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Decision

Matter of: Haworth, Inc.

File: B-297077; B-297077.2

Date: November 23, 2005

James J. McCullough, Esq., Deneen J. Melander, Esq., Steven A. Alerding, Esq., and Courtney J. Edmonds, Esq., Fried, Frank, Harris, Shriver & Jacobson LLP, for the protester.

Michael A. Nemeroff, Esq., Patrick K. O'Keefe, Esq., Richard L. Larach, Esq., and Patrick F. Linehan, Esq., Sidley Austin Brown & Wood LLP, for Herman Miller, Inc., an intervenor.

Kenneth A. Redden, Esq., Environmental Protection Agency, for the agency.

Paul N. Wengert, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency issued blanket purchase agreement for office furniture to vendor whose quotation did not comply with requirements of request for quotations.
 2. Protest is sustained where agency evaluation of protester's quotation for furniture was based on purported weakness under one evaluation criterion, where quotation showed that vendor actually met (or even exceeded) that criterion, and protester was competitively prejudiced because evaluation showed quotations were considered very close under the technical evaluation.
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DECISION

Haworth, Inc. protests the issuance of a blanket purchase agreement (BPA) to Herman Miller, Inc. (HMI) by the United States Environmental Protection Agency (EPA) under a request for quotations (RFQ) for furniture, including design and installation, for the Potomac Yard Complex buildings in Crystal City, Virginia.¹

¹ We note that the RFQ apparently had no serial number, and is simply identified by the parties as "Furniture Procurement for One & Two Potomac Yard," or similar phrasing.

Protest at 1. Haworth objects that its quotation was miscalculated, and that the successful vendor's quotation was noncompliant with the terms of the RFQ.

We sustain the protest.

The EPA issued the RFQ on July 15, 2005 to six vendors holding contracts under General Services Administration (GSA) Federal Supply Service (FSS) schedule 71 I for office furniture. The RFQ contemplated that the EPA would obtain its furniture as a single "Project," consisting of "the design and installation of approximately one thousand five hundred twenty (1,520) workstations and approximately one hundred eighty (180) private offices, along with conference rooms and miscellaneous furniture as noted in the counts provided." RFQ at 1.² In explaining the basis for vendor selection the RFQ stated that "[i]n accordance with FAR [Federal Acquisition Regulation] 8.404(d), award will be made to the GSA Schedule Contractor that offers the best value to the Government." RFQ at 34. Haworth agrees that the RFQ contemplated selection of a single vendor. Supplemental Protest at 4.

The RFQ provided that "[a]ll evaluation factors and significant sub-factors that will affect the contract award and their relative importance, other than cost and price, when combined are significantly more important than cost and price. All technical evaluation factors are essentially equal in importance." RFQ at 34. The RFQ listed four technical evaluation factors: product, environmental factors, past performance, and management approach. RFQ at 33-34. After receipt of quotations from three vendors, including Haworth and HMI, the agency selected HMI as the strongest technical submission and second lowest overall cost. Agency Report (AR), Tab L, Memorandum to File, at 3. Haworth was ranked second on the basis of its technical submission and its quotation was priced higher than HMI's.

The EPA issued a BPA to HMI on August 11. AR, Tab N, BPA No. GS-28F-8049H, at 1. On August 16, the EPA issued a unilateral modification, appearing to state that the BPA was an indefinite-quantity contract.³ AR, Tab R, Mod. No. GS-28F-8049H/0001, at 2.

² The agency confirms that it anticipated "that a blanket purchase agreement (BPA) would be awarded to the GSA Schedule Contractor that offered the best value." Contracting Officer's Statement at 1.

³ The terminology used by the parties to refer to the contracting actions challenged here is not consistent. The RFQ contemplated orders, but also stated that "[t]he Agency will award a contract to a 'GSA Contract Holder' only." Haworth styled its protest as an objection to the issuance of a "delivery order" or "task order" to HMI for the entire requirement. Protest at 1; Supplemental Protest at 1; Protester's Supplemental Comments at 1. However, the record shows that, rather than issuing a single task or delivery order, the EPA initially executed a BPA with HMI. The subsequent modification added a clause stating that "[t]his is an indefinite-quantity

(continued...)

The EPA provided a debriefing to Haworth on August 16, after which Haworth filed this protest on August 19. The agency notified our Office that the agency had determined to proceed with performance based on the best interests of the government. Letter from EPA Protest Control Officer to GAO (Aug. 31, 2005).

