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**Comptroller General
of the United States**

**United States Government Accountability Office
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Decision

Matter of: CAMSS Shelters

File: B-309784; B-309784.2

Date: October 19, 2007

William A. Shook, Esq., George M. Koehl, Esq., Victor G. Vogel, Esq., and Kelley P. Doran, Esq., Kirkpatrick & Lockhart Preston Gates Ellis LLP, for the protester.

Richard J. Conway, Esq., Robert J. Moss, Esq., and Justin A. Chiarodo, Esq., Dickstein Shapiro LLP, for Alaska Structures, Inc., an intervenor.

Capt. Christy J. Kisner, and Lt. Col. John M. Dowling, Department of the Air Force, for the agency.

Paul N. Wengert, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the rejection of a quotation as unacceptable is denied where the quotation submitted in response to a solicitation for shelters on brand-name-or-equal basis was properly found not to meet the solicitation's salient characteristics.
 2. Protest alleging that the awardee's brand name product does not meet the salient characteristics in the solicitation is dismissed as untimely; any alleged inconsistency between a brand name item and the salient characteristics used to define an "or equal" product must be protested prior to the closing time for receipt of offers, or in this case, quotations.
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DECISION

California Industrial Facilities Resources, Inc., doing business as CAMSS Shelters (CAMSS), a small business, protests the issuance of a purchase order to Alaska Structures, Inc. (ASI) by the Department of the Air Force under request for quotations (RFQ) No. FA4452-07-Q-A055 for nine 18 foot by 26 foot shelters. CAMSS objects that its lower-priced quotation was unreasonably rejected as unacceptable, while the requirements were waived for ASI.

We deny the protest.

BACKGROUND

On June 22, 2007, the Air Force posted a combined synopsis/solicitation on the FedBizOpps.gov website; the solicitation was issued as a small business set-aside. The RFQ requested quotations to supply nine “Brand Name or Equal Alaska Extreme 1836 Shelter[s]” and identified ASI’s part number AK-18EXT-26-2.¹

Since the RFQ indicated that the Air Force was seeking a specific brand name item, the solicitation also provided a list of 28 salient characteristics, in order that other firms could determine whether they could supply an equivalent item. The salient characteristics in the RFQ began with the shelter dimensions: a maximum width of 18 feet, a maximum length of 26 feet, and a minimum footprint of 468 square feet. The RFQ continued to other salient characteristics, four of which bear on the issues in this protest:

12. The one-piece liner system must have been tested and approved by the USAF [United States Air Force] in a U.S. government test facility

18. (2) 120v receptacle lines with 3 molded tri-plex outlets

27. Shelter must have been successfully tested by an independent laboratory to withstand a[n] 80 mph [miles per hour] sustained wind load for at least 30 minutes with intermittent 100 mph wind gust (include final test report with bid)

28. Shelter must have been successfully tested by an independent laboratory to withstand a 15 pound per square foot snow load (include final test report with bid)

RFQ at 2-3.

The RFQ also required vendors offering an “equal product” to submit documentation showing that their shelters would meet all of the salient characteristics. Id. at 3. Finally, the RFQ stated that the Air Force would purchase the shelters from the lowest-priced vendor whose shelters met the requirements in the RFQ. Id.

The Air Force received quotations from both ASI and CAMSS. ASI’s quotation identified its “Alaska Extreme 1826 Shelter” at a total price of \$183,015.00.

¹ The solicitation contained a typographical error in both the name of the ASI product, and the part number. According to the Air Force, instead of the “Alaska Extreme 1836 Shelter” it meant to specify the “Alaska Extreme 1826 Shelter.” Similarly, instead of part number AK-18EXT-26-2, it intended AK-1826-XTR-2. Agency Supp. Memo. of Law, Sept. 11, 2007, at 11.

ASI Quotation, at 1. CAMSS's quotation offered its "CAMSS18EX Expeditionary Shelter System" at a total price of \$97,410.99.

Since the CAMSS quotation offered a product it asserted was equal to the brand name item, it also addressed the salient characteristics. As relevant to our resolution of the protest, the quotation stated:

Engineered to withstand 80 mph sustained wind load for at least 30 minutes, with 100 mph gusts

Engineered to withstand a 15 psf snow load

AR, Tab 6, CAMSS Quotation, at 1.

In evaluating the quotations, the Air Force first concluded that ASI had offered the required brand name item, and determined that its quotation was therefore acceptable. The Air Force concluded that the CAMSS product offered as an equal did not meet four of the salient characteristics (quoted above), and therefore the agency considered the quotation to be unacceptable. Contracting Officer's (CO) Statement at 2. Since only ASI had submitted an acceptable quotation, the Air Force issued an order for the shelters to ASI on July 2. CO Statement at 1.

