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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: CI Filing Systems, LLC

File: B-411012

Date: April 17, 2015

Corey J. Hogan, Esq., and Randy C. Mallaber, Esq., HoganWillig, for the protester.
Roy E. Potter, Esq., and Melissa A. Pachikara, Esq., Government Printing Office,
for the agency.
Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Where solicitation sought bids for file folders with embedded fasteners, and provided that adhesive fasteners were unacceptable, the agency reasonably rejected protester's bid as nonresponsive based on the agency's determination that the protester was offering to provide file folders with adhesive fasteners.

DECISION

CI Filing Systems, LLC, (CFS) of Totowa, New Jersey, protests the Government Printing Office's (GPO) rejection of the bid CFS submitted in response to invitation for bids (IFB) No. 386-060S R-1 (also referred to as "Jacket 386-060S R-1") seeking bids to provide "A-File" folders for the Department of Homeland Security (DHS).¹ CFS challenges the agency's determination that CFS's bid was nonresponsive to the solicitation requirements.

We deny the protest.

BACKGROUND

The agency published the IFB at issue in September 2014, seeking bids to provide file folders that complied with various requirements, including a requirement that the

¹ The folders are used by DHS in connection with its responsibilities regarding immigration matters.

folders have “embedded” metal fasteners. Protest, exh. A, Solicitation, at 6. More specifically, the solicitation contained the following notation directly below the specifications for fasteners:

NOTE: Fasteners MUST be permanently embedded within the folder leaves. Glue-on or Adhesive type fasteners will not be accepted.^[2]

Id. (bolding and capitalization in original).

On or before the September 9 closing date, bids were submitted by various offerors, including CFS and its sister corporation, IFS Filing Systems LLC (IFS).³ Thereafter, GPO determined that CFS’s affiliate was the low bidder and, on September 16, issued a purchase order to IFS. Protest, exh. E, Timeline for Jacket 386-060, at 5. On October 8, IFS delivered pre-production samples of the folders that included fasteners which IFS described as “Permclip bonded fastener[s].” Protest, exh. E, Letter from HoganWillig (Counsel for both IFS and CFS) to GPO Contracting Officer, Oct. 15, 2014, at 1.

On October 10, following receipt and consideration of the pre-production samples, the GPO contracting officer issued a cure notice to IFS stating that the Permclip fasteners failed to comply with the terms of the solicitation, which required fasteners to be “embedded within the folder leaves.” Protest, exh. E, Timeline for Jacket 386-060, at 6. The contracting officer concluded that the Permclip fasteners were “adhesive type fasteners” that the solicitation expressly identified as unacceptable. See Solicitation at 6.

On October 14, counsel for IFS responded to the cure notice, arguing, among other things, that the Permclip fasteners should be considered “embedded” because they are attached to the folders using a “proprietary bonding medium.”⁴ Protest, exh. E, Letter from HoganWillig to GPO Contracting Officer, Oct. 14, 2014, at 3. Alternatively, IFS asserted that, since various other federal government agencies have successfully used the Permclip fasteners, the contract should be modified to make the Permclip fasteners acceptable. In this regard, IFS presented a proposed contract modification, which stated:

² The solicitation also advised offerors that “[t]hese specifications have been extensively revised to include various new requirements.” Protest, exh. A, Solicitation at 1.

³ CFS states that “IFS and [CFS] share common ownership.” Protest at 5.

⁴ With its response, IFS also presented various information regarding the bonding process which IFS asserts established that the Permclip fasteners are “embedded” within the file folders.

Change is hereby made in Purchase Order 92580, Jacket 386-060, as follows:

The Permclip Bonded/Welded Fastener shall be considered appropriate for this Jacket, in compliance with specifications.

Protest, exh. E, IFS's Proposed Contract Modification, Oct. 14, 2014.

On November 5, the contracting officer again advised IFS that use of the Permclip fasteners failed to comply with the terms of the solicitation, noting that Permclip's own website described them as "adhesive" fasteners. Protest, exh. E, Letter from HoganWillig to GPO, Nov. 10, 2014, at 5. On November 10, CFS responded, stating that the language on the Permclip website should not be considered because that language had been changed to represent that the bonding process "permanently embeds the fabric overlay deep into the folder fibers." Id. Accordingly, CFS asserted that, "since [the] website has been changed . . . we expect that [the contracting officer's] objections have been satisfied." Id. On December 10, the contracting officer issued a final decision terminating IFS's contract for default. Agency Report (AR), Feb. 4, 2015, at 2; Protester's Comments on Agency Report, Tab 1, Request for Inspector General Investigation, at 5.

