



## Decision

**Matter of:** California Industrial Facilities Resources, Inc., d/b/a CAMSS Shelters

**File:** B-403397.3

**Date:** March 21, 2011

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### DIGEST

Protest that solicitation is unduly restrictive because it requires firms to submit proposals based solely on a brand name list of particular products is sustained where the solicitation does not include salient characteristics for the brand name products, and the agency has not taken the steps necessary to procure its requirements using other than full and open competition.

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### DECISION

California Industrial Facilities Resources, Inc., d/b/a CAMSS Shelters, of Monroe, Washington, protests the terms of request for proposals (RFP) No. SPM8EJ-10-R-0004, issued by the Defense Logistics Agency (DLA) for tents, shelters and associated accessories. CAMSS asserts that the RFP fails to include specifications that are adequate for purposes of competing for the agency's requirements.

We sustain the protest.

### BACKGROUND

The RFP was issued as part of the tailored logistics support (TLS) program. The agency intends to award multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts for the acquisition of commercial tents and shelters, along with associated accessories, for a base year with three 1-year option periods. The agency advises that the requirement is for approximately \$800 million worth of tents, shelters and accessories.

The RFP includes a general description of the agency's requirements. In this regard, the RFP provides that:

The scope of this contract includes mobile, non-permanent shelters and soft-sided tents which can be readily assembled and disassembled in the field for troop movement, as well as accessories related to the set-up, repair and replacement, habitability and field movement and deployment of those items defined to be within the scope of the program.

RFP, Statement of Work (SOW), § 2(a).<sup>1</sup> The RFP further states that the agency's requirements can be generally categorized into the following 12 types of shelters: (1) aviation hangers, (2) warehouse units, (3) housing/billeting units, (4) command centers, (5) decontamination units, (6) emergency response shelters, (7) HAZMAT shelters, (8) mobile medical hospitals, (9) first aid stations, (10) security gates/checkpoints, (11) field shelters and (12) large shops. Id. In addition, the RFP provides that the scope of the contract will include accessories for these tents and structures, citing as examples of such accessories lighting equipment and combination storage/power generation/environment control trailers. Id. Finally, the RFP references seven Federal Supply Classes (FSCs) of commercial items that will be included within the scope of the contract, but specifically advises that:

The scope of this contract is not limited to these FSCs. In addition to the categories provided above, these FSCs are merely an indication of some of the general categories supported under this contract. Likewise, not all items within these supply classes may be covered under this contract.

Id.

In addition to the above general description of the agency's requirements, the RFP included two detailed lists of specific items. The first, identified as the core list, includes 249 brand name products identified by manufacturer, manufacturer's part number and national stock number (NSN); this list includes "estimated 12 month demand" quantities for each of the products.<sup>2</sup> Agency Report (AR), exh. B, at 59-63. The second list, identified as Attachment 4, includes 117 additional brand name

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<sup>1</sup> The record shows that the RFP has been amended a number of times, and that the SOW has been changed through those amendments. The latest version of these provisions is in amendment 8 to the RFP, included in the record as exhibit H.

<sup>2</sup> DLA states that the core list is based on the agency's customer usage demand for items within scope of the contract for fiscal year 2008.

products, also identified by manufacturer, manufacturer's part number and NSN; no quantities were identified for these items. AR, exh. E, at 2-5.

With respect to both lists, the RFP cautions that the listed products are merely representative--and not inclusive--of the agency's overall requirements. As to the core list, the RFP provides that:

DLA Troop Support has identified approximately 249 Core List items to be supplied under any resultant contract. In addition to the items included on the Core List, TLS [tailored logistics support] Contractors will be required to provide the logistical support necessary to supply any of a variety of items, from various manufacturers, determined to be within the scope of this contract.

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The Core List is only considered representative of the items that may be required by DLA Troop Support's customers throughout the duration of the contract. Acquisitions under this contract are not limited to the items on the Core List, and the Government anticipates a large number of items that are within the scope of the program, but not included on the Core List, will be acquired through this program. Based on customer demand, additional items will be introduced as the term of the TLS program contract progresses.

RFP, SOW, § 2(a). Similarly, as to the Attachment 4 list, the RFP provides that:

Attachment 4 includes items covered by the Scope of this acquisition which have been procured by DLA in the past. DLA expects to make these items available to authorized customers in addition to the items included in the Core List and any other item determined to be within the scope of the contract. No pricing for these items is requested or accepted at this time. It is intended that, as customer demand/usage data develops for Attachment 4 items, requests for pricing will be submitted to all TLS awardees/vendors so that these items can be acquired and may become additions to the TLS program Core List. TLS Vendors and prospective offerors are encouraged to develop relationships with manufacturers included on Attachment 4 as well.

RFP, SOW, § 2(d)(5) (emphasis in original).

In summary, the solicitation very broadly defined the agency's requirements, but did not include any detailed specifications; while, as noted, it included representative lists of brand name products, no salient characteristics were specified for the listed products.

As for price, prospective offerors were required to propose prices for each of the brand name items listed in the core list. The solicitation specifically cautioned in this regard that offerors were required to price, and to be able to supply, all of the brand name items included in the core list. RFP, Instructions to Offerors, §§ III (1) (d) and (e).

