



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: American Material Handling, Inc.

File: B-410899

Date: March 12, 2015

Wes McCleary for the protester.

Matthew Myers, Esq., International Boundary and Water Commission, for the agency.

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

DIGEST

Protest that agency unreasonably evaluated protester's quotation as technically unacceptable is denied, where the evaluation was reasonable and consistent with the terms of the solicitation, and the communications with the protester were clarifications, not discussions, which could not correct material deficiencies in its quotation.

DECISION

American Material Handling, Inc. (AMH), of Watkinsville, Georgia, protests the International Boundary and Water Commission's (IBWC) award of a contract to Federal Contracts Corporation, of Tampa, Florida, under request for quotations (RFQ) No. 936886, for an excavator. The protester challenges the agency's evaluation of its quotation as unacceptable.

We deny the protest.

BACKGROUND

On September 27, 2014, the agency issued the solicitation, set aside for small businesses, using simplified acquisition procedures. Agency Email, Feb. 25, 2015; Agency Report (AR), Tab 2, RFQ; see Federal Acquisition Regulation (FAR) Subpart 13.5. The RFQ sought quotations for the award of a contract for one excavator, brand name or equal to Caterpillar 320EL or John Deere 210GLC, to the vendor submitting the lowest-priced, technically acceptable quotation. An attached specifications sheet contained salient characteristics and solicitation

requirements that included, as relevant, requirements for a quick coupler line with necessary hydraulic lines, a heavy duty bucket, the vendor's "maximum extended warranty," training for 15 operators, and four copies of the manuals (two hard copies and two electronic). RFQ, Specification Sheet, at 2.

Three firms--AMH, Federal Contracts, and Gaithersburg Farmers Supply, Inc. (GFS)--submitted timely quotations by the 10 a.m., September 30 submission deadline. Aff. of Technical Evaluator ¶ 6.¹ AMH quoted an "or equal" Volvo excavator for \$191,937, while GFS quoted an "or equal" Hyundai excavator for \$189,900 and Federal Contracts quoted an "or equal" Caterpillar excavator for \$220,859. AR, Tab 5, AMH Quotation at 1; Tab 3, GFS Quotation; Tab 7, Federal Contracts Quotation, at 1.

The technical evaluator initially evaluated AMH's quotation as technically unacceptable on the basis that AMH listed a standard bucket, while the RFQ specified a heavy duty bucket; did not include a quick coupler in the quotation; and did not specify the additional hydraulic lines required for the quick coupler. The agency also evaluated GFS's quotation as technically unacceptable, finding that GFS's quotation did not include the required training for 15 operators and four copies of the manuals, and that the agency could not ascertain from the quotation whether GFS's quoted cab met all applicable federal requirements. Aff. of Technical Evaluator, attach. A, Email from Technical Evaluator to Contract Specialist, Sept. 30, 2014; AR, Tab 4, Evaluation of GFS Quotation; Tab 6, Evaluation of AMH Quotation. The agency evaluated Federal Contract's quotation as technically acceptable. AR, Tab 8, Evaluation of Federal Contract Quotation.

As a result of the above concerns, the contract specialist sent an email to AMH requesting that it:

Please address the following questions:

1. Is the bucket standard or heavy duty?
2. Does the Volvo come with a quick coupler?
3. Quote does not address additional hydraulic line for quick coupler.

Evaluation of AMH Quotation, Email from Contract Specialist to AMH, Sept. 30, 2014. AMH responded as follows:

- 1) Bucket is Heavy Duty
- 2) Quick coupler will be on machine

¹ The record indicates that the agency was seeking to make award on September 30, the last day of the fiscal year. Aff. of Contract Specialist at ¶ 6.

3) Necessary hydraulic lines are included for quick coupler

Evaluation of AMH Quotation, Email from AMH to Contract Specialist, Sept. 30, 2014.

