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Decision

Matter of: Sourcelinq, LLC--Protest and Costs

File: B-405907.2; B-405907.3; B-405907.4

Date: January 27, 2012

H. Todd Whay, Esq., The Whay Law Firm, for the protester.
Lt. Col. Steven P. Cullen, Department of the Army, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is denied where agency reasonably determined that descriptive literature for equal product submitted by protester in response to brand name or equal solicitation failed to demonstrate compliance with specified salient characteristics.
 2. Protester's request for a recommendation that it be reimbursed its protest costs for an earlier protest pertaining to this acquisition is denied where protest was not clearly meritorious.
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DECISION

Sourcelinq, LLC, of Dallas, Texas, protests the rejection of its quotation and the issuance of an order to FBC Enterprises, LLC, of Scottsdale, Arizona, under request for quotations (RFQ) No. W9124M-11-T-0069, issued by the Department of the Army for fitness equipment for Fort Stewart, Georgia. Sourcelinq also requests that we recommend that it be reimbursed the costs of filing and pursuing an earlier protest pertaining to this acquisition, in response to which the agency took corrective action.

We deny the protest and the request for a recommendation for protest costs.

BACKGROUND

The RFQ sought rowing machines and a number of other items of basic fitness equipment on a brand name or equal basis, with award to be made to the vendor

submitting the lowest-priced, technically-acceptable quotation.¹ The solicitation identified the salient characteristics for the equal products and instructed vendors, via incorporation of Federal Acquisition Regulation (FAR) § 52.211-6, that equal products would be considered for award only if the vendor furnished descriptive literature demonstrating compliance with the specified salient characteristics. Salient characteristics for the rowers were as follows:

Includes either PM3 or PM4 Performance Monitor. Flywheel design. Easy spiral damper controls feel of each pull. Ergonomic handle. Aluminum rail capped with a stainless-steel track for smooth movement of the seat. Adjustable monitor arm for compact storage. Flex foot footrests. Compact storage. Machine separates easily into two parts for transport and storage. Easy assembly. Tools and illustrated instructions included. Caster wheels make it mobile.

RFQ at 46.

Multiple vendors submitted quotations prior to the September 21, 2011 due date. The protester quoted on other than the brand name items and furnished a brochure for its proposed rower and photographs of the other fitness equipment. On September 26, the agency announced that an order had been issued to FBC Enterprises, LLC at a price of \$4,086,958.72. On September 28, the protester contacted the agency for further information regarding the non-selection of its substantially-lower-priced quotation; in response, the agency furnished the following explanation:

Only your collar set, bumper plates and ring sets met the specs. Your rower weighed too much for crossfit purposes (moving items around) and there was nothing to evaluate the rest of the items on (did not supply supporting documentation to do evaluation).

Protest at 4.

Sourcelinq protested to our Office on October 5. The protester complained that while the agency had considered the photographs submitted with its quotation in evaluating its collar set, bumper plates, and ring set, the agency had ignored its photographs in evaluating the other items. The protester also complained that the agency's finding that its rower weighed too much for crossfit purposes was inconsistent with the terms of the RFQ, which did not identify weight as a salient characteristic of the rowing machine.

¹ Specifically, the solicitation sought ring sets, abmats, jump ropes, medicine balls, plyoboxes, kettlebells, pull-up bars, collar sets, training bars, and bumper plates.

On October 28, one week prior to the specified due date, the agency filed its report responding to the protest. In response to the protester's complaint that the agency had not considered all of the photographs submitted as part of its quotation, the agency asserted that the protester had furnished photographs for only a few of the items. With regard to the protester's complaint pertaining to evaluation of its proposed rower, the agency reported that the brochure furnished by Sourcelinq failed to demonstrate compliance with a number of the specified salient characteristics, including the requirements for a flywheel design, an ergonomic handle, an aluminum rail capped with a stainless-steel track for smooth movement of the seat, an adjustable monitor arm for compact storage, and easy separation for transport and storage. The agency further explained that while the contract specialist had referred to the weight of the rower in the evaluation summary that she furnished to the protester, the weight of the rower was not the basis for the technical evaluator's finding of noncompliance with the stated salient characteristics. According to the agency, failure to conform to the above requirements resulted in the finding of noncompliance, with the weight of the rower merely noted as an additional parenthetical comment.²

