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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Elementar Americas, Inc.

File: B-289115

Date: January 11, 2002

Scott Hughes for the protester.

Alan D. Groesbeck, Esq., Department of Agriculture, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Procuring agency unreasonably evaluated the protester's quote of an "equal" product under a "brand name or equal" solicitation conducted under simplified acquisition procedures where the procuring agency did not reasonably consider the protester's descriptive literature describing the characteristics of its product.

DECISION

Elementar Americas, Inc. protests the issuance of a purchase order to CE Elantech, Inc. under request for quotations (RFQ) No. EAZ-33-01-104, issued by the United States Department of Agriculture, Forest Service, Asheville, North Carolina, for a "112-302-15 CE Instruments Model Flash EA1112 Combustion Nitrogen/Carbon Analyzer, OR EQUAL."

We sustain the protest.

The RFQ, issued July 26, 2001, was conducted under the simplified acquisition and commercial items procedures contained in Federal Acquisition Regulation (FAR) Parts 12 and 13. The Forest Service posted the requirement on *CBDNET* on July 11 with no identified salient physical, functional, or performance characteristics that "equal" products must meet to be acceptable for award, except the statement that "[e]quipment should have ability to run samples in approximately 3 minutes." Agency Report, Tab B, *CBDNET* Notice. The RFQ then specified the solicited equipment, also without listing any salient characteristics or other essential minimum requirements to be met by an equal product, but advised that quotes should contain:

[a] technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation. This may include product literature, or other documents, if necessary.

RFQ § 52.212-1(b)(4). There was no mention in the RFQ of any requirement to run samples in approximately 3 minutes.

The Forest Service received quotes from Elantech and Elementar by the August 13 closing date. Elantech's quote, priced at \$32,675, was based on providing the brand-name product. Elementar's quote, priced at \$28,200, was based on furnishing its own "equal" product, the vario EL III. Both Elantech and Elementar included product literature in their quotes. The Forest Service determined that Elementar's product was not equal to the brand-name product and issued a purchase order to Elantech on September 13. Before this protest was filed, the equipment was delivered.

Elementar protests that the Forest Service unreasonably determined that its offered product was not equal to the brand-name product.

FAR § 11.104 allows the use of brand name or equal purchase descriptions in describing agency needs in a solicitation, but requires:

(b) Brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an 'equal' item must meet to be acceptable for award.

Acquisitions conducted under FAR Parts 12 and 13 are not exempt from this requirement.¹ Thus, this brand name or equal RFQ was defective because it did not list salient characteristics, so that quoters offering equal products were left to guess at the desired essential qualities of the brand-name item. See Ciba Corning Diagnostics Corp., B-223131, Aug. 13, 1986, 86-2 CPD ¶ 185 at 3.² Where an agency does not include a list of salient characteristics in the solicitation, the agency is precluded from rejecting a quote offering an equal product for noncompliance with some performance or design feature, unless the offered item is significantly different from the brand-name product. *Id.* at 4; see Access Logic, Inc., B-274748, B-274748.2, Jan. 3, 1997, 97-1 CPD ¶ 36 at 3-6. Here, the Forest Service did not reasonably

¹ Indeed, FAR § 12.202(b) requires for the acquisition of commercial items that "[t]he description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services may be suitable."

² To the extent Elementar is protesting this defect at this time, the protest, not filed prior to the closing date for receipt of quotes, is untimely and not for our consideration. Ciba Corning Diagnostics Corp., *supra*.

determine that Elementar's offered equal product was significantly different from the brand-name product.

The first and primary reason that the Forest Service determined Elementar's product was not equal to the brand name was the analysis time associated with processing samples. The Forest Service determined that the brand-name product's analysis time was 2.5 minutes per sample for carbon/nitrogen, whereas the Forest Service determined Elementar's equal product's analysis time for these elements was 10 minutes per sample. The Forest Service states that this is critical because the laboratory must process 15,000 samples per year, which cannot be met at the slow product analysis time present in Elementar's product. The Forest Service does not state the basis for its statement that the brand name product's analysis time was 2.5 minutes for carbon/nitrogen, and states that it learned of the 10-minute analysis time of Elementar's product from a company representative of Elementar in December 2000. Agency Report at 4; Tab F, End User's Analysis, at 1; Tab I, Denial of Agency-Level Protest (Oct. 1, 2000), at 1.

The product literature for the Elementar analyzer included in the quote stated with regard to analysis time:

self-adjusting, depending on element content and weight e.g. CHN
[carbon, hydrogen, and nitrogen] simultaneous: 6 to 12 min[utes]. . . .

Agency Report, Tab E, Elementar's Product Literature, at 8. The Elementar product literature does not state the analysis time for carbon and nitrogen only, although Elementar asserts that this would require less time, "4 to 6 minutes for many [carbon/nitrogen] analys[e]s." Elementar Protest Supplement (Oct. 9, 2001) at 2.

Elantech's product literature contains no evidence that its average analysis time for carbon/nitrogen is 2.5 minutes, or less than 3 minutes, as claimed by the agency.³ Instead, the technical specifications included in Elantech's quote state that the brand-name instrument has an analysis time of "less than 5 min[utes] (according to

³ As noted, the agency did not include the 3-minute analysis time requirement reflected in the *CBDNET* in the solicitation. Moreover, this requirement does not state which elements were to be analyzed, although it is now clear that the agency meant analyses of samples for nitrogen and carbon. In view of our conclusion that there is no evidence that the brand-name product can satisfy the 3-minute requirement, and because the record suggests that Elementar's product has a comparable analysis time for these elements, we do not decide whether the *CBDNET* statement adequately apprised Elementar that this was a salient characteristic that had to be satisfied.

the sample nature).”⁴ Agency Report, Tab D, Elantech’s Technical Specifications, at 1. In the technical brochure for the brand-name product included with Elantech’s quote, it is stated in several places that the analysis time for nitrogen and carbon is “less than 5 minutes.” Id., Elantech’s Technical Brochure, at 2, 3, 4. This literature also states that the instrument “is capable of providing single elemental Sulphur determination just within a short span of four minutes, or with Nitrogen and Carbon in less than 10 minutes.” Id. at 6.

Thus, the record evidences that the pertinent analysis time for Elantech’s brand-name product is “less than 5 minutes,” not 2.5 or 3 minutes. Noting that this information was not in its quote because it was not requested, Elementar advises that its product’s analysis time should be between 4 to 6 minutes when restricted to an analysis of only carbon and nitrogen. The record evidences that the analysis time of the brand-name product based on three (albeit different) elements is not significantly different from the protester’s analysis time of 6 to 12 minutes on three elements. Thus, the quotes suggest that the analysis times of Elantech’s brand-name product and Elementar’s equal product were comparable. Thus, the record does not support the reasonableness of the agency’s determination that Elementar’s offered product is not comparable to the brand name with regard to analysis time.⁵

The other reasons that the Forest Service found justified determining that Elementar’s analyzer was not equal to the brand name were that “the instrument used aluminum cups that needed to be cleaned out for the next sample, not tin capsules that the laboratory was currently using”; that “the instrument [would] not run liquid samples”; that there was no “‘stand-by’ feature where the instrument [could] be put in a reduced operation mode overnight to save warm-up time the next

⁴ The protester states that the literature is worded this way because the size of the sample, and the content of carbon and nitrogen in the sample generally will increase the time necessary to process a sample. Protester’s Comments at 4.

⁵ In its agency report, the Forest Service did not dispute the protester’s assertions that its product was comparable with regard to analysis time, except to note that the information regarding analyzing samples solely for carbon/nitrogen was not in Elementar’s quote, and that the agency could rely upon an earlier discussion with Elementar’s company representative as a basis for concluding that the Elementar instrument had a 10-minute analysis time for carbon/nitrogen. However, the reliance on this discussion 7 months prior to this solicitation, in the face of the protester’s literature that reflected that the 6 to 12-minute analysis time was based upon the analysis of three elements (carbon/nitrogen/hydrogen) was unreasonable. In this regard, Elementar advises that its representative does not recall the details of this conversation and that it is likely that the agency may have confused specifications of the various Elementar analyzers that were discussed with the Forest Service on that date. Protester’s Comments at 4.

day”; and that the instrument did not “[tailor] the oxygen injection to each individual sample.” Agency Report, Tab I, Denial of Agency-Level Protest (Oct. 1, 2001), at 1. However, none of these reasons seem valid in view of the descriptive literature included with Elementar’s quote, which either directly or indirectly addresses these concerns and does not otherwise reflect any significant deviation from the brand name product literature.⁶

For example, the literature advises that “[l]iquids are sealed in gastight tin capsules” and “[s]olid samples are packed in tin boats” with pictures showing these features. Agency Report, Tab E, Elementar’s Product Literature, at 7. These statements contradict the agency’s belief that aluminum cups that needed to be cleaned out would be used on the product and that the equipment would not run liquid samples.⁷

With regard to the other reasons, Elementar’s product literature states that the offered product has “direct oxygen jet injection,” that the instrument can analyze certain elements (including carbon/nitrogen) “individually or simultaneously over a wide range of sample matrices and concentrations” and that an “external [personal computer] controls and monitors all operational functions.” Agency Report, Tab E, Elementar’s Product Literature, at 2-4. Moreover, Elementar states that its software has the ability to enter “sleep” mode and to select oxygen dosing specific for each sample, and that these capabilities can be confirmed by a review of the software itself or the user manual for the software, both of which are available for review by the agency. Elementar Protest Supplement (Oct. 9, 2001) at 2. Here, again we find that the product literature does not directly support the Forest Service’s assertions that oxygen injection could not be tailored to each sample, and that there was no standby feature in Elementar’s offered product, or that Elementar’s products is not comparable to the brand-name product.

In sum, we find that the Forest Service did not reasonably consider the literature or reasonably evaluate Elementar’s quote.

⁶ Here too, some of these reasons are based on the discussion with Elementar’s representative 7 months prior to this solicitation. The agency’s reliance on its recollection of that discussion to reject Elementar’s quote when the product literature contradicts this advice is unreasonable.

⁷ The protester advises that the Elementar analyzer can be equipped with optional accessories for manual and automatic syringe injection of liquids, which were not quoted because they were not specified. Protester’s Comments at 2. We note that the brand-name product offers automatic syringe injection of liquids as an accessory as well, and that this was not a requirement solicited by the RFQ, or offered in the awardee’s quote. See Agency Report, Tab D, Elantech’s Technical Specifications, at 4.

The protest is sustained.

Since the contract has been performed, disturbing the award is not practicable. Therefore, we recommend that Elementar be reimbursed its quote preparation costs, as well as its cost of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1), (2) (2001). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Anthony H. Gamboa
General Counsel