On December 11, the contracting officer determined that CFS was the next low bidder and, accordingly, sent CFS an email seeking confirmation that the bid it previously submitted was still valid. AR, Tab 3, Email from GPO Contracting Officer to CFS's Chief Executive Officer (CEO), Dec. 11, 2014. Additionally, because the contracting officer noted that CFS's bid was nearly identical to IFS's bid, he also asked CFS: "[C]an you give me information about the fastener that will be used in the folder?" Id.

On December 13, CFS responded that its previously submitted price was still valid. However, with regard to the fasteners, CFS declined to provide any additional information stating only: "[W]e will use the fasteners according to the specification." AR, Tab 3, Email from CFS's CEO to GPO Contracting Officer, Dec. 13, 2014.

On December 15, the GPO contracting officer again sought clarifying information regarding the fastener that CFS was offering to provide, stating: "Can you please send me a sample of a job you have produced with the fastener you intend to use for this job?" Email from GPO Contracting Officer to CFS CEO, Dec. 15, 2015. On December 24, the contracting officer clarified his request, stating "I am not asking for a sample of the actual job, just a sample of something similar that you have previously produced with the type of fastener called for in the [solicitation] specs." AR, Tab 3, Email from GPO Contracting Officer to CFS, Dec. 24, 2014.

On December 29, CFS responded to GPS's request stating, "We do not have any samples to send you." AR, Tab 3, Email from CFS's CEO to GPO Contracting Officer, Dec. 29, 2014.

On December 30, the contracting officer advised CFS that, based on CFS's unwillingness to substantively respond to the contracting officer's requests, along with the fact that CFS's bid was nearly identical to the bid submitted by IFS (which had led to termination for default of IFS's contract), CFS's bid was considered nonresponsive to the solicitation requirements regarding embedded fasteners. AR, Tab 5, Letter from GPO Contracting Officer to CFS CEO, Dec. 30, 2014. This protest followed.

DISCUSSION

CFS does not dispute that it intended through its bid to provide the same Permclip fasteners that had been rejected by GPO as unacceptable in connection with the award to IFS.⁵ CFS argues, however, that the Permclip fastener is superior to other fasteners and, therefore, should have been accepted by GPO; that the bonding process associated with the Permclip fastener should be considered to meet the solicitation requirement for embedded fasteners; and that the agency's request for a sample of the fastener CFS was offering was improper. We find no basis to sustain CFS's protest.

First, CFS asserts that it believes the Permclip fastener to be "the strongest, most reliable, and safest fastener available," maintaining that it "is widely used by the federal government," and asserting that "our file folders provide the government with the best product at the lowest price." Protest at 3-4. Accordingly, CFS asserts that "[p]recluding the use of the Permclip fastener would surely have an anti-competitive effect on the bidding process" and, therefore, maintains that the contracting officer's rejection of its bid was unreasonable. Id. at 4.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. A protest challenging the terms of a solicitation must be filed prior to the solicitation closing date. 4 C.F.R. § 21.2(a)(1). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.--Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

⁵ Specifically, in pursuing this protest, CFS states: "[CFS] would have been delivering A-files with the same fasteners as IFS used." Protester's Comments, Feb. 13, 2015, at 5.

Here, to the extent CFS's protest is based on its assertion that the terms of the solicitation effectively precluded consideration of a product that, according to CFS, is superior to the products sought by the solicitation, its protest constitutes an untimely challenge to the terms of the solicitation. As noted above, the solicitation established a September 9, 2014 closing date. CFS's protest to this Office was not filed until January 9, 2015. Accordingly, CFS's assertions that the terms of the solicitation improperly limited competition or precluded consideration of what CFS believes to be a superior product will not be considered.

Next, CFS protests that the agency erroneously determined that its bid failed to comply with the terms of the solicitation regarding embedded fasteners. In this regard, CFS presents various information and affidavits regarding the nature of the bonding process it employs, asserting on the basis of this information that the Permclip fasteners it proposed met the solicitation requirement for embedded fasteners, and disagreeing with the contracting officer's contrary determination.