The contract specialist also emailed GFS the following questions:

Can you please clarify the following:

1. Does your quote include 1 day of training for 15 operators?
2. Manuals: Does your quote include 4 sets, two hard copies and two electronic copies?
3. It is not clear if cab with [Rollover Protective Structure/Falling Object Protective Structure] meets SAE [International] and [International Organization for Standardization] criteria. A cabin with [Rollover Protective Structure/Falling Object Protective Structure] is listed as "optional equipment". Does it meet criteria or not?

Evaluation of GFS Quotation, Email from Contract Specialist to GFS, Sept. 30, 2014. GFS responded that it would train up to 20 people for one day and include the required four copies of the manuals, and that the quoted cab met all federal requirements. Evaluation of GFS Quotation, Emails from GFS to Contract Specialist, Sept. 30, 2014.

Concerns were also raised regarding compliance with the solicitation requirement that the vendor quote its "maximum extended warranty." See RFQ, Specification Sheet, at 2. In this regard, AMH's quotation provided a warranty of "12 months, 2,500 hours," included in the base price of the excavator. AMH Quotation at 2. The contract specialist emailed the AMH the following questions: "What is the maximum extended warranty for the equipment? Is there additional cost?" Evaluation of AMH Quotation, Email from Contract Specialist to AMH, Sept. 30, 2014. AMH responded as follows:

Full coverage for entire machine
84 Months, 8,000 hours is an addl cost of 25k.

We don[']t typically have anyone purchase that but folks will purchase the following warranty. Powertrain and Hydraulics
8,000 Hours/84 Months \$15,000[.]

Evaluation of AMH Quotation, Email from AMH to Contract Specialist, Sept. 30, 2014.

The contract specialist likewise emailed GFS the following questions: "What is the Warranty on [your quoted equipment]? What is the maximum extended warranty for

the equipment? Is there additional cost?" Evaluation of GFS Quotation, Email from Contract Specialist to GFS, Sept. 30, 2014. GFS responded that the "warranty . . . is three years/3000 hours full warranty with additional 5 year/5000 hour structural warranty against manufacturer defects in structural components." Evaluation of GFS Quotation, Emails from GFS to Contract Specialist, Sept. 30, 2014. The technical evaluator ultimately evaluated both AMH's and GFS's quotations as technically unacceptable for failing to provide the required "maximum extended warranty." Evaluation of GFS Quotation, Email from Technical Evaluator to Contract Specialist, Sept. 30, 2014.

Both AMH's and GFS' quotations having been determined to be unacceptable, award was made to Federal Contracts as the vendor which submitted the only technically acceptable quotation. After filing an agency-level protest, AMH filed this protest with our Office.

DISCUSSION

The protester challenges the agency's evaluation of AMH's quotation as technically unacceptable, asserting that it addressed the agency's concerns in its response to the agency's questions. The agency maintains that AMH's quotation was unacceptable for failure to comply with the solicitation requirements for the required heavy duty bucket, quick coupler, hydraulic line for the quick coupler, and "maximum extended warranty." AR, Tab 16, Contracting Officer's Statement of Facts. Regarding the questions asked of AMH concerning both the extent and cost of the warranty and the hardware to be provided, the agency asserts that the questions were intended as clarifications only, not discussions, and therefore did not provide AMH an opportunity to modify its quotation so as to render it acceptable. Aff. of Contracting Officer ¶¶ 20-23.

Clearly stated solicitation requirements are considered material to the needs of the government, and a quotation that fails to conform to such material terms is technically unacceptable and may not form the basis for award. 4D Sec. Solutions, Inc., B-400351.2, B-400351.3, Dec. 8, 2008, 2009 CPD ¶ 5 at 4. Further, in the case of a brand name or equal solicitation, 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. Sourceling, LLC--Protest and Costs, B-405907.2 et al., Jan. 27, 2012, 2012 CPD ¶ 58 at 3. 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. Nas/Corp-Telmah, Inc., B-405893, Jan. 10, 2012, 2012 CPD ¶ 88 at 2; OnSite Sterilization, LLC, B-405395, Oct. 25, 2011, 2011 CPD ¶ 228 at 2. If the firm fails to do so, its product is properly rejected as technically unacceptable. Id.

