

Matter of: D.M. & E. of Las Vegas, Inc.

File: B-261415

Date: September 20, 1995

Jeff Taraby for the protester.
Gail Booth, Esq., Defense Logistics Agency, for the agency.
C. Douglas McArthur, Esq., and Ralph O. White, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Agency properly rejected protester's alternate product for failure to supply original equipment manufacturer data where solicitation required such information to ensure the technical acceptability and functional integrity of any alternate offer.

DECISION

D.M. & E. Las Vegas, Inc. protests the award of a contract to the Gans Tire Co., Inc. under solicitation No. SP0770-95-R-5206, issued by the Defense Construction Supply Center (DCSC). D.M. & E. contends that the agency improperly rejected its offer as technically unacceptable.

We deny the protest.

The agency issued the solicitation on November 17, 1994, for a firm, fixed-price contract for 230 manually operated pneumatic tire bead breakers, described by Gans part number BB105289. The solicitation set forth in its entirety a clause entitled, "Conditions for Evaluation and Acceptance of Offers for Part Numbered Items,"¹ Defense Logistics Agency (DLA) Regulation § 52.217-9002, advising potential offerors that they must indicate whether they are offering the Gans part number listed in the schedule or an alternate product. The clause also advised potential offerors that

¹This clause is identical, in essential respects, to the products offered clauses used by DLA to evaluate offers of alternate products. See Magnetic Design Labs, Inc., B-259282, Mar. 20, 1995, 95-1 CPD ¶ 150.

the agency had no data for use in the evaluation of alternate products, and stated as follows:

"If an alternate product is offered, the offeror must furnish with its offer legible copies of all drawings, specifications or other data necessary to clearly describe the characteristics and features of the alternate product being offered. Data submitted must cover design, materials, performance, function, interchangeability, inspection and/or testing criteria and other characteristics of the offered product. [In addition], the offeror must furnish drawings and other data covering the design, material, etc., of the exact product cited in the [purchase item description (PID)] sufficient to enable the Government to determine that the offeror's product is equal to the product cited in the PID."

The clause further advised offerors that the failure to furnish the required data within a reasonable time would preclude consideration of the offer.

The agency received three offers on December 21. The protester submitted the low offer, based on a product manufactured by Branick Industries, Inc. but included no technical data for evaluation. Accordingly, on January 26, 1995, the agency asked D.M. & E. to submit technical data to allow evaluation of its offer. In response, D.M. & E. provided a sample of the offered product but provided no technical data apart from a page from Branick's catalog, with a short description of the item. After considering this material, the agency advised D.M. & E. by letter of April 12 that its offer was technically unacceptable, and this protest followed.

D.M. & E. initially contended that the descriptive literature supplied should have been sufficient for the agency to determine whether its product was acceptable but now concedes that it did not provide the complete information required. The protester states that it could not furnish further data because the manufacturer refused to cooperate, and contends that the contracting officer instead suggested she would waive the requirement for technical data, thereby causing the protester to spend time, effort, and money purchasing a Gans unit for the agency to compare with the offered Branick unit to verify the similarity of the alternate product.

The obligation to demonstrate the acceptability of an alternate offer is on the offeror, and consequently an offeror must submit sufficient information with its alternate item to enable the contracting agency to determine

whether the item meets all the requirements of the solicitation. Alfa Kleen, B-252743, July 26, 1993, 93-2 CPD ¶ 55. The procuring agency is responsible for evaluating the data supplied by an offeror and ascertaining if it provides sufficient information to determine the acceptability of a product. Marine Elec. Sys., B-253630, Sept. 15, 1993, 93-2 CPD ¶ 175. We will not disturb an agency's technical determination in this regard unless it is unreasonable. Id.

We find that the agency acted reasonably in rejecting D.M. & E.'s alternate offer. As noted above, the solicitation advised offerors that the agency had no data for the evaluation of alternate products, and placed the responsibility for furnishing such data on offerors. Specifically, offerors were required to submit information sufficient for the agency to determine whether the alternate was equal to the Gans bead breaker. There is no dispute here that the protester failed to provide this information.

With respect to the protester's assertion that the contracting officer suggested that the agency would waive the data requirement and perform its own comparison of the offered part and the specified Gans part, the contracting officer denies this contention. Instead, the contracting officer explains in a sworn statement that she told the protester only that it could submit a sample along with the required technical data. In its comments, the protester does not pursue this allegation, and does not submit a sworn statement or other evidence contradicting the contracting officer's version of these events.

Nonetheless, we note that where a solicitation requires offerors to submit technical data, an agency is not obligated instead to accept product samples for testing. The W.H. Smith Hardware Co., B-220531, Dec. 17, 1985, 85-2 CPD ¶ 681. In fact, since the solicitation here advised that the agency lacked the requisite data to permit a review

of alternate parts, the agency could not have performed the comparison sought by the protester in any event.² Thus, we conclude that the rejection of D.M. & E.'s proposal was in accordance with the solicitation.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
General Counsel

²To the extent that D.M. & E. is complaining that the agency should have been able to perform the required comparison, D.M. & E.'s protest challenges a solicitation requirement, and should have been filed prior to the submission of proposals. Thus, this issue is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1) (1995).