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Decision

Matter of: NLB Corporation

File: B-286846

Date: February 26, 2001

George W. Ash, Esq., and William H. Carroll, Esq., Dykema Gossett, for the protester.
David H. Binney, Esq., Preston Gates Ellis, for Flow International Corporation, an intervenor.

Paul W. Knoth, Esq., Naval Supply Systems Command, for the agency.

Marie Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined that awardee's quoted product was a current production model quoted for sale through manufacturer's published brochures, as required by solicitation, where manufacturer's brochures submitted with quote substantiated current production model status by providing details of the product pertinent to design, construction, operations, components, and capacities, as required by solicitation.

DECISION

NLB Corporation protests the award of a contract to Flow International Corporation under request for quotations (RFQ) No. N00600-00-Q-2662, issued by the Department of the Navy for high-pressure water blast paint removal and related pumping equipment for use on Navy ships. The protester argues that the solicitation improperly failed to provide for evaluation of ownership costs, and that Flow's quoted hand-held high-pressure water blast equipment fails to meet the solicitation's current production commercial item requirement.

We deny the protest.

The RFQ, issued under the simplified acquisition procedures (Federal Acquisition Regulation (FAR) subpart 13.5), called for various equipment to be furnished in three delivery lots, with options for increased quantities. The items were to be commercial items, the RFQ providing that the "paint removal, pumping equipment shall be one of the manufacturer's current production models which, on the date this solicitation is

issued [i.e., August 7, 2000], has been designed, engineered and sold, or is being offered for sale through advertisements or manufacturer's published catalogs or brochures," and that "[p]roducts such as a prototype unit, pre-production model, or experimental unit do not qualify as meeting this requirement." RFQ ¶ 3.1 at 17. To substantiate that the quoted equipment is a "current production model," the RFQ required the submission of "descriptive literature" providing details of the product "pertinent to design, construction, operation, materials, components, capacities and performance characteristics, and accessories." Id. at 51. Additionally, the RFQ provided that "[t]he only literature that will be considered for this purpose includes manufacturer's published brochures, manufacturer's 'as built' engineering drawings and associated parts' lists . . . and manufacturer's published technical manuals." Id. Award was to be made for a fixed price to the "[o]fferor whose quote conforms to the solicitation and is determined to be the lowest priced among those [quotes] rated 'Technically Acceptable.'" RFQ at 52.¹

The Navy received quotes from NLB and Flow; although both were initially determined to be technically unacceptable, after discussions and receipt and evaluation of revised submissions, the agency determined that both quotes were acceptable. The agency made award to Flow as the lowest-priced acceptable vendor in the amount of \$3,446,968 (versus \$[DELETED] for NLB) on September 26, 2000.

On September 28, 2000, NLB filed an agency-level protest arguing, among other things, that (1) Flow's quote was based on a two-pump system that did not meet the solicitation's paragraph 3.8.3 requirement for a single pump, indicated by the reference to "pump" in the singular, and (2) Flow's quoted hand-held TomCat units did not meet the solicitation's current production commercial item requirement because Flow "has not had advertisements or sold any of the . . . products." RFQ ¶¶ 3.8.3, 3.8.4 at 26-27; NLB Agency-Level Protest, Sept. 28, 2000, at 2-3.

In response, on November 9, acknowledging that the RFQ "may have been ambiguous as to the pump requirements," the Navy issued amendments changing the singular references to pump to "pump or pumps" and "pumping system." Amends. 0005 and 0006, Nov. 15, and 16, 2000; Agency Response to NLB's Agency-Level Protest, Nov. 9, 2000, at 4. The agency also extended the closing date for revised quotes to December 8. Amend. 0007, Nov. 21, 2000. Regarding NLB's commercial item argument, the Navy denied the protest, responding that Flow's quoted TomCat met the RFQ's requirements because it was quoted for sale through the manufacturer's published brochures, as indicated in the firm's submitted "brochure along with additional literature outlining their TomCat model." Agency Response to NLB's Agency-Level Protest, Nov. 9, 2000, at 3. In this regard, Flow submitted with

¹ Although the solicitation used was an RFQ, the record reflects the terminology of negotiated procurements; for example, those submitting quotations are referred to in some places as offerors.

its quote a two-page “technical data” brochure that included descriptive material, specifications, a photograph and drawing, as well as Flow’s corporate and Internet addresses and telephone and fax numbers. Flow also submitted a full-page enlarged photograph of the TomCat in vertical operation and a one-page brochure entitled “Handle Option for TomCat,” with descriptive text in bullet form and a photograph showing TomCat in horizontal operation. NLB thereafter filed this protest in our Office on November 20.

OWNERSHIP COSTS

NLB argues that the amended RFQ should have provided for evaluation of ownership costs, i.e., the costs of operation and maintenance, for the pump systems quoted, since, while the acquisition cost of a multiple pump system (quoted by Flow) is lower than that of a single pump system (quoted by NLB), the ownership cost for multiple pump systems is higher. NLB contends that it is aware of one Navy shipyard that has operation and maintenance records that could be used to compare the ownership cost of NLB’s single pump to the cost of Flow’s equipment. NLB Protest, Nov. 20, 2000, at 11.²

We find no impropriety here. There is no requirement that ownership costs be considered in any particular commercial item or other acquisition.³ FAR § 12.213 provides that the contracting officer “should consider” commercial practices that might be suitable for incorporation into a solicitation. However, the regulation leaves it within the contracting officer’s discretion to determine whether a commercial practice is “appropriate in concluding a business arrangement satisfactory to both parties” The agency acknowledges that ownership costs may sometimes be evaluated in commercial buys, but it has determined that consideration of such costs was not appropriate in this case due to the unavailability of reliable data for potential vendors’ equipment; according to the agency, it does not have a method to reasonably evaluate the companies’ own assertions about ownership costs, and has no means of assuring that any available data was based on comparable use. NLB has not established otherwise; the mere fact that a shipyard (which the protester does not identify) may possess data on the two systems does not address the agency’s concern regarding the reliability and comparability of such data. In any case, in terms of the regulation, the agency clearly has not determined that evaluation of ownership costs is necessary to conclude a contract satisfactory to

² We note that this argument is timely filed, since it is based on the RFQ as amended and was filed in our Office prior to the Dec. 8, 2000 deadline for receipt of revised quotes.

³ FAR part 12 specifies certain solicitation provisions and clauses to be used in commercial item acquisitions; none concerns evaluation of equipment ownership costs.

the agency and contractor, and there is no basis for us to find otherwise. The agency therefore was not required to consider ownership costs in the evaluation.⁴

NLB claims that failure to consider ownership costs effectively denied it an opportunity to compete, since a two-pump system is more acquisition price competitive than its one-pump system. We reject this position. All vendors were free to quote on either a one- or two-pump system in accordance with the RFQ's specifications, and the award was to be made to the lowest-priced vendor. The fact that one type of acceptable system may be more expensive to purchase than another type under an otherwise proper evaluation scheme does not constitute an improper restriction on competition.

CURRENT PRODUCTION MODEL

NLB argues that Flow's quoted TomCat hand-held unit is not a current production model but, rather, is more of a "prototype unit, pre-production model, or experimental unit," and that no current production model has been sold. NLB Comments, Jan. 2, 2001, at 12.⁵ In this regard, the protester contends that the TomCat model quoted does not include the waste disposal/filtration system specified in the descriptive literature brochure accompanying the quote. This argument is constructed from language in a response to an agency discussion question, where Flow responded that "[v]acuum and filtration system shown in diagram of TomCat is an option and not required since FLOW will be providing a vacuum as specified under [RFQ ¶] 3.8.7 and is shown in literature as FlowVac System." Flow Revised Quotation, Sept. 7, 2000, at 6 ¶ (4). Relevant here, NLB equates the term "filtration system" with the term "waste disposal system," and then concludes that, since the TomCat brochure states that the TomCat comes with a "required" waste disposal system, and Flow's discussion question response referred to an "optional" filtration system, Flow must be quoting an item different from the one in the brochure. NLB

⁴ According to the protester, the agency failed to conduct market research, in accordance with FAR § 12.213, to determine whether commercial practices were available that would be appropriate for this acquisition. As discussed, however, the agency was fully aware of the commercial practice of considering ownership costs but determined that this practice was inappropriate here.

⁵ In this regard, Flow states that "[a]ll equipment quoted by [it] is current production which has been supplied to shipyards and contractors around the world" and "[w]e can without doubt assure you that no 'experimental prototype' equipment will be supplied and the Navy will not be asked in any manner to provide funds or time for testing or product development." Letter from Flow to Contracting Officer 2 (Oct. 5, 2000).

Comments, Jan. 2, 2001, at 11. NLB concludes that the item Flow quoted is not a current production model.

Determining whether a product is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable. Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 11.

We find no basis for concluding that Flow was quoting an item different from the TomCat model specifically identified in its quote. It is clear from the TomCat brochure that the waste disposal system as described is part of the quoted system, not an option, and we do not think a single reference to the filtration system—which may or may not equate with the waste disposal system—as optional is sufficient to establish otherwise. Current production model status was substantiated by Flow’s printed descriptive literature for the TomCat, which identified Flow and provided a drawing, photographs, description of both vertical and horizontal operation, features, benefits, applications, options, specifications, and system requirement. Flow’s quote also included a six-page printed brochure for the “Husky Direct Drive Model S-200 Pump,” which described the pump’s operation, standard features, benefits, and provided specifications, drawings, and a photograph. These brochures met the RFQ requirement that current production model status be substantiated by “descriptive literature,” including “manufacturer’s published brochures,” providing details of the product “pertinent to design, construction, operation, materials, components, capacities and performance characteristics, and accessories.” RFQ at 51. The brochures thus provided a reasonable basis for the agency to conclude that the quoted models met the current production model requirement.

We note, furthermore, that, even if the record showed that Flow was quoting a different waste disposal system for its TomCat unit, there is no prohibition against making a modification to a commercial item. Chant Eng’g Co, Inc., B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45 at 5 n.3. Under the FAR, commercial item modifications of a type customarily available in the commercial marketplace, or minor modifications of a type not customarily available in the commercial marketplace, made to meet government requirements, are permitted. FAR § 52.212-4(e). While the RFQ did not incorporate the FAR’s commercial item definition, it did not provide for anything different concerning modifications. Rather, the only restriction was that the unit could not be a “prototype unit, pre-production model, or experimental unit.” The protester has not shown that the alleged change in the waste disposal system was so significant a modification that it violated this restriction, and the mere fact that Flow may have quoted a TomCat modified in this way does not establish that the unit was not a current production model. See Attachmate Corp., B-250030.6, B-250030.7, July 30, 1993, 93-2 CPD ¶ 63 at 4.

In response to the protest, the Navy obtained additional information to confirm the current production model/commercial item status of the TomCat. This information includes three examples of order and sales information for the TomCat and sales information for the FlowVac vacuum Flow quoted for use with the TomCat. NLB asserts that this information is inadequate to establish these items' current production model status, because there are discrepancies between the model order number on the TomCat brochure and the numbers on the order and sales information. However, one of the orders and a prepared quote specifically refer to the TomCat, and Flow explains that the discrepancy in part numbers is due to the fact that the invoice provided was generated by Flow's German subsidiary, which uses a different numbering system. There is no evidence in the record indicating otherwise. Flow Supplemental Comments, Jan. 10, 2001, at 3.

The post-protest information also includes an e-mail from a Navy technical representative concerning his post-protest visit to one of Flow's customers for a demonstration of the TomCat. In the e-mail, the representative stated that the TomCat met the RFQ requirements, and went on to state "Flow's representatives acknowledged that this demo unit has been sent around to other prospective customers but has not been in demand[;] [t]herefore, they have stated it just did not warrant the unit being demonstrated at . . . water blast shows." E-mail from Navy Technical Representative to Contracting Officer, Dec. 14, 2000. NLB contends that the use of the term "demo unit" in the e-mail indicates that the TomCat is a prototype unit. We disagree. When the e-mail is read in its entirety, we think it is clear that the reference to demo unit was merely shorthand for the fact that the TomCat unit was being demonstrated. There is no indication that the technical representative ever intended to state that the unit is a prototype or otherwise is not a current production model; indeed, the e-mail specifically states the representative's conclusion that "[t]his demonstration has adequately verified that Flow does in fact have a current production model unit that meets all of the Navy's requirements." Id.

The protest is denied.

Anthony H. Gamboa
Acting General Counsel