Here, by AMH's own admission during its email exchange with the agency, AMH's quotation as submitted by the closing time did not meet at least one of the

solicitation requirements, that is, the requirement that the vendor offer its “maximum extended warranty.” Instead, AMH offered to provide the required maximum warranty for an additional \$25,000. Evaluation of AMH Quotation, Email from AMH to Contract Specialist, Sept. 30, 2014.

AMH asserts that its email responses to the agency’s questions, in which it offered its extended warranty, should have resolved the agency’s concerns with respect to the warranty. The record, however, indicates that AMH was not afforded an opportunity to modify its quotation so as to substitute its extended warranty for the lesser warranty initially quoted. In this regard, although an agency is not required to conduct discussions under simplified acquisition procedures, where an agency avails itself of negotiated procurement procedures, the agency should fairly and reasonably treat offerors in the conduct of those procedures. See ERIE Strayer Co., B-406131, Feb. 21, 2012, 2012 CPD ¶ 101 at 4; Kathryn Huddleston and Assocs., Ltd., B-289453, Mar. 11, 2002, 2002 CPD ¶ 57 at 6. FAR §15.306 describes a range of exchanges that may take place when the agency decides to conduct exchanges with offerors during negotiated procurements. Clarifications are “limited exchanges” between an agency and an offeror for the purpose of eliminating minor uncertainties or irregularities in a proposal, and do not give an offeror the opportunity to revise or modify its proposal. FAR § 15.306(a)(2); ERIE Strayer Co., *supra*; Lockheed Martin Simulation, Training & Support, B-292836.8 *et al.*, Nov. 24, 2004, 2005 CPD ¶ 27 at 8. Clarifications are not to be used to cure proposal deficiencies or material omissions, or materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. eMind, B-289902, May 8, 2002, 2002 CPD ¶ 82 at 5. Discussions, on the other hand, occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect. Gulf Copper Ship Repair, Inc., B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108 at 6; see FAR §15.306(d).

While the contract specialist’s questions to the vendors were not explicit that the agency intended its inquiries to be requests for clarifications and not discussions, the contracting officer states that he asked the contract specialist only to request clarifications, and that the evaluation was based upon the quotations as initially submitted by the 10 a.m. closing time. Aff. of Contracting Officer ¶¶ 10, 18, 19, 21, 22. These statements are consistent with the contemporaneous evaluation record, where both technical evaluations of AMH’s quotation evaluated the quotation as unacceptable for failing to satisfy material terms of the RFQ. Evaluation of AMH Quotation. Where, in response to clarification requests, an agency receives information that seeks to materially modify a proposal or quotation, we will not consider the communications to be discussions where the agency does not rely on the modification in its evaluation. S4, Inc., B-299817, B-299817.2, Aug. 23, 2007, 2007 CPD ¶ 164 at 7.

The protester's quotation, as initially submitted, failed to satisfy at least one material term of the RFQ, that is, the requirement for the vendor's "maximum extended warranty." Although the agency's request for clarification elicited a proposed modification to AMH's quotation that may have been sufficient to render the quotation compliant with the warranty requirement, under the circumstances here, we have no basis on which to question the reasonableness of the agency's decision not to consider that information in its technical evaluation. As a result, AMH's quotation was properly rejected for failure to comply with a material term of the solicitation.²

The protest is denied.

Susan A. Poling
General Counsel

² We note, however, that in a lowest-priced, technically acceptable procurement, the requirement that vendors quote their "maximum extended warranty," does not appear to provide an objective minimum standard against which quotations can be evaluated on a common basis. Any objection to the language, however, was required to be protested not later than the closing time for receipt of quotations. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2014).