Upon learning of the award, CAMSS requested and was offered a debriefing, which was scheduled for July 16. However, CAMSS filed this protest on July 12. The debriefing took place as scheduled, and CAMSS amended its protest to add additional grounds. CAMSS also filed a supplemental protest after receiving the agency report.

DISCUSSION

In its protest, CAMSS argues that the agency unreasonably rejected its quotation after wrongly concluding that its equal product failed to meet four of the salient characteristics identified in the RFQ. Alternatively, CAMSS argues that the RFQ's requirements for test reports could not be enforced, as they were improper qualification requirements imposed in violation of Federal Acquisition Regulation (FAR) § 9.206. With respect to ASI's quotation, CAMSS argues that ASI did not offer the brand name item specified in the RFQ, and that, as a result, the agency was required to analyze whether the ASI product met the solicitation's salient characteristics.

As set forth below, we conclude that (1) ASI offered the brand name item, and neither CAMSS, nor the Air Force, was misled by a typographical error in the solicitation's identification of the brand name item; (2) the agency reasonably decided that the CAMSS item did not meet the salient requirements identified in the solicitation; (3) CAMSS's argument that the solicitation contained qualification

requirements in violation of the FAR is untimely; and (4) any argument that ASI's brand name product did not meet the salient characteristics is also untimely.

The FAR encourages the use of performance specifications, rather than "brand name or equal" purchase descriptions, but expressly recognizes that brand name or equal descriptions "may be advantageous under certain circumstances." FAR § 11.104 (a). When a brand name or equal purchase description is imposed, however, the FAR requires that such descriptions

must include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an 'equal' item must meet to be acceptable for award. Use brand name or equal descriptions when the salient characteristics are firm requirements.

FAR § 11.104(b).

When a solicitation sets forth particular features of a brand name item, they are presumed to be material and essential to the government's needs. Mid-Florida Corp., B-228372, Jan. 22, 1988, 88-1 CPD ¶ 60 at 4. Here, as noted above, the Air Force listed 28 salient characteristics in the RFQ.²

With respect to a firm offering an equal product, the quotation must demonstrate that the product conforms to the salient characteristics listed in the solicitation. See Bryan Constr. Co., B-261482, Sept. 20, 1995, 95-2 CPD ¶ 142 at 2-3 (sealed bidding). If the quotation fails to do so, it is properly rejected as nonconforming, id.; clearly stated technical requirements in a solicitation are considered material to the needs of the government, and a vendor's submission that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Team One USA, Inc., B-272382, Oct. 2, 1996, 96-2 CPD ¶ 129 at 8. This Office will review the record to determine whether the procuring agency had a reasonable basis for concluding that the offeror of an "equal" product was properly rejected in favor of a purchase of the brand name item. Elementar Americas, Inc., B-289115, Jan. 11, 2002, 2002 CPD ¶ 20 at 2-3.

² We note that in the context of salient characteristics, test reports such as those identified in the RFQ (and material to the dispute here) do not appear to be "physical, functional, or performance characteristics" of the kind anticipated by FAR § 11.104(b). On the other hand, no protest challenged this aspect of the specification before the RFQ closing date. In this decision, we adopt and apply the Air Force's characterization of these test report requirements as salient characteristics, even as we recognize a tension between the solicitation here and the FAR guidance.

In contrast, with respect to an offer of the brand name item, absent certain provisions in a solicitation that impose additional requirements applicable to the item, an agency can reasonably accept a brand name offer and make award without further investigation. See, e.g., General Hydraulics Corp., B-181537, Aug. 30, 1974, 74-2 CPD ¶ 133 at 2 (brand name item properly rejected where solicitation expressly required additional features applicable to the item).

We address first the argument that the ASI product accepted by the agency was not the brand name product identified in the solicitation, and the contention that the agency was required to treat the ASI product as an “equal” product, and determine whether the product met the salient characteristics.

There is no dispute in this record that the solicitation here contained a typographical error in its identification of the brand name product. Instead of identifying an Alaska Extreme 1826 Shelter, the solicitation identified an “Alaska Extreme 1836 Shelter.” We note that the numerical portion of this description is the same as the dimensions of the shelter—i.e., ASI’s 1826 shelter measures 18 feet by 26 feet. Thus, the 1826 number matches the dimensions set forth in the solicitation’s salient characteristics, which identified a shelter measuring 18 feet by 26 feet. RFQ at 2.

In addition, ASI explains that “there is no such thing as an Alaska Structures Extreme 1836 Shelter.” ASI’s Supp. Comments, Sept. 17, 2007, at 2. Moreover, CAMSS has not suggested that it was misled by this error; CAMSS was aware that the solicitation required—and CAMSS offered—a shelter measuring 18 feet by 26 feet.³ While we recognize that the Air Force should have identified the proper brand name in its brand name or equal product description, there is no evidence in this record that the parties were misled by this typographical error in the RFQ. We conclude that ASI offered, and the Air Force accepted, the brand name item requested. As a result, the Air Force properly accepted the ASI product without determining whether the product met the salient characteristics identified for “equal” products. See Mid-Florida Corp., supra.

