



Decision

Matter of: ACME Endeavors, Inc.

File: B-417455

Date: June 25, 2019

Austin Nowakowski, Esq., Nowakowski Legal PLLC, and Scott M. Haapala, Esq., Scott M. Haapala PLLC, for the protester.
Melissa D. McClellan, Esq., United States Department of Agriculture, for the agency.
Joshua Gillerman, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the terms of the solicitation as being ambiguous and unduly restrictive of competition is denied where the record shows that the terms of the solicitation provide sufficient information to allow vendors to intelligently prepare their quotations on a common basis and are reasonably necessary to meet the agency's needs.

DECISION

ACME Endeavors, Inc., of Missoula, Montana, a small business, protests the terms of request for quotations (RFQ) No. 1204H119Q7000, issued by the United States Department of Agriculture, Forest Service, for commercial vehicle weed washing services and equipment. ACME argues that the RFQ is ambiguous and limits competition by overstating the agency's minimum requirements.

We deny the protest.

BACKGROUND

The RFQ, issued March 11, 2019, sought quotations from service-disabled veteran-owned small businesses and participants in the Small Business Administration's section 8(a) program, and anticipated the establishment of multiple blanket purchase

agreements (BPA). Agency Report (AR), Tab C, RFQ, at 1.¹ The RFQ seeks commercial vehicle weed washing services and equipment to be provided in Forest Service region 6. AR, Tab A, Memorandum of Law (MOL) at 1. Quotations were due by April 5. RFQ at 1.

By way of background, the agency explains that during fire suppression and incident response activities, vehicles and equipment utilized in off-road locations can pick up and transport seeds and spores, leading to the potential disruption or destruction of native ecosystems. MOL at 1 (citing AR, Tab E, Agency Report on Comparison of Relocatable Commercial Vehicle Washing Systems, at 106). The RFQ seeks weed washing services to remove soil, dirt, vegetative matter, and other debris from vehicles and equipment to reduce the spread of nonnative and invasive species. Id.

The BPAs are to be issued to the vendors whose quotations, conforming to the RFQ, are most advantageous to the agency, considering price and non-price factors. RFQ at 6. The non-price factors were: operational acceptability of the equipment and past performance dependability risks. Id. Relevant here, the RFQ set forth several performance based requirements related to weed washing and included certain minimum equipment requirements. RFQ at 19-20. The RFQ provided that quotations would be considered operationally acceptable if the offered equipment met the minimum requirements delineated in the solicitation. Id.

On April 3, the agency issued amendment 1 to the RFQ, which included answers to questions received from vendors. AR, Tab D, Amend. 1, at 1. The amendment did not modify the April 5 due date for quotations. On April 5, prior to the time set for receipt of quotations, ACME filed this protest.

DISCUSSION

ACME raises multiple challenges to the terms of the solicitation. We note at the outset that the determination of the government's needs and the best method of accommodating them is primarily the responsibility of the procuring agency. Columbia Imaging, Inc., B-286772.2, B-287363, Apr. 13, 2001, 2001 CPD ¶ 78 at 2. Our Office will not sustain a protest challenging any agency's determination of its needs unless the protester presents clear and convincing evidence that the specifications are in fact impossible to meet or unduly restrict competition. Second Street Holdings, LLC, B-417006, Jan. 17, 2019, 2019 CPD ¶ 63 at 3. We have reviewed ACME's challenges to the agency's specifications and find that none provide a basis to sustain its protest.

ACME's "primary argument" is that the agency should have held a "pre-quote meeting" prior to quotation submission to provide vendors the opportunity to ask questions and

¹ The agency stamped each page of its exhibits, including the RFQ, with a Bates number. Citations to exhibits contained in the AR are to the Bates number.

seek additional clarification on some of the solicitation's terms.² Comments at 2. In this regard, ACME contends that it should not have had to file a bid protest to get its questions answered and the agency's failure to comprehensively respond to questions will deter potential vendors from competing and increases the likelihood of a dispute during performance. Id.

As a general rule, a solicitation must be drafted in a fashion that enables vendors to intelligently prepare their quotations and must be sufficiently free from ambiguity so that vendors may compete on a common basis. Phoenix Environmental Design, Inc., B-411746, Oct. 14, 2015, 2015 CPD ¶ 319 at 3. However, there is no requirement that a competition be based on specifications drafted in such detail as to completely eliminate all risk or remove every uncertainty from the mind of every prospective vendor; to the contrary, an agency may provide for a competition that imposes maximum risks on the contractor and minimum burdens on the agency, provided the solicitation contains sufficient information for vendors to compete intelligently and on equal terms. Id.

