



Decision

Matter of: OnSite Sterilization, LLC

File: B-405395

Date: October 25, 2011

Al Koehler, for the protester.
Kevin L. Pearson, Esq., Department of Veterans Affairs, for the agency.
Jacqueline Maeder, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Under brand name or equal solicitation, protester's quotation was properly rejected where the product quoted as equal to the brand name failed to satisfy salient characteristics set out in the solicitation.

DECISION

OnSite Sterilization, LLC, of Pottstown, Pennsylvania, protests the award of a contract to San-I-Pak Pacific, of Tracy, California, under request for quotations (RFQ) No. VA-246-11-RQ-0298, issued by the Department of Veterans Affairs (VA) on a "brand name or equal" basis to acquire a medical waste compactor for the Hunter Holmes McGuire Veterans Affairs Center in Richmond, Virginia. The protester asserts that the VA improperly evaluated its proposal.

We deny the protest.

The solicitation, issued as a small-business set-aside on May 25, 2011, specified that vendors were to provide a San-I-Pak Model Mark V11-N, Sterilizer/Compactor, or equal, and listed 10 salient characteristics that had to be satisfied by any product offered as equal to the brand name.¹ The salient characteristics required, among

¹ The RFQ contained the Brand Name or Equal clause at Federal Acquisition Regulation (FAR) § 52.211-6, which advises vendors that, to be considered for award, offers of "equal" products must meet the salient physical, functional, or performance characteristics specified in the solicitation. RFQ at 29-30.

other things, that the sterilizer use the existing steam source; use existing utilities from the current system as well as the phone line to the master controller; manage both medical and solid waste with an integrated high-density compactor; fit into the footprint of the existing system; be a dual-sterilization chambered system; be constructed of type 3161 stainless steel; and that operation (loading, sterilization, discharge) of the unit should be automated/touch-free with pivoting chambers. Id. at 4.

The RFQ provided that a purchase order would be issued to the vendor whose quotation was evaluated as the “best value” considering technical factors, past performance, and price. Id. at 14. The technical and past performance factors when combined were more important than price. Id.

The agency received three quotations, including OnSite’s and San-I-Pak’s, by the June 3 closing date. San-I-Pak and the third vendor quoted the brand name equipment; OnSite quoted its VariClave system model number VC250. Agency Report (AR), Contracting Officer Statement, at 1. The agency’s technical evaluation panel (TEP) made a site visit to Gastonia, North Carolina, to evaluate OnSite’s product. The TEP found that OnSite’s equipment failed to meet 7 of the 10 salient characteristics. Specifically, the evaluators found that OnSite’s system was not an automated, touch-free system; not dual chambered; did not include an integrated compactor; did not use existing utilities; and that its sterilization chambers were not constructed of type 3161 stainless steel. Additionally, the evaluators determined that OnSite’s system did not process raw material waste and solid waste, and it did not fit into the existing footprint. Id. Accordingly, VA determined that OnSite’s product was not equal to the brand name and thus was ineligible for award. Id. A purchase order was issued to San-I-Pak, the next low vendor, on the basis of its quote of the brand name product.

OnSite complains that the salient characteristics were improper in that several are “exclusive” to San-I-Pak. Protester Comments at 1. This argument is untimely. Protesters are required to file protests against solicitation improprieties apparent on the face of the solicitation not later than the date set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (2011). Here, the solicitation clearly required the Mark V11-N Sterilizer/Compactor or equivalent and set forth the salient characteristics an equal product must satisfy. To the extent OnSite objected to the specifications, to be timely its protest had to be filed no later than the June 3 proposal due date. Because this argument was not raised until after OnSite’s product had been rejected, it is untimely.

OnSite contends that the agency erred in evaluating its product. According to the protester, the deficiencies the VA found in its system are not material to the agency’s actual needs, and/or its system is superior to the brand name such that the VA should have issued the purchase order to OnSite as the lowest priced vendor. Protester Comments at 1-5.

Under a brand name or equal solicitation, a firm offering an equal product must demonstrate that the product conforms to the salient characteristics of the brand name product listed in the solicitation. American Government Marketing, Inc., B-294895, Nov. 22, 2004, 2005 CPD ¶ 109 at 2. If the firm fails to do so, its product properly is rejected as nonconforming. Id.

