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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Precision Lift, Inc.

File: B-310540.4

Date: June 26, 2008

Marc Lamer, Esq., Kostos & Lamer, for the protester.

Thomas Spika, for Spika Welding & Manufacturing, Inc., the intervenor.

Christine M. Choi, Esq., and Raymond M. Saunders, Esq., Department of the Army, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined that the awardee's quotation complied with the solicitation's requirement that a commercial, non-developmental item be provided, where the awardee's offered item has been previously offered for sale to the general public, although none have been sold.
 2. Agency's evaluation of quotations is reasonable, where the record of the technical evaluation evidences that the agency reasonably determined that the awardee's quoted item was technically superior to that quoted by the protester, and the record of the past performance evaluation evidences that the agency reasonably determined that previous contracts performed by the awardee were for items similar to those sought in this procurement.
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DECISION

Precision Lift, Inc. (PLI) protests the award of a contract to Spika Welding & Manufacturing, Inc., under request for quotations (RFQ) No. W9133L-07-T-0033,

issued by the Department of the Army, for portable helicopter maintenance platforms.¹

We deny the protest.

The RFQ provided for the award of a contract to the vendor submitting the quotation determined to represent the best value to the government based upon the evaluation factors (listed in descending order of importance) of technical, past performance, and price. RFQ at 6. The solicitation informed vendors that their quotations “must be complete, self-sufficient, and respond directly to the requirements of this solicitation,” and requested that the quotations be comprised of three parts, with each part addressing an evaluation factor. RFQ at 13. The RFQ also included, under the heading “Performance Specification,” a number of “minimum performance standards (MPS)” that were “required to be offered in the candidate platform,” and provided that these MPSs “shall not be traded against other technical or non-technical requirements” in the vendor’s quotation.² RFQ at 3. As relevant here, one MPS stated: “The portable maintenance platform shall be a commercial, non-developmental item.” RFQ at 4. In addition, the RFQ provided under the heading “Design Specifications” that vendors whose platforms were “not currently available” were to provide “[d]etailed engineering drawings complete with design/specifications/dimensions, and detailed descriptions,” as well as “[l]ead times for delivery of required maintenance stands once [agency] review/approval of engineering drawings has been conducted and provided to vendor.”³ RFQ at 5.

The agency received quotations from three vendors, with Spika’s quotation being rated as “very good” under the technical factor and “low risk” under the past performance factor, at a price of \$2,704,000. PLI’s quotation was rated as “good” under the technical factor and “low risk” under the past performance factor, at a price of \$2,625,524. Agency Report (AR) at 7; Tab 12, Source Selection Authority (SSA) Decision, at 2. The agency determined that Spika’s quotation represented the best value to the government, given certain evaluated technical advantages

¹ Although the protest here concerns the placement of an order under an RFQ, the parties refer to the award of a contract as does the decision for the sake of consistency.

² The RFQ also listed threshold capabilities that “should be offered in the candidate platform” and “may be traded against other technical and non-technical requirements” in the vendor’s quotation. RFQ at 3.

³ As explained by the agency, the terms “maintenance stands” and “maintenance platforms” are used interchangeably. AR, Tab 26, Declaration of the Past Performance Evaluator, at 1.

associated with Spika's platforms, and subsequently awarded a contract to that firm. AR, Tab 12, SSA Decision, at 3.

PLI filed a protest with our Office challenging the award of the contract to Spika, arguing that Spika's platforms were not compliant with the RFQ's requirement that the platforms be "commercial, non-developmental item[s]." PLI also argued that the agency's evaluation under the technical factor of its quotation as "good" and Spika's as "very good" was not reasonably based, given PLI's prior experience in providing maintenance platforms and the asserted noncompliance of Spika's platforms with the RFQ's requirement that the platforms be commercial, non-developmental items. The protester also argued that the agency's evaluation of Spika's quotation as "low risk" under the RFQ's past performance factor was unreasonable.

The agency, after submission of the agency report and receipt of protester's comments, informed our Office and the parties that it intended to reevaluate the quotations under the past performance factor, and "conduct further research on the issue of whether the [Spika's quotation] contains commercial non-developmental items." AR, Tab 17, Agency Corrective Action Letter (Nov. 21, 2007). Given this, our Office dismissed PLI's prior protest as academic. The agency took the corrective actions described above, and again determined that Spika's quotation represented the best value to the government.

PLI again protests that Spika's quotation is noncompliant with the solicitation's requirement that the maintenance platforms be commercial, non-developmental items. The protester argues that because Spika has not previously manufactured the platforms, that firm's platforms cannot be considered commercial non-developmental items, especially as that requirement was clarified by the agency through the inclusion of the following question and answer in amendment No. 2 to the RFQ:

Are you referencing previously designed and in use full wrap around phase/depot level maintenance platforms?
YES

RFQ amend. 2, at 2 (emphasis added).

The determination of whether a product is a commercial or non-developmental item is largely within the discretion of the contracting agency, and will not be disturbed by our Office unless it is shown to be unreasonable. Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ 214 at 3. As pertinent here, Federal Acquisition Regulation (FAR) § 2.101 defines a commercial item as:⁴

⁴ A quotation of either a commercial item or non-developmental item would have met the RFQ's commercial, non-developmental item requirement. Avtron Mfg., Inc.,
(continued...)

(1) Any item . . . that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and--

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. . . .

Spika's quotation, as well as information Spika submitted in response to the agency's corrective action and during the course of this protest, establish that Spika has not manufactured the platforms that are the subject of this RFQ, but rather, has manufactured other aircraft maintenance platforms, as well as some of the components comprising the subject platforms. AR, Tab 8, Spika Quotation, at 5-6; Tab 16, Spika Letter to Contracting Officer (Oct. 15, 2007); Agency Supp. Report at 11; Tab 2, Spika E-mail (May 23, 2008). However, the record also reflects that Spika has offered the subject platforms for sale to private firms, as well as to the government through a response to a previous solicitation, and that Spika's quotation included product brochures regarding the subject platforms. AR, Tab 8, Spika Quotation, at 12-23; Agency Supp. Report, Tab 2, Spika E-mail (May 23, 2008); Tab 4, Spika Letter to GAO (Nov. 26, 2007), at 11; Tabs 7-9, Spika Letters to Potential Commercial Customers. Additionally, as pointed out by the agency, Spika's platforms are "based on non-patented and non-proprietary maintenance platform

(...continued)

B-280758, Nov. 16, 1998, 98-2 CPD ¶ 148 at 4. In light of the agency's determination that Spika's maintenance platforms are commercial items, the FAR definition of a non-developmental item is not relevant to this protest.

designs that have been in service in maintenance facilities throughout the United States.” AR at 15; Tab 16, Spika Letter (Oct. 15, 2007).

As indicated above, actual sale of an item to the general public is not required for an item to be considered a commercial item and the record shows that Spika has in fact offered these platforms for sale to commercial entities.⁵ See Coherent, Inc., supra, at 2-3. Although the above-quoted question and answer referenced by the protester suggests that the platforms quoted should be “in use,” that language must be considered in the context of the solicitation read as a whole. See SRI Int’l, Inc., B-250327.4, Apr. 27, 1993, 93-1 CPD ¶ 344 at 6 n.5 (solicitations are read as a whole and in a manner that gives effect to all provisions of the solicitation). That is, the solicitation includes the commercial item language (which does not require that the item quoted have been actually sold to the general public or that it be “in use”), as well as the section of the solicitation that allows for the submission of quotations from vendors whose platforms are “not currently available,” and provides for the “delivery of required maintenance stands once [agency] review/approval of engineering drawings has been conducted and provided to vendor.” See RFQ at 5. Thus, given that Spika has offered these platforms for sale to commercial entities, we have no basis on this record to question the agency’s determination that Spika is offering a commercial, non-developmental item in compliance with this solicitation requirement that one be supplied.⁶ See Coherent, Inc., supra.

