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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Glem Gas S.p.A.

File: B-414179

Date: February 23, 2017

Dr. Matteo Zappile, USCOMED Consulting Services, for the protester.
Eva Escalante, Esq., and Robert Kois, Esq., Department of the Navy, for the agency.

Pedro E. Briones, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the issuance of an order under a brand name or equal procurement is denied where the protester has not demonstrated that it was competitively prejudiced by the agency's waiver of the solicitation's salient characteristics by selecting the awardee's similar product.

DECISION

Glem Gas S.p.A., of San Cesario sul Panaro, Italy, protests the issuance of a purchase order to Gaeta Ship Supply SRL (Gaeta), of Gaeta, Italy, under request for quotations (RFQ) No. N68171-17-T-2003, issued by the Department of the Navy, Naval Supply Systems Command, for stoves. Glem Gas contends that the Navy improperly waived the RFQ's salient characteristics by selecting the awardee's non-conforming product.

We deny the protest.

BACKGROUND

The RFQ was issued under Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Items, and part 13, Simplified Acquisition Procedures, to procure, on a brand name or equal basis, 270 gas stoves for base housing at U.S. Naval Air Station Sigonella, Italy. RFQ amend. 1, at 1-10; Mem. of Law (MOL) at 1; Contracting Officer's Statement (COS) ¶ 1. The RFQ identified a stove model manufactured by Glem Gas as the brand name appliance, and listed several salient characteristics that had to be satisfied by any other stove offered as equal to the

brand name model, including, as relevant here, a depth (external dimension) of 60 centimeters and an oven capacity (internal volume) of 95 liters. See RFQ amend. 1, at 3-4. The solicitation incorporated, by reference, the FAR brand name or equal provision 52.211-6, which informs offerors that to be considered for award, proposals for equal products must include sufficient information to show that the offered items meet the salient characteristics listed in the solicitation. Id. at 5; FAR § 52.211-6 (Aug. 1999). The RFQ provided for award on a lowest-priced, technically acceptable basis, and advised that technical acceptability would be evaluated based on the offeror's submissions. RFQ amend. 1, at 10.

Offerors were to submit product literature and documentation with their quotation that described the technical capability of their proposed stove and included the following data: (a) the brand name; (b) make or model number; (c) a product illustration or technical design, including links to the manufacturer's website showing parts and accessories; (d) a technical data sheet; and (e)--for any item other than the specified brand name--any other information demonstrating that the proposed item met the RFQ's salient physical, functional, or performance characteristics. See id. at 9-10. The RFQ stated that a proposed product that met or exceeded the salient physical, functional, or performance specifications would be found technically acceptable, and that a product that did not meet such specifications would be found technically unacceptable. See id. at 10.

The Navy received four timely quotations, including from Gaeta and Glem Gas, all of which were evaluated as technically acceptable by the base's housing facilities specialist. Agency Report (AR), encl. 9, Source Selection Doc. (SSD), at 5, 13. Gaeta, which submitted the lowest-priced quotation, offered an alternative stove (manufactured by Bertazzoni) that has a depth of 50 centimeters and an oven capacity of 92 liters. Id. at 12; AR, encl. 3a, Gaeta Quotation (Quote), at 7-12. Glem Gas, which submitted the third lowest-priced quotation, offered the brand name stove (albeit its latest model year)¹ that has a depth of 60 centimeters and an oven capacity of 101 liters.² AR, encl. 9, SSD, at 12; encl. 3b, Glem Gas Quote, at 6, 18-21.

¹ Glem Gas states that the model identified in the RFQ is no longer in production and that the current model year has the same dimensions, but a larger oven capacity. See Supp. Comments at 2.

² Glem Gas is an interested party to pursue its protest because the intervening (i.e., second lowest-priced) offeror proposed the identical Bertazzoni stove model proposed by Gaeta (the lowest-priced offeror), thus Glem Gas would be next in line for award if it were to prevail on its challenge that the Navy improperly found that model technically acceptable. See 4 C.F.R. § 21.0(a)(1); COS ¶ 3; AR, encl. 3d, Intervening Quote, at 11-15; encl. 9, SSD, at 12; Container Prods. Corp., B-234368, June 8, 1989, 89-1 CPD ¶ 536 at 2 n.2, recon. den., B-234368.2, Oct. 18, 1989, 89-2 CPD ¶ 363 (Though third in line for award, the protester is an interested party
(continued...))

The contracting officer, who was the source selection authority for the procurement, determined that Gaeta submitted the lowest-priced, technically acceptable quotation with fair and reasonable pricing, and the Navy issued the order to Gaeta for €125,145 (\$138,297).³ See COS ¶¶ 1, 3; AR, encl. 9, SSD, at 1-7. This protest followed.⁴

DISCUSSION

Glem Gas contends that the award was improper because Gaeta's proposed stove model did not meet the RFQ's salient characteristics. Protest at 3-4. Glem Gas argues that the Navy should have rejected Gaeta's quotation as technically unacceptable, because it failed to meet the dimensions and oven capacity specified in the RFQ for a non-brand name product.⁵ Id.

The Navy acknowledges that the "Awardee's product offers an alternate depth dimension of 50 cm and oven capacity of 92 liters, but [the agency] maintains that these deviations (10 cm and 3 liters) are minor (at most a minor fraction of the size and volume of the Protester's product) and inconsequential." MOL at 5. According to the agency, these "insignificant differences would not impact the stove's performance capabilities--the two stoves would do the same job in a like manner with the same results." Id. at 4. The Navy contends that since the stoves are functionally interchangeable and will perform identically, waiver of the two specifications was appropriate. Id. at 4-6. The agency is incorrect.

(...continued)

because if its protest that the agency relaxed the solicitation's specifications were sustained, then the product proposed by the second lowest-price offeror would also be non-conforming). The quotation of the highest-priced offeror is not relevant.

³ The RFQ required offerors to quote prices in Euros. RFQ amend. 1, at 10.

⁴ The Navy states that it has accepted delivery of 90 stoves that had already been shipped by the time the awardee received notice of the protest filing, but that the agency has stayed delivery of the remaining (180) stoves. COS ¶ 3; MOL at 3.

⁵ Although our decision does not specifically address each of the protester's arguments, we have considered all of its assertions and find none furnishes a basis for sustaining its protest. For example, Glem Gas asserts that the awardee's stove does not meet the RFQ's salient characteristics regarding the capacity, or output, of the stove-top's center burner. See Protest at 4; Comments at 3. Contrary to the protester's apparent belief, the RFQ, as the Navy points out, did not specify burner capacity. See MOL at 2 n.3; RFQ amend. 1, at 3-4. We thus dismiss this assertion as legally and factually insufficient under our Bid Protest Regulations. See 4 C.F.R. § 21.5(f).

Under a brand name or equal solicitation, a firm offering an equal product must demonstrate that the product conforms to the salient characteristics of the brand name product listed in the solicitation.⁶ OnSite Sterilization, LLC, B-405395, Oct. 25, 2011, 2011 CPD ¶ 228 at 3. In general, the particular features of the brand name item identified in the solicitation as salient characteristics are presumed to be material and essential to the government's needs, and quotations offering other than the brand name product that fail to demonstrate compliance with the stated salient characteristics are properly rejected as unacceptable. Sourceling, LLC--Protest & Costs, B-405907.2 et al., Jan. 27, 2012, 2012 CPD ¶ 58 at 4. In reviewing protests of agency evaluations, we review the record to ensure that the evaluation and source selection decision were reasonable and consistent with the terms of the solicitation and applicable procurement statutes and regulations. Ricoh America's Corp., B-402239, Feb. 22, 2010, 2010 CPD ¶ 55 at 3.

The solicitation, as noted above, specified that for quotations offering other than the brand name, the stove must have a depth of 60 centimeters and an oven capacity of 95 liters, among other things. See RFQ amend. 1, at 3-4. The RFQ stated, explicitly, that a proposed product that did not meet the salient physical, functional, or performance specifications would be found technically unacceptable. Id. at 10. Contrary to these provisions, the record here shows--and the agency concedes--that the stove proposed by the awardee and accepted by the agency did not meet the RFQ's specified 60-centimeter depth and 95-liter capacity. The Navy's actions here, however, provide no basis to sustain Glem Gas' protest.

An agency may waive compliance with a material solicitation requirement in awarding a contract only if the award will meet the agency's actual needs without prejudice to other offerors. Safety-Kleen (TS), Inc., B-284125, Feb. 23, 2000, 2000 CPD ¶ 30 at 2-3. Competitive prejudice from such a waiver exists only where the requirement was not similarly waived for the protester, or where the protester would be able to alter its quotation to its competitive advantage if given the opportunity to respond to the relaxed term. See Phoebe Putney Mem'l Hosp., B-311385, June 19, 2008, 2008 CPD ¶ 128 at 3-4. In cases where the protester argues that an agency waived a certain requirement, prejudice does not mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful. Geonex Corp., B-274390.2, June 13, 1997, 97-1 CPD ¶ 225 at 5. Rather, the pertinent question is whether the protester would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived. Brown & Root, Inc. and Perini Corp., a joint venture, B-270505.2, B-270505.3, Sept. 12, 1996, 96-2 CPD ¶ 143 at 11.

⁶ The term "salient characteristics" generally refers to the essential characteristics of a product that must be met for another product to be considered equal to a specified name brand product. See FAR § 52.211-6.

In short, competitive prejudice is an essential element of a viable protest, and we will not sustain a protest challenging the waiver of a solicitation requirement where, as here, there is no basis for finding competitive prejudice to the protester. Geonex Corp., *supra*; Phoebe Putney Mem'l Hosp., *supra*; Safety Storage, Inc., B-275076, Jan. 21, 1997, 97-1 CPD ¶ 32 at 4 (In a brand name or equal procurement conducted as a simplified acquisition for prefabricated storage sheds, protest that agency waived RFQ's specifications by accepting a shed with a slightly smaller storage area is denied where, despite specific requests for a showing of prejudice, the protester fails to articulate how it would have altered its quotation had it known that a shed with a smaller storage area would have satisfied the agency's needs); see Complete Packaging & Shipping Supplies, Inc., B-412392 et al., Feb. 1, 2016, 2016 CPD ¶ 28 at 8-10 (Although we agree with the protester that the agency waived the RFQ requirement to provide two specified items, the protester has not argued that, had it known that the agency ultimately would not require the items, it would have changed its quotation to improve its competitive position.).

Although we agree with Glem Gas that the Navy improperly waived the RFQ's salient characteristics by selecting the awardee's non-brand name stove, we also agree with the agency that the protester has not shown that it was prejudiced by the waiver. As the Navy points out, Glem Gas has not alleged that it would have quoted a lower price for its brand name model, or that it would have offered another similar product, if it had known that the agency would waive the RFQ's salient characteristics at issue here.⁷ We thus have no basis to sustain Glem Gas' protest.

The protest is denied.

Susan A. Poling
General Counsel

⁷ We note that the Navy specifically argued that Glem Gas had not shown that it was prejudiced by the agency's actions, yet the protester did not address this issue in its various submissions. Compare MOL at 6 and Request for Dismissal at 7 with Response to Request for Dismissal at 1-5, Comments at 1-5, Response to GAO Interrogatory at 1-2 and Supp. Comments at 1-3; see Protest at 1-6; encls.; cf. Henschel Inc., B-275390.5, May 14, 1997, 97-1 CPD ¶ 184 at 6 (sustaining protest that agency accepted awardee's alternate product that was materially noncompliant with the solicitation's functional requirements, where the protester asserts that it would have offered a lower performance, lower-priced product if had realized that the agency did not require the full performance capabilities of the brand-name product).