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Decision

Matter of: Custom Pak, Inc.; M-Pak, Inc.

File: B-409308; B-409308.2; B-409308.3; B-409308.4

Date: March 4, 2014

Kristin Wampler, Custom Pak, Inc.; and Kevin P. Joyce, Esq., Centre Law Group, LLC, for M-Pak, Inc., the protesters.

Chaya Greenfield, Star Poly Bag, Inc., for the intervenor.

Paul K. Petrabor, Esq., Department of Veterans Affairs, for the agency.

Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency failure to retain evaluators' handwritten evaluation sheets does not furnish a basis for sustaining protest against determination that protesters' samples were noncompliant with specifications where comprehensive contemporaneous summary documents provided an adequate supporting rationale in the record from which to conclude that the agency had a reasonable basis for the evaluation.

2. Protesters' assertion that proposed mailing bags evaluated as noncompliant with specifications were identical to bags found acceptable in previous agency acquisitions does not furnish a basis for questioning the evaluation since each procurement stands on its own.

3. Record does not establish an improper "bait-and-switch" where there is no evidence that the awardee either knowingly or negligently made a misrepresentation regarding the mailing bags it intended to furnish during contract performance.

DECISION

Custom Pak, Inc., of Springfield, Massachusetts, and M-Pak, Inc., of Aledo, Texas, protest the Department of Veterans Affairs' (VA) establishment of a blanket purchase agreement (BPA) with Star Poly Bag, Inc., of Brooklyn, New York, under request for quotations (RFQ) No. VA797M-13-Q-0060, for mailing bags. The protesters challenge the evaluation of quotations.

We deny the protest.

BACKGROUND

The RFQ, issued on June 12, 2013, required the delivery of pharmaceutical mailing bags in various sizes to VA Consolidated Mail Output Pharmacies at several locations in the United States. The solicitation was set aside for small business firms which were contract holders under Federal Supply Schedule (FSS) No. 81 I B-Shipping, Packaging and Packing Supplies. RFQ at 1. Award was to be made “to the responsible offeror whose offer conforming to the solicitation is the lowest price[d] and [is] technically acceptable.” Id. at 26. For purposes of determining technical acceptability, the RFQ required the submission of sample bags with the quotations. Id. at 7. In this regard, the RFQ provided as follows:

All requested samples must meet all requirements in the Statement of Work, Section 2.0. Technical acceptability will be evaluated by examining and testing the sample bags submitted by the offerors. If the sample bags fail to meet any of the technical standards, the offeror will receive no further consideration.

Id. at 26. The RFQ established five technical standards for evaluation of the sample bags, including tamper resistance, water resistance, thickness, glue, and use of opaque materials. Id.

Six quotations were received by the closing date of June 26, 2013, including quotations from Custom Pak, M-Pak, and Star Poly. Contracting Officer's (CO) Statement (COS) at 1. The sample bags submitted with the quotations were subjected to testing by the United States Postal Service (USPS) and the VA in accordance with the RFQ. Id. at 1. Testing of samples submitted by the three lowest-priced vendors (including M-Pak, but not Custom Pak or Star Poly) was conducted by the USPS “in current production conditions,” with VA personnel present. Source Selection Decision Document (SSDD), Oct. 28, 2013, at 1. This testing involved the bags’ “ability to withstand rough transit.” Id. All three tested samples failed the USPS test. Id. at 3. As a result, VA decided to submit all six vendors’ samples for VA testing. SSDD at 3.¹ The VA testing included assessment of tamper resistance, water resistance, thickness of the bags, and opaqueness. Id. at 3. A failing score for any size bag resulted in a failing score for the vendor. Id. All vendors’ sample bags except Star Poly’s failed the VA testing.

¹ Failure of USPS testing did not exclude a vendor’s bags from being tested by the VA source selection team. Id. at 2.

SSDD at 11. Star Poly's bags were then sent by the VA to the USPS for testing, and subsequently passed the USPS testing.² SSDD at 3-4.

Given these testing results, the Source Selection Authority (SSA) concluded that "Star Poly has submitted the only sample mailing bags which are technically acceptable and reasonably priced, thereby representing the best overall value to the government." SSDD at 1. Award was made to Star Poly on November 19, 2013. After receiving a debriefing, Custom Pak and M-Pak filed these protests.

DISCUSSION

Custom Pak and M-Pak challenge several aspects of VA's evaluation of quotations. Where an agency conducts a formal competition for the establishment of a BPA, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the solicitation and applicable procurement statutes and regulations. The Clay Group, LLC, B-406647, B-406647.2, July 30, 2012, 2012 CPD ¶ 214 at 8; OfficeMax, Inc., B-299340.2, July 19, 2007, 2007 CPD ¶ 158 at 5. In reviewing protests of alleged improper evaluations and source selection decisions, it is not our role to reevaluate submissions; rather, we will examine the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. The Clay Group, LLC, *supra*. We have considered all of Custom Pak's and M-Pak's arguments and find that none furnishes a basis for questioning the selection of Star Poly for award. We address several of the protesters' arguments below.

Adequacy of Documentation

Both protesters point out, and the agency concedes, that handwritten evaluation sheets from the evaluation team members, although compiled into a summary document, were not themselves retained. VA E-Mail to GAO, Jan. 22, 2014. M-Pak asserts that "VA's failure to create or retain this testing documentation makes it impossible for GAO or any other impartial reviewer to assess the merits of the VA's evaluation." M-Pak Comments at 4; see Custom Pak Comments at 2.

We disagree. Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its source selection decision. Navistar Def., LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 *et al.*, Dec. 14, 2009, 2009 CPD ¶ 258 at 13. The destruction of individual evaluator documents, however, does not render an agency's evaluation unreasonable per se;

² Custom Pak's sample bags did not pass the VA testing and accordingly were not sent to USPS for testing. SSDD at 3.

rather, we will consider the record adequate if the consensus documents and source selection decision sufficiently document the agency's rationale for the evaluations. Joint Mgmt. and Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 3-4.

Here, the evaluation record adequately detailed the strengths and weaknesses that formed the basis for the agency's evaluation ratings for each vendor and for the source selection decision. See National Beef Packing Co., B-296534, Sept. 1, 2005, 2005 CPD ¶ 168 at 12 n.6. The agency has provided statements from the evaluators that indicate that, although the evaluators' notes were not retained, they were taken into consideration and were compiled into the summary source selection decision. In this regard, the record indicates that:

[the program manager] was on the IPT [Integrated Product Team] and participated in the USPS testing. She consolidated the evaluation sheets for insertion into the SSD. A summary document was provided to the team during and at the conclusion of the evaluation process. At no time did any of the team state their ratings were not included.

Supp. AR, attach. 5 (Program Manager's Statement I); see also attach. 8 (Program Manager's Statement II).

Further, the source selection decision sets forth a detailed summary of the testing results for both the USPS and the VA testing. SSDD at 3-10. With regard to the USPS testing of M-Pak's samples, the source selection decision indicated the following results:

FAIL
Tears apart easily due to weak adhesive
Lots of damage to bags from sorting belts, especially the Large and X-Large bags
Does not withstand rough transit

SSDD at 4. With regard to the VA testing of M-Pak's samples, the overall results were as follows:

FAIL – The Small and Medium do not contain an anti-static strip. The Large and X-Large bags have weak glue and are not tamper-resistant. The X-Large bag has a lighter inner liner that allows you to read the contents in the package.

SSDD at 4; see also SSDD at 12. Similarly, with regard to the VA testing of Custom Pak's samples, the overall results were as follows:

FAIL. Bags are not tamper-resistant, contain poorly constructed side seams and mailing labels do not stick. The material of the bags is “crinkly” and may impact barcode readability through the mail stream.

SSDD at 7, 13. Further, these summary conclusions in the source selection document are followed by detailed, comprehensive evaluator findings with regard to each of the four sizes of sample bags submitted by M-Pak, Custom Pak, Star Poly, and the other vendors under each of the five evaluation categories. See, e.g., SSDD at 4-5 (M-Pak), 7-8 (Custom Pak), 9-10 (Star Poly).

In these circumstances, given the comprehensive nature of the agency’s summary evaluation documents, there is an adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for finding the protesters’ bags noncompliant with the specification requirements. This protest ground is denied.³

Previous Acquisitions

Both protesters assert that the bags they quoted and furnished for testing in this acquisition were identical to bags quoted and supplied in previous VA acquisitions, where the bags were found acceptable. We have previously held, however, that each procurement “must stand on its own.” See, e.g., Kilgore Flares Company, LLC, B-406139, Feb. 2, 2012, 2012 CPD ¶ 63 at 8; Camnetics Mfg. Corp., B-299738, June 21, 2007, 2007 CPD ¶ 115 at 3-4. Even if the quoted bags here were the same as those accepted by VA in prior procurements, that does not render unreasonable

³ Custom Pak points out that the evaluation record indicates that the evaluators found that Star Poly’s sample extra large bag included a flap measuring 2 1/4”. Custom Pak Comments at 2-3 (citing SSDD at 10). Custom Pak asserts that Star Poly’s extra large bags therefore did not satisfy the requirement in the statement of work that bags “shall contain a 2” seal flap.” RFQ at 5. This protest ground, however, is untimely, since Custom Pak did not raise it until January 27, 2014, more than 10 days after it was on notice of the basis for the protest, that is, after it received the source selection decision (with the description of Star Poly’s samples) included in the January 10 agency report. 4 C.F.R. § 21.2(a)(2) (2013). In this regard, the fact that Custom Pak’s time to respond to the agency report was extended to January 27, did not extend the time for the filing of supplemental protests. See Unitor Ships Serv., Inc., B-245642, Jan. 27, 1992, 92-1 CPD ¶ 110 at 10.

