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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Fantasy Lane, Inc.

File: B-253407

Date: September 14, 1993

Richard Suter for the protester.
David S. Cohen, Esq., Cohen & White, for Cartridge Technology Network, Inc., an interested party.
Benjamin G. Perkins, Esq., Defense General Supply Center, for the agency.
Robert C. Arsenoff, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation requirement that offers for recycled toner cartridges be accompanied by independent laboratory certification is not subject to regulations governing the establishment of qualified products lists because the certification relates to the qualifications of the producer of the cartridges and not to the products themselves.

2. Since the evaluation of proposals must be in accordance with the solicitation's evaluation provisions, agency properly rejected protester's offer because it was not accompanied by independent laboratory certification as required by the solicitation.

DECISION

Fantasy Lane, Inc. (FLI) protests the rejection of its offer under request for proposals (RFP) No. DLA450-93-R-0505, issued by the Defense General Supply Center (DGSC) for electrostatic toner cartridges. FLI contends that its offer was rejected pursuant to an unauthorized clause establishing a qualification requirement and that the rejection was otherwise improper because it was based on minor differences in design, construction or features which did not affect the suitability of its products for their intended use.

We deny the protest.

The RFP was issued on a "brand name or equal" basis on December 29, 1992, with a closing date of January 29, 1993. Twenty-four offers, including one from FLI, were received.

On March 10, 1993, the RFP was amended to establish a March 15 date for receipt of final offers and to add a clause, DGSC 52.210-9G42, entitled "Preference for Recycled Toner Cartridges." That clause implements 42 U.S.C.A. § 6962(j) (West. Supp. 1993) which provides, absent market conditions not present here, that "[n]otwithstanding any other provision of law," Federal agencies shall purchase recycled toner cartridges. The statute and the clause both define a "recycled cartridge" as one "which has been remanufactured in the United States by a small business concern which has been certified by an independent laboratory to meet generally accepted industry standards."[1]

The clause required offerors to submit the name of the certifying laboratory and were cautioned that failure to provide the requested information could result in rejection of their offers. FLI submitted a timely final offer indicating that it did not possess an independent laboratory certification and its offer was consequently rejected.

FLI first alleges that, in requiring laboratory certification in the RFP, the agency violated Defense Federal Acquisition Regulation Supplement (DFARS) § 209.202(a)(1) because the approval of the Executive Director, Technical and Logistics Services, Defense Logistics Agency (DLA), was not obtained before the solicitation was amended to include DGSC clause 52.210-9G42.

The problem with this argument is that DFARS § 209.202(a)(1) only requires the designated DLA official to approve "the inclusion of qualification requirements in specifications for products which are to be included on a Qualified Products List," and the protested clause imposes a requirement that the remanufacturer of toner cartridges be certified by an independent laboratory as meeting generally accepted industry standards. Since the solicitation requirement does not relate to a product that is to be included on a qualified products list, the DFARS provision relied upon by FLI does not apply to this procurement.

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[1] Although the statute provides for a waiver of the certification requirement in certain circumstances, the clause does not. Any contention by FLI that the clause does not accurately reflect the substance of the statute is untimely because it involves an alleged impropriety in the solicitation which was apparent on the face of the March 10 amendment adding the clause and, therefore, had to be filed by the closing date next following the incorporation of the clause. Bid Protest Regulations, 4 C.F.R. § 21.1(a)(1) (1993).

FLI next alleges that the rejection of its offer violated DFARS § 210.004(b)(3)(B)(2) which precludes rejection of offers in brand name or equal procurements for "minor differences in design, construction, or features which do not affect the suitability of the product for its intended use." Underlying this contention is FLI's view that laboratory certification is not commercially necessary and that its product is suitable for DGSC's intended use even though the firm does not possess the certification.

We find this argument to be inapposite because the rejection of FLI's offer did not involve a difference in design, construction or features of the toner cartridges proposed by the protester. Rather, the rejection was based on clause 52.210-9G42 of the solicitation which required offerors to obtain required independent laboratory certification in order to qualify for award. The longstanding rule is that the evaluation of offers must be in accordance with the solicitation's evaluation provisions. Diemaco, Inc., B-246065, Oct. 31, 1991, 91-2 CPD ¶ 414. Here, since the solicitation was amended to require laboratory certification as a precondition to award, DLA had no choice but to reject FLI's offer which did not contain the required certification. Id. We have no basis to disturb the agency's decision.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel