



Decision

Matter of: W K Engineering International, Inc.

File: B-414846; B-414930

Date: September 26, 2017

Jonathan R. Hickman, Esq., Esquire Corporate Services, L.C., for the protester.
Niketa L. Wharton, Esq., Defense Logistics Agency, for the agency.
Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that agency unreasonably restricted competition for a critical application item to one approved source is dismissed as untimely where the protest was not raised before the closing date for receipt of quotations.

DECISION

W K Engineering International, Inc. (WKE), a small business located in Santa Clarita, California, protests the issuance of two purchase orders to AMI Industries, Inc., of Colorado Springs, Colorado, under request for quotations (RFQ) Nos. SPE4A7-17-T-C587 and SPE4A7-17-T-H699 (hereinafter the “C587 RFQ” and the “H699 RFQ” respectively), issued by the Defense Logistics Agency (DLA) for pulley wheels associated with aircraft ejection seats. The protester challenges the agency’s decision to restrict sources of supply for the pulley wheels to one approved source when WKE quoted a lower price and faster delivery schedule, and when WKE had previously provided the same part to the government.

We dismiss the protests as untimely.

BACKGROUND

On March 23, 2017, DLA issued the C587 RFQ requesting quotations on the DLA’s Internet Bid Board System (DIBBS) to supply a quantity of 40 sector, pulley wheel, ejection seats (hereinafter “pulley wheels”), identified by national stock number (NSN) 1680-00-358-1632. C587 RFQ at 6. The solicitation requested quotations to be submitted by April 3. *Id.* at 1. On June 6, DLA issued the H699 RFQ requesting

quotations on the DIBBS website for 25 pulley wheels, identified by the same NSN. H699 RFQ at 6. Quotations were to be submitted by June 16. Id. at 1.

Both solicitations noted that the requested pulley wheel was a critical application item¹ and also described the pulley wheels as a “life support item” for which “[o]nly quotes from the approved source of supply or authorized dealers are acceptable” C587 RFQ at 3, 6; H699 RFQ at 3, 6.

Section B of both solicitations provided the manufacturer’s commercial and government entity (CAGE) code and the applicable part number as “AMI INDUSTRIES, INC. DBA GOODRICH 31218 P/N D115088-1.” C587 RFQ at 6; H699 RFQ at 6. The solicitations did not list WKE as an approved source of supply for the pulley wheel.

Both solicitations incorporated the terms and conditions set forth in the DLA master solicitation for automated simplified acquisitions. C587 RFQ at 1; H699 RFQ at 1. The DLA master solicitation for automated simplified acquisitions incorporates a procurement note, DLA procurement note M06, which is applicable where items in the solicitation “are identified in the item description only by the name of an approved source (CAGE code), a part number, and a brief description. . . .” DLA Master Solicitation for Automated Simplified Acquisitions, March 3, 2017, at 10. In such circumstances, DLA procurement note M06 provides that offers of alternate products will not be evaluated for the contract action if the solicitation is automated.² See DLA Procurement Notes, Sept. 19, 2016, at M06.

On March 23, WKE submitted a timely quotation in response to the C587 RFQ via the DIBBS website. B-414846 Agency Report (AR),³ Tab 3, WKE Quotation. WKE quoted a delivery date of 120 days and a price of \$750 per pulley wheel, which resulted in a total price of \$30,000. Id. at 1. On June 6, WKE submitted a timely quotation in response to the H699 RFQ via the DIBBS website. B-414930 AR, Tab 3, WKE Quotation. WKE quoted a delivery date of 90 days and a price of \$950 per pulley wheel, which resulted in a total of \$23,750. Id. at 1.

¹ A critical application item is an item essential to weapon system performance or operation, or the preservation of life or safety, or safety of operating personnel, as determined by the military services. Critical Process Filtration, Inc., B-400746 et al., Jan. 22, 2009, 2009 CPD ¶ 25 at 3 n.7.

² The parties do not dispute that both solicitations were automated.

³ Subsequent to the submission of separate agency reports, our Office consolidated WKE’s protests. Citations to documents that are preceded by “B-414846” refer to documents submitted as part of the protest docketed as B-414846, whereas citations to documents preceded by “B-414930” refer to documents submitted as part of the protest docketed as B-414930.

