



Decision

Matter of: High Noon Unlimited, Inc.

File: B-417830

Date: November 15, 2019

George B. Inabinet, III, High Noon Unlimited, Inc., for the protester.
Major Will A. Schmitt, Graeme Henderson, Esq., Lisa L. Baker, Esq., and Ellen Clark, Esq., United States Marine Corps, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of proposals and source selection decision is sustained where record shows that awardee's proposal may have failed to meet mandatory solicitation requirements.

DECISION

High Noon Unlimited, Inc., of Holiday, Florida, protests the award of a contract to High Speed Gear, Inc., of Swansboro, North Carolina, under request for proposals (RFP) No. M67854-19-R-1549, issued by the United States Marine Corps for a quantity of rifle magazine pouches. High Noon argues that the agency miscalculated proposals and made an unreasonable source selection decision.

We sustain the protest in part, and dismiss it in part.

BACKGROUND

The RFP contemplates the award, on a best-value tradeoff basis, of a fixed-unit-price indefinite-delivery, indefinite-quantity contract to provide a quantity of rifle magazine pouches. The RFP included three "go/no-go" considerations (not relevant here), and also provided that proposals found acceptable under the go/no-go factors would be evaluated under three remaining factors: technical performance, past performance and

price. RFP amend. No 0005, at 5-6.¹ The RFP did not specify the relative importance of the non-price factors, so we find that they were weighted equally. LIS, Inc., B-400646.2, B-400646.3, Mar. 25, 2009, 2010 CPD ¶ 5 at 9. The RFP did specify that technical performance and past performance, in combination, were significantly more important than price.² RFP amend. 0005, at 6. The RFP also identified three elements under the technical performance factor: compatibility, weight, and “marine preference.” RFP amend. 0005, at 6. Because the RFP did not specify the relative weight of these elements, we also find that they were equally weighted. LIS, Inc. supra. Finally, the RFP provided that the agency would evaluate prices for completeness and reasonableness. RFP amend. No. 0005, at 9.

In response to the solicitation, the agency received a number of proposals. The record shows that, after evaluating the proposals under the go/no-go factors and finding that all but one of the proposals were acceptable, the agency then identified a number of the remaining proposals, including those of the protester and awardee, that were the highest rated under the weight and compatibility elements of the technical performance factor. Agency Report (AR), exh. 2, Source Selection Decision Document (SSDD), at 2. The most highly rated proposals were then evaluated for marine preference.³

Based on this evaluation process, the agency assigned both the protester’s and awardee’s proposals acceptable ratings under the past performance factor. AR, exh. 2, SSDD, at 3. The record shows that the agency assigned the High Speed proposal a rating of outstanding under the technical performance factor and assigned High Noon’s proposal a rating of good under that factor. Id. High Speed offered a price of \$3,588,380, while High Noon offered a price of \$2,211,000. Id. On the basis of these evaluation results, the agency selected High Speed for award, finding that, although award to that firm involved a price premium, its proposal represented the best value to the government. After being advised of the agency’s selection decision and requesting and receiving a debriefing, High Noon filed the instant protest.

¹ The agency issued amendment No. 0005 to the solicitation in an effort to clarify and simplify the solicitation’s evaluation criteria. Our citations to the RFP are to the pdf page number of the evaluation scheme as clarified in amendment No. 0005.

² The RFP provided that past performance would be assigned adjectival ratings of either acceptable or unacceptable. RFP amend. No. 0005 at 6. The RFP further advised that proposals would be assigned adjectival ratings under the technical performance factor of outstanding, good, acceptable, marginal or unacceptable. RFP amend. No. 0005 at 8.

³ Firms were required to provide 24 sample pouches for the agency to evaluate. Those pouches were used to evaluate weight, compatibility, and marine preference.

DISCUSSION

Preliminary Issues

Before turning to the merits of High Noon's protest, we discuss several procedural matters. The agency argues that High Noon abandoned its original bases for protest and raised entirely new and untimely protest arguments in its comments responding to the agency report. The agency requests that we dismiss High Noon's original protest bases as abandoned, and its subsequently-raised allegations as untimely filed.

By way of background, the agency originally filed its report with our Office on September 9, 2019. Electronic Procurement Docketing System (EPDS) Docket Entry 12. Our Office suspended the deadline for submission of comments responding to the agency report because we determined that the report, while providing some information to the protester, did not fully respond to all of the allegations advanced in the original protest. We therefore requested that the agency resubmit its report. EPDS Docket Entry 13. In particular, the agency did not provide the protester with any of the exhibits included with its report to our Office, and provided only a heavily redacted version of the contracting officer's statement and legal memorandum. In response to our request, the agency resubmitted a version of its agency report on September 10, EPDS Docket Entry 14, but we determined that the second version of the agency report included documents (other than the previously-produced contracting officer's statement and legal memorandum) that were so heavily redacted that the protester was not afforded an adequate record on which to base its comments.

In light of these circumstances, on September 11, we requested that the agency produce certain specific materials for review by the protester. EPDS Docket Entry 15. The agency produced the requested materials on September 12, EPDS Docket Entry 16. We established a deadline for the protester to submit its comments by September 23, the first business day following the 10th day after submission of the requested materials. EPDS Docket Entry 17. High Noon timely submitted its comments on September 23. EPDS Docket entries 18, 19. In sum, because of the problems associated with the agency's providing the protester an adequate report, there was a 14-day interval between when the agency initially filed its report (on September 9), and the date on which the protester filed its comments (September 23).

In its initial protest, High Noon made three arguments: (1) the High Speed product did not meet the solicitation's requirement relating to weight; (2) the High Speed product did not meet the solicitation's requirement for "ease of removal" once it has been affixed to the pouch attachment ladder system (PALS) because it required the use of a tool for removal, and also required the use of clips to attach the product to the PALS which could be lost or misplaced; and (3) the agency's selection decision was unreasonable because it relied on what the protester described as an "unarticulated" basis for establishing marine preference that could not reasonably have outweighed the price savings associated with award to the protester. In this latter connection, the record shows that the agency advised High Noon during its debriefing that the selection

decision was based on “marine preference” but did not elaborate on the underlying basis for that preference. The agency provided responses to these arguments in the redacted legal memorandum and contracting officer’s statement filed on September 9.

The agency argues that High Noon abandoned all three of its original arguments when it filed its comments responding to the agency report, and that High Noon advanced three new--but untimely--arguments for the first time in its comments. We agree with the agency in part, and disagree in part. As set forth below, we conclude that two of High Noon’s arguments were advanced in its original protest and maintained in its comments; we therefore find that these two arguments were not abandoned and consider them on the merits. We also conclude that High Noon abandoned its third protest argument, and advanced a new--untimely--argument in its comments. Consequently, we dismiss these latter two arguments without consideration on the merits.

First, High Noon at all times argued that the High Speed product does not meet the solicitation’s weight requirement. High Noon based its original allegation on information obtained from High Speed’s website. High Noon also argued that it had purchased and weighed the product, and found that the weight corresponded to the weight advertised on High Speed’s website. Finally, High Noon--without knowing how the agency had measured the weight of the High Speed product--speculated: “The final weight is probably even more out of compliance with the required specification since we believe it was calculated without the required MOLLE [modular lightweight load-carrying equipment] clips.” Protest at 3.

In responding to the protest, the contracting officer acknowledged--as suspected by High Noon--that the High Speed product had been weighed without the clips. Contracting Officer’s Statement of Facts, at Paragraph 10.⁴ In filing its comments, High Noon, now aware that the agency had weighed the High Speed product without the clips, continued to argue that this was improper.

In requesting dismissal of this aspect of High Noon’s protest, the agency argues that High Noon originally did not challenge the method used by the agency to weigh the High Speed product, and only generally averred that the product did not meet the RFP’s weight requirements. The agency therefore argues that High Noon abandoned its original--general--allegation relating to the weight of the High Speed product, and argued for the first time in its comments that the agency used an improper methodology to weigh the High Speed product without the required clips. The agency argues that High Noon’s “new” argument is untimely because it was not raised within 10 days of when High Noon received the contracting officer’s statement of facts.

⁴ The contracting officer’s statement is the only information in the record provided to the protester that discusses the methodology used by the agency to weigh the High Speed product. Other evidence in the record that establishes the agency’s methodology for weighing the products was not provided to the protester. AR, exh. 10, E-Mail from the Contracting Officer to Agency Counsel.

As the quotation from High Noon's original protest demonstrates, High Noon speculated (without the benefit of any evidence) that the agency may have used an improper methodology to weigh the High Speed product. The agency report confirmed High Noon's original speculation, and the firm continued to challenge the agency's actions, arguing both that the High Speed product does not meet the solicitation's weight requirement, and also challenging the agency's actions in weighing High Speed's product without the clips. In light of these considerations, we conclude that the protester's arguments that the High Speed product did not meet the weight requirement, and also that the agency erred in the methodology used to weigh the product, were both timely raised, and not abandoned.

Second, High Noon argued in its original protest that the High Speed product was unacceptable because it could not be removed without the use of a tool, and also that the use of clips to affix the High Speed product to the PALS was problematic because the clips could be lost or misplaced.

In responding to this argument, the agency maintained that the High Speed product met the RFP's requirements for attachment and detachment from the PALS, and also acknowledged that, while there was a potential "clip issue," this issue was outweighed by other benefits associated with the High Speed product. Agency Legal Memorandum, at 6.

In its comments, High Noon continued to challenge the acceptability of the High Speed product because it could not be removed from the PALS without use of a tool, and also that it required the use of clips that could be lost or misplaced.

In arguing that we should dismiss this aspect of High Noon's protest, the agency does not contend that High Noon abandoned its original allegation. Instead, the agency appears to argue that, while the protester generally raised the "clip issue" in its protest, it challenged the agency's tradeoff determination based on the "clip issue" for the first time in its comments.

The record shows that High Noon at all times argued that the use of clips to affix the High Speed product to the PALS rendered it unacceptable, both because it could not be removed without use of a tool, and also because there was a concern based on the possibility that the clips could be lost or misplaced. High Noon has argued at all times that this weakness or deficiency should have resulted in disqualification of the High Speed product. Significantly, High Noon does not challenge the reasonableness of the agency's tradeoff decision in light of the clip issue. It follows that this argument was both timely raised, and not abandoned.

Finally, we conclude that High Noon abandoned its third protest argument and raised a new, untimely, argument for the first time in its comments. As noted, High Noon's original protest argued that the agency's tradeoff decision was unreasonable because it relied on an "unarticulated" basis for a finding of marine preference for the High Speed

product. The agency responded to this argument, and High Noon made no further mention of it in its comments. We therefore dismiss this aspect of High Noon's protest as abandoned. Yang Enterprises, Inc., B-415923, Mar. 12, 2018, 2018 CPD ¶ 109.

The record also shows that High Noon argued for the first time in its comments that the agency erred in making an upward revision to the government estimate to account for an element not previously considered when the original estimate was prepared. High Noon argued that this upward revision to the government estimate resulted in the agency incorrectly concluding that the price proposed by High Speed was reasonable.

Unlike the other arguments in High Noon's comments, the protester did not advance this argument in its original protest, and it was raised for the first time in response to a statement made by the contracting officer in the agency report filed on September 9. Although, as noted above, the contracting officer's statement filed on September 9 was heavily redacted, it nonetheless included a statement relating to the agency's upward adjustment to the government estimate. It is the contracting officer's statement filed on September 9 that provided High Noon with the information forming the basis for this aspect of its protest.

Since High Noon's argument relating to the agency's upward adjustment to the government estimate was made for the first time 14 days after High Noon became aware of the information forming the basis for the argument, we dismiss this aspect of High Noon's protest as untimely. In this connection, protests must be filed within 10 days of when a protester knows, or should know, of its basis for protest. 4 C.F.R. § 21.2(a)(2). The fact that we temporarily suspended the deadline for submission of its comments did not relieve High Noon of its obligation to raise its new protest argument--relating to the upward adjustment to the government estimate--within 10 days of when it learned the about the agency's actions from the contracting officer's statement. Raydar & Associates, Inc., B-401447, Sept. 1, 2009, 2009 CPD ¶ 180 at 6 n.3. We therefore dismiss this aspect of its protest as untimely.

Protest Issues

Turning to the merits of the protest, as noted, High Noon raises two arguments concerning the technical acceptability of the High Speed product. First High Noon argues that High Speed's product does not meet the solicitation's weight requirement. Second, High Noon argues that the High Speed product cannot be removed from the PALS without using a tool, and also that the clips required for use of the High Speed product render it potentially unacceptable in a real-world environment. We note at the outset that an agency may not properly award a contract based on a proposal that fails to meet one or more of a solicitation's material requirements. Contrack International, Inc., B-408945, B-408945.2, Dec. 27, 2013, 2013 CPD ¶ 300 at 4-5. Here, we conclude that the record shows that the agency erred in finding that the High Speed product met all of the solicitation's requirements. We therefore sustain High Noon's protest.

Weight

The RFP required the offered product to have a threshold weight of no more than 0.24 pounds to be acceptable, and also specified an objective weight of 0.20 pounds or less. Performance Work Statement (PWS) at 2. The RFP provided as follows with respect to evaluation of the offered product's weight:

Offerors shall propose a claimed weight in the written proposal. The Government will verify the claimed weight using a tared scale with the weight rounded to the nearest one-hundredth. The Government will weigh three of the provided source selection samples and use the average to verify the weight meets or exceeds the threshold weight requirement in the solicitation.

RFP amend. No.0005 at 7. There is no dispute in the record that the agency weighed the High Speed product (as well as, apparently, other proposed products) without including the clips that would be essential to attach the High Speed product to the PALS. AR, exh. 10, E-Mail from Contracting Officer to Agency Counsel. Based on that action, the agency concluded that the High Speed product complied with the RFP's weight requirement because it weighed less than the threshold weight of 0.24 pounds.

The agency has offered no explanation for why it weighed the High Speed product without the clips. The clips apparently are an essential component of the overall product, since they are necessary to attach the High Speed product to the PALS. AR, exh. 10, E-Mail from the Contracting Officer to Agency Counsel. Inasmuch as the RFP required the offered product to weigh an amount equal to or less than the threshold weight of 0.24 pounds, the agency's actions in weighing what essentially amounts to only a part of the High Speed product do not withstand logical scrutiny.

The agency's actions also appear inconsistent with guidance that the agency provided to prospective offerors during market research that it conducted. The record shows that, prior to issuance of the solicitation, the agency issued a request for information to obtain market information about available rifle magazine pouches. Protester's Comments, exh. 1, Request for Information, Oct. 22, 2018. The agency also published questions from prospective offerors, along with the answers to those questions. Of relevance here, one of those questions and answers provided as follows:

Q: If removable clips are allowed, would those be included in the weight target?

A: The total system would be evaluated for weight.

Protester's Comments, exh 2, Prospective Offeror Questions and Answers. Notwithstanding this guidance provided to offerors, the agency nonetheless did not weigh the total High Speed system to determine whether it complied with the RFP's requirements. This is of particular concern because, as pointed out by the protester, High Speed itself advertises the product offered in response to the RFP as weighing

0.30 pounds, or approximately 0.06 pounds heavier than the threshold weight required under the RFP. See <https://www.highspeedgear.com/hsgi/112R00-112R00.html>.⁵

Since the record does not establish that the High Speed product met the RFP's threshold requirement for weight, we conclude that the agency erred in finding that High Speed's product is technically acceptable. It follows that award to High Speed was improper because the agency did not properly conclude that the High Speed proposal complied with a material requirement of the solicitation. We therefore sustain this aspect of High Noon's protest.

Attachment and Removal of the High Speed Product

High Noon also argues that the High Speed product cannot be attached to and removed from the PALS without the use of a tool, and also that the clips used to affix the High Speed product to the PALS are problematic because they could be lost or misplaced, which would render the product non-functional. The PWS included the following requirement relating to this aspect of the products proposed:

Must be compatible with the current Pouch Attachment Ladder System (PALS) for attachment to current load bearing equipment. Must allow for the system to be attached/detached to a PALS platform without special tools, excessive force, and excessive time (T [threshold]). Must be able to be attached to a PALS platform under 3 minutes and detached under 3 minutes (O [objective]).

RFP, PWS, at 2; amend. No. 0005, at 7. The record shows that the agency was able to attach and detach the High Speed product to the PALS in under three minutes, as specified by the RFP. There is evidence that some of the marines testing the equipment preferred to use a tool to attach the High Speed product, and also expressed concerns about the clips themselves. AR, exh. 15, Marine User Evaluation Report, at 8; exh. 10, E-Mail from the Contracting Officer to Agency Counsel.

We are unable to conclude on the basis of this record that the High Speed product required use of a "special tool," which was the only express prohibition in the RFP. As noted, the evidence shows only that some marines preferred to use an undefined "tool" to attach the High Speed product to the PALS, and also expressed reservations about the use of the clip element of the High Speed product.⁶ Consequently, there is no basis

⁵ The protester also submitted the results arrived at by a third-party concern that weighed the High Speed product on behalf of the protester and found it to be heavier than the threshold weight required by the RFP. Protester's Response to the Agency's Initial Request for Dismissal, exh. 1.

⁶ Logic dictates that, since only some of the marines testing the products preferred to use a tool to attach the High Speed product to the PALS, other marines testing the product did not use a tool to attach the High Speed product to the PALS.

for us to find that the agency erred in determining that the High Speed product met this requirement of the solicitation.

RECOMMENDATION

In view of the foregoing discussion, we sustain High Noon's protest. We recommend that the agency reevaluate proposals and make a new source selection decision in a manner that is consistent with the discussion above, and the requirements of the RFP.⁷ Should the agency conclude that a firm other than High Speed is properly in line for award of the contract, we further recommend that the agency make award to that firm if otherwise proper, and terminate the contract awarded to High Speed for the convenience of the government. Finally, we recommend that the agency reimburse High Noon the costs associated with filing and pursuing its protest. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

⁷ As discussed above, the record shows that some of the marines testing the products preferred to use a "tool" to attach the High Speed Product to the PALS, and also expressed concern about the use of clips to attach the High Speed product to the PALS. While we do not find this a basis for sustaining High Noon's protest, the agency nonetheless may wish to revisit this issue in connection with its reevaluation, given the issues identified by the marine product testers.