The procurement was conducted as a competition among selected FSS contractors, and the RFQ invoked FAR § 8.404(d). Under the FSS program, agencies are not required to conduct a competition before selecting a vendor that represents the best value and meets the agency's needs at the lowest overall cost. Federal Acquisition Regulation (FAR) § 8.404(a); Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4. However, where, as here, an agency handles the selection of a vendor for an FSS order like a competition in a negotiated procurement, and a protest is filed challenging the outcome of the competition, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. Id. at 4-5. An order issued on the basis of a quotation that deviates from RFQ requirements is objectionable where other firms in the competition are prejudiced by the award, that is, where the other firms might have been able to meet the agency's needs if afforded an opportunity to compete based on the relaxed requirements. Armour of Am., B-237690, Mar. 19, 1990, 90-1 CPD ¶ 304 at 4.

Haworth alleges that HMI's quotation should have been evaluated as technically unacceptable because the quotation indicated that HMI could not provide furniture meeting the specifications in the RFQ. As explained below, we agree, because we conclude that the HMI quotation did not provide chairs that would stack as required by the RFQ, and did not provide Forest Stewardship Council (FSC)-certified wood conference tables.⁴

The RFQ provided specific requirements for furniture, including the following for the stacking chairs to be used in break areas:

(...continued)

contract for the supplies or services specified, and effective for the period stated, in the Schedule," and providing that "[t]he Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the 'maximum.' The Government shall order at least the quantity of supplies or services designated in the Schedule as the 'minimum.'" AR, Tab R, Mod. No. GS-28F-8049H/0001, at 2-3. We do not address the propriety of the procedures by which the contract resulted from the RFQ, since they were not challenged in the protest.

⁴ Given our recommendation below, we find it unnecessary to address several additional issues concerning HMI's alleged noncompliance with other specifications. We expect that the agency will review those issues in the course of implementing our recommendation.

Stacking Capability: Stacking capacity shall be eight (8) units high, forty-eight (48) inches nominal above finished floor, or twenty (20) units high, seventy-three (73) inches nominal above finished floor on dolly.

RFQ at 53.

In its quotation, HMI submitted a version of a multipurpose chair, which it calls the [deleted] chair. The commercial brochure indicated that the [deleted] chair was designed, among other things, for use in break areas, and that “[deleted].” HMI Quotation, Tab 2, HMI [deleted] Chairs Brochure. HMI also noted that “[deleted].” HMI Quotation, Tab 9, Specifications for Furniture To Be Priced, at 33.

While the RFQ required the chairs to stack at least “eight (8) units high . . . above finished floor,” HMI’s chair could be stacked only “[deleted].” At the same time, while the RFQ required stacking “twenty (20) units high . . . on dolly,” HMI’s chairs could be stacked only “[deleted].” The information in HMI’s quotation thus clearly indicated that that these stacking chairs did not have the required stacking capability required by the RFQ.

The agency apparently concedes that HMI’s chairs did not meet the specifications. However, the agency argues that the RFQ allowed it to find a quotation acceptable notwithstanding the discrepancy:

If a discrepancy existed between Herman Miller’s submission and the RFQ in this regard, the RFQ specifically states under Section 3.1.2i, Volume I – Technical Instructions that ‘A GSA Schedule Contractor shall be considered deficient if the products do not match the requirements and if the contractor fails to identify the discrepancies.’ (Emphasis added). Therefore, in accordance with this language, the Agency was under no obligation to downgrade Herman Miller if it did in fact fail to meet the standard expressed in the RFQ for chair stacking capability in break areas since Herman Miller clearly identified this discrepancy in its submission.

Supplemental Legal Memorandum at 8-9 (quoting RFQ at 27).

The protester counters that it understood this provision was an invitation for vendors to offer “equal or better” alternatives, not that the agency would disregard unacceptable aspects of a quotation simply because they were clearly identified. Protester’s Supplemental Comments at 17.

As a threshold matter, we note that there is nothing in the contemporaneous record to show that the agency identified HMI’s quotation as deviating from the RFQ requirement, or that the agency was aware that it was agreeing to HMI furnishing a nonconforming product. In any event, we do not believe the language of the

quotation preparation instructions supports the agency's position that vendors could supply a noncompliant product. The language, by its terms, merely states that a schedule contractor's quotation is deficient if its product does not match the requirements and the vendor fails to identify the discrepancies. It does not authorize a vendor to supply a noncompliant product.

Generally, where, as here, the solicitation contains a clause that permits a vendor to include in its quotation products that deviate from the specifications, the provision ordinarily allows a vendor to suggest changes that the agency could consider for possible revisions to its specifications, and is not a means by which an agency can freely disregard specifications. See, e.g., Simmonds Precision Prods., Inc., B-244559.3, June 23, 1993, 93-1 CPD ¶ 483 at 10-11 (deviations clause was means for agency to determine whether specific deviations met agency needs, and gave agency an opportunity to inform all offerors of revised specifications). In this case, if the agency concluded that HMI's deviations demonstrated that the RFQ standard exceeded the agency's minimum needs, the agency was required to notify all competitors.

