

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Sea Box, Inc.

File: B-405711.2

Date: March 19, 2012

Robert A. Farber, Esq., for the protester.
Theresa A. Chesnut, Esq., and Barbara J. Amster, Esq., Department of the Navy,
for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

1. The failure of the protester's quotation to agree to hold its prices firm for 90 days did not render the quotation unacceptable, because the concept of an acceptance period has no application to quotations, which are not offers.
 2. An agency unreasonably considered a technically unacceptable, intervening quotation in determining not to apply a Buy American Act preference to the protester's quotation.
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DECISION

Sea Box, Inc., of East Riverton, New Jersey, protests the issuance of a purchase order to Caru Containers, Inc., of Quincy, Massachusetts, under request for quotations (RFQ) No. N00244-11-T-0540, issued by the Naval Supply Systems Command, Department of the Navy, for cargo containers.

We sustain the protest.

BACKGROUND

The RFQ, issued as a combined synopsis/solicitation under commercial item acquisition and simplified acquisition procedures of Federal Acquisition Regulation (FAR) subparts 12.6 and 13.5, provided for the issuance of a fixed-price purchase order for Tricon Double Door Both Ends Cargo (Tricon II) Containers, NSN 8145-

01-533-8674.¹ Agency Report (AR), Tab 1, RFQ, at 7. The RFP also identified a number of configuration changes, including minimum interior dimensions for the Tricon II containers. Id.

Vendors were informed that the purchase order would be issued on a lowest-price, technically acceptable basis, considering the following factors: technical capability of the item to meet the requirement, past performance, and price. Id. at 8. The RFQ provided that the technical acceptability of the vendors' containers would be assessed by evaluating commercial product brochures, drawings or technical information. Id. Vendors were warned that quotations that failed to meet minimum criteria would be technically unacceptable and rejected. Id. The RFQ incorporated by reference FAR clauses 52.212-1 (instructions to offerors-commercial items) and 52.212-2 (evaluation-commercial items), and informed vendors that subparagraph (c) of FAR clause 52.212-1 was changed to require vendors to hold prices firm for 90 days from the receipt of quotations. Id.

The RFQ also incorporated by reference FAR clause 52.225-1. Buy American Act—Supplies, which informed vendors that The Buy American Act, 41 U.S.C. §§ 10a-10d provided a preference for domestic end products. Under this preference, where the quotation of a domestic end product is not low, the contracting officer must determine the reasonableness of the cost of the domestic end product by adding 50 percent to the price of the low quotation. See also Department of Defense FAR Supplement (DFARS) § 225.105.

The agency received timely quotations from five vendors, including Sea Box, Caru, and Hyundai Translead. Contracting Officer Statement at 4-5. These firms' price quotations for the Tricon II containers were as follows: Caru, \$158,700; Hyundai, \$190,762; and Sea Box, \$228,344. AR, Tab 10, Pre-Award Business Clearance Memorandum, at 7. Caru and Sea Box included technical information and/or brochures/pictures with their quotations.² AR, Tab 4, CARU Quotation; Tab 5, Sea Box Quotation. Hyundai, which offered an end product of Mexico, did not provide any technical information or descriptive literature with its quotation. AR, Tab 3, Hyundai Quotation. The agency determined without conducting discussions that the quotations were technically acceptable. AR, Tab 10, Pre-Award Business Clearance Memorandum, at 5.

¹ As issued, the RFP also solicited quotations for Type 1 International Standards Organization Containers, but the agency decided to procure these items under another solicitation. See AR, Tab 8, Navy Email to Vendors, Sept. 22, 2011.

² Sea Box's quotation provided that it was valid for only 30 days. AR, Tab 5, Sea Box Quotation, at 1.

The contracting officer recognized that only Sea Box's quotation was for a domestic end product, and that the other vendors' quotations were for end products that were manufactured outside the United States. The contracting officer determined that the Buy American Act preference would be applicable to Caru's quotation of a noneligible end product, but not against Hyundai's quotation of an eligible end product--that is a Mexican-made end product, which was exempt from the Act pursuant to the North American Free Trade Act.³ Contracting Officer Statement at 9. In accordance with FAR § 52.205(c)(3), the contracting officer did not provide Sea Box with the Buy American Act evaluation preference because of Hyundai's intervening quotation.⁴ Id. The contracting officer also noted that Sea Box's quotation had not provided that its price was firm for 90 days, as requested by the RFQ.

The purchase order was issued to Caru, and this protest followed a debriefing. The agency has stayed performance pending our decision in this matter.

DISCUSSION

As an initial matter, the agency contends that Sea Box is not an interested party because its quotation had expired. In this regard, the agency notes that Sea Box's quotation failed to provide that its price would be held firm for 90 days as requested by the RFQ. See Contracting Officer's Statement at 17.

We do not agree with the agency that the "expiration" of Sea Box's quotation rendered the quotation unacceptable. We recognize that, in practice, agencies and vendors often treat quotations as if they were offers. Nonetheless, as a matter of law, quotations are different from bids or offers.

The submission of a bid or proposal constitutes, by its very nature, an offer by a contractor that, if accepted, creates a binding legal obligation on both parties. Computer Assocs. Int'l, Inc.—Recon., B-292077.6, May 5, 2004, 2004 CPD ¶ 110 at 3. Because of the binding nature of bids and offers, they are held open for acceptance within a specified or reasonable period of time, and our case law has necessarily developed rules regarding the government's acceptance of "expired"

³ An eligible offer is defined to be an offer of an eligible product. An eligible product is defined to be a foreign end product that due to the applicability of a trade agreement is not subject to discriminatory treatment. See FAR § 25.003; see also DFARS § 225.503(5).

