).

for Milton J. Socolar
Comptroller General
of the United States