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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: M.Braun, Inc.

File: B-298935.2

Date: May 21, 2007

Thomas Dobbins for the protester.

Kenneth A. Redden, Esq., Environmental Protection Agency, for the agency.

Nora K. Adkins, Esq., Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An agency is not permitted to consider a late quotation, where the solicitation contained a late submission provision that limited the agency's consideration of late quotations, and no exception to the provision applied.

DECISION

M.Braun, Inc. protests the issuance of a purchase order to Premier Technology, Inc. under request for quotations (RFQ) No. RFQ-DC-06-00339, issued by the Environmental Protection Agency (EPA), for a glovebox to be used by the EPA's National Enforcement Investigations Center in Denver, Colorado.

We sustain the protest.

The RFQ, issued August 11, 2006 as a small business set-aside and a commercial item acquisition, sought quotations for a glovebox, which is a container that allows for the rapid identification of the exact chemical structure of hazardous substances in an isolated engineering controlled environment. Contracting Officer's Statement (COS) at 1. The RFQ requested fixed-price quotations and included the following evaluation factors in descending order of importance: technical capability, past performance and price. The RFQ incorporated by reference the standard "Instructions to Offerors--Commercial Items" clause of the Federal Acquisition Regulation (FAR) § 52.212-1, and required the submission of quotations electronically by 2 p.m., September 11, 2006. Vendors were informed that issuance of the "purchase order [would be] based upon 'best value' methodology." RFQ at 2; Id. amend. 2, at 1.

Three quotations, including M.Braun's, were received by the closing time for receipt of quotations. Premier attempted to submit its quotation prior to the 2 p.m. closing time, but its quotation, which included "zipped" files, was not accepted by the agency's electronic system.¹ After being informed by the contracting officer that the EPA could not accept zipped files, Premier resubmitted its quotation without zipped files. This submission was received by the agency at approximately 2:15 p.m., after the time set for receipt of quotations. COS at 2-3.

Premier's quotation included the following "Clarifications and Exceptions" language:

1. This proposal reflects raw material pricing as of 9/11/06. Due to the current volatility of the steel markets, raw material pricing will need to be negotiated at time of release for fabrication.
2. Leak testing can be performed at 10 times normal operating pressure as indicated in the RFQ. Premier would like to propose mass spectrometer helium leak testing in accordance with American Glovebox Society Standards as an alternative to the specified method.

Agency Report (AR), Tab 9, Premier Quotation, at 11th unmarked page.

All four quotations were evaluated by the agency's technical review committee, which found that Premier's quotation complied "with the terms, expectations and overall quality as outlined in the statement of work (SOW)." The other three quotations, including M.Braun's, "while adequate, were judged lower in overall quality." In this regard, the evaluation committee concluded that the protester's quotation "appeared to be a customization of a COTS [commercial off the shelf] production model and had limited details on the project plan." AR, Tab 13, Technical Review of Quotations, Sept. 19, 2006, at 2.²

After the technical evaluation, Premier transmitted an e-mail to the contracting officer, stating that "[h]ere is the revised document we spoke of. Let me know if there is anything further you need." AR, Tab 14, E-mail from Premier to Contracting Officer, Sept. 20, 2006, at 1. Attached to this e-mail was a revision to Premier's "Clarifications and Exceptions," which deleted the section that provided for future price negotiation.

¹ A "zipped" file is one that is in a compressed, ".zip" format.

² The technical review committee evaluated each quotation with respect to overall thoroughness of the proposed technical approach, past experience with similar custom gloveboxes, details of the cost estimate, and impression of overall quality. AR, Tab 13, Technical Review of Quotations, at 1.

Thereafter, the contracting officer determined that Premier's quotation represented the "best value" to the government. AR, Tab 16, Source Selection Memorandum. On September 22, the EPA issued to Premier a purchase order, which provided for the installation of the glovebox by late May 2007. This purchase order incorporated by reference Premier's September 11 quotation, which included Premier's reservation of future price negotiation. AR, Tab 19, Purchase Order to Premier, at 2.

Following a debriefing, on October 4, M.Braun protested to our Office. On October 12, the EPA informed our Office that it was taking corrective action and would reevaluate the quotations. Thereafter, we dismissed the protest as academic.

