



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Tennier Industries, Inc.

File: B-299624

Date: July 12, 2007

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
Maj. Walter R. Dukes, and Cathleen Perry, Esq., U.S. Army Materiel Command, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging numerous aspects of solicitation as ambiguous or otherwise deficient is denied where solicitation, read as a whole, is understandable, and provides a reasonable basis for offerors to intelligently prepare proposals.

DECISION

Tennier Industries, Inc. protests the terms of request for proposals (RFP) No. W91CRB-07-R-0010, issued by the Department of the Army for fire resistant clothing. Tennier asserts that various aspects of the solicitation are ambiguous and need to be clarified, or are otherwise deficient and need to be corrected.

We deny the protest.

The RFP contemplates the award of one or more fixed-price indefinite-delivery, indefinite-quantity (ID/IQ) contracts to provide fire resistant equipment ensembles (FREE). A FREE is comprised of various clothing components, including t-shirts, boxer briefs, sports bras, base layer clothing, mid-weight clothing, a wind resistant jacket and pant, an insulated softshell jacket, pant and vest, a hardshell jacket and pant, socks, balaclavas, cold weather gloves and a rigger belt. RFP at 23. The RFP advises prospective offerors that they may either propose all articles--a FREE system--or one or more individual system components. *Id.* at 22. The agency will order a minimum quantity of 50 units (whether components or FREE systems) and a maximum quantity of 300,000 units over a contract period of 5 years. *Id.* at 6-8.

Awards are to be made to those firms offering the “top performing” products considering the following factors (in descending order of importance): technical, management, past and present performance, and price. Id. at 33. The RFP envisions a “downselection” process in three phases. During phase 1, offerors will submit proposals and product samples that will be evaluated for award purposes; the agency anticipates awarding numerous initial contracts based on its phase 1 evaluation. (The product samples called for under phase 1 are to include one “set” of the proposed product for each size that the offeror manufactures, along with fabric samples that have not been fabricated into completed garments.) During phase 2, the government will issue delivery orders to the awardees for 50 units of their system or components. These 50 units will be further evaluated for various aspects of suitability (for example, fit/sizing, donning and doffing ease, compatibility with mission relevant equipment, and burn injury prediction). At the conclusion of phase 2, the agency will select two FREE systems—either complete systems or components knitted into a system by the agency—for participation in phase 3. RFP at 32. During phase 3, the agency will order an additional 500 units that will be evaluated by prospective users to verify durability, mission compatibility and soldier preference. At the conclusion of phase 3, the agency will select a single FREE system to meet its needs over a 5-year period. RFP at 32.

Tennier challenges numerous terms of the RFP. As a general rule, solicitations must contain sufficient information to allow offerors to compete intelligently and on an equal basis. However, there is no legal requirement that a solicitation contain such detail as to completely eliminate all risk or remove all uncertainty from the mind of every prospective offeror. Braswell Servs. Group, Inc., B-276694, July 15, 1997, 97-2 CPD ¶ 18 at 2-3. In interpreting solicitation terms, we will read the solicitation as a whole and in a manner that gives effect to all of its provisions. AMS Group, B-299369, Apr. 12, 2007, 2007 CPD ¶ 72 at 3. We have considered each of Tennier’s arguments and find that they are without merit. We discuss Tennier’s primary arguments below.

Tennier asserts that, since the RFP provides for multiple awards, it is unclear whether the minimum and maximum quantities will be ordered from each awardee or whether the total quantity will be split among all awardees. This assertion is without merit. We think it is sufficiently clear, as explained above, what quantities in the RFP will be ordered from each awardee. Initial orders of 50 units from each contractor will be used in the phase 2 evaluation; this quantity represents the minimum that the agency will order under the awardees’ ID/IQ contracts. At the conclusion of the phase 2 evaluation, the agency will place orders for an additional 500 units from up to two contractors, for purposes of the phase 3 evaluation. At the conclusion of the phase 3 evaluation, the agency will select one contractor, from which it intends to order the remainder of the up to 300,000 units.

Tenier argues that the agency has failed to limit the number of units it can order in a given period during contract performance, such that it is possible for the agency to order all 300,000 units at once. We find no impropriety here. An ID/IQ contract, by

its very nature, is used where an agency is unsure of the quantities or the delivery times that it may ultimately require. Thus, as Tennier alleges, it is of course possible for the agency to order all 300,000 units within a short time, and under those circumstances, the contractor would be legally obligated to furnish them in accordance with any established delivery schedule. We are aware of nothing legally objectionable in an agency's proceeding in this fashion, since, again, ID/IQ contracts are appropriate in precisely the circumstances present here, namely, where the agency cannot determine at the outset precisely how many units it will ultimately order from each awardee. See Federal Acquisition Regulation (FAR) §16.504(b). (We note that the agency has specified 60,000 as the approximate number of units it is likely to order in each of the 5 contract years, up to the maximum quantity of 300,000 units.)

Tennier argues that the minimum quantity of 50 units is inadequate if that is the number of production units that be will be ordered over the contracts' 5-year period of performance, and that the minimum therefore should be increased. Tennier cites no legal authority--and we are aware of none--for the proposition that a 50-unit minimum quantity is impermissible. Again, moreover, as a practical matter, it is clear that the solicitation contemplates that the agency will fulfill its production unit requirements of up to 300,000 units from the one firm receiving award following the evaluation under phase 3.

Tennier asserts that it is not clear whether the agency intends to pay for the quantities to be ordered under phases 2 and 3 (50 and 500 units, respectively), and that it is unclear whether separate awards will be made for phases 2 and 3. Tennier's assertion is without merit. First, there simply is no basis to assume that the agency will not pay the contractors for the units ordered under phases 2 and 3. Second, the record is clear that the agency will make a single award of an ID/IQ contract to each successful offeror, and will thereafter issue the phase 2, and possibly phase 3, delivery orders under each of those contracts.

Tennier argues that, since the evaluations under all phases will take more than 120 days (the period for which firms are required to offer their proposed prices), the RFP should have some provision for price adjustments at the conclusion of the phase 3 evaluation. However, Tennier has cited no legal authority, and we are aware of none, requiring that the agency provide for such pricing adjustments. We point out, furthermore, that the RFP includes a pricing table that allows firms to propose different pricing based on the number of units ordered, as well as different pricing for each phase and for each of the 5 years of the production. Amend. No. 3, attach. 1. This will enable offerors to adjust their pricing on the basis of quantity as well as period of performance.

Tennier asserts that the agency unreasonably declined to extend the due date for initial proposals, despite the fact that the offerors will be required to tender production demonstration models with their initial proposals. Tennier maintains that these are specialty items that require long lead times, and that the RFP

unreasonably requires offerors to submit proposals in essentially 45 days. (Tennier maintains that it requires 6-8 weeks to obtain materials plus additional time for manufacturing its product samples.)

Agencies are required to afford offerors an adequate amount of time in which to prepare proposals; the determination of what constitutes an adequate amount of time for proposal preparation is a matter committed to the discretion of the contracting agency; we will object to that determination only where it is shown to be unreasonable. Lanier Worldwide, Inc., B-249338, Nov. 12, 1992, 92-2 CPD ¶ 343 at 3.

Tennier has not shown that the time permitted for proposal preparation is unreasonable. The RFP was synopsised on December 21, 2006, more than 4 months prior to the deadline for submitting proposals, and was issued approximately 2 months before the closing date for submitting proposals. There is no evidence in the record indicating that offerors generally would be expected to require more time, or supporting Tennier's assertion that it will require some 6 to 8 weeks lead time to acquire materials, and additional time to complete the fabrication of its product demonstration models. Further, as the agency notes, the RFP contemplates the furnishing of commercial-off-the-shelf, non-developmental (COTS/NDI) items that are routinely manufactured, and thus do not include materials with long lead times necessary for fabrication.¹ (We note that the agency proceeded with acceptance of proposals under the RFP, and received 20 proposals, which supports the view that the time permitted for proposal preparation is sufficient.)

Tennier argues that the RFP is ambiguous with respect to the delivery times for the production units because it states only that those deliveries must be made in accordance with the timeframes stated in the delivery orders. In this regard, the RFP advises that the agency will establish delivery schedules when issuing production delivery orders. RFP at 30. There is no basis for objecting to the RFP's providing that delivery schedules will be established for the production items when the delivery orders are issued. Indeed, this is consistent with the nature of an ID/IQ contract, under which the delivery schedule is not established at the outset.

Tennier asserts that the RFP improperly fails to include information relating to the sizes required by the agency; Tennier maintains that it needs to know the required sizes in order to intelligently prepare its proposal.² As discussed above, the RFP

¹ Tennier maintains that the items being acquired are not COTS/NDI items. However, Tennier has submitted no evidence or information refuting the agency's position to the contrary.

² Tennier objects to the requirement that offerors submit product demonstration models in every size the offeror manufactures, claiming that this will be unreasonably costly. However, there is no basis for precluding the agency from requiring samples in all sizes that potentially will be furnished under the contract.

requires samples in all sizes an offeror manufactures. The agency also has made available comprehensive data on the Army's population. Amend. No. 2 at 5. Given that the agency is seeking to acquire standard sizes regularly manufactured by the offerors, and in light of the information provided, in our view the solicitation provides adequate information in this area.

Tennier asserts that two components of the FREE system--the balaclavas and the rigger belt--are items that must be acquired from the National Industries for the Severely Handicapped, National Institute for the Blind (NISH/NIB) pursuant to the Javitz Wagner O'Day (JWOD) Act.³ According to the protester, this potentially creates a competitive inequality because offerors proposing a complete FREE system may choose NISH/NIB products from different regional centers, and the selected products may vary as to price and quality. The protester also asserts that the RFP is silent respecting how the NISH/NIB items will be evaluated.

There is no merit to this aspect of Tennier's protest. The RFP advises offerors that the balaclavas and rigger belt are listed on the NISH/NIB procurement list, Amend. No. 2 at 6, that NISH/NIB may submit a proposal and product demonstration models directly to the agency for those items, and that these products will be evaluated and tested in accordance with the RFP; to the extent that they are found technically acceptable, the items will be downselected for production purposes. Amend. No. 3 at 3. Thus, offerors other than NISH/NIB will not need to include the NISH/NIB items in their FREE systems; rather, those firms will propose their own balaclavas and rigger belts (or those of a subcontractor), which will be evaluated and tested in accordance with the terms of the RFP. In any case, even if the protester were correct that different firms may submit different NISH/NIB products from different regional centers, we fail to see how this would improperly establish an unequal competition; the situation would be no different from one where firms submit the products of different subcontractors, which, obviously, is not improper.

Tennier protests the solicitation's requirement for past performance information. The RFP provides that the agency will assess the relevance of the past performance information, and that past contracts for the manufacture of fire resistant items at a rate of 5,000 units or more will be deemed more relevant than contracts for the

³ The JWOD Act establishes the Committee for Purchase From People Who Are Blind or Severely Disabled, and authorizes it to establish and maintain a list of commodities and services provided by qualified nonprofit agencies for the blind or severely handicapped that it has determined are suitable for procurement by the government. 41 U.S.C. §§ 46(a), 47(a) (2000). Once a commodity or service has been added to the procurement list, contracting agencies are required to procure that commodity or service directly from a qualified agency for the blind or severely handicapped if it is available within the time period required. 41 U.S.C. § 48; FAR § 8.704; JAFIT Enters., Inc., B-266326, B-266327, Feb. 5, 1996, 96-1 CPD ¶ 39 at 2.

manufacture of fire resistant items at a rate of 2,500 or more, and that contracts for the manufacture of other clothing at a rate of 5,000 units or more will be deemed still less relevant. Tennier maintains that the RFP is unclear because it does not specify the time period over which the units must have been manufactured, for example, 5,000 units per month or per year. This argument is without merit. The RFP provides broad guidance to the effect that more recent experience and the past production of greater quantities of fire resistant clothing items will be deemed more relevant than less recent experience and the manufacture of lesser quantities of fire resistant clothing or comparable quantities of non-fire resistant clothing; we think it implicit that firms demonstrating production of greater quantities will be given more favorable consideration than firms producing a lesser quantity over a given period of time. This is sufficient to put offerors on notice of the prior contracts that they should provide as the best examples of their past performance.

The protest is denied.

Gary L. Kepplinger
General Counsel