



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Wellco Enterprises, Inc.

File: B-282150

Date: June 4, 1999

Joel R. Feidelman, Esq., Anne B. Perry, Esq., Jonathan S. Aronie, Esq., and Shelby L. Katz, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.
Michael Trovarelli, Esq., and Maria Ventresca, Esq., Defense Logistics Agency, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably rejected the protester's proposal as technically unacceptable where the protester took exception in its proposal to material specification requirements in the solicitation.
2. There is no basis to object to agency decision not to communicate with offeror regarding whether it intended to comply with material specification requirements contained in solicitation's purchase description, since any such communication would have constituted discussions, not clarifications, and the solicitation clearly notified offerors of the agency's intention to make award without discussions.

DECISION

Wellco Enterprises, Inc. protests the rejection of its proposal as unacceptable and the award of a contract to Cove Shoe Co. under request for proposals (RFP) No. SPO100-98-R-0021, issued by the Defense Supply Center Philadelphia (DSCP), Defense Logistics Agency (DLA), for intermediate, cold/wet boots with safety toe. Wellco argues that the agency unreasonably rejected its proposal. Wellco also argues that Cove's participation in the procurement presented an organizational conflict of interest which should have disqualified the firm from receiving the award.

We deny the protest.

Background

The RFP, issued on March 9, 1998, contemplated the award of an indefinite-delivery, indefinite-quantity, fixed-price contract for a minimum of 21,348 and a maximum of 35,586 pairs of boots during the base period, with up to two 1-year options. RFP § B, at 6-7, § I, at 49. Section M of the RFP listed the following evaluation criteria in descending order of importance: product demonstration models (PDM); experience/past performance; DLA mentoring business agreements program; and socioeconomic considerations. Id. § M, at 67. The RFP stated that PDMs were to be subjected to evaluation for all characteristics of the purchase description (PD)¹ attached to the RFP, including conformance to the visual, dimensional, and end item test requirements of the PD. Id. § L, at 60, § M, at 68. End item tests would consist of a leakage test and an impact resistance test. Id. § L, at 60. The RFP emphasized that PDM was the most important evaluation factor and stated that technical quality was more important than price. Id. § M, at 67. Award was to be made to the responsible offeror whose proposal conformed to the solicitation and was deemed most advantageous to the government. Id.

With their proposals, offerors were required to submit three pairs of boots of any size for evaluation for conformance to the visual, dimensional, and end item test requirements of the RFP's PD. Id. § L, at 60. The RFP specifically warned that "[f]ailure of models to conform to the requirements of the [PD] may result in an unfavorable evaluation of the offer." Id. The RFP further stated that the government preferred that all materials to be used in the PDMs be those listed in the PD. If an offeror proposed to use alternate materials, however, the RFP required the offeror to provide a letter with its PDM stating any departures from the PD. Offerors were further required to include a statement certifying that if awarded the contract, the item would comply with all the terms of the PD. Id.

¹Section C of the RFP required offerors to manufacture the boots in accordance with the specifications contained in PD 96-07, July 30, 1997. RFP § C, at 9. The agency states that the PD was developed based on research conducted by the Naval Air Warfare Center, with the purpose of developing a boot that would provide Naval and Marine aircrew adequate protection when exposed to a variety of climate extremes, including impact protection, particularly when forced to evacuate their aircraft. Agency Report (AR) at 2. As a result of that extensive research and testing, the PD specifies the materials, components, and manner of manufacturing the boot. In particular, to achieve impact resistance in the toe area, the PD requires a steel toe cap, with specific types of lining under the steel toe cover and above it to provide comfort. PD ¶ 3.2.8-3.2.8.5.

By letter to DSCP dated March 12, Cove suggested several changes to the PD, which DSCP forwarded to the Navy for review and approval. Pending the Navy's review of Cove's suggestions, DSCP extended indefinitely the RFP's closing date. RFP amend. 0001, Mar. 24, 1998. The agency subsequently amended the RFP to incorporate the changes to the PD approved by the Navy and establish a new closing date of August 24. RFP amend. 0002, July 16, 1998.

Wellco also requested changes to the PD, primarily addressing the construction of the toe area of the boot. AR, Tab 9, Letter from Wellco to DSCP (July 31, 1998).² Although DSCP forwarded Wellco's request to the Navy for review and approval, the Navy responded that it would not be possible to review and approve the requested changes to the PD prior to the solicitation's August 24 closing date. The contracting officer (CO) explains that on or about August 18, a Wellco representative telephoned her to inquire as to the status of its requested changes to the PD. The CO states that she explained to Wellco that the Navy had not yet responded to the requested changes to the PD and that the closing date would not be extended. AR, Tab 12, CO Affidavit. The CO states that she further advised Wellco that the RFP contained the standard clause reserving to the government the right to make award on initial proposals, and cautioned that Wellco should submit an offer on the solicitation as written, with an alternate offer incorporating Wellco's requested deviations. Id.

Three firms, including Wellco and Cove, responded to the RFP by the August 24 closing date. With its proposal, Wellco submitted a letter regarding its PDM, stating in part as follows:

On July 31 and August 4, 1998, we sent to DSCP information provided to us by Rocky Shoes and Boots concerning procedures and materials in [the PD] which are different than those used by Rocky and the industry as a whole A copy of this communication is attached to this section. We suggested a simple way to conform [the PD] to the procedures and materials stated in Rocky's letter. To date, we have not received a response. Our PDMs incorporate the 'deviations' from [the PD] outlined in this correspondence. It is impossible to produce this boot without certain of these deviations. If you do not agree with all of these deviations, we hereby certify that we will change to those procedures and materials in [the PD] where ever such is possible.

AR, Tab 13, attachment to Wellco's Proposal, at 1-2.

²Wellco inadvertently omitted an attachment to its July 31 submission which consisted of a letter from its supplier listing several deviations from the PD, and submitted that letter on August 4.

Wellco also attached a letter from its supplier, Rocky Shoes and Boots, taking exception to several of the PD's requirements for construction of the boot's [DELETED].

The record shows that DSCP evaluated Wellco's proposal and the PDMs notwithstanding Wellco's letters. Wellco's PDMs were examined to determine whether they complied with visual and dimensional requirements and were subjected to laboratory testing for leakage and impact resistance in accordance with the RFP. Wellco's PDMs passed both laboratory tests and were found to contain only minor visual and dimensional deficiencies. AR ¶ 11, at 4. The evaluator noted that Wellco's PDM had certain minor deficiencies (in the visual and dimensional areas) that could be easily corrected during production and rated Wellco's PDMs acceptable overall. The evaluator also noted, however, that Wellco had not manufactured its PDMs in accordance with the PD requirements, finding that Wellco had cited approximately six deviations from the PD requirements. According to the evaluator, these deviations could not be rated under the visual or dimensional criteria because the boots would have to be cut apart in order to view the extent of the deviations. AR, Tab 15, PDM Evaluation Form, at 2.

DPSC requested that the agency's Chief, Field Product Services (CFPS) review the letters Wellco had included with its proposal listing the various deviations from the PD requirements. The CFPS first disagreed with Wellco's statement "that it is impossible to produce this boot without certain of these deviations." In this regard, the CFPS specifically noted that a careful review of competing offerors' PDMs found that they were produced in accordance with the PD requirements without any of the deviations Wellco claimed were required. AR, Tab 16, Memorandum from the CFPS to DSCP-FRFA at 1 (Oct. 16, 1998). The CFPS then identified several areas where Wellco's PDM deviated significantly from the PD. One significant deviation was the [DELETED]. The CFPS found this to be a significant change because [DELETED]. The CFPS also noted that Wellco proposed to use a [DELETED] instead of the required felt strip for masking the underside breastline of the safety toe. Id. Based on his evaluation, the CFPS concluded that Wellco's PDM departed significantly from the PD. Id.

Based on the results of the evaluations, the CO found that Wellco's proposal took exception to several aspects of the PD. The CO specifically noted that Wellco took exception to the PD requirements regarding the [DELETED] contained in the PD. AR, Tab 17, Pre-Negotiation Briefing Memorandum/Price Analysis, Nov. 17, 1998, at 3. In addition, the CO noted that Wellco specifically stated in its proposal that it is impossible to produce the boot without certain of these deviations, and that if DSCP did not agree with all of the deviations, Wellco would change to the procedures and materials in the PD "where ever such is possible." Id. The CO further noted that Wellco's proposed deviations had been forwarded to the Navy for approval; that none of Wellco's deviations had been approved; and that the CFPS had determined that Wellco's proposed deviations from the PD were significant in several respects, as

By contrast, the CO found that Cove did not take exception to any of the RFP requirements, and its PDMs were rated acceptable. The CO also conducted a detailed price analysis and found that Cove's prices were fair and reasonable. Based on these evaluations, on February 18, 1999, the CO awarded the contract to Cove based on initial proposals. This protest to our office followed a debriefing by the agency.

Wellco argues that DLA misinterpreted its proposal by ignoring Wellco's explicit offer to abide by the government's original approach if DLA did not approve of Wellco's proposed deviations. The protester also contends that Cove's involvement in the procurement presented an organizational conflict of interest that should have disqualified the firm from receiving the award.

In a negotiated procurement, a proposal that fails to conform to material solicitation requirements is technically unacceptable and cannot form the basis for award. See International Sales Ltd., B-253646, Sept. 7, 1993, 93-2 CPD ¶ 146 at 2. Here, the record shows that the protester clearly took exception to material solicitation requirements, thus rendering its proposal technically unacceptable.

c. Products delivered under any resultant contract shall conform to the [PD]. Approval of the [PDM] as part of the technical proposal does not relieve the potential awardee from the requirements of the [PD] of the RFP.

e. The offeror is not permitted to utilize alternate manufacturing operations or change the construction/design of the PDM. PDM must be manufactured in accordance with applicable specifications.

Wellco's proposal identified several areas where its PDM deviated from the PD requirements and clearly stated that it would be impossible to manufacture the boots without "certain" of the deviations. For example, below we list some of the PD's

requirements and Wellco's stated deviations (as set out in its supplier's June 5, 1998 letter):

PD § 3.2.8.2 Box toe cushion. The material used to cushion the box toe and mask the breastline shall be of ¼ inch opencell polyurethane. The cushion shall be cut large enough to extend approximately ½ inch rearward of the box toe breast line.

Wellco response: [DELETED].

PD § 3.2.8.3 Felt Strips. The felt strips for masking the safety toe breast line shall be a minimum of ½ inch in width.

Wellco response: [DELETED].

PD § 3.2.8.4 Masking tape. The tape for holding the felt strips against the breast line of the steel box toe shall be coated with a pressure sensitive adhesive and be a minimum width of 1-1/2 inches.

Wellco response: [DELETED].

PD § 3.2.8.5 Vamp lining. The vamp lining shall be cut from 100 [percent] short staple heterofil polyamide fiber, thermally bonded non woven fabric. The fabric shall then be laminated to a cotton twill cloth conforming to A-A-55296, Class II. (RFP amend. 0002, July 16, 1998, at 2).

Wellco response: [DELETED].

The record shows that the CFPS reviewed Wellco's proposed deviations and concluded that Wellco's PDM departed significantly from the PD in three respects-- [DELETED]. The CFPS further concluded that, contrary to Wellco's assertions, competing PDMs were constructed in accordance with the PD requirements, without any of the deviations Wellco claimed were required to produce the boots. The CO explains that the boot's steel toe design requires specific lasting procedures and materials to assure protection and comfort from the steel toe cap, and insulation from cold or wet conditions. According to the agency, Wellco's proposed deviations, which involve eliminating the [DELETED] as required by the PD and changing the [DELETED], are material deviations from the PD requirements because they could affect the boot's degree of comfort and protection. AR ¶ 18, at 6. In addition, while Wellco stated in its proposal that if the agency did not agree with all of its deviations, it would use the procedures and materials required by the PD "where ever such is possible," that statement is simply inconsistent with the terms of the letter from Wellco's supplier which Wellco included as part of its proposal, and with Wellco's own statements that it is impossible to produce the boots without the deviations and

that its PDMs incorporated these deviations. Since Wellco's proposal explicitly took exception to material requirements of the RFP as contained in the PD, we conclude that the agency reasonably rejected Wellco's proposal as technically unacceptable.³

Wellco argues that to the extent that its proposal was "minimally unclear" with respect to whether the firm intended to comply with material PD requirements, the agency should have sought "clarification" from Wellco. In this regard, Wellco suggests that the agency should have asked a "straight-forward question, such as 'Is Wellco agreeing to comply with the specifications as written?'" Comments, Apr. 12, 1999, at 13. We do not agree that such a communication with Wellco could have been construed as merely seeking clarification, rather than discussions. "Clarifications" are limited exchanges between the government and offerors that may occur when award without discussions is contemplated. Federal Acquisition Regulation (FAR) §15.306(a). Such communications with offerors before establishing a competitive range are not to be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. FAR § 15.306(b)(2). Discussions, on the other hand, occur when a CO indicates or discusses with each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to enhance materially the proposal's potential for award. FAR §15.306(d)(3).

Here, the RFP required offerors to submit technical proposals and PDMs in accordance with section L of the solicitation, and warned that technically unacceptable proposals would be rejected without discussions. RFP § M.52.215-9P20(b)(1), at 72. Further, section L of the RFP required that PDMs be constructed in accordance with the specifications contained in the PD attached to the RFP. RFP § L.52.215-9P14, at 60. As explained above, Wellco took exception to several material requirements of the RFP as contained in the PD, and made it clear in its proposal that it believed that it was "impossible to produce this boot without certain of the deviations." Thus, the agency having found the proposal unacceptable, the purpose of any communication with Wellco with respect to whether it intended to comply with the PD requirements would have been to provide Wellco the opportunity to cure material defects in its proposal, and therefore would have constituted discussions. See BE, Inc.; PAI Corp., B-277978, B-277978.2, Dec. 16, 1997, 98-1 CPD ¶ 80 at 5 (the acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal). Since we conclude that the agency reasonably determined that Wellco's proposal took exception to material requirements of the solicitation rendering the proposal

³The record shows that the technical evaluator assigned Wellco's PDM an overall rating of acceptable. That rating is irrelevant, however, since the RFP warned that approval of the PDM as part of the technical proposal did not relieve offerors from complying with the PD requirements. RFP § L.52.215-9P14 (c), at 60.

technically unacceptable, and since the solicitation clearly notified offerors that technically unacceptable proposals would be rejected without discussions, the agency was under no obligation to hold discussions with Wellco. See Working Alternatives, Inc., B-276911, July 2, 1997, 97-2 CPD ¶ 2 at 4.

Finally, Wellco is not an interested party eligible to challenge the contract award on the basis that Cove had an organizational conflict of interest. Pursuant to statute and our Bid Protest Regulations, only an interested party may protest a federal procurement; that is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 31 U.S.C. § 3551(1),(2) (1994 & Supp. II 1996); 4 C.F.R. §§ 21.0(a), 21.1(a) (1999). A protester is not an interested party where it would not be in line for award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. In this case, the agency evaluated three proposals and properly rejected Wellco's as technically unacceptable. Since there was another technically acceptable, reasonably-priced proposal besides the awardee's eligible for award, Wellco is not an interested party to challenge the award. See Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 at 4.

The protest is denied.

Comptroller General
of the United States