



Decision

Matter of: American Material Handling, Inc.

File: B-422171

Date: January 22, 2024

Benjamin DeJarnett, for the protester.

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DIGEST

Protest that the agency unreasonably evaluated the protester's quotation of an equal product in response to a brand name or equal solicitation is sustained where the agency evaluated the quotation based on unstated salient characteristics.

DECISION

American Material Handling, Inc., (AMH) of Watkinsville, Georgia, protests the award of a task order to Caterpillar, Inc., of Irving, Texas, under request for quotations (RFQ) No. RFQ-1623378, issued by the International Boundary and Water Commission for a brand name or equal Caterpillar 980 wheel loader. The protester contends that the agency unreasonably evaluated its quotation as unacceptable based on unstated salient characteristics.

We sustain the protest.

BACKGROUND

The RFQ was issued on April 28, 2023, to procure a brand name or equal Caterpillar 980 wheel loader to be delivered to the agency's American Dam Field Office in El Paso, Texas. Agency Report (AR), Tab 4, RFQ at 1, 3. The RFQ was issued through the General Services Administration's e-Buy system to vendors holding Federal Supply Schedule (FSS) contracts pursuant to Federal Acquisition Regulation (FAR) subpart 8.4. *Id.* at 1. The RFQ contemplated the award of a contract to the vendor offering the lowest-priced, technically acceptable quotation considering price and technical acceptability, with performance to be completed within 300 days of award. *Id.* at 1, 4.

The RFQ stated that the proposed “wheel loader equipment must meet the salient features or specifications of the Caterpillar 980 or exceed the specifications attached,” and included a two-page specification sheet. *Id.* at 1. The protester contacted the contracting officer to inquire whether the RFQ was issued on a brand name or equal basis and stated that it could provide an equal product. Protest, attach. 1, Email from Protester to Agency, May 1, 2023. The contracting officer responded “Yes sir. Please do.”¹ Protest, attach. 1, Email from Agency to Protester, May 1, 2023.

The agency received two quotations by the submission due date, one from AMH and one from Caterpillar. Contracting Officer’s Statement (COS) at 1. The protester offered the Volvo L220H wheel loader, and Caterpillar offered the brand-name Caterpillar 980. AR, Tab 6, Technical Evaluation at 4, 7. After receiving quotations, the contracting officer added salient characteristics to the technical evaluation form to be considered during evaluations that were not expressly stated in the solicitation. COS at 1. The agency evaluated both quotations and concluded that the Volvo L220H did not meet the following six² salient characteristics, none of which were listed in the solicitation:

	CATERPILLAR 980	VOLVO L220H
OPERATING WEIGHT	66,877 lbs	71,140 lbs
MAXIMUM HORSEPOWER	393 hp	366 hp
GROSS POWER	393 hp	366 hp
MAXIMUM TRAVEL SPEED	24.5 mph	22.7 mph
TURNING RADIUS³	26.1 ft	48.96 ft
FUEL TANK CAPACITY	112.5 gal	96.7 gal

AR, Tab 6, Technical Evaluation Form at 4-5, 7-8; MOL at 4; Protest at 2-4.

¹ While the solicitation did not expressly state that it was issued on a “brand name or equal” basis, or include the applicable FAR clauses for such procurements, the parties agree that it was, in effect, a brand name or equal procurement and that wheel loaders other than the Caterpillar 980 would be considered for award. This understanding is consistent with the terms of the solicitation, which stated that proposed wheel loaders must meet or exceed the salient characteristics of the Caterpillar 980, or otherwise exceed specifications attached to the solicitation.

² The agency marked 16 salient characteristics as not being met by the Volvo L220H wheel loader. AR, Tab 6, Technical Evaluation Form at 4-5. However, the agency appears to rely on only six of those as the basis for rejecting the Volvo L220H. Protest, attach. 4, Debriefing at 2; Protest, attach. 6, Agency-Level Protest Decision at 3; Memorandum of Law (MOL) at 4.

