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**Comptroller General
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Decision

Matter of: Armed Forces Merchandise Outlet, Inc.

File: B-294281

Date: October 12, 2004

Anne B. Perry, Esq., Jonathan S. Aronie, Esq., Louis D. Victorino, Esq., and Jaime H. Weinberg, Esq., Sheppard, Mullin, Richter, & Hampton, for the protester.
Vera Meza, Esq., and David H. Scott, Esq., U.S. Army Materiel Command, for the agency.

Katherine I. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency's issuance of a delivery order to a firm pursuant to its General Services Administration (GSA), Federal Supply Schedule contract was improper is sustained where the product to be furnished is outside of the scope of the firm's GSA schedule contract and the agency unreasonably determined that the selected product met the solicitation specifications.

DECISION

Armed Forces Merchandise Outlet, Inc. (AFMO) protests the U.S. Army Materiel Command's (AMC) issuance of a delivery order to KP Sports, Inc. under KP Sports' General Services Administration (GSA), Federal Supply Schedule (FSS) contract, pursuant to request for quotations (RFQ) No. W91CRB-04-T-0142, for "Wick Away Sports Bras." AFMO argues that the order to KP Sports was improper because it was outside of the scope of KP Sports' GSA schedule contract, and contrary to the terms of the solicitation.

We sustain the protest.

BACKGROUND

The RFQ, issued on May 18, 2004, contemplated the award of a 36-month indefinite-delivery, indefinite-quantity contract "under the terms and conditions of General Services Administration (GSA) contract (to be determined at the time of award), Schedule 078," Sports, Promotional, Outdoor, Recreation, Trophies and Signs (SPORTS). RFQ § B.1. Likewise, participation under the RFQ was "limited to

contractors possessing GSA contracts under Schedule 078.” RFQ B.4. The RFQ listed performance specifications, including requirements that the sports bra not have a tag (other than a blank identification tag heat-sealed onto the outside back of the garment), that sizing information be heat-sealed on the inside of the garment, and that the color of the bra was to be black. In addition, the RFQ for the sports bras specifically provided that “[t]he shell material used in production shall consist of 82% Nylon, 18% Spandex. The entire garment shall be lined with a material consisting of 84% polyester and 16% spandex.” RFQ Performance Specifications. Amendment 1, issued on May 20, revised the solicitation “to request bid samples be provided along with descriptive literature in order to verify compliance with specifications.” Amend. 1. As amended, the RFP required that “[q]uotes shall include descriptive literature sufficiently detailed to demonstrate that the proposed items conform to the above performance requirements, as well as bid samples.” Id.

As amended, the solicitation provided for award to be made to the vendor whose quotation represented the best value based on two evaluation factors: technical and price. Technical was significantly more important than price. Contractors were cautioned that to receive consideration for award, a rating of no less than “Acceptable” must be achieved for the technical factor. Amend. 2.

AMC received quotations from KP Sports, Tactical Gear Now, and a third contractor by the May 26 closing time. Following an inquiry by the contracting officer, it became clear that Tactical Gear Now did not possess the required GSA contract. On May 28, AFMO submitted a quotation for two different bras, signed by the same person who had submitted Tactical Gear Now’s quotation and using the same company address, in which it cited AFMO’s GSA contract and asked that its name be substituted for that of Tactical Gear Now. On that same date, AFMO also submitted two bid samples, along with a letter that stated as follows: “Enclosed please find two ‘pre-production’ samples to fulfill the above-referenced Request for Quotation number. Please note that these are sample room samples, not to exact specifications.”

On June 9, the agency evaluation board completed its evaluation of the samples. Although AFMO’s quoted price was lower than KP Sports’, AFMO’s quotation was found to be unacceptable because its samples were determined not to meet certain of the specifications. According to the report of the evaluation board:

The [AFMO] bid is determined to be unacceptable. The bid sample does not meet the purchase description as stated by the offeror in their letter accompanying the bid sample. Additionally, the company is a GSA schedule holder, but this item is not an available item on that schedule.

Technical Evaluation of Agency Evaluation Board, June 9, 2004. Among the deviations from the specifications was that the shell and lining of AFMO’s bras were

comprised of different material than that required in the specifications; the lining of the bras was white rather than black; the bras had a tag on the inside; and the samples did not include an identification tag on the outside. The quotation of the third vendor also was found to be unacceptable on the basis that its sample bra did not meet certain specifications. The agency concluded that only the quotation submitted by KP Sports was acceptable; according to the agency's evaluation, KP Sports' sample bra met all of the specifications, and was on KP Sports' GSA schedule contract. On June 10, AMC advised AFMO by letter that "[y]our bid/sample/technical quote was evaluated and determined technically unacceptable since your submitted bid sample did not meet the specifications stated in the purchase description." On June 14, AMC issued an order to KP Sports. After receiving a debriefing, AFMO filed this protest with our Office.