Here, as noted above, the agency found OnSite's product nonconforming for failing to meet seven salient characteristics. In its response to the agency report, OnSite acknowledges that its product does not fully conform to all of the requirements specified in the solicitation.² OnSite, however, asserts that its product essentially complies with the solicitation requirements or, in the alternative, that any deviations are offset by some other benefit or result in a product that is superior to the brand name product.

For example, as noted above, the agency determined that OnSite did not quote a dual-chambered system, as required by the RFQ. The agency explains that it required a dual-chambered system for capacity, and required a back-up in case of system failure or when the unit requires servicing. AR, Contracting Officer Statement, at 3. While OnSite acknowledges that its compactor is single-chambered, it nonetheless argues that this shortfall is immaterial because its unit was specifically designed to have a minimal maintenance profile. Protester Comments at 4.

We have previously found that an agency should waive a minor deviation from a brand name or equal solicitation's salient characteristics where the deviation does not affect the ability of the nonconforming product to meet the agency's actual functional needs, and no other firm is prejudiced by the waiver. General Projection Systems, Inc., B-241418.3, Dec. 27, 1991, 91-2 CPD ¶ 582 at 4. Here, however, OnSite's compactor deviates materially from the agency's actual needs because it did not meet the salient characteristics. Thus, the agency required a dual-chambered system in order to have a back-up when the system needed service; we find reasonable the agency's position that OnSite's quote of a single-chambered system with no back-up represented a material deviation from the specifications.

Likewise, the solicitation required that the compactor have an automated/touch-free operation so as to avoid the costs associated with additional labor to manually load or unload the compactor. AR, Contracting Officer Statement, at 3. The agency states that OnSite's unit was not fully automated, resulting in additional labor costs

² For example, the protester acknowledges that its system has a single chamber, rather than the dual chamber required under the solicitation; that OnSite uses type 304 stainless steel which OnSite states is less costly and "entirely adequate for the intended use," rather than the 3161 stainless steel required by the RFQ; and that OnSite's system "has a different footprint but still fits into the existing space." Protester Comments at 1-2.

over the life of the unit. Id. The protester acknowledges that while its “system is touch-free and automated on the loading side,” on the unloading side it is only “touch free and semi-automated”; according to the protester, the “manual function is to push the carts into the chamber and to pull them out and place them on the cart tipper for dumping into the compactor.” Protester Comments at 1, 4. OnSite asserts that this deviation from the salient characteristic is immaterial because the OnSite unit has 3.77 times the volume of the San-I-Pak unit and “accordingly offsets this labor expense by having far greater unit capacity and fewer operating cycles for the same amount of waste.” Id. at 4. The protester also states that to achieve the automatic discharge feature, San-I-Pak dumps free liquids into the compactor, creating a continuous odor problem. The protester asserts that, in contrast, its unit is odor free. Id.

Again, the protester’s arguments amount to a contention that the deviation of its product is offset by some other benefit. The solicitation, however, reflected the agency’s determination that it needed an automated touch-free system without additional labor; we find reasonable the agency’s position that the fact that OnSite’s system is not totally automated and requires some manual operation represents a material deviation from the solicitation. To the extent the protester believes its alternate approach better meets the agency’s needs, the protester was required to protest the specifications prior to the time set for receipt of quotations. 4 C.F.R. § 21.2(a)(1). Because OnSite did not file its protest until well after the closing date, we will not consider a challenge to the specifications.

OnSite also challenges the selection of San-I-Pak, asserting, for example, that it is doubtful that San-I-Pak’s dual-chambered unit would fit the footprint of the current single-chambered unit. Protester Comments at 4. However, since we have concluded that the agency properly rejected OnSite’s nonconforming quotation, and there is an intervening vendor who quoted the brand name product and whose quotation was evaluated as acceptable, OnSite is not an interested party for purposes of raising these allegations. 4 C.F.R. § 21.0(a). In this regard, where, as here, there is an intervening vendor who would be in line for the award if the protester’s challenge to the award were sustained, the intervening vendor has a greater interest in the procurement than the protester, and we generally consider the protester’s interest to be too remote to qualify it as an interested party. Ridoc Enterprise, Inc., B-292962.4, July 6, 2004, 2004 CPD ¶ 169 at 9.

The protest is denied.

Lynn H. Gibson
General Counsel