The protester also argues that the agency’s evaluation of its and Spika’s quotations under the technical factor was not reasonably based. Specifically, the protester argues that the documentation of the technical evaluation is inadequate and does not support the agency’s rating of its quotation as “good” and Spika’s quotation as “very good.”

⁵ The protester, citing to the Restatement (Second) of Contracts § 24, and FAR § 2.101, contends that the Spika letters to potential commercial customers describing its “product offering” cannot properly be considered as “offer[s] for sale,” given that Spika’s letters would not “allow the ‘offeree’ to bind the ‘offeror’ by the offeree’s unilateral acceptance thereof.” Protester’s Supp. Comments at 3. Our Office has declined to give such a limited definition to the phrase “offered for sale,” and believes that the marketing of the item to commercial customers fits within the phrase “offered for sale” as that term is used in FAR § 2.101 and 10 U.S.C. § 2376 (2000 & Supp. IV 2004) (referring to 41 U.S.C. § 403(12) (2000) for definition of “commercial item”). See Coherent, Inc., supra, at 2-3.

⁶ Spika’s platforms are not available solely as the result of the instant solicitation. Cf. Chant Eng’g Co., Inc., B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45 at 4 (new equipment that may only become available as a result of a commercial item solicitation cannot satisfy the solicitation’s requirement for a commercial item).

In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the evaluation factors set forth in the RFP. The protester's mere disagreement with the agency's judgment does not render the evaluation unreasonable. Hanford Env'tl. Health Found., B-292858.2; B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 4.

The record of the agency's technical evaluation consists primarily of a one-page memorandum that notes the evaluated strengths and weaknesses of each of the three quotations received with certain comments, and a two-page evaluation matrix setting forth each of the MPS and threshold capabilities, and identifying for each quotation received whether it met or exceeded the applicable MPS or threshold capability. AR, Tab 9, Technical Evaluation Memorandum and Matrix.

The evaluation documentation, although brief, is sufficient to permit review of the agency's technical evaluation and does provide the evaluated discriminators between PLI's and Spika's quotations that led to their respective ratings of "good" and "very good" under the technical factor. For example, the technical evaluation states that Spika's quotation provided for a 5-year warranty for each platform, as opposed to the 3-year warranty provided by PLI's quotation, and noted as an additional strength that Spika's platforms "have [an] advanced interlocking alignment pin system" that exceeded the relevant MPS, again in contrast to PLI's quotation, which was found to have "met" the relevant MPS. Id. at 1. The agency also noted that although PLI's platform "met" the MPS concerning platform surfaces, Spika's "[e]xceeded [the] requirement [with] ribbed 1.5 inch extruded plank decking with 40% more cross-sectional material," which in the evaluator's view "equates to greater strength, support and safety." Id. at 4. In fact, these specific features of Spika's quoted platforms--the "advanced interlocking alignment pin system and the 1.5 inch] thick extruded aluminum deck planking"--were specifically found by the SSA to justify Spika's quotation's higher price. AR, Tab 12, SSA Decision, at 3. Although PLI disagrees with the results of the agency's technical evaluation and the adequacy of its documentation, we cannot find that the evaluation is inadequately documented or that the technical evaluation is not reasonably based.

PLI argues that the agency's evaluation of both its and Spika's quotations as "low risk" under the past performance factor was not reasonably based.⁷ In this regard, PLI contends that "given the fact that it previously supplied the very same platforms to the [agency] as are being procured under this Solicitation, whereas Spika has never performed in any contracts which could be described as 'similar in scope and complexity,' the assignment of the same rating to Spika as PLI received is unreasonable." Protester's Comments at 15.

⁷ The RFQ provided that quotations could be evaluated under the past performance factor as low risk, moderate risk, high risk, or unknown risk. RFQ at 7.

The RFQ provided that in evaluating quotations under the past performance factor, the agency would consider “[p]ast performance on contracts currently ongoing or completed within the last five years that are directly similar in scope and complexity of the performance specifications.” RFQ at 6-7. The solicitation continued by stating that “[e]ach [vendor] will be evaluated on its performance under existing or prior contracts for similar products or services,” and concluded here by stating that “[t]he government reserves the right to consider all aspects of an offeror’s performance history, but will attribute more significance to recent work comparable in scope to this solicitation.” RFQ at 7.

The section of Spika’s quotation addressing the past performance evaluation factor referenced five contracts. The record reflects that the agency, in reevaluating Spika’s quotation, contacted references for two of the listed contracts. The first reference, provided by [DELETED], related to a contract for fixed-wing aircraft maintenance platforms. This reference provided in part that although there were certain “minor” issues regarding the assembly of the platforms, Spika’s “[c]ustomer service/support handling these issues was outstanding,” and that “[o]verall we are very satisfied with the product Spika Manufacturing has produced.” AR, Tab 18, Past Performance Reevaluation, at 1-2. This reference also stated that Spika’s platforms “provided some very innovative options which will allow us to better utilize our stands during all facets of organizational maintenance,” and that the customer would “continue to purchase these stands from Spika.” Id.

The second reference, provided by [DELETED] in relation to universal maintenance platforms for helicopters, responded to the agency’s inquiry regarding Spika’s past performance as follows:

We love our stands, we even had people in to look at them so they could see the quality. We had a company in here we bought a hoist from and they build stands also. They looked at them and said they were nice and even took down their number and address. We are going to be buying another set for a different aircraft [we’r]e getting. . . .

AR, Tab 18, Past Performance Reevaluation, at 2. The agency evaluator who performed the reevaluation of Spika’s quotation determined that the [DELETED] reference was “a positive testament to the quality of Spika’s product as well as the quality of their support service.” Id. The evaluator noted with regard to the second reference that “[t]he customer is clearly very satisfied with the stands and has intent to purchase more in the future,” and that according to the reference “[t]he materials and service were deemed to be of high quality.” Id.

The evaluator, who has “been in aviation maintenance” for “over 32 years” and is currently “responsible for over 400 helicopters and their supporting systems,” determined that based upon his experience, which includes using “fixed-wing

maintenance stands . . . to repair helicopters,” that the platforms Spika supplied for the [DELETED] contract were for the purposes of the past performance evaluation “‘directly similar in scope and complexity’ to the [agency’s] requirement” as set forth in the RFQ. AR, Tab 26, Declaration of the Past Performance Evaluator, at 1-2. The evaluator adds that he determined based upon his experience that the “stands supporting maintenance operations for the UH-60 and CH-47 [helicopters] in the Lockheed Martin contract were very similar to the type of maintenance platforms that the [agency] was soliciting for its AH-64, UH-60 and CH-47 [helicopters] and therefore were ‘directly similar in scope and complexity to our performance specifications’ as stated in the solicitation.” Id.

In our view, the record reflects that the agency reasonably determined that these previously provided Spika maintenance platforms were similar to the platforms to be provided here. Although the protester appears to be correct, based upon the descriptions of the platforms provided by the references and the value of the contracts, that the platforms provided to [DELETED] and [DELETED] clearly were not identical to those to be supplied here, we cannot find that the agency’s conclusions regarding Spika’s past performance lacked a reasonable basis. See Landoll Corp., B-291381 et al., Dec. 23, 2002, 2003 CPD ¶ 40 at 6 (agency reasonably considered awardee’s past performance similar with regard to a solicitation for the manufacture of trailers for the transport of nuclear weapons, where the awardee had performed contracts for the production of trailers used to transport cargo at airfields); Marquette Med. Sys., Inc., B-277827.5, B-277827.7, Apr. 29, 1999, 99-1 CPD ¶ 90 at 12 (awardee’s past performance reasonably considered by agency where solicitation sought experience on similar, but not identical, projects).

The protest is denied.

Gary L. Kepplinger
General Counsel