DISCUSSION

AFMO challenges the determination that its quotation was unacceptable. According to AFMO, the requested samples were not required to conform to the specifications; the protester maintains that AFMO's "clear and unequivocal commitment" to comply with the specifications was sufficient for purposes of establishing acceptability. AFMO Comments, Aug. 6, 2004, at 10. In any case, according to the protester, the agency did not treat vendors equally when evaluating quotations.

AFMO Interested Party Status

As a preliminary matter, we address the argument raised by the agency that AFMO is not an interested party to protest the order to KP Sports because the protester's quotation was submitted after the closing time for receipt of quotations and, in any case, was technically unacceptable.

It is well established that the standard for late proposals does not generally apply to requests for quotations. An RFQ, unlike a request for proposals (or an invitation for bids), does not seek offers that can be accepted by the government to form a contract. Rather, the government's purchase order represents the offer that the vendor may accept through performance or by a formal acceptance document. DataVault Corp., B-248664, Sept. 10, 1992, 92-2 CPD ¶ 166 at 2. It follows that language in an RFQ requesting quotations by a certain date cannot be construed as establishing a firm closing date for receipt of quotations, absent a late quotation provision expressly providing that quotations must be received by that date to be considered. Instruments & Controls Serv. Co., B-222122, June 30, 1986, 86-2 CPD ¶ 16 at 3. An agency may consider "late" quotations or quotation modifications, so long as the award process has not begun and other offerors would not be prejudiced. KPMG Consulting LLP, B-290716, Sept. 23, 2002, 2002 CPD ¶ 196 at 11.

Here, AMC considered AFMO's submission substituting that firm for Tactical Gear Now. AMC's action was consistent with the RFQ, which did not contain a late

quotation provision. Further, the substitution of AFMO for Tactical Gear Now was received on May 28, only 2 days after the closing time on May 26, and apparently before start of the selection process. Since there is no apparent basis to find that any competitor was prejudiced by the agency's acceptance of the substitution of AFMO for Tactical Gear Now, we find that AMC acted properly when it accepted AFMO's "late" modification of the quotation.

Further, we also find that AFMO is an interested party to protest the issuance of an order to KP Sports notwithstanding the unacceptability of AFMO's quotation. As an initial matter, we agree with AMC that, notwithstanding AFMO's arguments to the contrary, the agency reasonably determined that AFMO's quotation was unacceptable. AFMO does not dispute, and indeed conceded in the cover letter accompanying its samples, that the sample bras it submitted did not comply with all of the specifications set forth in the RFQ. While AFMO asserts that only its promise to perform, and not the characteristics of its samples, should have been determinative of the acceptability of its quotation, its position ignores the clear language of the solicitation. As the first page of Amendment 1 made clear, "samples [were to] be provided along with descriptive literature in order to verify compliance with performance specifications." Amend. 1, Standard Form 30. Given the clear noncompliance of AFMO's samples with the required specifications, its quotation was reasonably found technically unacceptable.

In addition, we agree with the agency's technical evaluation panel that AFMO's quotation also was unacceptable because the quoted bras were not available on its GSA schedule contract. In this regard, as a general rule, contracting agencies are required to obtain full and open competition in the procurement of supplies and services. 10 U.S.C. § 2304(a)(1)(A) (2000); Federal Acquisition Regulation (FAR) § 6.101. The FSS program gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. FAR § 8.401(a). The procedures established for the FSS program satisfy the requirement for full and open competition. 10 U.S.C. § 2302(2)(c); Sales Res. Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 3. However, non-FSS products and services may not be purchased using FSS procedures; instead, their purchase requires compliance with the applicable procurement laws and regulations, including those requiring the use of competitive procedures. Symlicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 3; OMNIPLEX World Servs. Corp., B-291105 Nov. 6, 2002, 2002 CPD ¶ 199 at 4-5.

Here, while the RFQ did not explicitly state that all solicitation items were to be procured under FSS contracts, the solicitation did announce the agency's intention to order from an existing GSA contractor; in our view, this was sufficient to place vendors on notice that the agency intended to order all items using GSA FSS procedures and hence that all items were required to be within the scope of the vendor's FSS contract. Altos Fed. Group, B-294120, July 28, 2004, 2004 CPD ¶ 172 at 4. Since it is undisputed that AFMO's quoted bras were not on its GSA schedule

contract, we find that AMC properly determined AFMO's quotation to be unacceptable on this basis, as well on account of the deviation of its samples from the stated specifications.

However, the unacceptability of AFMO's quotation is not determinative of its interested party status. It is of course true that under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556, only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (2004). Determining whether a party is interested involves consideration of a variety of factors, however, including the nature of the issues raised, the benefit of relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., B-228470, Feb. 16, 1988, 88-1 CPD ¶ 151 at 2-3. In general, a offeror whose offer was properly rejected is not an interested party eligible to protest an award to another firm where there are other offerors that would be in line for award if the protest were sustained. See Aquila Fitness Consulting Sys., Ltd., B-286488, Jan. 17, 2001, 2001 CPD ¶ 4 at 4.

