



Decision

Matter of: Nordic Air, Inc.

File: B-400540

Date: November 26, 2008

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DIGEST

Protest of agency's award to firm that offered products that have not been assigned the national stock numbers (NSN) referenced in solicitation is denied where solicitation referenced NSNs for illustrative purposes to describe types of required items, along with list of salient characteristics of the items, and encouraged offerors to propose alternative terms and commercial items to meet solicitation's requirements.

DECISION

Nordic Air, Inc., of West Geneva, Ohio, protests the award of a contract to Air Rover, Inc., of Tyler, Texas, under request for proposals (RFP) No. N00164-08-R-JS25, issued by the Department of the Navy, Naval Surface Warfare Center, Crane Division, Crane, Indiana, for environmental control units (ECU). Nordic contends that the Air Rover proposal failed to meet material solicitation requirements in that the awardee did not propose to provide ECUs with the same NSNs as those included in product descriptions under four contract line item numbers (CLIN) for various types and sizes of required ECUs. The protester, the only firm that manufactures ECUs with the NSNs referenced in the RFP, alleges that the agency improperly relaxed the RFP's requirements for Air Rover by accepting its proposal of ECUs that have not been assigned the NSNs referenced in the RFP and thus will not comply with additional detailed specifications associated with the referenced NSNs.

We deny the protest.

The RFP sought proposals for a 5-year indefinite-delivery/indefinite-quantity contract for commercial and modified commercial item ECUs. RFP Product/Performance Specification at 3. The RFP listed five CLINS for ECUs; the specifications for the CLINS, which were set out by CLIN, in a chart attached to the RFP's product/performance specification, listed an NSN (without identifying a particular manufacturer or its part number), as well as 14 salient characteristics (including, for instance, descriptive information regarding type, size, weight, power, capacity, power cord length, and paint options); a sixth CLIN was provided for orders of modified ECUs. RFP, Attach. A.

Award was to be made to the offeror that submitted the proposal deemed to be the most advantageous to the agency based solely on past performance and price, where past performance (with equally weighted subfactors for history of meeting required delivery schedules, and history of delivering quality products) was to be more important than price. RFP at 25. The RFP, which did not provide for the submission of technical proposals or sample products for evaluation, advised offerors that the agency sought commercial and modified commercial items meeting the RFP's requirements. Offerors were also advised that additional ECU specifications would be provided in the delivery orders issued by the agency for particular ECUs. RFP at 17, 25, 39 and Product/Performance Specification at 3-4. All offerors were encouraged, pursuant to the "Instructions to Offerors--Commercial Items" clause of Federal Acquisition Regulation § 52.212-1, incorporated by reference into the RFP, to propose multiple offers of "alternative items and conditions or commercial items for satisfying the requirements of this solicitation." RFP at 25.

Five proposals were received in response to the RFP, including offers from Nordic and Air Rover. Nordic's proposal offered the exact NSNs for the ECUs referenced in the RFP's specification chart; Air Rover's proposal, which did not take exception to any solicitation terms and requirements, offered ECUs that have not been assigned the NSNs referenced in the RFP. Past performance evaluations were conducted, which included information obtained from five past performance references for Air Rover that consistently rated the firm's performance as highly favorable; available performance information for Nordic (which had previously provided ECUs to the agency) similarly indicated highly favorable performance. Considering the similarly favorable past performance ratings for the offerors, and the significantly lower price offered by Air Rover, the agency made award to that firm. This protest followed.

Nordic generally argues that the award to Air Rover was improper because that firm failed to propose ECUs with the exact NSNs referenced in the RFP. In this regard, Nordic contends that the detailed specifications associated with the NSNs (exceeding product specifications provided in the RFP) were necessarily incorporated into the solicitation through the RFP's listing of the NSNs.

The agency contends that Nordic's interpretation of the RFP is unreasonable. The agency explains that the RFP merely referenced the NSNs available from Nordic as descriptive information to illustrate the type of product required under each CLIN. The agency's requirements for the ECUs were described by a listing of 14 salient product characteristics to be met by the offerors' products; according to the agency, there would have been no need for the list of salient characteristics under Nordic's restrictive interpretation that only the exact NSNs referenced in the product description were sought by the agency. The agency also reports that the RFP encouraged the proposal of commercial items other than those referenced in the solicitation to satisfy the agency's requirements, and that a technical evaluation of proposed products was not required for award.

In negotiated procurements, a proposal that fails to comply with material terms of the solicitation should be considered unacceptable and may not form the basis for award. See Champion-Alliance, Inc., B-249504, Dec. 1, 1992, 92-2 CPD ¶ 386 at 3. We will not disturb an agency's determination of the acceptability of a proposal absent a showing that the determination was unreasonable, inconsistent with the terms of the solicitation, or in violation of procurement statutes or regulations. Id. When a dispute exists as to the actual meaning of a solicitation requirement, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. See Media Funding, Inc. d/b/a Media Visions, Inc., B-265642; B-265642.2, Oct. 20, 1995, 95-2 CPD ¶ 185 at 3. Further, we will read a provision restrictively only where it is clear from the solicitation that such a restrictive interpretation was intended by the agency. Ampex Data Sys. Corp., B-248112, July 30, 1992, 92-2 CPD ¶ 71 at 4-5.

We find no support for Nordic's restrictive interpretation that the RFP's references to certain NSNs in effect required firms to offer only those products, or that the references served to incorporate additional detailed specifications or testing requirements associated with those NSNs into the solicitation's requirements. As the agency points out, the RFP sought commercial item and modified commercial item ECUs with at least 14 listed salient characteristics. We find reasonable the agency's position that the references to the NSNs, when the solicitation is read as a whole, merely provide further description of the type of products sought by the agency rather than constituting a mandatory requirement for each of the NSNs noted. As the agency points out, while the identified NSNs are the same as those assigned to the protester's ECUs, the agency did not issue the solicitation on a brand name or equal basis for Nordic's ECUs. Rather, salient characteristics for the units were listed and offerors were invited to propose items meeting the characteristics, or to propose alternative terms and commercial items to otherwise meet the agency's needs.

In conclusion, since we see no basis to conclude that the RFP's NSN references limited offerors to proposing ECUs with those NSNs only, or that Air Rover's failure to propose ECUs with those exact NSNs rendered its proposal unacceptable in any

way under the RFP, the protester's challenges provide no basis to question the propriety of the award.¹

The protest is denied.

Gary L. Kepplinger
General Counsel

¹ In its comments responding to the agency's report on the protest, Nordic raises a number of issues which lack sufficient factual or legal support. For instance, the protester generally challenges a lack of documentation in the record regarding an apparent review by agency technical personnel of technical data submitted by Air Rover. The protester, however, has failed to show that any technical review by the agency was required for, or was a factor in, the award decision here. Rather, the record shows that the award determination was limited to the RFP's stated evaluation criteria of past performance and price. Nordic similarly challenges the sufficiency of the documentation of the past performance evaluation. The record shows, however, that each of the five past performance references for Air Rover gave highly favorable performance reports for the firm under both evaluation subfactors; Nordic does not provide any basis to question the overall highly favorable past performance rating assigned to Air Rover's proposal. Lastly, Nordic generally argues that, since it was unable to confirm from a review of Air Rover's website whether the units proposed by that firm are available military ECUs, the commercial nature of the awardee's products should be questioned. Because there is nothing in the record indicating that, prior to award, the contracting officer was on notice of facts which would lead to the conclusion that the item to be furnished was not in fact a commercial item, the contracting officer was not required to request additional information as argued by the protester, and could instead rely on Air Rover's commercial item certification. Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ 214 at 3.