On October 31, protester's counsel contacted agency counsel regarding the agency's representation that Sourcelinq had failed to furnish descriptive literature such as photographs for the kettlebells, men's bars, abmats, jump ropes, plyoboxes, modular pullup systems, and medicine balls. In response, the agency reviewed the matter further and determined that not all of the photographs that Sourcelinq had submitted with its quotation had been forwarded to the technical evaluator, and, as a consequence, the agency's technical evaluation had been based on an incomplete version of the quotation. The agency notified our Office that it would be taking corrective action in response to the protest by reevaluating the quotation and making a new award determination. We dismissed the protest as academic. Sourcelinq, LLC, B-405907, Nov. 3, 2011.

The technical evaluator completed his reevaluation in early November. With regard to the protester's proposed rower, he noted as follows:

Does not meet specs, (Vendors rower specs does not mention flywheel or ability to break down in two parts, additionally no working website to identify additional information on equipment) (sic)

² Specifically, the evaluator found as follows:

Does not meet specs, [Weights too much (rower in PR&C weighs 57 Lbs, vendor's rower weighs roughly 100 lbs)] (sic)

First Technical Evaluation, Agency Report (AR), Tab 6.

Second Technical Evaluation, AR, Tab 7. The technical evaluator also found that it could not be determined from the photographs furnished with the protester's quotation whether the kettlebells were cast in one piece and the medicine balls were leather, both of which were salient characteristics of the items; in addition, he could not determine whether the modular pullup system met the specifications.

On November 16, the agency notified Sourcelinq that it had determined that some of the products offered by the protester did not meet the salient characteristics specified in the solicitation, and that it intended to proceed with its order to FBC. On November 25, Sourcelinq protested to our Office.³

DISCUSSION

The protester argues that the photographs of the basic fitness equipment and the brochure pertaining to the rower that it submitted with its quotation demonstrated that its offered products complied with the salient characteristics of the solicitation. Sourcelinq further argues that to the extent the agency considered its documentation to be insufficient, the agency should have sought clarification from, or engaged in discussions with, it.⁴

When a solicitation contains a brand name or equal purchase description, the FAR requires that it include "a general description of those salient physical, functional, or performance characteristics of the brand name item that an 'equal' item must meet to be acceptable for award." FAR § 11.104(b). The particular features of a brand name item set forth in a solicitation are presumed to be material and essential to the government's needs. Mid-Florida Corp., B-228372, Jan. 22, 1988, 88-1 CPD ¶ 60 at 4. With respect to a firm offering an equal product, the quotation must demonstrate that the product conforms to the salient characteristics listed in the solicitation. CAMSS Shelters, B-309784, B-309784.2, Oct. 19, 2007, 2007 CPD ¶ 199 at 4. If the quotation fails to do so, it is properly rejected as technically unacceptable. Id.

³ In addition, on November 18, Sourcelinq filed a request for a recommendation that it be reimbursed the costs of filing and pursuing its earlier protest. We address this request later in this decision.

⁴ Also, in its comments on the agency report, the protester complained that in defining the salient characteristics of the equipment sought, the agency had merely copied the brand name offerors' descriptions of their products. We will not consider this complaint because it is an untimely challenge to the terms of the solicitation. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2011).

Here, we think that the agency reasonably determined that the descriptive literature furnished by the protester did not establish that its proposed rower complied with the salient characteristics for a flywheel design and easy separation into two parts for transport and storage. Sourcelinq contends that the agency's technical evaluator should have been able to determine from a picture of the rower in its submitted brochure that the unit contained a flywheel and that it could easily be broken down into two pieces by removing two bolts. We disagree. We have reviewed the picture, and it does not clearly establish either that the unit contains a flywheel or that it may easily be separated into two pieces by removing two bolts. Thus, we have no basis to find the agency's evaluation unreasonable.⁵

With regard to the protester's argument that the agency should have sought additional information from it regarding the characteristics of its proposed products via clarifications or discussions, where, as here, a solicitation states that the agency intends to make award without discussions, the contracting officer's discretion not to hold discussions is quite broad and is, in general, a matter that we will not review. Trace Sys., Inc., B-404811.4, B-404811.7, June 2, 2011, 2011 CPD ¶ 116 at 5. Likewise, while agencies have broad discretion as to whether to seek clarifications from offerors/vendors, there is no requirement that offerors/vendors be permitted to clarify their proposals. JBlanco Enters., Inc., B-402905, Aug. 5, 2010, 2010 CPD ¶ 186 at 4 n.4.

