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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Logistics Network, Inc.

File: B-408995

Date: January 6, 2014

Jim Yeatts, Logistics Network, Inc., for the protester.
David W. Altieri, Esq., Department of Veterans Affairs, for the agency.
Matthew T. Crosby, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably rejected protester's response to brand name or equal solicitation on basis that protester provided insufficient information to evaluate offered products where record reflects that protester offered "equal" products and protester's product information consisted almost entirely of text taken from solicitation and images that appeared on brand name manufacturer's website.

DECISION

Logistics Network, Inc. (LNI), of Norwood, North Carolina, protests the rejection of its response to solicitation No. 528-13-2-5088-0060 issued by the Department of Veterans Affairs for modular patient room furniture at the Veterans Affairs Medical Center in Canandaigua, New York.

We deny the protest.

BACKGROUND

The solicitation, which was issued on September 6, 2013, contemplated the issuance of a fixed-price purchase or delivery order for specified quantities of 19 furniture and furniture-related items.¹ Solicitation at 1, 3; Contracting Officer's Statement ¶¶ 3. The solicitation did not directly state the basis for award, but it

¹ The solicitation was issued as FedBid Buy No. 540670_02. FedBid is a commercial online procurement services provider that operates FedBid.com.

inferred that award would be made based on the lowest price submitted for items conforming to the solicitation requirements. Solicitation at 2. Pricing was to be submitted in an online reverse auction. Contracting Officer's Statement ¶¶ 2, 3.

The solicitation stated that the procurement was being conducted on a "brand name or equal basis," and it incorporated a statement of work (SOW) that provided the manufacturer name, model number, and salient characteristics of the items being procured. Solicitation at 1-2. Regarding "equal" items, the solicitation instructed as follows:

Sellers MUST enter exactly what they are bidding (including make, model and description) into the blank description field in order for the bid to be considered. The Buyer will evaluate 'equal' items on the basis of information furnished by the Seller or identified in the bid and reasonably available to the Buyer. The Buyer is not responsible for locating or obtaining any information not identified in the Bid.

Id. at 2. Also regarding "equal items," the solicitation stated that firms "must include . . . [p]roduct literature/brochures for items submitted as 'equal' to brand name [items]." Id. at 2.

The agency received three responses to the solicitation, including one from LNI. Contracting Officer's Statement ¶ 3. LNI's response included a statement that the firm would provide items that were identical to--i.e., copies of--the brand name items. Protest, attach. 4, LNI Transmittal Ltr. to VA (Sept. 11, 2013), at 2; Protest, attach. 5, LNI Product Literature, at 1. LNI's response also included product literature that the firm prepared specifically for this procurement. Protest, attach. 5, LNI Product Literature. The product literature included a page for each item listed in the solicitation's SOW. Id. at 2-20. These pages consisted almost entirely of short excerpts taken from the item descriptions in the SOW. Id. Some pages also included images of items as they appear on the brand name manufacturer's website. Id. at 2-6. Other pages stated "no image available." Id. at 7-15, 18-20.

Upon reviewing LNI's response, the contracting officer found that certain statements within the response together with the images that appeared on the brand name manufacturer's website, made it unclear whether LNI was offering "equal" or brand name items. See Contracting Officer's Statement ¶¶ 4-5. After further review, and after contacting the brand name manufacturer and learning that LNI was not an authorized dealer for that firm, the contracting officer concluded that LNI was not offering brand name items. Id. ¶¶ 4-5. He then determined that LNI's product literature failed to provide sufficient information to evaluate LNI's offer of "equal" items. Id. ¶ 6. For this reason, the contracting officer rejected LNI's submission as non-responsive. Id.

The contracting officer also rejected the submission of the second firm. Id. ¶ 7. However, he found the third firm's submission to be responsive, and its pricing to be reasonable. Id. ¶ 8. Accordingly, on September 22, the contracting officer selected that firm for award. Id. ¶ 9.

On September 24, LNI received information from the agency about why its response to the solicitation was rejected. On September 30, LNI filed a protest with our Office.