However, we have found a firm to be an interested party even though its product sample had been properly rejected as failing to comply with various required salient characteristics of the solicited product, where its protest alleges that the product samples of the awardee did not comply with the salient characteristics and where the awardee was the only other offeror eligible for award. Wilcox Indus. Corp., B-281437.2 et al., June 30, 1999, 99-2 CPD ¶ 3 at 3-4. In addition, we will consider a protest where an offeror protests that it was denied equal treatment because the agency rejected its nonconforming offer while accepting a competitor's similarly nonconforming offer. GNB Technologies, Industrial Battery Co., B-262187, Dec. 4, 1995, 95-2 CPD ¶ 263 at 2; Maintenance and Repair, B-251223, Mar. 19, 1993, 93-1 CPD ¶ 247 at 5; Dillingham Ship Repair, B-218653, Aug. 14, 1985, 85-2 CPD ¶ 167 at 3. In other words, we view a protester as an interested party where the basis for protest is that the protester and the awardee were treated disparately, even where we agree that the protester's offer was unacceptable. Aquila Fitness Consulting Sys., Ltd., supra.

Here, as discussed below, AFMO asserts that if its quotation was unacceptable, then the quotation of KP Sports was as well, and yet that firm's quotation was the only one determined by the agency to be acceptable. In these circumstances, we consider AFMO to be an interested party to challenge the evaluation of KP Sports' quotation.

Acceptability of KP Sports' Quotation

KP Sports' current FSS contract under Schedule 078 lists a black sports bra ("JogBra") which the schedule describes as having a fabric content of 63 percent nylon, 23 percent polyester, and 14 percent lycra. AFMO argues that the order to KP

Sports is outside the scope of its FSS contract because the RFQ required a different fabric, that is, that the lining have a fabric content of 84 percent polyester and 16 percent spandex, and that the bra shell have a fabric content of 82 percent nylon and 18 percent spandex.

AMC recognizes that products not on the GSA schedule may not be purchased where, as here, the agency is using GSA FSS procedures. Further, the agency appears to concede that KP Sports' schedule contract identifies a sports bra that is described on the schedule as having fabric whose content is inconsistent with the content required under the RFQ. AMC, however, asserts that KP Sports' FSS contract was modified on May 17 to include the sports bra, part number 1134, specified in its quotation. Specifically, according to the agency,

[w]hile the part number was changed, its fabric content, which differs from the old part number, was inadvertently not updated. The fabric content of part number 1134 is as certified by the awardee in its proposal and in the sample provided.

Agency Comments, Aug. 10, 2004.

We find AMC's position to be unpersuasive. Both on the GSA Advantage website and in the modification to KP Sports' contract issued by GSA, the selected sports bra is described as having a fabric content of 63 percent nylon, 23 percent polyester, and 14 percent lycra, and not the polyester/spandex blend required by the RFQ. While the agency asserts that the fabric content of the sports bra on KP Sports' GSA schedule contract was "inadvertently not updated" when the contract was modified, we find that the record indicates otherwise. Specifically, AMC has furnished our Office a copy of KP Sports' letter to GSA dated February 26, 2004, requesting that its FSS schedule contract be updated, in which KP Sports advises GSA that "[w]e have updated our product numbers under SIN 192-45, the products are the same, we just changed our numbering system." In addition, AMC has also furnished our Office a copy of a price list for KP Sports' product line, which the agency indicates was attached to KP Sports' request for a modification of its GSA schedule contract. KP Sports' price list, which appears to be the same price list that was attached to GSA's modification of its schedule contract, likewise describes the sports bra on the schedule as having a fabric content of 63 percent nylon, 23 percent polyester, and 14 percent lycra. Since it is clear from the record that the quoted sports bra was not the sports bra on KP Sports' schedule contract, we conclude that the order to KP Sports was improper because the delivery order included items that were outside the

scope of that firm's GSA schedule contract, and we sustain AFMO's protest on this basis.¹

In addition, we find that order to KP Sports also was improper because its sample did not comply with the RFQ specifications. Here, the specifications clearly stated that "[n]o tag is permitted," RFQ at 4, and one of the reasons that the agency cited as a basis for rejection of AFMO's bid sample was that AFMO's sample had a tag. Although the evaluators determined that KP Sports' sample met the requirement that no tags were permitted, our Office has examined KP Sports' sample bra, and it is clear that the sample in fact has a tag. Because the agency's evaluation was inconsistent with the terms of the solicitation, we sustain the protest on this basis as well.

We recommend that the agency terminate the order to KP Sports, assess its actual requirements, and then either amend the RFQ or issue a new solicitation, whichever is appropriate. We also recommend that AFMO be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2004). AFMO 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.

Anthony H. Gamboa
General Counsel

¹ We note that KP Sports did not intervene in this protest. Moreover, although our Office contacted GSA regarding this protest, as is our practice with protests related to the FSS, GSA did not submit comments.