CAMSS asserts that the solicitation fails to include specifications that will permit it to compete for the agency's requirements. According to the protester, the agency is required, at a minimum, to list the salient characteristics of the brand name items included in the core list, so that manufacturers of other, comparable, items (such as CAMSS) can compete for the agency's requirements.

The agency maintains that the RFP contains an adequate statement of the agency's requirements, including the supplies or services to be provided. The agency notes that it may properly use an ID/IQ-type contract where, as here, it is unable to precisely identify its requirements at the time of award. Further, the agency explains that the primary purpose of the core list is to price the initial proposals and advise potential offerors of the types of items that may be required under the resultant contracts. According to the agency, after award, and in response to customer demand, it anticipates adding items to the contracts so that additional products not currently available under the contracts can be purchased.

## ANALYSIS

In effect, CAMSS's position is that the agency's approach of requiring offerors to submit prices for a list of particular brand name items--without also including salient characteristics to allow firms to propose equivalent products--fails to meet the most basic requirements for full and open competition under the Competition in Contracting Act (CICA). We agree.

CICA expressly requires agencies to specify their needs and develop specifications in a manner designed to achieve full and open competition. 10 U.S.C. § 2305(a)(1)(A) (2006). To that end, solicitations are required to include specifications that permit full and open competition, and may include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency. 10 U.S.C. § 2305(a)(1)(B). Agencies are further instructed that they may use specifications stated in terms of function (so that a variety of products or services may qualify), performance characteristics or design requirements, depending on the nature of the requirements. 10 U.S.C. § 2305(a)(1)(C).

These basic requirements are echoed in FAR part 11, under which, to the maximum extent practicable, agencies must articulate their requirements in terms of functions to be performed, performance characteristics required, or essential physical characteristics. FAR § 11.002(a)(2). While the use of performance specifications is preferred, FAR §§ 11.101, 11.104, the FAR also permits agencies in appropriate circumstances to use "brand name or equal" purchase descriptions, where the

purchase description includes a statement of the salient physical, functional or performance characteristics that are necessary to render an “equal” product eligible for award. FAR § 11.104. Agencies are precluded from specifying their requirements solely in terms of a particular firm’s product unless the particular brand name, product or feature is essential to the government’s needs, and market research shows that other companies’ similar products lacking the particular feature do not meet the agency’s needs, or cannot be modified to meet the agency’s needs. FAR § 11.105. Further, when procuring on a brand name only basis, agencies are required to follow documentation and approval procedures for acquiring goods or services using other than full and open competition. FAR § 11.105.

Here, the RFP required prospective offerors for the ID/IQ contract to submit proposals exclusively for the exact brand name items specified in the core list, with no provision for offering alternate, “equal,” products. Although the solicitation thus amounts to a brand name only procurement, the agency has not prepared and executed the required justification and approval (J&A) for use of other than full and open competition. 10 U.S.C. §§ 2304(c), (f); FAR § 11.105; Critical Process Filtration, Inc., B-400747, et al., Jan. 22, 2009, 2009 CPD ¶ 25, at 5-7 (where purchase exceeds simplified acquisition value threshold, agency is required to prepare J&A before using brand name only specification, or to conduct acquisition using full and open competition).<sup>3</sup> The agency’s actions therefore are improper.

DLA asserts that its decision not to include salient characteristics for the 249 core list items is based on the fact that the salient characteristics for one user might be different from another user, depending on, for example, considerations such as the geographic location where the tent or shelter might be used. As noted above, however, while the use of a “brand name or equal” approach is one method for describing the agency’s requirements, there are various ways (including the use of either functional, performance or design specifications) for the agency to express its requirements in a manner that allows for full and open competition, and DLA has not shown that one or another of these methods is inadequate for purposes of preparing an adequately written solicitation. In any case, as discussed above, the agency is required to execute the required J&A for use of other than full and open competition before it can rely on the brand name only approach embodied in the current RFP.

Given the terms of the current solicitation along with DLA’s failure to execute the required J&A for use of other than full and open competition, we sustain CAMSS’s protest.

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<sup>3</sup> As noted, the agency anticipates that its requirement is for approximately \$800 million, an anticipated amount that exceeds the general simplified acquisition threshold of \$150,000. FAR § 2.101.

## RECOMMENDATION

We recommend that the agency prepare an adequately written solicitation that meets the CICA requirement for full and open competition.<sup>4</sup> In the alternative, we recommend that the agency prepare and execute an appropriate J&A that sets forth the agency's reasons for conducting its acquisition using other than full and open competition. We also recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations 4 C.F.R. § 21.8(d)(1) (2010). The protester should submit its certified claim for these costs, detailing the time spent and the costs incurred, directly to the agency within 60 days of receiving our decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson  
General Counsel

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<sup>4</sup> In the event that DLA determines to use a "brand name or equal" approach, we note that, because the agency is not actually acquiring the items on the Attachment 4 list, it need not include salient characteristics for those items at this time. However, if and when it adds the Attachment 4 items to its core list, we would anticipate that it would also include salient characteristics for the added items.