⁴ DFARS § 225.502(c) provides that for Defense procurements subject to the Buy American Act or the Balance of Payments Program, contracting officers should actually use the provisions of DFARS § 225.502(c), and not FAR § 25.502(c). As relevant here, there is no substantive difference in the FAR and DFARS provisions.

bids or proposals. See, e.g., Consultants Ltd., B-286688.2, May 16, 2001, 2001 CPD ¶ 92.

A quotation, on the other hand, is not a submission for acceptance by the government to form a binding contract; rather, vendor quotations are purely informational. Zarc Int'l, Inc., B-292708, Oct. 3, 2003, 2003 CPD ¶ 172 at 2. In the RFQ context, it is the government that makes the offer, albeit generally based on the information provided by the vendor in its quotation, and no binding agreement is created until the vendor accepts the offer. FAR § 13.004(a). A vendor submitting a price quotation therefore could, the next moment, reject an offer from the government at its quoted price. Because vendors in the RFQ context hold the power of acceptance and their submissions are purely informational, there is nothing for vendors to hold open. Thus, we have not applied the acceptance period concept or the attendant rules regarding expiration of bids or offers to RFQs. See Computer Assocs. Int'l, Inc.—Recon., supra.

The Navy also contends that, in any event, the agency was not required to provide Sea Box with the Buy American Act preference because of Hyundai's intervening quotation of an eligible end product. Specifically, the Navy cites FAR § 25.502(c)(3), which provides that if the low offer is a noneligible offer and there is an eligible offer that is lower in price than the lowest domestic end item, then award is made to the lower priced eligible offer without application of the preference.

Sea Box responds that Hyundai's quotation could not be considered in the agency's Buy American Act analysis under FAR § 25.502(c)(3), because Hyundai's quotation was not technically acceptable.⁵ Specifically, Sea Box states that, contrary to the criteria set forth in the RFQ, Hyundai provided no technical information, commercial literature, or other data to show that the end product in its quotation satisfied the identified configuration changes, including minimum interior dimensions. Comments at 12.

The Navy argues that Hyundai's quotation was technically acceptable, because, although the firm did not provide the requested information, Hyundai did not take exception to any of the requirements. Contracting Officer's Statement at 19. The Navy contends, citing Pacific Lock Co., B-405800, Dec. 27, 2011, 2011 CPD ¶ 286, that an agency may properly rely upon a vendor's representation that it will furnish products that comply with the RFQ's requirements. Id. We disagree.

⁵ FAR § 25.502(a)(1) states that the first step in applying the Buy American Act evaluation factors is to eliminate all offers that are unacceptable for reasons other than price. See also DFARS Procedures, Guidance, and Information (PGI) 225.504 (evaluation under Buy American Act assumes that contracting officer has eliminated all offers that are unacceptable for reasons other than price or a trade agreement).

Here, the RFQ sought quotations for TRICON II containers with numerous configuration changes, including specific minimum interior measurements. RFQ at 7. Vendors were specifically required to provide information demonstrating that the vendor's quotation would satisfy these requirements. In this regard, the RFQ stated that failure to meet the minimum technical requirements would render a quotation technically unacceptable. Id. at 8. The RFQ also stated that proposals failing to meet these requirements would not be further evaluated. Id. We have found that where an RFQ contains such requirements, blanket statements of compliance without submission of requested technical information is insufficient to show compliance with identified requirements.⁶ See ProMar; Urethane Prods. Corp., B-292409 et al., Aug. 25, 2003, 2003 CPD ¶ 187 at 7; see also Koehring Cranes & Excavators; Komatsu Dresser Co., B-245731.2, B-245731.3, Nov. 23, 1992, 92-2 CPD ¶ 362 at 7.

Furthermore, the Navy's reliance on our Pacific Lock decision is misplaced. In Pacific Lock, we recognized that an agency may rely upon a vendor's affirmative certification that it would provide a domestic part, where the solicitation only required such a certification, absent some reason to question the certification. Here, the RFQ required vendors to demonstrate their technical compliance, which Hyundai did not do. Moreover, Hyundai made no affirmative representations concerning the compliance of its product.

In short, the record does not support the Navy's determination that Hyundai's quotation was technically acceptable. Accordingly, Hyundai's quotation should not have been considered an intervening eligible quotation in the agency's determination under FAR § 25.502(c)(3) that Sea Box's quotation was not entitled to a Buy American Act preference. Applying the Buy American Act preference here would increase Caru's evaluated price to \$238,050 (\$158,700 plus the 50 percent

⁶ The agency suggests that, because this procurement was conducted under FAR subpart 13.5 simplified acquisition procedures, it was not required to closely scrutinize Hyundai's quotation. See Contracting Officer's Statement at 19. There is no merit to this argument. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. LASEOD Group, LLC, B-405888, Jan. 10, 2012, 2012 CPD ¶ 45 at 4; Brican Inc., B-402602, June 17, 2010, 2010 CPD ¶ 141 at 4. This general tenet is equally applicable to simplified acquisitions, and our Office will review allegations of improper agency actions in conducting simplified acquisitions to ensure that the procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. United Coatings, B-291978.2, July 7, 2003, 2003 CPD ¶ 146 at 10-11.

evaluation preference). See Contracting Officer's Statement at 18-19. Thus, under this analysis, Sea Box should have been found to have submitted the lowest-priced, technically acceptable quotation.

We sustain the protest.

RECOMMENDATION

We recommend that the agency terminate the purchase order issued to Caru, and issue a purchase order to Sea Box, if the firm is otherwise found to be responsible. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest. 4 C.F.R. § 21.8(d)(1)(2011). The protester's certified claim for costs, detailing the time spent and the cost incurred, must be submitted to the agency within 60 days after receiving the decision.

Lynn H. Gibson
General Counsel