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Decision

Matter of: W&G Machine Corporation, Inc.

File: B-418698.2; B-418698.3

Date: August 4, 2020

James White, Esq., Marshall and White, PC, for the protester.
Colleen Loughran, Esq., Defense Logistics Agency, for the agency.
Michael Price, Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency had a reasonable basis to cancel solicitation for critical safety item because the agency failed to first prepare required justification and approval documentation in support of the solicitation's identification of a particular manufacturer as the only approved source for the required item.

DECISION

W&G Machine Company, Inc. (W&G), a small business of Hamden, Connecticut, protests the cancellation of request for quotations (RFQ) SPE7L3-20-Q-0507, issued by the Defense Logistics Agency (DLA) for commercial items, namely, 625 rigid connecting links. W&G argues that the agency's decision to cancel the RFQ lacks a reasonable basis and was a pretext to avoid having to evaluate W&G's quotation.

We deny the protest.

BACKGROUND

On April 20, 2020, the agency issued the RFQ seeking a total of 625 rigid connecting links for use in helicopters, a commercial item with National Stock Number (NSN) 3040-01-159-4611. Req. for Dismissal, exh. 1, RFQ at 4. The RFQ included three fixed-price contract line item numbers (CLINs) for the links, with each CLIN representing a different quantity to be sent to a different DLA stock location in the United States, and two additional CLINs for item testing requirements. *Id.* The RFQ required vendors to include pricing and delivery dates with their quotations. *Id.* Since the items are commercial items, and the dollar value of the procurement is between \$150,000 and

\$7,000,000, the agency issued the RFQ using the simplified acquisition procedures established under Federal Acquisition Regulation (FAR) subpart 13.5. *Id.* at 2.

As relevant, the connecting links have been designated as a critical safety item that can only be procured from pre-qualified manufacturers. RFQ at 7. Accordingly, the solicitation included the following provisions in the “Item Description” section:

Note: this is a restricted source item. Manufactured to the [original equipment manufacturer] drawings cited. Herein and as of the date of this solicitation only the source(s) cited below has/have been prequalified to manufacture the item. Offers based on supplying other manufacturer’s parts shall be accompanied by technical and other data sufficient to evaluate the item for the intended application. . . said evaluation may take an extended period of time and may therefore be applicable to future procurements. Final approval authority rest [sic] with the government design control activity.

Id. The RFQ went on to identify Sikorsky Aircraft Corporation as the only prequalified manufacturer source for the item, noting as follows: “The NSN is identified as an Army Critical Safety Item. . . . Critical Application Item: Sikorsky Aircraft Corporation, [doing business as] 78286, [part number] 70400-02258-048.” *Id.*

The RFQ also included provisions under section L04, Offers for Part Numbered Items, which explained additional requirements for quotations when, as is the case here, the item(s) being solicited were identified in the item description only by the name of an approved source, a part number, and brief description. *Id.* at 40. Subsections (c) – (h) of section L04 described requirements and additional provisions regarding the submission of “alternate offers,” including requirements that alternate offers must be supported by extensive technical data concerning any alternate product proposed. *Id.* at 40-41

The record reflects that the agency received two quotations by the RFQ’s May 1, closing date, one from W&G and [DELETED]. Req. for Dismissal at 2. W&G proposed its own product, while [DELETED] proposed [DELETED]. *Id.* Prior to the closing date, W&G also filed an initial protest with our Office challenging the terms of the solicitation. Specifically, W&G, which was separately seeking to become an approved source to supply its own product to the government,¹ argued that the solicitation was unduly restrictive by listing Sikorsky as the only approved source for the item. Protest, B-418698, April 30, 2020, at 5-8. Among other things, W&G argued that the solicitation was a “de facto sole source procurement,” the agency failed to prepare a written justification and approval (J&A) in support of the sole- source as required by the FAR, and that the protestor should be a qualified source for the item. *Id.* The protestor

¹ The record reflects that the protestor has submitted a request to become an approved source for the connecting links required by the solicitation.

requested, as relief, that our Office “[d]irect the Agency to cancel the [s]olicitation. . . so that W&G is able to properly compete.” *Id.* at 10.

On May 6, the agency canceled the solicitation because it failed to follow the applicable regulatory requirements when it issued the solicitation as a “brand name” procurement for a Sikorsky product.² See Req. for Dismissal at 3. Based on its decision to cancel the RFQ, DLA requested dismissal of the protestor’s initial protest as academic, which we did on May 26. See *W&G Machine Corporation. Inc.*, B-418698, May 26, 2020 (unpublished decision). The protestor filed subsequent protests with our Office challenging DLA’s cancellation of the solicitation, which are the subject of this decision.