³ On the technical evaluation form, the agency incorrectly marked that the Volvo L220H did not meet the tipping load requirement. The agency explains that it meant to record that the Volvo L220H does not meet the turning radius requirement, which the protester does not refute. MOL at 4; Comments at 1-2.

The technical evaluation panel found that the Volvo L220H “did not meet the [h]orsepower requirement, it was lower than specified; and its weight is higher than specified. The weight is a[n] issue when working in the river channel on sandy and muddy terrains.” AR, Tab 6, Technical Evaluation at 4-6. The agency concluded that Caterpillar’s 980 wheel loader met the salient characteristics and was technically acceptable. *Id.* at 7-9.

The agency made award to Caterpillar on September 17 for \$660,219, and the protester subsequently requested a debriefing.⁴ COS at 3; AR, Tab 10, Contract Award at 2. The agency responded, explaining that while AMH was the lowest bidder with a total price of \$597,892, the Volvo L220H was found technically unacceptable based on its failure to meet the above-referenced salient characteristics. Protest, attach. 4, Debriefing at 2.

On October 5, the protester filed an agency level-protest, arguing that the agency unreasonably evaluated its quotation because the Volvo L220H met all the salient characteristics stated in the specification sheet at a lower price. Protest, attach. 5, Agency Level Protest at 1. The protester asserted that the six salient characteristics identified in the debriefing were not listed on the specification sheet. *Id.* at 2. The agency denied the protest on October 23, explaining that while “AMH submitted the lowest priced item and that the Volvo L220H Wheel Loader met the salient characteristics listed on the specification sheet . . . the specification sheet was not the sole determining factor in an award decision and there were other criteria that deemed your offer technical unacceptable.” Protest, attach. 6, Agency-Level Protest Decision at 1. The agency further explained that the stated salient characteristics were to be used solely for determining whether a quotation was “responsive,” not technically acceptable, and that technical acceptability had to be determined based on other criteria. *Id.* at 2-3.

This protest followed.

DISCUSSION

AMH argues that the agency unreasonably evaluated its quotation as technically unacceptable based on unstated salient characteristics. Protest at 3. We agree, and

⁴ Although the parties refer to a “debriefing,” debriefings are provided pursuant to the competitive procedures of FAR part 15. The term does not apply here because this procurement was conducted pursuant to the procedures in FAR subpart 8.4; what the protester received was a “brief explanation” of the award decision. FAR 8.405-2(d) (“If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided.”). For the sake of consistency with the record and convenience, however, we refer to the agency’s communication with the protester as a debriefing.

we sustain the protest based on our review of the record, which shows that the agency improperly considered unstated salient characteristics during its evaluation.

Where, as here, an agency issues an RFQ to FSS contractors under FAR subpart 8.4 and conducts a competition, we will review the record to ensure that the agency's evaluation is reasonable and consistent with the terms of the solicitation. *Deloitte Consulting, LLP, et al., B-411884 et al.*, Nov. 16, 2015, 2016 CPD ¶ 2 at 6. In reviewing a protest challenging an agency's technical evaluation, our Office will not reevaluate the quotations; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *Id.*

As described above, the solicitation included an attached specification sheet that detailed the salient characteristics for the required wheel loader, including such characteristics as 23.5 R25 tires and a high-lift bucket. RFQ at 7. The six salient characteristics that formed the basis of the agency's rejection of the Volvo L220H were not included in the specification sheet or anywhere else in the solicitation. COS at 1.