With respect to whether the agency acted reasonably in concluding that CAMSS’s quotation failed to establish that its product met the salient requirements of the solicitation, we deny the protest. As set forth above, the agency concluded that CAMSS’s quotation failed to establish that its product met four of the salient characteristics. In two of the areas resulting in the rejection of CAMSS’s quotation, the solicitation required the submission of test reports—in one instance, to establish the ability of the product to withstand a sustained wind load; in the other, to establish the ability of the product to withstand a snow load. While the protester

³ There is also no evidence in this record to suggest that CAMSS was, in any way, misled by the typographical error in the RFQ’s identification of the ASI part number as AK-18EXT-26-2, rather than the intended AK-1826-XTR-2.

argues that its product can meet both requirements, the record shows that CAMSS did not submit test reports to document its ability to meet either of these requirements. AR, Tab 6, CAMSS Quotation. At best, CAMSS simply asserts in its quotation that its product is engineered to withstand the wind load and snow load requirements. *Id.* at 1. Accordingly, we think the agency reasonably concluded that the quotation failed to meet the requirements established in the solicitation.⁴

CAMSS also argues that the requirements in the RFQ for test reports constituted unapproved “qualification requirements,” as that term is defined in FAR § 2.101. More specifically, CAMSS argues that the agency cannot enforce these requirements without violating FAR § 9.206, which requires that agencies comply with specific procedures to obtain approval of particular qualification requirements. This argument is untimely. Under our Bid Protest Regulations, a protest objecting to the terms of a solicitation must be filed before the closing date for responses in order to be timely. 4 C.F.R. § 21.2(a) (2007). The testing requirements at issue here were explicitly stated in the RFQ, yet CAMSS did not challenge their inclusion until after the competition was complete and ASI had been selected.⁵

As a final matter, CAMSS argues that the ASI brand name product itself fails to meet certain salient characteristics included in the solicitation. This ground of protest is untimely. The purpose of a solicitation’s statement of salient characteristics, as set out in FAR § 11.104(b), is to define the minimum characteristics of the brand name product that an alternative “equal” product must meet. Thus, by definition, the salient characteristics should be derived from, and should reflect, the essential characteristics that, in the agency’s view, the brand name product possesses. Accordingly, a contention that the solicitation-identified brand name item does not meet the salient characteristics is an argument that the solicitation is defective, because the solicitation represents that the brand name product possesses the salient characteristics listed, when, in the protester’s view, it does not. Any alleged inconsistency between a brand name item and the salient characteristics used to define an “or equal” product thus must be protested prior to the closing time for receipt of offers, or in this case, quotations—consistent with our standard rule for

⁴ Since we conclude that CAMSS was properly found unacceptable under two of the four bases given for rejection of its quotation, we need not address the protester’s challenges to the evaluation under the requirements for approval of the one-piece liner, and for the correct type of electrical outlets.

⁵ Similarly, we find untimely CAMSS’s argument that the specifications were crafted to preclude competition and to ensure a sole-source procurement from ASI. This argument also alleges a defect that was apparent in the solicitation, and therefore was required to be filed before the closing date, in order to be timely.

raising challenges to solicitation improprieties.⁶ 4 C.F.R. § 21.1(a)(1); M/RAD Corp., B-248146, July 29, 1992, 92-2 CPD ¶ 61 at 3; VTEC Labs., Inc., B-245481, Dec. 26, 1991, 91-2 CPD ¶ 581 at 3.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁶ We recognize that in the past our caselaw has been inconsistent on this subject. See, e.g., Abbott GmbH Diagnostika, B-241513, B-241513.2, Feb. 7, 1991, 91-1 CPD ¶ 139 at 3. To the extent our decision in Abbott establishes a different rule, it will no longer be followed. We note, however, that the requirement to file before the closing time does not apply to challenges to the brand name product's compliance with additional requirements set out in the solicitation that must be met by both the brand name product, and any product offered as an equal. These additional requirements are not salient characteristics of the brand name product, so that offering the brand name does not, alone, ensure compliance. For example, in Wyse Tech., Inc., B-297454, Jan. 24, 2006, 2006 CPD ¶ 23 at 5, a protest challenging the brand name product's compliance with requirements of the Trade Agreements Act, which was also a requirement of the solicitation, was timely filed after award. Such protests are not based on alleged defects in the solicitation and therefore are timely filed after award, since that is the first time when it can be ascertained whether the brand name product in fact complied with the additional requirements.