Sourcelinq also argues that the agency failed to establish the reasonableness of FBC's price. The protester maintains in this connection that the agency should have compared FBC's price to the prices quoted by other vendors. Sourcelinq, however, is not an interested party to raise this issue. As discussed above, it failed to propose a conforming product, therefore it would not be in line for award even if its protest were sustained on this ground. See American Government Marketing, Inc., B-294895, Nov. 22, 2004, 2005 CPD ¶ 109 at 2; 4 C.F.R. § 21.0(a)(1) (only an "interested party" may file a protest, that is a protester must be an actual or prospective bidder or offeror whose interest would be affected by the award or failure to award a contract).

In any event, the record clearly establishes the reasonableness of FBC's price. Not only, as pointed out by the agency, was the awardee's price the lowest for a technically acceptable quotation, but further, the bid synopsis spreadsheet reveals that only 3 of the 11 quotations received were lower in price than FBC's. In other

⁵ Because we think that the agency reasonably determined that the descriptive literature furnished by the protester failed to establish that its rower met the RFQ's salient characteristics, it is unnecessary for us to determine whether the protester also failed to establish compliance with the salient characteristics of other solicited items.

words, not only does a comparison to the prices quoted by other vendors fail to establish the unreasonableness of FBC's price, such a comparison in fact establishes the reasonableness of that price.⁶

In our view, the record fails to demonstrate error on the part of the agency in its evaluation of the protester's quotation. Accordingly, the protest is denied.

REQUEST FOR RECOMMENDATION OF PROTEST COSTS

As noted above, Sourcelinq also requests that we recommend that it be reimbursed the costs of filing and pursuing its earlier protest, in response to which the agency took corrective action.

When a procuring agency takes corrective action in response to a protest, our Office may recommend reimbursement of protest costs, including reasonable attorneys' fees, if, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. 31 U.S.C. § 3554(c)(1)(A) (2006); Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2011); AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 6. The mere fact that an agency decides to take corrective action does not also establish that a statute or regulation clearly has been violated. Id. Thus, as a prerequisite to our recommending the reimbursement of costs where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. PADCO, Inc.--Costs, B-289096.3, May 3, 2002, 2002 CPD ¶ 135 at 3. A protest is clearly meritorious

⁶ In its comments on the agency report, the protester raised two additional complaints, both of which we dismiss. We dismiss Sourcelinq's complaint that the agency acted unreasonably and inconsistently in finding that FBC's equipment met the solicitation's specifications because the complaint is both untimely (in that it is based on information furnished to the protester in the October 28 agency report responding to its initial protest--*i.e.*, the contracting officer's statement--but was not raised until December 19, after the protester received the agency report responding to its second protest) and based on speculation as to the content of FBC's quotation. We also dismiss the protester's complaint that to the extent the agency regarded its failure to identify a working website as a deficiency, this was inappropriate because the RFQ did not require vendors to identify working websites in their quotations. It is apparent from the record, as the protester essentially concedes, that the agency's reference to the absence of a working website was not intended as identification of a deficiency, but rather as an explanation for why the agency did not seek additional information on-line regarding the offered rower.

where a reasonable agency inquiry into the protester's allegations would reveal facts showing the absence of a defensible legal position. Yardney Technical Prods., Inc.--Costs, B-297648.3, Mar. 28, 2006, 2006 CPD ¶ 65 at 4.

Here, Sourcelinq's initial protest was not clearly meritorious, and thus we deny the protester's request. While the agency's initial evaluation was flawed (in that it was based on an incomplete version of the protester's quotation), Sourcelinq's initial protest was not clearly meritorious since the agency reasonably determined, as part of its initial evaluation, that the protester's proposed rower did not meet several of the specified salient characteristics.

The protest and the request for a recommendation of protest costs are denied.

Lynn H. Gibson
General Counsel