



Decision

Matter of: Rex Systems, Inc.

File: B-417294

Date: March 22, 2019

Julie M. Nichols, Esq., Roeder, Cochran, Phillips, PLLC, for the protester.
Christine T. Roark, Esq., Defense Logistics Agency, for the agency.
Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the issuance of a purchase order to a vendor based on its quotation of unused former government surplus property is dismissed where the solicitation permitted the quotation of such property.

DECISION

Rex Systems, Inc., of Chippewa Falls, Wisconsin, protests the issuance of a purchase order to White Aero, Inc., of Santa Clarita, California, under request for quotations (RFQ) No. SPE7M5-18-T-08X2, issued by the Defense Logistics Agency (DLA) for the provision of three radio frequency coils. The protester contends that the agency erred in issuing the purchase order, because White's quotation was based on providing surplus equipment, and the solicitation did not permit vendors to quote such equipment.

We dismiss the protest.

BACKGROUND

On September 21, 2018, DLA issued the RFQ as an automated solicitation on DLA's Internet Bid Board System (DIBBS). The solicitation sought quotations to provide three radio frequency coils, a part identified with a national stock number of 5950008633043. The RFQ listed Rex as an approved source, noting its commercial and government entity (CAGE) code and its part number for the radio frequency coil being sought. RFQ at 4.

The solicitation incorporated by reference the DLA Master Solicitation for Automated Simplified Acquisitions (Master Solicitation). Id. at 1. Section 3(a)(1)(iv) of part I of the

Master Solicitation provides that quoting unused former government surplus property is “not considered [an] exception[] to solicitation requirements and will not make a quotation ineligible for an award.” Master Solicitation at 3. The Master Solicitation also included DLA Directive (DLAD) Procurement Note C04, which required a vendor to make certain representations, upon request of the contracting officer, when it submits a quotation based on providing unused former government surplus property. The Master Solicitation noted that this provision is automatically included in automated solicitations and applies unless there is a documented restriction on quoting unused former government surplus property. Master Solicitation at DLAD Procurement Note C04.

Further, the Master Solicitation contained DLAD Procurement Note L04, a provision that is incorporated in solicitations when items are “identified in the item description only by the name of an approved source (CAGE code), a part number, and a brief description.” Id. at DLAD Procurement Note L04. Procurement Note L04 contained guidance for providing exact or alternate products that meet the RFQ requirements.

Rex timely submitted a quotation in response to the solicitation. On January 29, 2019, DLA issued the purchase order to White. This protest followed.

DISCUSSION

The protester argues that the agency erred in issuing a purchase order to White, because the latter vendor is not an approved source of the radio frequency coil and instead based its quotation on providing surplus equipment. The protester asserts that, under the solicitation, vendors were limited to quoting either exact products sourced from the listed approved source (i.e., Rex) or alternate products that were accompanied by a technical data package for the agency to review. Rex asserts that the solicitation did not provide for, or permit, a vendor to quote former government surplus property in lieu of quoting the product of the listed approved source or an alternative product accompanied by a technical data package.

DLA requests dismissal of the protest as factually and legally insufficient. The agency argues that the solicitation permitted vendors to quote unused former government surplus property meeting the solicitation’s technical requirements and therefore the protester’s allegations, even if true, would not establish improper agency action.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Pacific Photocopy & Research Servs., B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶ 69 at 4. To achieve this end, our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will

prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here we find the protest to be factually and legally insufficient because the solicitation permitted vendors to quote unused former government surplus property meeting the solicitation's technical requirements. In this regard, the solicitation incorporated by reference the DLA's Master Solicitation. The Master Solicitation, in turn, stated that unused former government surplus property is not considered an exception to the solicitation requirements. See Master Solicitation at 3. The Master Solicitation additionally included provisions governing the submission of unused former government surplus property in cases, such as the instant one, where the RFQ is an automated solicitation that does not contain a documented restriction on providing such property. Master Solicitation, DLAD Procurement Note C04.

The protester argues that these provisions did not require the acceptance of surplus property, and therefore could not override the express language in the RFQ that provided only one approved source for the radio frequency coils being solicited. The protester additionally argues that DLAD Procurement Note L04 "makes it clear that when DLA issues a solicitation [for a part numbered item] such as the one involved in this procurement, DLA is only going to accept either the exact product, as defined in L04, or an Alternate Offer." Rex Resp. to GAO Request for Info. at 6. The protester contends that an exact product must be sourced from the listed approved source (in this case, Rex, since the RFQ lists it by name and CAGE code), while an alternate offer must be quoted along with a technical data package to allow the agency to assess the suitability of that product. The protester argues that White's quotation of surplus property did not meet either of these standards.

Based on our review, however, we see no support for the protester's position. In this regard, neither the solicitation nor the Master Solicitation contained an express prohibition on quoting unused former government surplus property. While the protester seeks to read such a prohibition into the RFQ by virtue of the above-discussed provisions, which list Rex as an approved source and which contain guidance on quoting exact products, we do not agree. As noted above, the Master Solicitation provided that unused former government surplus property would not be considered an exception to the solicitation requirements. The Master Solicitation also included DLAD procurement note C04, which details the procedures for quoting such items, and which applies where, as here, the RFQ does not contain an express prohibition on quoting surplus property. Nothing in the provisions relied upon by the protester contradict, or are inconsistent with, these Master Solicitation provisions.¹ Accordingly, we find to be

¹ At worst, Rex's interpretation that the solicitation provisions discussing approved sources and exact products prohibit the submission of unused former government surplus property raises a patent ambiguity in the terms of the solicitation. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error. Where, as here, a patent ambiguity is not challenged prior to submission of solicitation

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reasonable the agency's position that the solicitation anticipated and permitted the quotation of unused former government surplus property.

The protest is dismissed.

Thomas H. Armstrong
General Counsel

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responses, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provisions. FFLPro, LLC, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 10. An offeror that competes under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the agency proceeds in a manner inconsistent with one of the possible interpretations. Shertech Pharmacy Piedmont, LLC, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2.