The agency argues that the solicitation incorporated the six salient characteristics by reference because the solicitation stated that the wheel loader must meet the salient features or specifications of the Caterpillar 980, which necessarily included *all* of the Caterpillar 980's characteristics. MOL at 2 (emphasis added). The agency points out that these characteristics were easily discoverable on Caterpillar's website.⁵

⁵ The agency also argues that even if we were to determine that these salient characteristics were not encompassed by reference, the protester's wheel loader is "significantly different" from the Caterpillar 980 wheel loader and therefore the agency reasonably determined that it was technically unacceptable. Agency's Resp. to GAO Req. The agency's argument is misplaced where the solicitation expressly identified the salient characteristics that it required an equal product to meet. The consideration of significant differences between a brand name and an equal product generally applies where a solicitation for a brand name or equal product is defective because it failed to specify salient characteristics as required by applicable FAR provisions.

Absent the identification of any salient characteristics in a brand name or equal solicitation, our Office is left to consider whether an agency had a reasonable basis for rejecting the equal product. In such a case, the standard our office has used is whether the agency reasonably found the equal product to be "significantly different" from the brand name product. *Pitney Bowes, supra*; see also *Ciba Corning Diagnostics Corp.*, B-223131, Aug. 13, 1986, 86-2 CPD ¶ 185 (explaining that a brand name or equal solicitation is defective if salient characteristics are missing and bidders offering equal products are left to guess at the desired essential qualities of the brand name item, but nevertheless concluding that under the circumstances, an equal product that is significantly different from the brand name product may be reasonably rejected).

We are not persuaded by the agency's argument. Once vendors are informed of the criteria against which proposals will be evaluated, the agency must adhere to them. *Access Logic, Inc.*, B-274748, B-274748.2, Jan. 3, 1997, 97-1 CPD ¶ 36. In a brand name or equal acquisition, the contracting agency has an obligation to inform vendors of the characteristics that are essential to the government's needs and a product offered as an "equal" one need not meet unstated features of the brand name product. *Id.* See also *Pitney Bowes, Inc.*, B-412185.2, *et al.*, May 6, 2016, 2016 CPD ¶ 147 (explaining in part that an equal product is not required to meet the exact characteristics of a brand name product where those characteristics are not stated in the solicitation).

The language in the solicitation that the wheel loader must meet the salient features or specifications of the Caterpillar 980 cannot be reasonably interpreted as directing vendors to find and meet additional salient characteristics not expressly stated, even when considered with the broadest interpretation. Not only would such an interpretation be counterintuitive to the solicitation itself (in that it included a list of salient characteristics and this interpretation would require vendors to somehow know this list was incomplete), but is also contrary to procurement regulations. FAR 11.104(b) (solicitations must include "a general description of those salient physical, functional, or performance characteristics of the brand name item that an 'equal' item must meet to be acceptable for award).

Moreover, the agency only cites six characteristics as the basis for rejecting the Volvo L220H despite finding that it apparently did not meet 10 other unstated characteristics listed on the technical evaluation form. This further demonstrates the agency's inconsistent consideration of the characteristics and that it appeared to be deciding what characteristics it considered to be salient for the first time during its evaluation of quotations. Thus, the record reveals that the agency did not transparently convey what salient characteristics would form the basis of its evaluation as required by FAR 11.104(b).

Furthermore, the agency's intention to evaluate quotations based on unstated salient characteristics is fundamentally unreasonable because the failure of a solicitation to list the salient characteristics of the desired item improperly restricts competition by precluding vendors of equal products from determining what characteristics are considered essential for its item to be accepted. *Kingdomware Technologies*, B-407389, Dec. 4, 2012, 2012 CPD ¶ 348 at 3. As a result, we conclude that the agency's evaluation was improper and the protest must be sustained.

RECOMMENDATION

We recommend that the agency terminate the task order issued to Caterpillar for the convenience of the government and make award based on the salient characteristics identified by the solicitation. Alternatively, the agency should amend the underlying solicitation to accurately reflect the salient characteristics it requires; obtain and evaluate revised quotations; and issue the task order to the firm identified as the successful vendor under the revised solicitation. We also recommend that AMH be

reimbursed the costs of filing and pursuing its protest. 4 C.F.R. § 21.8(d)(1). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel