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Decision

Matter of: W K Engineering International, Inc.

File: B-414932

Date: October 13, 2017

Jonathan R. Hickman, Esq., Esquire Corporate Services, LC, for the protester.
Ashley M. Kelly, Esq., Defense Logistics Agency, for the agency.
Elizabeth Witwer, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a protester is not an approved source for items requiring source approval, protester is not an interested party to challenge the issuance of a purchase order for those items.
 2. Protest alleging that agency unreasonably restricted competition for a critical application item to one approved source is dismissed as untimely where the protest ground was not raised before the closing date for receipt of quotations.
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DECISION

W K Engineering International, Inc. (WKE), a small business located in Santa Clarita, California, protests the issuance of a purchase order to AMI Industries, Inc. (AMI), of Colorado Springs, Colorado, under request for quotations (RFQ) No. SPE4A7-17-T-H866, issued by the Defense Logistics Agency (DLA) for headrest pad assemblies associated with aircraft ejection seats. The protester contends that the award to AMI was improper because the protester's quotation was lower-priced and offered a shorter delivery period. The protester also contends that the solicitation unreasonably restricted competition to those quotations submitted by the approved source of supply.

We dismiss the protest.

BACKGROUND

On June 7, 2017, DLA issued the RFQ on DLA's Internet Bid Board System (DIBBS) requesting quotations to supply 162 headrest pad assemblies, identified by national stock number (NSN) 1680-01-053-3072. RFQ at 8, 9. The solicitation also contained a

requirement that the successful vendor submit one headrest for first article testing. Id. at 2-3. Quotations were to be submitted through the DIBBS website by June 19. Id. at 1, 2.

The solicitation provided that the headrests were a critical application item,¹ and also described the headrests as a life support item for which “[o]nly quotes from the approved source of supply or authorized dealers are acceptable.” Id. at 4, 8. Specifically, the solicitation stated as follows:

This is a life support item; surplus material will not be considered for award. Only quotes from the approved source of supply or authorized dealers are acceptable for life support items. The dealer must provide a copy of the letter from the approved source of supply approving them to act as a dealer/distributor with their quote. Quotes from secondary dealers will not be accepted.

Id. at 4. Section B of the solicitation listed AMI as the approved source of supply and provided AMI’s commercial and government entity (CAGE) code and applicable part number as “AMI INDUSTRIES, INC. DBA GOODRICH 31218 P/N J114620-503.” Id. at 8. The solicitation did not list WKE, or any other firms, as an approved source of supply for the headrests.

The solicitation also incorporated the terms and conditions set forth in the DLA master solicitation for automated simplified acquisitions. Id. at 1. Relevant here, the DLA master solicitation incorporates DLA procurement note M06, which applies when items are identified in the solicitation “only by the name of an approved source (CAGE code), a part number, and a brief description[.]” Agency Report (AR), Tab C, DLA Master Solicitation for Automated Simplified Acquisitions Revision 38, May 26, 2017, at 10. In such circumstances, DLA procurement note M06 provides that offers of alternate products will not be evaluated for the contract action if the solicitation is automated. AR, Tab D, DLA Procurement Note M06, Sept. 19, 2016, at 21. The agency contends that the RFQ here is an automated solicitation issued through DIBBS. Memorandum of Law (MOL) at 5. We concur.²

¹ A critical application item is an item essential to weapon system performance or operation, or the preservation of life or safety, or safety of operating personnel, as determined by the military services. W K Eng’g Int’l, Inc., B-414846, B-414930, Sept. 26, 2017, 2017 CPD ¶ 298 at 2 n.1; Critical Process Filtration, Inc., B-400746 et al., Jan. 22, 2009, 2009 CPD ¶ 25 at 3 n.7.

² The DLA master solicitation for automated simplified acquisitions provides that “[a]utomated solicitations are identified by ‘SPE’ in the first three positions of the solicitation number and ‘T’ or ‘U’ in the ninth position of the solicitation number[.]” AR, Tab C, DLA Master Solicitation for Automated Simplified Acquisitions Revision 38, at 1. The solicitation number here is SPE4A7-17-T-H866, thus putting vendors on notice that the RFQ is an automated solicitation.

On June 7, WKE submitted a timely quotation through the DIBBS website. AR, Tab G, WKE Quotation. As noted, WKE was not listed in the solicitation as an approved source of supply, RFQ at 8, nor did WKE furnish with its quotation a letter from AMI approving WKE to act as a dealer or distributor of AMI's product.³ See generally, AR, Tab G, WKE Quotation. Rather, WKE represented that it was offering an "alternate product" with a part number (J114620-503) that matched the applicable part number, but a CAGE code (58748) that did not match AMI's CAGE code (31218).⁴ Id. at 2.

