



Decision

Matter of: Savannah Cleaning Systems, Inc.

File: B-415817

Date: March 27, 2018

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General Services Administration, for the agencies.
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DIGEST

Protest that agency improperly issued a Federal Supply Schedule purchase order to a firm is sustained where the vendor quoted an item that did not meet the specifications and the agency has not shown the item was equivalent to the brand name specified, and where the item was not listed on the vendor’s Federal Supply Schedule contract.

DECISION

Savannah Cleaning Systems, Inc., of Savannah, Georgia, protests the issuance of a purchase order to Border Construction Specialists, LLC (BCS), of Phoenix, Arizona, by the Department of the Navy, Trident Refit Facility, under request for quotations (RFQ) No. 1249714 for five pressure washers. The solicitation was issued under the General Services Administration’s (GSA) Federal Supply Schedule (FSS). The protester alleges that the Navy improperly issued the purchase order because BCS offered an off-schedule item which did not meet the solicitation’s specifications.

We sustain the protest.

BACKGROUND

On November 1, 2017, the agency issued the RFQ via the GSA’s e-Buy system pursuant to the procedures set forth in Federal Acquisition Regulation (FAR) subpart 8.4. The RFQ contemplated the issuance of a fixed-price purchase order to be awarded on a best-value/technically acceptable basis for five pressure washers under the selected vendor’s FSS contract. Agency Report (AR) at 76. The RFQ was distributed to 91 vendors. Id. at 7.

The RFQ included one line-item for Landa brand pressure washers with manufacturer part number 1.106-002.0. AR at 76. The RFQ provided technical specifications for the solicited pressure washer, which included a 20 horsepower engine capable of producing a 5 gallons per minute stream at 5,000 pounds per square inch (psi). Id. at 82. Additional features included a 460 volt, 3-phase engine, a trigger gun with stainless steel wand, a downstream chemical injector, a 50 foot hose, two 6-gallon fuel tanks, four 6-inch pneumatic tires, and a high impact steel roll cage. Id. The RFQ stated that the agency would consider equivalent items, which “must be equal to or comparable to the manufacture item listed on the RFQ.” Id. at 76.

The agency received quotations from nine vendors by the closing date. The BCS quotation was the lowest-priced, at \$19,994.45, and offered an alternative pressure washer. The Savannah quotation was the second-lowest priced, at \$20,524.60, and offered the brand name pressure washer. The agency issued the purchase order to BCS and posted notice of the award on November 28. Following an unsuccessful agency-level protest, Savannah filed the instant protest with our Office.

DISCUSSION

Savannah argues that the Navy unreasonably evaluated BCS’s quotation as offering pressure washers that were equal or comparable to the brand name item listed in the solicitation. Savannah also argues that the award was unreasonable because the pressure washers quoted by BCS are not on its schedule contract. We address these arguments in turn and conclude that the protest should be sustained on both grounds.

Equal or Comparable Item

Savannah argues that the BCS pressure washers are not equal or comparable to the brand name item listed in the RFQ because they are less powerful and do not contain the same features. Savannah points out that the Landa pressure washers have 20 horsepower engines, produce a 5 gallon per minute stream, have a high impact steel roll cage, and have four 6-inch pneumatic tires, while the pressure washers quoted by BCS have 15 horsepower engines, produce a 4 gallon per minute stream, do not have a roll cage, and have only two wheels. Protest at 1.

In its agency report, the Navy does not contend that the pressure washers quoted by BCS were equal or comparable to the brand name pressure washers; rather, the Navy argues that because quotations are not offers the agency can accept, the agency may select a quotation that does not comply with the RFQ’s identified requirements, where the agency finds that the quotation will otherwise satisfy the agency’s needs. Agency Supplemental Legal Memorandum at 2. The Navy also asserts that Savannah did not suffer competitive prejudice. Id. at 3. We disagree.

The legal nature of a quotation vis-à-vis “offer” and “acceptance” in the context of an RFQ issued to FSS vendors does not alter the fundamental requirement that the FSS

competition be conducted fairly and in a manner that affords vendors an opportunity to compete on an equal basis. Hanel Storage Sys., L.P., B-409030.2, Sept. 15, 2014, 2015 CPD ¶ 88 at 4. Where an agency determines that an item other than the one specified in an RFQ will meet its needs, it generally should amend the RFQ and reopen the competition. Zarc Int'l, Inc., B-292708, Oct. 3, 2003, 2003 CPD ¶ 172 at 2; Hanel Storage Sys., L.P., supra at 4.

Here, after quotations were received, the Navy determined that a less powerful pressure washer with fewer features was capable of meeting its needs. AR at 16. After receipt of quotations, the contracting officer contacted the agency user, who stated that the pressure washers quoted by BCS were sufficient for his needs because the pressure washers had 440 volt, 3-phase engines, and no soap injector was required. Id. Under these circumstances, the agency should have amended the solicitation to reflect that it did not require the horsepower or features of the solicited pressure washer. Failure to amend the solicitation prevented vendors from competing equally. Draeger Safety, Inc., B-285366, B-285366.2, Aug. 23, 2000, 2000 CPD ¶ 139 at 4. Although the agency requested quotations from 91 vendors, the quotations received were in response to the agency's purported need for a brand name or equivalent pressure washer.

Finally, we also find that Savannah has established a reasonable possibility that it suffered prejudice as a result of the agency's failure to amend the solicitation. A protester satisfies that burden when it alleges that it could have offered an alternate product to meet the agency's actual needs. See Hanel Storage Sys., L.P., supra at 4 (protester suffered prejudice when it represented that it would have proposed a lower-priced system had it known that the agency was willing to accept storage units with a different extractor system); Zarc Int'l, Inc., supra at 2-3 (protester did not suffer prejudice when it did not allege that it would have offered an item other than the specified item had it been on notice that the agency would consider equivalent items); Spacesaver, B-224339, Aug. 22, 1986, 86-2 CPD ¶ 219 at 2 (protester did not suffer prejudice when the protester did not represent that it would have been able to quote a lower-priced mobile storage system). Here, Savannah stated that it sells a 15 horsepower pressure washer and that it can offer this model at a lower price than the solicited pressure washer because the 15 horsepower pressure washer is less powerful and has less expensive features. Protest at 1. Thus, Savannah has established that it suffered competitive prejudice because it would have offered a less powerful pressure washer with fewer features had it known that the agency was willing to accept it.

Schedule Contract

Savannah also argues that the Navy unreasonably issued the purchase order to BCS because the pressure washers BCS quoted were not listed on its schedule contract. The Navy responds that BCS could quote the pressure washer even though it was not listed on its schedule contract. According to the agency, as a Schedule 51V contract holder with special item number (SIN) 105-003, Hardware Store, Home Improvement Center, or maintenance, repair, and operations supplies (MRO)-Services, BCS can "outsource" (i.e., offer) off-schedule products, so long as it has a related similar item on

its schedule contract.¹ Agency Response to GSA Legal Opinion at 1. As support for its position, the agency relies on informal guidance it received from a GSA employee in 2014. That guidance provided that a Schedule 51V contract holder with SIN 105-003 containing an “outsourcing” provision may offer any item typically offered in a home improvement center for which it has another item of the same category on its schedule contract. AR at 14-15.

The FSS program, directed and managed by GSA, provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services. FAR § 8.402(a). Orders placed using the procedures established for the FSS program satisfy the requirement for full and open competition. 41 U.S.C. § 152(3); FAR § 6.102(d)(3). Non-FSS products and services may not be purchased using FSS procedures; instead their purchase requires compliance with applicable procurement laws and regulations, including those requiring the use of competitive procedures. OMNIPLEX World Servs. Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199 at 4-5. Thus, where an agency announces its intention to order from an existing FSS, all items quoted and ordered are required to be on the vendor’s schedule contract as a precondition to its receiving the order. LS3 Tech., Inc., B-407459, B-407459.2, Jan. 7, 2013, 2013 CPD ¶ 21 at 9.

Because GSA administers the FSS program, our Office requested that GSA provide its views to GAO and the parties on whether a Schedule 51V contract holder with SIN

¹ SIN 105-003 provides the following:

All commercially available services typically performed in a Hardware Store. This also includes All [sic] services performed must be within the spirit and concept of a hardware store. THESE WOULD BE ANCILLARY SERVICES FOR THE PRODUCTS ORDERED THROUGH SIN 105-001 OR 105-002 (NOT FOR SERVICES ONLY). For purposes of 51V Hardware Superstore this also includes Contractor Operated Civil Engineer Supply Stores (COCESS), Contractor Operated Hardware Stores (COHS) and Contractor Operated Supply Stores (COSS) or Virtual Contractor Operated Supply Stores (VCOSS), including Hardware Store, Home Improvement Center, or MRO Services. THESE SERVICES MAY ONLY BE OFFERED BY CONTRACTORS AWARDED SIN 105-001 AND/OR 105-002.

NOTE: ALL SERVICES OFFERED UNDER THIS SIN MUST BE INCIDENTAL TO PRODUCTS OFFERED UNDER SIN(s) 105-001 OR 105-002.

OFFERS FOR SERVICES ONLY WILL NOT BE ACCEPTED.

GSA Letter to GAO, Mar. 9, 2018 at 2 (citing GSA Solicitation 6FEC-E6-060173-B (emphasis in original)).

105-003 may offer a different pressure washer than the model listed on its schedule contract as an ancillary service. GAO E-mail to GSA, Feb. 21, 2018. GSA advised that a 51V contract holder may not offer products that are not on its FSS contract, even if its contract includes SIN 105-003. GSA Letter to GAO, Mar. 9, 2018 at 1. GSA explained that SIN 105-003 allows contract holders to offer ancillary services to products ordered under SINs 105-001, Hardware Store, Home Improvement Center, or MRO-Store Front, and 105-002, Hardware Store, Home Improvement Center, or MRO-Catalog, but does not allow a contractor to offer an item that is not otherwise available.² Id. at 2.

Under SIN 105-003, the record shows that a contractor may perform all commercially available services typically performed in a hardware store and that those services “would be ancillary services for the products ordered through SIN 105-001 or 105-002.” GSA Letter to GAO, Mar. 9, 2018 at 2 (citing GSA Solicitation 6FEC-E6-060173-B (emphasis omitted)). The provision further notes that “all services under this SIN must be incidental to products offered under SIN(s) 105-001 or 105-002.” Id. (emphasis omitted). In our view, the provision is consistent with GSA’s position and inconsistent with the agency’s interpretation. The provision plainly permits a contractor to offer ancillary services for products offered under other SINs. It contemplates a scenario where an agency has ordered an item under another SIN and then using SIN 105-003 has a supplemental service rendered to the product to better suit the agency’s needs. In contrast to the Navy’s position, the provision does not contain language suggesting that the agency may order products not listed on a contractor’s scheduled contract. On this record, we find that the Navy improperly issued the purchase order for an item not listed on BCS’s schedule contract.

RECOMMENDATION

Ordinarily, we would recommend that the agency terminate the order issued to BCS and amend the solicitation to reflect the agency’s actual requirements; however, such action is not feasible because the agency has already accepted delivery of the pressure washers. Agency Response to GSA Legal Opinion at 2. For that reason, we are unable to recommend substantive relief under our remedies listed in 4 C.F.R. § 21.8(a). In such circumstances, our Office may recommend that the protester recover its quotation preparation costs where we find that the protester, having a substantial chance for award, was unreasonably excluded from the procurement. American BallScrew, B-223915, Dec. 10, 1986, 86-2 CPD ¶ 664 at 6. Likewise, in such circumstances, we will also allow the recovery of costs for filing and pursuing the protest. Id.

² GSA may wish to consider providing additional guidance to those agencies seeking to order items from Schedule 51V contract holders. The record shows that the agency has received the same informal guidance from GSA employees on more than one occasion regarding what services a contractor with SIN 105-003 may provide. AR at 14-15; Agency Response to GSA Legal Opinion, attach. A.

Here, the agency's relaxation of a material requirement, and its failure to amend the solicitation, effectively precluded the protester from having an opportunity to compete. Savannah had a substantial chance for award because its quotation for the solicited pressure washer was only slightly higher-priced than BCS's quotation and Savannah explains that it would have been able to submit a lower price for the less powerful pressure washer. Accordingly, we recommend the agency reimburse the protester its quotation preparation costs and its costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d); International Waste Indus., B-411338, July 7, 2015, 2015 CPD ¶ 196 at 6. The protester 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. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel