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Decision

Matter of: Kardex Remstar, LLC

File: B-418714

Date: August 4, 2020

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DIGEST

Protest challenging solicitation terms as unduly restrictive of competition is denied because the record demonstrates that the requirements are reasonably related to the agency's minimum needs.

DECISION

Kardex Remstar, of Westbrook, Maine, protests the terms of request for quotations (RFQ) No. SP3300-20-Q-5015, issued by the Defense Logistics Agency (DLA) for vertical lift module storage systems. The protester contends that the product requirements set forth in the RFQ are tailored to match the product offerings of a single vendor, resulting in "a brand name only procurement cleverly disguised as a procurement under full and open competition." Protest at 7.

We deny the protest.

BACKGROUND

On April 6, 2020, the agency issued RFQ No. SP3300-20-Q-5015 on an unrestricted basis pursuant to the commercial item and simplified acquisition procedures of Federal Acquisition Regulation parts 12 and 13. Agency Report (AR), Tab 2, RFQ at 1; Combined Contracting Officer's Statement and Memorandum of Law at 2. The solicitation seeks quotations for the supply and installation of five vertical lift module storage systems at the agency's facility located in Yokosuka, Japan. RFQ at 1; AR, Tab 4, Statement of Work (SOW) at 3. The solicitation contemplates award of a single fixed-price contract. RFQ at 1.

Warehouses, such as those operated by the Defense Logistics Agency, require employees, referred to as pickers, to retrieve items from the various storage units within the warehouse to fulfill customer orders. AR, Tab 6, Decl. exh. 3, Dual-Tray Vertical Lift Modules for Fast Order Picking at 1. Warehouse picking is one of the most costly and time consuming activities in a warehouse, in part because it often requires a picker to travel throughout the warehouse aisles to retrieve each separate item in an order. *Id.* Warehousing small objects can compound these costs because small objects are often stored in pallets that occupy a high volume of space. *Id.* One method warehouses use to reduce the space, picking time, and costs associated with small items is the creation of a fixed storage system that houses a multitude of different small items allowing a picker to retrieve numerous items while remaining in one location--referred to as a static solution. *Id.* at 2. Vertical lift module storage systems are one type of static solution. *Id.*

Vertical lift module storage systems consist of a storage column in which small items are stored in extractable trays. AR, Tab 6, Decl. exh. 3, Dual-Tray Vertical Lift Modules for Fast Order Picking at 2. The systems have computer-operated powered mechanisms that travel throughout the column to retrieve the extractable trays and deliver them to a work station from which a picker operates the mechanism and can access the items in each tray then return the trays to storage within the unit. *Id.* As the name implies, these systems also maximize the use of vertical space, which can further reduce costs.

As relevant to the protest, the RFQ requires quoted vertical lift module storage systems to be capable of providing "automatic tray delivery . . . external to the sheet metal machine enclosure in a dual (upper and lower) level tray configuration"--*i.e.*, external dual tray delivery. SOW at 17. Specifically, the RFQ requires quoted units to be capable of being programmed by a picker with a list of storage trays "in queue," and continuously having three trays from the queue in simultaneous rotation, with two of the trays being outside the frame of the unit. *See id.* at 17-18. In this process, there would be a first tray, from which picking has just been completed, sliding away from the external workstation and back into the unit's frame to be re-stowed; a second tray dropping down from an external on-deck position to the external workstation in front of the picker; and a third tray being retrieved from inside the unit and moved to the external on-deck position. *See id.* This process, akin to the operation of a Ferris wheel, would continue until all of the trays programmed into the queue list have been retrieved and delivered to the workstation in front of the picker. *See id.*

As part of the solicitation process, the agency permitted vendors to submit questions and amended the solicitation with its answers to timely submitted questions. AR, Tab 3, RFQ Amend. No. 0001. One vendor submitted a question related to the requirement for external dual tray delivery. *Id.* at Question No. 1. The vendor asked:

Your very detailed and specific description in the solicitation for dual tray delivery is specific to one manufacturer, which is Modula. This renders the solicitation effectively a brand name only procurement, even though you have not labeled the Solicitation as so. In order to conduct a brand name

only procurement, you are required to establish a Justification and Approval [J&A] document providing detailed information about why the government must purchase from Modula and not any other vendor, which the government has not done in this case. Will you be either providing the J&A document for public review very soon or revising the solicitation (and your very Modula-specific description for dual tray delivery) to make this procurement brand name or equal [BNOE]? And, in establishing a BNOE procurement, [will] DLA revise its descriptions to only require the salient physical, functional, and performance characteristics that are truly required by DLA?

Id. The agency responded:

The Government has performed extensive market research and there exist several companies that manufacture external, dual tray delivery system configurations. This type of delivery system is not unique to one manufacturer. DLA Distribution has a need for a [vertical lift module storage system] VLM that provides the external dual tray delivery systems as these types of systems allow the operators to pick or stow from more than one tray at a time. This feature provides ergonomic and unobstructed overhead access to the trays leading to a more efficient and safer workplace environment for workers.

Id.

The solicitation required vendors to submit quotations by 1:00 p.m. Eastern Standard Time on May 6, 2020. RFQ at 9. Prior to that time, Kardex filed its protest with our Office.

DISCUSSION

The protester contends that the product requirements set forth in the RFQ are tailored to match the product offerings of a single vendor, Modula, Inc., that only Modula's products can meet the RFQ requirements, and that the RFQ is actually a brand-name only procurement for which the agency has not prepared the required justification for other than full and open competition. Protest at 7. Specifically, the protester maintains that ten of the product requirements set forth in the RFQ unreasonably limit competition because they "are tailored to" Modula. *Id.* at 3-6, 8. The protester argues that, of the ten challenged requirements, the one that "narrows the field of competit[ion] the most" is the requirement for external dual tray delivery. *Id.* at 8-9. The protester represents that "many companies, including [the protester], can deliver two trays internal to the machine or one tray at a time outside the machine," but that Modula is the only vendor with a product "that currently can deliver two trays outside of the unit's frame at the same time." *Id.* at 5 n.6, 9. The protester further contends that the ability to provide external dual tray delivery "does not enhance the performance or operation of the system." *Id.*

at 5 n.6. The protester argues that the agency's tailoring of the RFQ requirements to be specific to Modula products is unduly restrictive of competition. *Id.* at 8-9. For the reasons discussed below, we disagree with the protester.

In preparing a solicitation, a contracting agency must solicit offers, or as here quotations, in a manner designed to achieve full and open competition, and include restrictive provisions only to the extent necessary to satisfy the agency's minimum needs. 10 U.S.C. §§ 2305(a)(1)(A)-(B). A contracting agency has the discretion to determine its needs and the best method to accommodate them. *Harris Enters., Inc.*, B-311143, Mar. 27, 2008, 2008 CPD ¶ 60 at 2. When a protester challenges a specification or requirement as unduly restrictive of competition, that is, challenges both the restrictive nature of the requirement as well as the agency's need for the restriction, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency's needs. *GlobaFone, Inc.*, B-405238, Sept. 12, 2011, 2011 CPD ¶ 178 at 3. Our Office will examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. *CompTech-CDO, LLC*, B-409949.2, Jan. 6, 2015, 2015 CPD ¶ 62 at 4. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. *Parcel 49C Limited P'ship*, B-412552 *et al.*, Mar. 23, 2016, 2016 CPD ¶ 95 at 11.

With respect to the protester's insistence that the RFQ constitutes an improper sole-source procurement because the SOW is written around Modula's vertical lift module storage system, we find the protest without merit.¹ In seeking full and open competition, an agency is not required to construct its procurements in a manner that

¹ In support of its arguments, the protester maintains that the agency "has a dubious track record of awarding these types of contracts to only one offeror, Werres Corporation, which is a distributor for Modula, Inc." Protest at 7 n.12. The protester further represents that the last nine "procurements for similar sites and virtually identical procurements from DLA have all been awarded to Werres Corporation/Modula and none have been awarded to any other company." *Id.* at 9 (emphasis omitted). The protester contends that the "conspicuous absence" from the past nine awards of the two other vendors the agency points to as potential suppliers of RFQ-compliant products "lends credence to the argument that the Agency is systematically drafting procurements with Modula in mind." Comments at 11-12.

To the extent the protester is alleging bad faith on the part of the agency, the protester has failed to provide the requisite showing to support such allegations. Government officials are presumed to act in good faith, and a protester's claim that contracting officials were motivated by bias or bad faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. *Harris Enters., Inc.*, *supra* at 3. Here, the protester's inferences based on past procurements are insufficient to support a finding of bad faith.

neutralizes the competitive advantages some potential offerors, or as here vendors, may have over others by virtue of their own particular circumstances. *Staveley Instruments, Inc.*, B-259548, B-259548.3, May 24, 1995, 95-1 CPD ¶ 256 at 3-4. Moreover, specifications that are based upon a particular product are not necessarily improper in and of themselves; an assertion that a specification was “written around” design features of a particular product will not provide a basis for sustaining a protest if the record establishes that the specification is reasonably related to the agency’s minimum needs. *Fisons Instruments, Inc.*, B-261371, July 18, 1995, 95-2 CPD ¶ 31 at 2. The relevant inquiry, therefore, is not whether the SOW mirrors Modula’s product brochure, as alleged by the protester, but whether the SOW reasonably reflects the agency’s needs. *Remote Diagnostic Techs., LLC*, B-413375.4, B-413375.5, Feb. 28, 2017, 2017 CPD ¶ 80 at 4.

Here, the record reflects that the industrial engineer responsible for drafting the SOW augmented existing personal knowledge of vertical lift module storage systems by researching technical journals, attending trade shows, reviewing product technical information available on vendor websites, and speaking with other industrial engineers in both the public and private sectors. AR, Tab 6, Decl. at 1-2. In developing the SOW, the engineer considered things like the size of a vertical lift module storage system related to available warehouse space, output efficiency, load capacity, ergonomics, and worker safety. *Id.* at 2.

Based on this research and consideration of the agency’s needs, the engineer concluded that external dual tray delivery increases efficiency because it allows a picker to pick from tray one and then immediately begin picking from tray two, which is automatically delivered to the picker while tray one is moved back inside the frame of the unit. AR, Tab 5, Memorandum for Record at 1. Additionally, the engineer found that vertical lift module storage systems with external dual tray delivery are capable of interfacing with overhead cranes, which “is extremely helpful for lifting of heavy items.” *Id.* The engineer further concluded that external dual tray delivery “provides ergonomic and unobstructed overhead access” to trays, whereas vertical lift module storage systems that deliver trays inside the unit require a picker “to lean over” the unit to pick or stow items. *Id.*

The agency explains that ergonomic tray access is important because it reduces the need for pickers to move unnaturally to retrieve or stow items, thereby decreasing the likelihood of pickers suffering a musculoskeletal injury. AR, Tab 6, Decl. at 3. The agency notes that the Bureau of Labor Statistics reported in 2013 that stock and material movers, such as warehouse pickers, incurred the highest number of musculoskeletal disorders resulting in lost work days at a rate of 289.5 cases per 10,000 full-time workers. *Id.* at 2; AR, Tab 6, Decl. exh. 1, Models for an Ergonomic Evaluation of Order Picking from Different Rack Layouts at 1. Of these incidents, “40% were related to overexertion and body-reactions associated with repetitive material handling work.” *Id.* The agency further explains that high rates of musculoskeletal disorders “are associated with high costs to employers such as absenteeism, lost

productivity, and increased health care, disability, and worker's compensation costs."² AR, Tab 6, Decl. at 2.

As noted above, the engineer responsible for drafting the SOW reviewed publicly available product information on vendors' websites. Based on this market research, the

² The protester contends that the agency's report responding to the protest "includes no documented market research report . . . prior to or contemporaneous with the development of the procurement," and urges our Office to reject the *post hoc* declaration provided by the agency's engineer. Comments at 13 (emphasis omitted). The protester is incorrect that the record is devoid of contemporaneous documentation. The record reflects that the agency engineer responsible for preparing the SOW prepared a memorandum for the record explaining the rationale for requiring external dual tray delivery. See AR, Tab 5, Memorandum for Record. This memorandum was signed and dated April 6, 2020, the same day the agency issued the RFQ. *Id.* The record further reflects, that the same contemporaneous explanation evident in this memorandum was communicated to vendors during the RFQ's Q&A period. AR, Tab 3, RFQ Amend. No. 0001 at Question No. 1.

Subsequent to the filing of the protest with our Office, the agency engineer did conduct further research to confirm his earlier conclusions and prepared a declaration explaining both the process of preparing the original memorandum and the additional post-protest research. See AR, Tab 6, Decl. Our Office generally will consider declarations, such as the one here, that provide a detailed rationale for contemporaneous conclusions and fill in previously unrecorded details, so long as the explanations are credible and consistent with the contemporaneous record. *Erickson Aero Tanker*, B-411306.2, B-411306.5, July 29, 2015, 2015 CPD ¶ 226 at 9 n.6. Here, we find no basis to disregard the engineer's post-protest declaration.

Nor do we find any basis to disregard the engineer's contemporaneous memorandum for the record. The protester contends that the memorandum only appears contemporaneous and is, in fact, a *post hoc* rationalization based on an earlier protest. Protester's Reply to Agency Response to Protester's Comments at 9. The protester argues that it filed a protest with our Office challenging the agency's award of a contract under No. SP3300-19-Q-5034, which was "virtually the same procurement from last fall." *Id.* The protester further argues that, rather than re-evaluating quotations and making a new award decision, as it committed to doing in a notice of corrective action, the agency "canceled the procurement altogether and gave the engineer time to justify the use of the external dual tray" delivery requirement. *Id.*, citing *Kardex Remstar, LLC*, B-418153, Nov. 6, 2019 (unpublished decision). Each procurement action is a separate transaction and an action taken under one procurement is not relevant to the propriety of the action taken under another for the purposes of a bid protest. *Harris Enters., Inc.*, *supra* at 3.

engineer concluded that at least three firms, including Modula, were capable of supplying products with external dual tray delivery. See AR, Tab 6, Decl. at 3-4. As a result of the above-discussed conclusions, related to workplace efficiency and worker safety, and as a reflection of the agency's needs, the engineer prepared a justification for the inclusion of an external dual tray delivery requirement in the SOW. AR, Tab 5, Memorandum for Record.

The protester argues that the agency has failed to establish that the RFQ requirement for external dual tray delivery is reasonably necessary to meet its needs. Comments at 9. The protester contends that while "[u]ndoubtedly, dual tray delivery systems for [vertical lift module storage systems] have many benefits for workers and employers" there is no requirement that the dual tray delivery be external to the unit to provide these benefits. *Id.* at 10-11. Rather, the protester maintains, any dual tray delivery system can provide these same benefits, whether the trays are delivered internally or externally to the unit. *Id.* The protester claims that its own product, which has an internal dual tray delivery system, can provide the same ergonomic and efficiency benefits of an external dual tray delivery system. *Id.* at 11. The protester's product provides a dual tray delivery option that delivers one tray to an opening in the unit for access by a picker while a second tray is retrieved and "kept in a waiting position behind the access opening" internal to the unit, thereby "decreasing wait time." Comments, exh. C, Kardex Product Brochure at 6.

The agency does not dispute the protester's argument that it's possible for internal dual tray delivery to provide similar time saving efficiencies as external dual tray delivery. The agency contends, however, that internal dual tray delivery fails to provide the same ergonomic benefits as external dual tray delivery. The agency maintains that vertical lift module storage systems providing internal dual tray delivery, such as the protester's, require pickers "to bend and pick items inside the [vertical lift module storage system]." Agency Response to Protester's Comments at 7.

When, as here, a requirement relates to human safety, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness. *Womack Mach. Supply Co.*, B-407990, May 3, 2013, 2013 CPD ¶ 117 at 3. Based on the record here, we find reasonable the engineer's conclusion that external dual tray delivery provides ergonomic benefits beneficial to worker safety that are not provided by internal dual tray delivery. See AR, Tab 5, Memorandum for Record at 1. Accordingly, we find unobjectionable the agency's requirement for external dual tray delivery as a means of decreasing the potential for worker injury.

To the extent the protester raises other concerns about the solicitation's requirements, it is not an interested party to pursue these challenges. Protest at 9. Under our Bid Protest Regulations, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a). Because we have concluded that the external dual tray delivery requirement is reasonably necessary to meet the agency's minimum needs, and because the protester

acknowledges that it cannot provide a product that meets this requirement, see Protest at 9, the protester is not an interested party to raise its additional challenges. *Omnicell, Inc.*, B-417941, Dec. 16, 2019, 2019 CPD ¶ 423 at 4. The protester lacks the requisite legal interest in this regard because, even were we to sustain its protest on the basis of one of its other challenges, the protester would not be able to quote a compliant product and would, therefore, be ineligible for award. *Remote Diagnostic Techs., LLC, supra* at 5. Accordingly, the protester's remaining challenges to the terms of the RFQ are dismissed.

The protest is denied.

Thomas H. Armstrong
General Counsel