Both WKE quotations selected the bid type as “alternate bid.” B-414846 AR, Tab 3, WKE Quotation, at 1; B-414930 AR, Tab 3, WKE Quotation, at 1. Under the category “part number offered,” each WKE quotation provided that it was offering an “alternate product” with a part number (D115088-1) that matched the applicable part number, but a CAGE code (58748) that did not match AMI’s CAGE code (31218). B-414846 AR, Tab 3, WKE Quotation, at 2; B-414930 AR, Tab 3, WKE Quotation, at 1. A notice appearing on the second page of both WKE quotations stated that:

Offers of alternate products will not be evaluated for the current procurement (see DLAD 52.217-9002). You may submit a request to the location below for evaluation of the alternate product’s technical acceptability for future procurements of the same item. The request for evaluation shall cite the National Stock Number (NSN)/Part # of the exact product and, as identified in this provision, include the applicable level of technical data on the alternate and exact products. All offers of alternate products will be handled in accordance with DLAD 17.7501(b)(4).

B-414846 AR, Tab 3, WKE Quotation, at 2; B-414930 AR, Tab 3, WKE Quotation, at 2. WKE’s quotations did not include a request for further evaluation of its product’s technical acceptability, nor did it include further technical information in support of such a request.

On May 5, DLA issued a purchase order under the C587 RFQ to AMI for a total price of \$69,427 (\$1,735 per pulley wheel) with a delivery date of 150 days. B-414846 AR, Tab 7, Purchase Order Award, at 1. On July 6, the agency issued a purchase order under the H699 RFQ to AMI for a total price of \$43,700 (\$1,748 per pulley wheel) with a delivery date of 180 days. B-414930 AR, Tab 6, Purchase Order Award, at 1. Both purchase orders were issued to AMI, rather than WKE, because AMI was determined to be the only approved source for the pulley wheel being solicited. B-414846 Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 2; B-414930 COS/MOL at 2.

On May 9, WKE filed an agency-level protest of the purchase order issued under the C587 RFQ. DLA dismissed the protest as untimely since it was not filed prior to the closing date for receipt of quotations. AR, Tab 9, Agency Protest Response, at 1. On June 23, WKE filed a protest with our Office of the purchase order issued under the C587 RFQ. On July 12, WKE filed a protest of the purchase order issued under the H699 RFQ.

DISCUSSION

WKE argues that the agency abused its discretion by issuing the purchase orders to AMI when WKE quoted lower prices and earlier delivery dates for the pulley wheels.

The protester further asserts that the agency abused its discretion in determining that AMI was the only approved source of supply for the pulley wheels.⁴

In response to these protest grounds, the agency explained the basis for its determination that AMI was the only approved source for the pulley wheel. Specifically, the agency states that it received information from the military service engineering support activity (ESA) indicating that the original equipment manufacturer for the pulley wheel, Boeing, had changed the data rights marking on certain technical documents related to products originally manufactured by Boeing. B-414846 COS/MOL at 1-2; B-414930 COS/MOL at 1-2. DLA contends that as a result of this change, the agency lost the data rights to competitively procure the pulley wheels, other than in procurements for specific weapon systems, until a new data rights letter or licensing agreement is established. Id. In October 2016, the ESA therefore restricted the approved source for the pulley wheel to AMI. Id. Before this restriction was put in place, the pulley wheel had been procured through fully competitive solicitations. Id.

In its comments, WKE challenges this justification as “unreasonable and unsupported by any facts or evidence.” B-414846 Comments at 3; B-414930 Comments at 3. The protester further contends that since it had previously supplied the same part to the government, and was currently providing a “mirror image” part on another government contract, WKE should have been considered an approved source by the agency. B-414846 Comments, Decl. of WKE’s President, at 1; B-414930 Comments, Decl. of WKE’s President, at 1.

Because we conclude that the terms of the solicitation apprised vendors of the source restriction to AMI, we find that WKE’s protest arguments, which were raised after the deadline for the receipt of quotations, are not timely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. The timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 5. Under these rules, protests based upon alleged improprieties in a solicitation, which are apparent prior to the time set for receipt of initial quotations, must be filed prior to the time set for receipt of initial quotations. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1). Further, a matter initially protested to the contracting agency will be considered timely by our Office only if the initial agency protest was filed within the time limits provide by the Regulations for filing a protest with our Office unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. 4 C.F.R. § 21.2(a)(3).