With respect to the use of FSC-certified wood for conference tables, the RFQ stated:

Products: In Section 5, GSA Schedule Contractors will find a table listing the types of environmental features for each category of furniture being proposed for the Project. GSA Schedule Contractors shall provide the following submittals to document the environmental features for the furniture items proposed for the Project. For each product category described in Table 5.1, provide a table showing the following information:

....

(b) Sustainable Harvested and Rapidly Renewable Materials: Active sustainable harvested wood certifications by an FSC-accredited certification agency and annually renewable materials used or available.

RFQ at 26-27.

Under the heading of "Wood Casegoods for Executive Offices and Conference Rooms," the RFQ also specified as follows:

Contractors shall make available for Agency a selection of wood color stains and finishes in a full range of species, including ash, maple, oak, sycamore and walnut in plain, birdseye and burl veneers that conform with the requirements of Section 5.

RFQ at 50.

Table 5.1 of the RFQ stated, next to a red dot,⁵ a requirement for “[w]ood components certified by an FSC-accredited certification agency” for the conference tables. RFQ at 38.

HMI based its quotation and pricing on the use of non-FSC-certified wood. After noting the requirement, HMI’s quotation stated:

The requirement in Section 6 is for FSC certified wood and veneers. You have also requested that this furniture be available in a wide variety of wood species. FSC certified [deleted] is not available and all of the other species are subject to availability in the quantities required for this project. There is a price premium for any of these species FSC certified. Since the premium varies by specie[s], we have provided a spreadsheet, which reflects the price increase based on the specific specie[s] selected. Again, any selection is subject to availability at the time of award. There would be a [deleted] charge for using FSC certified veneers and their use is subject to availability in the quantities and within the timelines required by this RF[Q].

HMI Quotation, Tech. Vol., Tab 9, § 6.4.1.i.

In short, HMI’s quotation indicated that the wood HMI planned to use was not FSC-certified, and HMI did not definitely commit itself to furnish FSC-certified wood. The pricing volume of HMI’s quotation indicated that the prices listed were not for FSC-certified wood.⁶

In its supplemental report responding to this protest allegation, instead of establishing from the evaluation record that HMI’s quotation complied with this requirement, the agency argues that the pricing volume of Haworth’s quotation did not contain prices for the FSC veneers, and that Haworth’s quotation also did not meet this requirement. Supplemental Legal Memorandum at 3. However, the record shows that Haworth committed in its quotation to supplying FSC-certified wood for those types of furniture that the RFQ required. Haworth Quotation, Tech. Vol Tab 8, at 19-20, 32. Moreover, there is no indication in the contemporaneous record that

⁵ Table 5.1 was entitled “Environmental Criteria by Furniture Item,” and each criterion was accompanied by either a red or blue dot. The key to the table indicated that a red dot indicated a “Required” feature, while a blue dot meant that the feature was merely “Preferred.” RFQ at 38.

⁶ Confirming that HMI had not priced FSC-certified wood, on the “Product Price Sheet–Summary” page of its pricing volume, HMI stated that “FSC certified woods can be provided at an additional cost and are subject to availability. Please see our response in Section 6.3.2.” HMI Quotation, Pricing Vol., Tab A.2 at 1. FSC-certified wood is not mentioned in § 6.3.2 of the quotation, but is discussed in § 6.4.1.i.

the evaluators believed that Haworth's quotation failed to meet the requirement for FSC-certified wood, or was unacceptable on this (or any other) basis. AR, Tab K, Tech. Evaluation Report, at 2, 29.⁷

Finally, Haworth objects that the agency improperly downgraded Haworth's quotation under the "environmental factors" evaluation factor because Haworth's quotation did not indicate that it had achieved at least one Leadership in Energy and Environmental Design (LEED)⁸ certification. The RFQ stated that the agency had a preference for a vendor that "has had or is in the process of having at least one (1) facility LEED-certified." RFQ at 36. Haworth argues that, among a number of references in its quotation to LEED certifications received by projects, it clearly stated that one of its projects in 2004 had "earned LEED CI gold level certification," while another in 2005 had been submitted for gold certification. Haworth Quotation, Tech. Vol., Tab 8, at 4.⁹

The agency concedes an error in the evaluation on this point. Legal Memorandum at 6. It argues, however, that Haworth was not prejudiced because the record shows that Haworth was also downgraded under another criterion, and thus was evaluated "somewhat weak in the [deleted] factor." AR, Tab K, Tech. Evaluation Report, at 3. The agency argues that under a reevaluation without the LEED certification error, the evaluators would have found Haworth's quotation "at best . . . essentially equal to [HMI]'s technical submission," and still would have selected HMI's lower-priced

⁷ It appears that the pricing volume in Haworth's quotation showed lower price increases than the agency expected because Haworth applied its discounts to the surcharges for FSC-certified wood. Haworth Quotation, Pricing Vol., Tab A.4, at A-4; Protester's Supplemental Comments at 17.