As an initial matter, we note that GPO procurements are governed by GPO's Printing Procurement Regulation (PPR),⁶ rather than the Federal Acquisition Regulation (FAR). Nevertheless (as is the case of executive agency IFBs under the FAR), GPO purchasing regulations specify that any bid that fails to conform to the essential requirements of an IFB, such as specifications, shall be rejected as nonresponsive. PPR Part XII, § 3. In this regard, where a contracting officer reasonably believes that a bid is based on providing a product that does not comply with the solicitation requirements, or where a bid is ambiguous regarding what the bidder intends to provide, the bid does not constitute an unequivocal offer to meet the solicitation requirements and must be rejected. Northwestern Motor Co., Inc., B-244334, Sept. 16, 1991, 91-2 CPD ¶ 249 at 2; Crash Rescue Equip. Serv., Inc., B-245653, Jan. 16, 1992, 92-1 CPD ¶ 85 at 2. Further, in reviewing a protest challenging a procuring agency's technical assessments or determinations, our Office will generally defer to the technical expertise of the agency and will not substitute our judgment for that of the agency; rather we will review the record to determine whether the agency's judgments were reasonable. See, e.g., Analytical Innovative Solutions, LLC, B-408727, Nov. 6, 2013, 2013 CPD ¶ 263 at 3.

Here, we find no basis to question the reasonableness of the agency's determination that the Permclip fasteners were adhesive fasteners, which the IFB

⁶ GPO's PPR is available online. See www.gpo.gov/pdfs/vendors/sfas/ppr.pdf.

expressly identified as unacceptable,⁷ and that CFS's bid failed to meet the material solicitation requirements for an embedded fastener.⁸

As discussed above, the contracting officer had inspected the pre-production samples of the Permclip fasteners that were submitted by CFS's sister corporation before reaching a conclusion that the fasteners were not embedded in the file folders. Further, the agency declined to accept a proposed modification of the contract that would have changed the requirements in this regard, opting instead to terminate the prior contract for non-compliance with the solicitation requirements. Finally, the manufacturer of the fastener, Permclip, used the term "adhesive" in describing the fasteners on its website. See Protest, exh. E, Letter from HoganWillig to GPO, Nov. 10, 2014, at 5. The fact that the description of the fasteners was subsequently altered to reflect language more consistent with the terms of the solicitation does not provide a basis for concluding that the contracting officer's determination was unreasonable. In short, the record reasonably supports the agency's determination that CFS's bid to provide Permclip fasteners failed to comply with the solicitation requirements for embedded fasteners--just as IFS's bid for the same product had done--and, accordingly, was nonresponsive. Neither the fact that CFS disagrees, nor the additional information and arguments that CFS has provided, persuade this Office that the agency unreasonably determined that the Permclip fasteners fail to comply with the solicitation requirement for embedded fasteners. See, e.g., AT&T Corp., B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 19.

Finally, CFS complains that it was improper for the agency to request that CFS submit a sample of the fastener prior to contract award. In this regard, CFS argues that the terms of the solicitation did not contemplate submission of pre-production samples prior to contract award. Protest at 2-3. The agency responds that the contracting officer's questions to CFS were a reasonable alternative to awarding a contract to CFS, and then having to terminate that contract for default based on CFS's failure to comply with the embedded fastener requirement. AR, Feb. 9, 2015, at 2.

⁷ CFS's protest asserts that the solicitation "contain[ed] no prohibition on any particular make . . . of fastener." Protest at 3. To the contrary, as discussed above, the solicitation expressly stated: "Glue-on or Adhesive type fasteners will not be accepted."

⁸ To the extent CFS's protest is based on an assertion that the meaning of the term "embedded" is ambiguous, the term was apparent from the face of the solicitation and, to the extent it was ambiguous, the ambiguity was patent. Where a patent ambiguity in a solicitation is not challenged prior to the submission of bids, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); Simont S.p.A., B-400481, Oct. 1, 2008, 2008 CPD ¶ 179 at 4.

As noted above, a contracting officer has the responsibility to determine whether an offeror is committing to provide the goods or services sought by a solicitation. Northwestern Motor Co., Inc., *supra*, at 3; Crash Rescue Equip. Serv., Inc., *supra*. Here, the contracting officer specifically clarified his request to CFS, noting that he was not seeking pre-production samples under the contract, but was only seeking a sample of "something similar that you have previously produced." AR, Tab 3, Email from GPO Contracting Officer to CFS CEO, Dec. 24, 2014. On the record here, it is clear that the contracting officer was merely attempting to ascertain whether CFS's bid was offering to comply with the solicitation requirements. The record is equally clear that, in response, CFS was not forthcoming regarding its intent to provide the Permclip fasteners. Accordingly, we reject CFS's assertion that the agency's actions were improper.

The protest is denied.

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General Counsel