ACME's argument does not articulate a violation of procurement law or regulation. Rather, it is effectively a request that the agency provide an additional opportunity to seek clarification on aspects of the solicitation. While ACME laments that it should not have had to file a bid protest to receive its desired level of clarification, this assertion, by itself, does not identify a term of the solicitation that is impossible to meet or unduly restrictive of competition. It follows that this argument provides our Office with no basis on which to sustain the protest.³

Debris Removal Threshold

ACME also contends that the RFQ's debris removal requirements fail to provide sufficient clarity to vendors. Protest, Ex. H, at 2-4. The RFQ provided that the contractor would be required to "[t]horoughly wash vehicles and equipment to remove soil, mud, caked dirt, plant parts, seeds, and vegetative parts." RFQ at 20. ACME asserts that the requirement to "thoroughly wash" vehicles is ambiguous as to how long it will take to complete these tasks and argues that it is not "practical" to have to remove all debris. Protest, Ex. H, at 4; Comments at 3.

² While the RFQ had, at some point, contemplated a "pre-quote" meeting to facilitate vendors' understanding of the work to be performed, the meeting was canceled. RFQ at 18-19.

³ In addition, ACME seeks clarification of the RFQ's performance requirements by posing a number of questions throughout its submissions. While these questions evidence ACME's desire that the agency be more prescriptive, these inquiries, without more, fail to demonstrate that the solicitation is insufficiently drafted to enable vendors to compete intelligently and equally. See Phoenix Environmental Design, Inc., supra.

The agency responds that the RFQ does not require the removal of all debris, but only requires the contractor to wash all vehicle surfaces containing debris. MOL at 3 (citing RFQ at 20-21). In addition, while ACME appears concerned with the length of time required to complete this cleaning requirement, the agency notes that the RFQ does not actually establish a set number of minutes for wash time per vehicle. Rather, the RFQ only provides that the “process time to wash vehicles and equipment shall be sufficient to meet the requirements of this agreement.” RFQ at 21.

On this record, we conclude that the requirements provide sufficient information to allow vendors to intelligently prepare their quotations and to allow the agency to fairly and equally evaluate those quotations. See Phoenix Environmental Design, Inc., supra. ACME has not demonstrated that that the requirement to “thoroughly wash” the vehicles is so ambiguous as to render vendors unable to intelligently compete for the requirement. In addition, as noted above, there is no requirement that a competition be based on specifications drafted in such detail as to completely eliminate all risk or remove every uncertainty from the mind of every prospective vendor. Thus, the agency was not obligated to quantify a debris removal threshold or establish a set number for wash time per vehicle.

Moreover, to the extent ACME believes that this debris removal requirement is not “practical,” such a concern merely reflects ACME’s dislike of the terms of the RFQ. As our Office has noted, a protester’s disagreement with the agency’s judgment concerning the agency’s needs and how to accommodate them does not show that the agency’s judgment is unreasonable. Second Street Holdings, supra, at 7. In Second Street, we noted that a challenged solicitation provision which merely affected the desirability of competing, but did not actually prevent firms from competing that otherwise wished to compete, did not actually present a question of undue restriction of competition. Rather, the protester simply disliked the terms on which the government wished to deal. Id. at 7 (citing USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 5.). Similarly here, ACME’s concerns with regard to the agency’s debris removal requirement reflect dislike of the terms on which the agency wishes to deal.

Underbody Washer Requirements

ACME also contends that the underbody washing system requirements are “confusing and contradictory.” Protest, Ex. H, at 5. The RFQ required that vendors provide weed wash containment station equipment, specifying that “Wash systems shall be high pressure with low volume and may be supplemented with low pressure with high volume.” RFQ at 19. However, with regard to underbody washer requirements, Amendment 1 included the following exchange:

Q: Will the unduly restrictive requirement for underbody washer minimum pressure and maximum capacity be deleted?

A: The Government doesn't specifically address minimum pressure requirements for the underbody wash system. A system can either be high pressure and low volume or high volume low pressure. . . .

AR, Tab D, Amendment 001, at 94.

The agency contends that there is no ambiguity--for underbody washers, vendors are allowed to quote either a high-pressure, low-volume system, or high-volume, low-pressure system, so long as the system "provide[s] water spray at such an angle to ensure complete coverage of underbody surfaces" Id. (citing RFQ at 20-21). The agency explains that it clarified in Amendment 1 that the underbody washers in particular are not governed by the RFQ's more general requirement to utilize high-pressure, low-volume wash systems, and thus, the underbody washers can also be low-volume, high-pressure. MOL at 3.

On this record, we disagree with ACME's contention that the underbody washing requirement is confusing or contradictory. Protest, Ex. H, at 3. As cited above, the RFQ as amended expressly states that under body washers can be either high-pressure, low-volume, or high-volume, low-pressure; these washers are not governed by the equipment requirements specifying high-pressure, low-volume, for other wash systems. As such, the record shows that the RFQ contemplates separate requirements for the underbody washers as a subset of wash systems equipment to be provided by vendors.⁴

Hand-Held Wands

ACME also challenges the RFQ's requirement for vendors to have two high-pressure, low-volume, hand-held wands. Protest, Ex. H, at 7-8; RFQ at 20. ACME contends that there are low-pressure, high-volume hand-held wands that are faster, safer, and potentially less expensive and asserts that the requirement is unduly restrictive of competition. Id. at 21.