³ As described in further detail below, WKE does not contend that it was listed as an approved source of supply. Moreover, WKE does not contend that it is an authorized dealer.

⁴ DLA procurement note L04, which was incorporated into the DLA master solicitation and is applicable here, see AR, Tab C, DLA Master Solicitation, at 10, defines an alternate product as follows:

(c) Alternate product

(1) The offeror must indicate that an alternate product is being offered if the offeror is any one of the following:

(i) An offeror who manufactures the item for an approved source cited in the item description, but does not have authorization from the approved source to identify it as the approved source part number, and sell the item directly to the Government;

(ii) A dealer/distributor offering the product of a manufacturer that meets the description in (i) above;

(iii) An offeror of a reverse-engineered product that is not cited in the item description; or

(iv) An offeror whose product does not meet the criteria of exact product, superseding product or previously approved product.

AR, Tab D, DLA Procurement Note L04(c)(1), at 21. WKE identified its product as an "alternate product," AR, Tab G, WKE Quotation, at 2, whereas AMI identified its product as an "exact product," AR, Tab I, AMI Quotation, at 2. An offeror of an exact product is defined, in relevant part, as "[a]n approved source offering its part number cited in the item description[.]" AR, Tab D, DLA Procurement Note L04(b)(1).

Because WKE identified its product as an alternate product, the system generated the following notice to WKE at the time WKE submitted its quotation:

Offers of alternate products will not be evaluated for the current procurement (see DLAD 52.217-9002). You may submit a request to the location below for evaluation of the alternate product's technical acceptability for future procurements of the same item. The request for evaluation shall cite the National Stock Number (NSN)/Part # of the exact product and, as identified in this provision, include the applicable level of technical data on the alternate and exact products. All offers of alternate product[s] will be handled in accordance with DLAD 17.7501(b)(4).

AR, Tab G, WKE Quotation, at 2-3. WKE's quotation did not include a request for further evaluation of its product's technical acceptability, nor did it include further technical information in support of such a request. MOL at 3 (citing AR, Tab H, Record of Significant Events & Abstract with Contracting Officer's Notes).

DLA received five quotations in response to the solicitation and evaluated those quotations it deemed to be eligible for award. MOL at 3; AR, Tab H, Record of Significant Events. On July 3, the agency issued the purchase order to AMI for a total price of \$75,905.42 (\$2,950.34 for the first article and \$450.34 per production unit). AR, Tab L, Purchase Order, at 1, 5, 7. The purchase order set forth a delivery date of 265 days for the delivery of the first article and 365 days for the delivery of all production units. Id. at 2.

On July 3, WKE was notified that its quotation was not selected for award. Protest at 3. This protest followed on July 12.

DISCUSSION

WKE raises two central arguments in its protest. First, WKE argues that the agency abused its discretion by issuing the purchase order to AMI when WKE quoted a lower price and earlier delivery date for the headrests. Protest at 3. Second, WKE contends that it is "unfair" to treat its quotation differently from the quotation of the approved source of supply, AMI, because either vendor, if successful, would be required to meet the solicitation's first article testing requirements. Id. at 4-5. In this respect, WKE contends that the solicitation terms are overly restrictive. Id. at 5.

In response to these protest grounds, DLA asserts that its award decision was reasonable and consistent with the terms of the solicitation. MOL at 4, 6. DLA argues that the solicitation informed vendors that the agency would accept quotations only from the approved source of supply or authorized dealers. Id. at 4. Because WKE was not listed in the solicitation as an approved source of supply and because WKE's quotation identified that it was submitting an alternate product, DLA contends that the agency's exclusion of WKE's quotation was reasonable. Id. at 6. DLA further contends that, to the extent WKE believed the solicitation terms to be unfair or overly restrictive, WKE

was required to protest the alleged improprieties in the solicitation prior to the date set for receipt of quotations, June 19. Id. at 4 (citing 4 C.F.R. § 21.2(a)(1)).

On the merits, DLA argues that WKE conflates source approval and first article testing. MOL at 4. DLA explains that the first article testing requirement is a separate requirement from source approval and is imposed to ensure that an approved source, who has not manufactured the item within the last 5 years, or within the last 3 years for critical safety items, has maintained the production capability and quality standards equal to those in place when it first received source approval. Id. at 5 (citing AR, Tab D, DLA Procurement Note H03(4), at 10). In this respect, DLA explains that source approval is not a basis to waive first article testing. Id. That said, DLA anticipates that first article testing may be waived for AMI because AMI currently holds two awards for the same NSN. Id. at 5 n.5.