⁴ The protester raises other collateral arguments. While our decision does not specifically address every argument, we have considered all of the protester's additional assertions and find that none provides a basis to consider the protests timely.

Here, we conclude that, when read as a whole, both solicitations apprised vendors of the fact that AMI was the only approved source of supply. In this regard, the solicitations listed AMI as the approved source of supply and also referred to “the approved source of supply” in the singular, thus indicating that there was only one approved source of supply, i.e., AMI. Further, both solicitations expressly incorporated the terms and conditions of the DLA master solicitation for automated simplified acquisitions. C587 RFQ at 1; H699 RFQ at 1. The master solicitation, in turn, incorporates a procurement note, DLA procurement note M06, for the evaluation of “offers for part numbered items.” DLA Master Solicitation for Automated Simplified Acquisitions, Mar. 3, 2017, at 10 (capitalization removed). This note applies when items in the solicitation “are identified in the item description only by the name of an approved source (CAGE code), a part number, and a brief description. . . .” Id. In such cases, the note provides that “[o]ffers of alternate products will not be evaluated for the contract action.” DLA Procurement Notes, Sept. 19, 2016, at M06. Here, we note that both of WKE’s quotations expressly stated that the item being quoted was an “alternate product.” B-414846 AR, Tab 3, WKE Quotation, at 2; B-414930 AR, Tab 3, WKE Quotation, at 1.

WKE argues that DLA procurement note M06 does not apply here because both RFQs included further details beyond a “brief description,” e.g., the NSN number, and various references and technical requirements. We disagree and note that both solicitations contained very little identification or technical description of the pulley wheel to be provided beyond the name of the approved source, the part number, the quantity requested, and various delivery instructions and ancillary requirements. See C587 RFQ at 6; H699 RFQ at 6.⁵ In light of this brief description, we conclude that this was a solicitation for “part numbered items” for which DLA procurement note M06 was incorporated.

Because WKE failed to protest the terms of the solicitations prior to the dates set for the receipt of quotations, we conclude that its protests are untimely.⁶ Moreover, even if the solicitations had been unclear regarding the incorporation of DLA procurement note M06, as the protester asserts, we conclude that the agency’s source limitation should have reasonably been known to WKE at the time it submitted its quotations. In this regard, the electronic quotation form used by vendors to submit their quotations gave each vendor the option of either providing an exact part through selecting a bid type of “bid without exception,” or providing an alternate product by selecting a bid type of

⁵ Such sparse details, which encompassed a small portion of each seven-page solicitation, was consistent with the agency’s use of simplified acquisition procedures.

⁶ We note that WKE’s agency-level protest of the purchase order issued under the terms of the C587 RFQ does not change this conclusion. That agency-level protest was filed after the deadline for quotation submission and therefore WKE’s subsequent protest to our Office is not timely. See 4 C.F.R. § 21.2(a)(3).

“alternate bid.” Agency Resp. to Request for Supp. Info., Sept. 12, 2017, at 1-2. If a vendor selected the “bid without exception” option, the vendor was informed that “[e]xact product means CAGE 31218 P/N D115088-1: manufactured by, under the direction of, or under agreement with CAGE 31218.” Id.; see also B-414846 AR, Tab 5, AMI Quotation, at 1-2; B-414930 AR, Tab 4, AMI Quotation, at 1-2. If a vendor selected the alternate bid option, as WKE did for both solicitations, the vendor was informed that “[o]ffers of alternate products will not be selected for the current procurement (see DLAD 52.217-9002).” Resp. to Request for Supp. Info., Sept. 12, 2017, at 1.

WKE therefore had notice, at the time it submitted its quotations on March 23 and June 6, that its submissions were considered by the agency to be for an “alternate product,” rather than a product from an approved source, as required under both RFQs. Accordingly, WKE knew that, under the terms of these solicitations, as viewed by the agency, DLA would not consider WKE’s submissions for purposes of issuing the purchase orders. To the extent the protester disagreed with the agency’s stated view, WKE was required to raise any challenge prior to the closing dates for receipt of quotations. Because WKE waited until after DLA issued the purchase orders to bring these protests, we conclude that its protests would be untimely even if the solicitation had not incorporated DLA procurement note M06.

The protests are dismissed.

Susan A. Poling
General Counsel