VA's well-explained determination that the protesters' sample bags did not comply with the solicitation specifications in this procurement.⁴

Material Misrepresentation

M-Pak asserts that Star Poly supplied sample bags for testing different than those it intended to supply in performance of the BPA. M-Pak Comments at 8-10. M-Pak cites a size determination decision by the Small Business Administration (SBA) with regard to an SBA protest filed by M-Pak. M-Pak Comments, exh. I, SBA Size Determination Memorandum, Case No. 1-SD-2014-13, Jan. 2, 2014 (SBA Determination). In particular, M-Pak cites the SBA's discussion of how Star Poly would accomplish manufacture of the bags:

In its response to the size protest, Star suggested that it planned to either purchase the end items through [deleted] or manufacturer of the end item itself. After SBA requested additional information on the parent company of the proposed supplier through [deleted], Star indicated that it would not purchase the end item through [deleted] at all and will only manufacture the end item at its Brooklyn, New York facilities.

Id. at 2.

M-Pak asserts that these SBA findings demonstrate that "Star Poly provided [deleted] bags with its initial submission, and then changed its position when the SBA inquired about the origin of the bags in an effort to elude the Protester's size protest." M-Pak Comments at 9. M-Pak argues that this constituted an "improper bait and switch" misrepresentation. Id.

⁴ We note that, in any case, the agency claims that there were significant differences between this acquisition and the prior acquisitions, asserting that:

[t]he requirements outlined in the RFQ were different, and the evaluation criteria with the 5 technical standards were different than what we have on any current contracts or individual procurements. The goal was to standardize and the standards on the bags needed to be higher.

Program Manager Statement I, at 2.

An offeror's material misrepresentation in its response to a solicitation can provide a basis for disqualification and cancellation of an award based upon the response. See Greenleaf Constr. Co., Inc., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 at 4. To establish an improper "bait-and-switch," a protester must generally show that the firm in question either knowingly or negligently made a misrepresentation regarding resources that it did not expect to furnish during contract performance, and that the misrepresentation was relied upon by the agency in the evaluation and had a material impact on the evaluation results. Alamo City Engineering Services, Inc., B-409072, B-409072.2, Jan. 16, 2014, 2014 CPD ¶ 32 at 6; Apache Enterprises, Inc., B-278855.2, July 30, 1998, 98-2 CPD ¶ 53 at 4. We conclude that the protester has not satisfied these requirements here.

According to Star Poly, upon review of the RFQ, it selected samples from its existing stock manufactured by [deleted], after determining that these bags met "the technical requirements as outlined in the statement of work." Star Poly Comments at 2.⁵ Star Poly concluded that "the mailer bags must be produced like these bags (the samples on hand), identical in all characteristics; such as film type, sizes, thickness and construction in order to meet the technical requirements." Star Poly Comments at 2. Star Poly thereupon negotiated unsuccessfully with [deleted] regarding "partnering" with them on the contract, but left open the possibility of buying from [deleted] a necessary piece of equipment for manufacture of the bags, a Nordson Hot Melt Glue Attachment. Id. Star Poly then contacted [deleted] and "confirmed that they [were] able to provide the identical Mailer Bags and support an uninterrupted source of supply," with bags produced by another company. Id. at 2. However, according to Star Poly, no agreement was reached between Star Poly and [deleted]. Id. at 3.

Award was made to Star Poly on November 19, 2013. COS at 1. On December 4, Star Poly was advised by SBA that a protest had been filed against the award with regard to compliance with the "non-manufacturer rule." Star Poly advises that, at that time, it was "exploring the resources to determine if producing the products on our own would be advantageous." Star Poly Comments at 3. Star Poly further advises that, on December 18, it reached a decision that it would not purchase the bags through [deleted], but instead would produce the end product at its own facility with a Nordson Hot Melt Glue Machine, purchased from [deleted]. Id.; see also SBA Determination at 2.⁶

⁵ The RFQ sets forth no requirements or guidance regarding the origin of the sample bags submitted or the relationship of the sample bags to the bags delivered under the BPA, see RFQ at 7, 26, and M-Pak points to none.

⁶ On January 2, 2014, SBA issued its size determination, resolving M-Pak's protest to SBA. SBA Determination. In that decision, SBA found that Star Poly qualified "as a manufacturer for a small business set-aside procurement." Id. at 3.

The record here does not support a finding of material misrepresentation by Star Poly. Star Poly's account, confirmed in material part by the SBA findings, indicates uncertainty as to which company would manufacture the bags Star Poly intended to supply. The protesters, however, point to nothing in the solicitation that required vendors to identify the manufacturer of the bags, nor did Star Poly identify the intended manufacturer in its quotation. Further, our review of this record provides no evidence that Star Poly, at any point, intended to misrepresent the characteristics of its bags. In fact, the record reflects a continuing effort by Star Poly to ensure that its delivered bags were "like" or "identical" to the sample bags. See Star Poly Comments at 2-3. Although Star Poly continued to explore various possibilities for obtaining or supplying the required bags, there is no indication that it at any time abandoned its requirement that the bags match the samples it provided with its quotation. The record, accordingly, does not show that Star Poly either knowingly or negligently supplied sample bags that were not representative of the bags it expected to furnish during contract performance. Accordingly, this protest ground is denied.

In sum, the protests furnish no basis for questioning the agency determination that Star Poly's quotation, and only Star Poly's quotation, was technically acceptable.

The protests are denied.

Susan A. Poling
General Counsel