Where a protester challenges a specification as unduly restrictive, that is, challenges both the restrictive nature of the specification and the agency's need for the restriction, the agency has the responsibility of establishing that the restrictive specification is reasonably necessary to meet its legitimate needs. GlobaFone, Inc., B-405238, Sept. 12, 2011, 2011 CPD ¶ 178 at 2. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is,

⁴ We also find no merit to ACME's assertions that the underbody washer requirements are unduly restrictive as they "require a minimum pressure, maximum capacity" and "indirectly require nozzles that are completely unsuitable for washing the underbodies of trucks." Protest, Ex. H, at 7. As the agency notes, this argument is based on the erroneous reading that the RFQ mandates the utilization of a high-pressure, low-volume system. As established above, no such requirement exists for underbody washers.

whether the explanation can withstand logical scrutiny. Id. at 3. Once the agency establishes support for the challenged solicitation term, the burden shifts to the protester to show that it is clearly unreasonable. Id.

The agency responds that it included this minimum requirement because it believes that high-pressure hand-held wands are versatile and allow for efficient and thorough cleaning. MOL at 5. In addition, the agency notes that market research shows these wands are comparable in price. Id. Finally, the agency highlights that the RFP expressly allows vendors to supplement their washer system with low-pressure, high-volume wands to the extent doing so would enable them to satisfy performance requirements. Id.

After considering the agency's arguments, we find its justifications for requiring high-pressure hand-held wands reasonable. In particular, we find that the agency has adequately explained why these wands are effective for efficient and thorough cleaning, and thus are an effective way for the agency to achieve its needs. Having considered the agency's rationale for this requirement, and found its rationale to be supported, we now turn to ACME's arguments to determine if it has met its burden to show the agency's specification is clearly unreasonable. We find that ACME has not met its burden.

ACME counters that high-pressure wands have a shorter effective dispersal range, which may lead to its employees operating in unsafe conditions. Comments, Ex. 1, at 5. Additionally, while ACME concedes that high-pressure wands are inexpensive and commercially available, it maintains that low-pressure wands would be faster, safer, and even less expensive, and that it should "have the option to utilize them." Id. at 6.

ACME has explained why, during the performance of the contract, it may behoove the firm to utilize low-pressure wands to ensure the safety of its staff. However, as noted above, this supplementation is expressly permitted by the RFQ. RFQ at 19. In sum, ACME's contentions have failed to demonstrate that this requirement unnecessarily limits competition, or is unreasonable.

Abandoned Challenge to Light Stand Requirement

Finally, ACME challenges the requirement that contractors provide a minimum of two 1000-watt, or equivalent work lights on stands that are adequate to illuminate the weed washing area. Protest, Ex. H. at 12-13. ACME contends that it is not reasonable to require night operation on a regular basis, as, in addition to being dangerous, performance rendered at night will be less effective. Id.

The agency responded to this allegation, asserting that while the RFQ does not contemplate "weed washing services to be provided at all hours," contractors may need to perform services in low-light conditions. MOL at 7. In its comments, ACME did not provide a response to the agency's arguments in response to this allegation. Where a protester fails to provide a substantive response to the agency's position, our Office will

dismiss the referenced allegations as abandoned. See Yang Enterprises, Inc., B-415923, Mar. 12, 2018, 2018 CPD ¶ 109 at 2. Since ACME did not provide a substantive response to the agency’s arguments in response to these allegations, we find these protest grounds are abandoned and we will not address them.⁵ Id.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁵ ACME also asserts that the RFQ’s specifications need to be modified “to require a nozzle placement of 45 degrees to the vertical” and to “include a description of what is required for a fixed nozzle underbody washer to provide complete coverage of all underbody surfaces.” Protest, Ex. H, at 11-12. First, the RFQ does not preclude ACME from placing its nozzles at a 45-degree angle as part of its washer systems configuration, it simply does not require vendors to do so if they are able to satisfy the RFQ’s performance requirements. MOL at 6. Further, the agency explains that it left to the discretion of vendors the determination of how to configure wash systems to meet the RFQ’s performance requirements. Id. We also agree with the agency that by advocating that vendors be required to demonstrate compliance with a particular nozzle placement, or that the agency dictate washer configuration requirements while rendering performance, ACME is essentially alleging that the RFQ should be more restrictive of competition, which is inconsistent with our Office’s role in reviewing bid protests. See Areaka Trading & Logistics Co., B-413363, Oct. 13, 2016, 2016 CPD ¶ 290 at 2-3 (GAO does not generally permit a protester to use a protest to advocate for more restrictive, rather than more open, competitions for government requirements.).