DISCUSSION

LNI asserts that the agency's rejection of its response to the solicitation was improper for a number of reasons. We have considered all of LNI's arguments, and, based on the record, we conclude that none have merit. Below we discuss LNI's principal contentions.

LNI argues that the agency's rejection of its response to the solicitation was unreasonable because LNI represented that it would provide items identical to those of the brand name manufacturer. Protest at 4; Comments at 3. In support of this argument, LNI states that neither the solicitation, nor the Federal Acquisition Regulation prohibits a firm from supplying an item that is identical to the item of another manufacturer. Protest at 4; Comments at 2. LNI also points out that the agency has not identified any salient characteristics listed in the solicitation that the items it offered failed to meet. Comments at 3-4.

The agency counters that LNI provided insufficient information to show that its items conformed to the salient characteristics listed in the solicitation, and, therefore, rejection of the firm's response to the solicitation was appropriate. Agency Report (AR) at 2-3. We agree.

Under a brand name or equal solicitation such as the one here, firms offering equal products must submit sufficient descriptive literature to permit the contracting agency to assess whether the equal product meets all the salient characteristics specified in the solicitation. See OnSite Sterilization, LLC, B-405395, Oct. 25, 2011, 2011 CPD ¶ 228 at 2; American Gov't Mktg., Inc., B-294895, Nov. 22, 2004, 2005 CPD ¶ 109 at 2; see also SOG Specialty Knives, Inc., B-281877, Apr. 12, 1999, 99-1 CPD ¶ 72 at 2; Advanced Med. Sys., Inc., B-258945, Feb. 13, 1995, 95-1 CPD ¶ 67 at 2. When the descriptive literature submitted fails to establish that the offered products would meet all of the listed salient characteristics, the response to the solicitation is properly rejected. See OnSite Sterilization, LLC, supra; American Gov't Mktg., Inc., supra; see also SOG Specialty Knives, Inc., supra; Infrared Techs. Corp., B-255709, Mar. 23, 1994, 94-1 CPD ¶ 212 at 3-4.

Here, the solicitation expressly stated that firms offering "equal" items must provide the make, model, and description of the items and provide "[p]roduct literature/

brochures.” Solicitation at 2. Additionally, the solicitation warned that the agency would not be “responsible for locating or obtaining any information not identified” in a response to the solicitation. Id. The limited information in LNI’s product literature consists almost entirely of text taken from the solicitation itself and images that appear on the brand name manufacturer’s website. Given that LNI’s response to the solicitation lacked almost any information that LNI itself generated about its specific products, we see no basis to question the contracting officer’s rejection of LNI’s response to the solicitation.

LNI also asserts that the contracting officer’s inquiry into whether LNI was an authorized distributor of the brand name manufacturer’s products reflects a bias on the part of the agency for products manufactured by the brand name manufacturer. Comments at 2; see also Protest at 4-5.

The agency states that the communication with the brand name manufacturer occurred because it was unclear from an initial review of LNI’s response to the solicitation whether the firm was offering “equal” or brand name items. See AR at 4.

Government officials are presumed to act in good faith, and a protester’s contention that procurement officials are motivated by bias or bad faith thus must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Career Innovations, LLC, B-404377.4 , May 24, 2011, 2011 CPD ¶ 111 at 7-8; Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6.

We agree with the agency that LNI’s response to the solicitation includes statements that cast question on whether the firm is offering the brand name manufacturer’s products or other products. Further, there no evidence in the record, other than LNI’s speculation, to support LNI’s allegation of bias. Under these circumstances, we see no basis to further consider LNI’s allegation.

Finally, LNI asserts that because the solicitation used brand name items as the basis for the design of the items being procured, the agency ensured that an unjustified sole source award would be made. Protest at 6-7; Comments at 6. Our Bid Protest Regulations provide that protests alleging apparent improprieties in a solicitation must be filed before responses to the solicitation are due. 4 C.F.R. § 21.2(a)(1) (2013). LNI’s assertion amounts to a challenge against the solicitation’s terms, and is therefore untimely.

The protest is denied.

Susan A. Poling
General Counsel