For the following reasons, we dismiss WKE's protest. With respect to WKE's first protest ground, i.e., that DLA unreasonably failed to issue the purchase order to WKE who quoted a lower price and shorter delivery period than AMI, we conclude that WKE is not an interested party within the meaning of our Bid Protest Regulations. 4 C.F.R. § 21.0(a). Under our Regulations, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Id. A protester is not an interested party to protest an award to an approved source where the protester would not be eligible for award because it is not itself an approved source for the item. Standard Bent Glass Corp., B-401212, June 23, 2009, 2009 CPD ¶ 143 at 5. See also Piedmont Propulsion Sys., LLC, B-410026.2, Mar. 30, 2015, 2015 CPD ¶ 140 at 7 (where firm is not an approved source, "it follows that the firm is not an interested party to pursue its protest").

Here, the solicitation provided that the agency would accept quotations only from "the approved source of supply" or authorized dealers. RFQ at 4. In fact, WKE acknowledges in its protest that the solicitation included two evaluation criteria: "price and approved source qualification." Protest at 3 (emphasis added). WKE does not allege that it is an approved source of supply or an authorized dealer. Rather, WKE contends that it is a "qualified manufacturer of similar parts."⁵ Protest at 4. Because WKE is not an approved source of supply or an authorized dealer for the headrests at issue in this procurement, WKE does not qualify as an interested party to challenge the agency's evaluation and award decision. Accordingly, we dismiss this protest ground.⁶

⁵ Even assuming that WKE had made such an allegation, however, we note that WKE's quotation did not represent that WKE was an approved source of supply or an authorized dealer. AR, Tab G, WKE Quotation, at 2. To the contrary, WKE represented in its quotation that it was submitting an "alternate product." Id.

⁶ In its protest, WKE alleges that there is no indication in the solicitation that AMI was the only approved source of supply. Protest 2, 3-4. Elsewhere, however, WKE concedes that "AMI was the only listed 'approved source.'" Comments at 3. See also
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With respect to WKE's second protest ground, *i.e.*, that DLA should have treated WKE, a "qualified manufacturer of similar parts," and AMI, "the listed approved source," equally because both vendors would be required to undergo first article testing if successful, *see* Protest at 4-5, we agree with the agency that this ground constitutes an untimely challenge to the terms of the solicitation.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. 4 C.F.R. § 21.2. The timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Under these rules, protests based upon alleged improprieties in a solicitation, which are apparent prior to the time set for receipt of initial quotations, must be filed prior to the time set for receipt of initial quotations. 4 C.F.R. § 21.2(a)(1).

As detailed above, the solicitation clearly informed vendors of both the source approval requirement and the first article testing requirement. RFQ at 2, 3, 4. Accordingly, to the extent WKE now contends that "there is no justifiable reason for not treating WKE's bid equally with AMI's proposal" because "[b]oth AMI, the listed approved source, and WKE have to meet the same [first article testing] qualification requirements post-award," *id.* at 5, such a challenge constitutes an untimely challenge to the terms of the solicitation.

As a final matter, WKE appears to argue in its comments that DLA had a duty to evaluate its alternate product. Comments at 2. We also find this ground untimely as the solicitation indicated that alternate products would not be accepted. DLA procurement note M06, which, as detailed above, was incorporated into the solicitation by reference, provides that "[o]ffers of alternate products will not be evaluated for the

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Protest at 4, 5 (describing AMI as "the listed approved source.") (emphasis added). Although WKE's position on this point is contradictory, we note that the solicitation clearly provided that quotations would be accepted only from "the approved source of supply," in the singular, and listed AMI in Section B as the only approved source of supply, *id.* at 4, 8, thus indicating that there was only one approved source of supply, *i.e.*, AMI. In any event, WKE's assertion, even if true, is unavailing because the solicitation did not list WKE as an approved source of supply. *Id.* Nor does WKE contend that it is an approved source of supply.

contract action.” AR, Tab D, DLA Procurement Note M06, at 21. Hence, WKE was required to raise this protest ground prior to the date set for receipt of quotations.⁷

The protest is dismissed.

Susan A. Poling
General Counsel

⁷ Furthermore, DLA’s source limitation was repeated to WKE at the time it submitted its quotation on June 7. When WKE identified its quotation in DIBBS as offering an alternate product, the system generated a notice informing WKE that “[o]ffers of alternate products will not be evaluated for the current procurement (see DLAD 52.217-9002).” AR, Tab G, WKE Quotation, at 2-3. Accordingly, on June 7, WKE received a second notice that DLA would not evaluate alternate products in this procurement.