DISCUSSION

W&G argues that DLA’s reason for cancellation “is factually incorrect and in error” because DLA’s belief that the procurement sought to procure a “brand name” item is belied by the record. Protest at 7-10. As support for its position, the protestor cites the solicitation provision allowing for the submission of alternate offers under section L04. *Id.* at 8. According to the protestor, the agency’s cancellation decision was instead a “mere ‘pretext’ to prevent it from having to evaluate W&G.”³ *Id.* at 10.

We note that the protestor’s arguments stand in stark contrast to those of W&G’s initial protest challenging the terms of the solicitation. As noted above, W&G initially claimed that the procurement was in fact a “de facto sole source procurement,” which failed to include a written J&A as required by applicable regulations. Protest, B-418698, Apr. 30, 2020, at 8. The protestor went so far as to argue that the agency should cancel the solicitation based on these defects, the very action the protestor now challenges as improper. *Id.* Setting aside the inconsistency of the protestor’s arguments, its current challenges are without merit.

² The agency previously submitted a request for dismissal on May 13, 2020, on grounds that it had received no quotations in response to the RFQ. Req. for Dismissal in B-418698, May 13, 2020, at 2. DLA went on to explain, in its corrected request for dismissal, that there had been an error in communication between counsel and the contracting officer. Req. for Dismissal in B-418698, May 19, 2020, at 1. The protestor and [DELETED] had submitted timely quotations, however, the agency did not prepare the required J&A documentation with its solicitation, justifying its decision to cancel. *Id.* at 2.

³ When it filed its protest, the protestor was under the mistaken belief that it was the only firm to submit a quotation. See *e.g.*, Protest at 10. Based on this belief, the protestor asserted that the cancellation decision was intended to specifically target the protestor. *Id.* During the development of the record, however, it became apparent that the agency in fact received two quotations, as discussed above. The protestor, nevertheless, failed to address this fact in its response to the agency’s request for dismissal of the protest.

A contracting agency must have a reasonable basis to support a decision to cancel an RFQ. *Progressive Servs. Corp.*, B-404183, B-404251.2, Jan. 11, 2011, 2011 CPD ¶ 18 at 2. So long as there is a reasonable basis for doing so, an agency may cancel a solicitation no matter when the information precipitating the cancellation first arises, even if it is not until offers (or, as here, quotations) have been submitted and evaluated. *A-Tek, Inc.*, B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 2-3.

As relevant, the simplified acquisition procedures established under FAR part 13 are designed to promote efficiency and economy in contracting, and to avoid unnecessary burdens for agencies and contractors, including in situations where, as here, the value of the acquisition is greater than \$150,000 but less than \$7,000,000. See FAR 13.002, 13.500. When using these procedures, an agency may limit a solicitation to a brand name or to a product with characteristics peculiar to one manufacturer when the contracting officer determines that the restriction is essential to the government's requirements and the basis for doing so is justified, approved, and documented. See FAR 11.105(a)(1), 11.105(a)(2)(ii), 13.501.

Also, the documentation supporting the restriction must be published with the solicitation. See FAR 13.501(a)(1)(i), (iv) (“[C]ontracting officers must [c]onduct sole source acquisitions . . . (including brand name) under this subpart only if the need to do so is justified in writing and approved at the levels specified in paragraph (a)(2) . . . and make publicly available brand name justifications with the solicitation.”); see *also* FAR 13.501(a)(2) (“Justifications and approvals are required under this subpart for sole-source (including brand name) acquisitions. . . for a proposed contract exceeding \$700,000 but not exceeding \$13.5 million, the advocate for competition for the procuring activity. . . or an official described in 6.04(a)(3) or (a)(4) must approve the justification and approval.”).⁴

Here, as discussed above, the RFQ identified Sikorsky as the only source that possesses the required approval to manufacture the item and restricted the procurement to the particular item manufactured by Sikorsky. RFQ at 7. The agency limited the solicitation to the Sikorsky item because the required rigid connection link is

⁴ In the alternative, DLA notes that even if the solicitation was not for a “brand name only,” but rather a “brand name or equal” procurement by virtue of the solicitation’s inclusion of the clause permitting alternate quotations, the agency argues that it would have still been compelled to cancel the solicitation because brand name or equal solicitations, per the Defense Federal Acquisition Regulation Supplement (DFARS), also require J&A documentation. Req. for Dismissal at 4; see DFARS 213.501(a)(ii) (“[T]he justification and approval addressed in FAR 13.501(a) is required in order to use brand name or equal descriptions.”). The agency also notes that brand name or equal procurements require a description of the salient characteristics of the items to be procured, in order to permit fair competition among vendors, and that the solicitation would have been defective because it failed to include any salient characteristics. Req. for Dismissal at 4.

considered a critical safety item, and therefore is a “restricted source item” which can only be obtained from an approved source. RFQ at 7. As explained by the agency, the only way a source can be approved to supply this item is if it is approved by an Army design control activity.⁵ Req. for Dismissal at 2. In any event, because the agency restricted the procurement to the Sikorsky product, as explained above, the agency was required under the FAR to document, justify and approve the restriction, and publish its supporting documentation with the solicitation. When the agency became aware that it failed to comport with these requirements, it properly decided to cancel the solicitation in order to rectify its error.

W&G’s argument that J&A documentation was not required, and therefore DLA’s cancellation of the solicitation was in error, is based on the solicitation’s inclusion of section L04, which provides procedures for the submission of offers of alternate products. Protest at 8-10. According to W&G, this provision indicates that the solicitation was not a brand name procurement, but rather, the agency would accept quotations from vendors offering a product other than the one manufactured by Sikorsky, so long as it met the requisite technical specifications. Protest at 8-9.

Our Office has previously considered numerous solicitations for restricted source items containing section L04, or similar predecessor language permitting offerors to seek to become approved sources for alternate products. See, e.g., *Twin Services*, B-415418, Jan. 9, 2018, 2018 CPD ¶ 24 at 4 n.4; *Critical Process Filtration, Inc.*, B-400750 *et al.*, Jan. 22, 2009, 2009 CPD ¶ 25 at 3. In this context, we have generally treated solicitations seeking restricted source items that are supplied by only one approved source as sole-source or brand name procurements, even when those solicitations contain language similar to the language in section L04 permitting offerors to propose alternate products. See *Critical Process Filtration, Inc.*, *supra* at 3-5 (treating solicitation seeking “critical application items” manufactured by one named vendor as a brand name procurement, notwithstanding inclusion of a clause indicating the agency would consider offers of alternate products); see also *National Aerospace Grp. Inc.*, B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 at 5 (protest of solicitation seeking item with only one approved source, and including clause permitting offers of alternate products, is sustained because the J&A was inadequate to support a sole-source procurement); cf. *Navistar Marine Instrument Corp.*, B-262221, Nov. 20, 1995, 95-2 CPD ¶ 232 at 3-4 n.3 (citing *Fantasy Lane, Inc.*, B-254072.3, June 23, 1994, 94-1 CPD ¶ 377 at 4) (concluding that inclusion of a similar clause permitting alternate offers did not constitute a brand-name or equal procurement or require the identification of salient features).

Here, the record indicates that the RFQ contemplated a procurement limited to a product manufactured by a single approved source, Sikorsky. RFQ at 7. The solicitation clearly identified the Sikorsky product as the only currently approved

⁵ See 10 U.S.C. § 2319 (“The term ‘design control activity’, with respect to an aviation critical safety item . . . means the systems command of a military department that is specifically responsible for ensuring the airworthiness of an aviation system or equipment.”).

acceptable product. *Id.* Because the connecting link is a critical safety item, sources intending to manufacture and supply these links are required to first obtain the Army's approval to supply the item, through the Army's design control activity. Req. for Dismissal at 1-2. Furthermore, the solicitation expressly notes that the evaluation of offers of alternate products may take an extended period of time and may "therefore be applicable to future procurements." RFQ at 7.

Accordingly, the presence of section L04, permitting quotations of alternate products, does not alter our conclusion above that this solicitation is, in effect, a brand name or sole-source procurement. While the FAR permits restrictions of this sort when using the simplified acquisition procedures contained in FAR part 13, for the reasons explained above, the agency was required to prepare and publish a J&A supporting the restriction. After realizing it failed to satisfy these requirements, the agency reasonably decided to cancel the solicitation in order to correct the perceived procurement error.

Finally, where, as here, a protester has alleged that the agency's rationale for cancellation is but a pretext--*i.e.*, that the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest--we will review the reasonableness of the agency's actions in canceling the acquisition. *Miller, Davis, Marter & Oppen, P.C.*, B-242933.2, Aug. 8, 1991, 91-2 CPD ¶ 176 at 4. Even if it can be shown that personal animus or pretext may have supplied at least part of the motivation to cancel the procurement, the reasonableness standard applicable to cancellation of a solicitation remains unchanged. *See, e.g., Lasmer Indus., Inc.*, B-400866.2 *et al.*, Mar. 30, 2009, 2009 CPD ¶ 77 at 4.

As discussed above, the record reflects that the restrictive nature of the solicitation required the agency to prepare J&A documentation in connection with its issuance of the RFQ, and to revise the solicitation if necessary. As such, the agency's decision to cancel the solicitation for failing to prepare this documentation was reasonable and the record does not reflect that the agency's decision to cancel was for an improper purpose. Further, the protestor's argument that the cancellation was a mere pretext holds little weight in light of the protestor's own initial protest, which claimed that the procurement was unduly restrictive and argued that the RFQ should be canceled and the requirement re-solicited.

We deny the protest.

Thomas H. Armstrong
General Counsel