⁸ According to the U.S. Green Building Council, the LEED Green Building Rating System is a set of certification standards providing specialized criteria for particular types of projects, such as commercial interiors ("LEED-CI"), and new construction ("LEED-NC"). Current LEED certifications include a "rating level" ranging from the basic "certified" through "silver," and "gold," to the highest rating of "platinum." U.S. Green Building Council, An Introduction to the U.S. Green Building Council and the LEED Green Building Rating System, October 2005 (visited Nov. 9, 2005) at 3, 27 <https://www.usgbc.org/FileHandling/show_general_file.asp?DocumentID=742>.

⁹ It appears that the agency preferred a vendor with a previous LEED certification because, as the RFQ emphasized, the terms of the leases for the Potomac Yard One and Two buildings require the agency to achieve at least LEED silver level certification. RFQ at 1, 35.

quotation. Legal Memorandum at 7.¹⁰ The agency thus asserts that Haworth was not competitively prejudiced by the error.

We note that this argument that the source selection official (SSO), notwithstanding the evaluation error, still would have selected HMI has no support in the contemporaneous record. In fact, the agency's position is limited to arguments from counsel, unsupported even by the SSO's very brief statement in this protest. In any event, our Office will accord little or no weight to such arguments, which have been made in the heat of litigation. KEI Pearson, Inc., B-294226.3, B-294226.4, Jan. 10, 2005, 2005 CPD ¶ 12 at 8 n.13; Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Here, the record reflects that, while the technical evaluators considered HMI to be ranked highest, they stated that "Haworth's [quotation] was only slightly behind [HMI's quotation] in terms of its strengths." AR, Tab K, Tech. Evaluation Report, at 4. If, after correction of this evaluation error concerning the certification preference, Haworth's quotation were to be determined technically superior, this could have changed the outcome of the competition. RFQ at 34.¹¹ Particularly in light of the other errors in the evaluation, we conclude that Haworth was competitively prejudiced.

We sustain the protest because the record shows that the agency erroneously concluded that HMI's quotation met the stated requirements and erroneously downgraded Haworth under the "environmental factors" evaluation factor.

Based on the record, including the agency's position during this protest, it appears that the agency overstated its actual needs, and that either the agency did not consider certain requirements to be significant to its overall needs, or the agency would find some items that deviated from the requirements to be acceptable. For example, the agency now characterizes the stacking chair requirement as an "incidental RFQ requirement." Supplemental Legal Memorandum at 14.

Where, as here, an agency determines that it is in the best interest of the government to proceed with performance in the face of a protest in our Office, and we sustain the protest, we are required by the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(b)(2) (2000), to make our recommendation for corrective action without regard to any cost or disruption from terminating the contract, or recompeting or reissuing the solicitation. During the course of the protest, at our request, the agency informed our Office of the issuance of three orders, the total price of which is

¹⁰ The agency acknowledges that HMI's quotation was evaluated as having a "minor weakness" in its [deleted]. Supplemental Legal Memorandum at 12.

¹¹ We note that under the price evaluation, Haworth's evaluated price was within [deleted] percent of HMI's, depending on the financing terms selected by the agency. AR, Tab L, Source Selection Decision, at 3.

slightly less than 1 percent of [deleted].¹² The orders also confirm that the furniture itself has not been ordered yet. We, therefore, recommend that the agency place no further orders for these requirements. We also recommend that the agency review its needs, revise the RFQ, if necessary, to reflect them, and solicit new quotations to ensure that all firms are afforded an equal opportunity to compete based upon the same set of requirements. The agency should then evaluate new quotations in accordance with the terms of the revised solicitation, and make a new award decision. If the award is made to a contractor other than HMI, the agency should terminate HMI's contract for the convenience of the government. In addition, we recommend that the agency reimburse Haworth the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. Haworth's certified claim for costs, detailing the time expended and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2005).

The protest is sustained.

Anthony H. Gamboa
General Counsel

¹² Order No. 1, issued on August 12, before the protest was filed, was for \$111,925.00; order No. 2, issued after the protest was filed, was for \$5,109.60; and order No. 3 was for \$16,168.20, for a total of \$133,202.80.