On January 4, 2007, after concluding its reevaluation of the quotations, the EPA affirmed the selection of Premier's quotation.³ In its reevaluation, the agency concluded that only Premier's quotation was technically acceptable. With respect to M.Braun's quotation, the agency concluded that the protester had failed to provide sufficient information and detail to demonstrate the acceptability of the firm's quotation. AR, Tab 24, Technical Reevaluation of Quotations.

After receiving notice of the EPA's confirmation of Premier's selection, the protester promptly filed a Freedom of Information Act (FOIA) request with the EPA, seeking information pertaining to the glovebox procurement. This protest followed within 10 calendar days of receiving the FOIA information from the agency.

M.Braun contends that the EPA improperly accepted Premier's late quotation submission and conducted discussions with Premier while not allowing M.Braun to address evaluated deficiencies in its quotation.

Generally, late quotations may be considered up to the time of issuance of the order, because an RFQ, unlike a request for proposals (or an invitation for bids), does not seek offers that can be accepted by the government to form a contract. Rather, the government's purchase order represents an offer that the vendor may accept through performance or by a formal acceptance document. DataVault Corp., B-248664, Sept. 10, 1992, 92-2 CPD ¶ 166 at 2. Moreover, we have found that language in an RFQ requesting quotations by a certain date does not establish a firm closing date for receipt of quotations, absent a late submission provision expressly providing that quotations must be received by that date to be considered. Instruments & Controls Serv. Co., B-222122, June 30, 1986, 86-2 CPD ¶ 16 at 3. Here, however, the RFQ incorporated the standard "Instruction to Offerors -- Commercial Items" FAR clause,

³ The agency's original technical evaluation report (before the agency's corrective action) and the reevaluation report (after the corrective action) were signed by the same individual.

which expressly limits the agency's consideration of a late submission. See FAR § 52.212-1(f).

The EPA concedes that Premier's quotation was late, but argues that consideration of Premier's late quotation was proper, because Premier's quotation was the only acceptable quotation received by the agency and therefore could be considered under FAR § 52.212-1(f)(2)(i)(C).⁴

The agency's argument, however, is not supported by the record, which establishes that, as submitted, Premier's quotation was not acceptable. As noted above, the RFQ required the submission of fixed-price quotations.⁵ Premier did not submit a fixed-price quotation, but conditioned its price, stating that "raw material pricing will need to be negotiated" in the future. AR, Tab 9, Premier Quotation, at 11th unmarked page. Where an agency solicits fixed-price quotations, it is not permitted to accept quotations that are not fixed-price. It is fundamental that an agency may not solicit quotes on one basis and then issue an order on a materially different basis when other vendors would be prejudiced by such an agency action. See The Mangi Envtl. Group, Inc., B-294597, Nov. 29, 2004, 2004 CPD ¶ 238 at 2.

The protest is sustained.⁶

Ordinarily, we would recommend that the agency terminate the order issued to Premier and consider the protester's and other vendors' quotations for the issuance

⁴ FAR 52.212-1(f)(2)(i)(C), which was incorporated by reference in the RFQ, provides that an agency may consider a late submission where the submission was received before award, would not unduly delay the acquisition, and that "[i]f this solicitation is a request for proposals, it was the only proposal received." Even though the present case involves a late quotation rather than a late proposal, because the agency relies upon this provision to accept Premier's late quotation, we will assume, but do not decide, that the provision is applicable in situations where only one acceptable quotation was received. As discussed below, we find Premier's quotation was not acceptable and this provision is not applicable. We note that subparagraph (A) of this clause also provides an exception for consideration of late quotations that were submitted electronically and were received at the "initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of offers." Because Premier only attempted to electronically submit its quotation on the closing date, this exception was also not applicable.

⁵ Agencies are required to provide for fixed-price or fixed-price with economic price adjustment orders or awards in commercial item acquisitions. See FAR § 12.207.

⁶ Because we sustain M.Braun's protest on the basis that the agency improperly accepted Premier's late quotation, we need not address the firm's complaint that the agency treated the vendors unequally by conducting discussions with only Premier.

of an order. However, here, the record shows that Premier has substantially performed the purchase order, such that it is not feasible to recommend termination of the order. See AR, Tab 19, Premier Purchase Order, at 3rd unmarked page, Tab 33, Premier's Glovebox Delivery Schedule, Mar. 6, 2007. Accordingly, we recommend that the protester be reimbursed its costs of quotation preparation and costs of filing and pursuing the protest, including reasonable attorney's fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1), (2) (2007). M.Braun should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision.

Gary L. Kepplinger
General Counsel