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Decision

Matter of: Freedom Scientific, Inc.

File: B-401173.3

Date: May 4, 2010

Claude P. Goddard Jr., Esq., Daniel J. Donohue, Esq., and Sarah M. Graves, Esq., Husch Blackwell Sanders LLP, and David E. Hilliard, Wiley Rein & Fielding LLP, for the protester.

Kristen E. Ittig, Esq., Stuart W. Turner, Esq., and Maureen Jeffreys, Esq., Arnold & Porter LLP, for Enhanced Vision Systems, Inc., an intervenor.

Maura C. Brown, Esq., Department of Veterans Affairs, for the agency.

Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General solicitation provisions mandating that the “contractor” comply with the requirements of federal, state, and local laws, codes and regulations do not require that an offeror demonstrate compliance prior to award; compliance with applicable federal, state or local requirements is a performance requirement that may be satisfied during contract performance.

2. Protest challenging evaluation of awardee’s proposal is denied where record shows that agency evaluated proposal in accordance with the solicitation criteria, and that its conclusions were reasonable.

DECISION

Freedom Scientific, Inc., of St. Petersburg, Florida, protests the award of a contract to Enhanced Vision Systems, Inc., of Huntington Beach, California, under request for proposals (RFP) No. VA-797-08-RP-002, issued by the Department of Veterans Affairs (VA) for closed-circuit electronic magnification devices (CCTVs) for use by visually-impaired veterans at VA medical centers. Freedom argues that the products offered by Enhanced do not meet the technical requirements of the solicitation and are not compliant with applicable Federal Communication Commission (FCC) regulations.

We deny the protest.

BACKGROUND

The solicitation, issued on May 28, 2008 as a small business set-aside for commercial items, contemplated the award of a fixed-price requirements contract for a base year, with four 1-year options, for two CCTV systems, one with a 17-inch monitor and one with a 19-inch monitor. RFP at 1, 4, 7. The RFP included minimum technical specification requirements regarding monitor, control, and camera features, and XY table and warranty requirements. RFP at 5-6.

Proposals were to include business and technical volumes, including past performance information, warranty information, and Buy American Act (BAA) Certificates. Offerors also were to provide descriptive literature, including cuts, illustrations, drawings, and brochures identifying the models and types of products being offered and clearly showing that the offered products are in compliance with the specifications listed in the solicitation. RFP at 39. If descriptive literature was not available to demonstrate compliance with all items listed as evaluation factors, a technical proposal detailing the required information had to be submitted. Id.

Offerors whose proposed products were determined to meet the BAA requirements were required to demonstrate the exact makes and models being offered at the VA National Acquisition Center in Hines, Illinois. Id. at 39. The product demonstration would be used to determine which products met the specification requirements. Id. at 42. Once the agency determined that an offered product met the specifications, it would be evaluated by the technical integrated products team. Id. While the demonstration would not be part of the technical review, the RFP advised that all sample CCTVs would be evaluated as submitted; if a CCTV did not work optimally, there would be no opportunity to submit additional samples. Id. The RFP also stated that “The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.” Id. at 11.

Award was to be made to the offeror whose proposal was evaluated as the “best value” to the government, considering: (1) technical factors (picture quality, machine controls, XY table, adjustability of monitor, and number of warranty years); (2) price; (3) quality/past performance; and, (4) small disadvantaged business participation. Id. at 42-43. The technical factors combined were more important than price. Id. at 42.

Both Freedom’s and Enhanced’s products were determined to comply with the BAA and the firms thus were invited to demonstrate their offered CCTVs. A technical panel reviewed the submitted samples and determined that all of the two firms’ offered products complied with the specifications, including a requirement for an auto focus feature. Agency Report (AR) at 3; AR, Tab 7, Declaration of Technical Panel Chairperson, at 1. The contracting officer determined that Enhanced’s proposal offered the best value and made award to Enhanced on March 6, 2009.

Freedom challenged the award in a protest filed in our Office, alleging that the agency improperly had awarded the contract before the closing date set for receipt of revised price proposals. Following an alternate dispute resolution conference, the agency decided to take corrective action and we dismissed the protest as academic (B-401173, June 11, 2009). VA reopened discussions regarding price and warranty issues, requested and evaluated revised proposals, again determined that Enhanced's proposal offered the best value, and awarded a contract to Enhanced on January 20, 2010.

DISCUSSION

Compliance with FCC Requirements

Freedom asserts that the award to Enhanced was improper because its products do not comply with FCC technical requirements, and thus do not comply with "all applicable Federal, State and local laws," as required under the solicitation. Protest at 7. Specifically, Freedom argues that Enhanced's 19-inch monitor does not comply with the FCC's emissions requirements and that its products violate the FCC's labeling requirements.

This argument is without merit. The RFP did not expressly require that offered products comply with FCC requirements as a precondition to award. Rather, the RFP clause requiring compliance with all federal, state, and local laws is included in the solicitation under "Section C - Contract Clauses" and, by its terms, applies to "the contractor." General solicitation provisions mandating that "the contractor" comply with federal, state, and local laws do not require that an offeror demonstrate compliance prior to award. Rather, compliance is a performance requirement that may be satisfied during contract performance and does not affect the award decision (except, possibly, as a general responsibility matter). Further, whether Enhanced ultimately complies with the provision is a matter of contract administration that we will not review. 4 C.F.R. § 21.5(a) (2009); Solar Plexus, LLC, B-402061, Dec. 14, 2009, 2009 CPD ¶ 256 at 2-3.¹

¹ During the evaluation of revised proposals, Freedom furnished VA with independent laboratory test results allegedly demonstrating that Enhanced's 19-inch video magnifier failed to meet FCC emissions requirements. AR, Tab 12, E-Mail from Freedom Scientific, at 1. Before making award, the agency provided the report to a VA senior biomedical engineer; he evaluated the report and advised the contracting officer that there was insufficient technical cause to remove the awardee's product from consideration because the test was performed on a single sample and there was no independently validated audit trail regarding how the model was chosen, transported and handled before testing. AR, Tab 13, Senior Biomedical Eng'r

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Auto Focus Feature

Freedom also contends that the awardee's monitors do not meet the minimum technical requirement of the solicitation because they lack the required auto focus on/off feature. Protest at 2.

Where a protest challenges an agency's technical evaluation, we will review the evaluation record to determine whether the agency's judgments were reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. W. Gohman Constr. Co., B-401877, Dec. 2, 2009, 2010 CPD ¶ 11 at 3.

The solicitation here required offerors to submit product samples for evaluation, as well as descriptive literature or technical details showing compliance with the technical specifications. The record shows that Enhanced's proposal specified the firm's Merlin LCD 17 and Merlin LCD 19, two "state of the art" systems that "generally meet and exceed the requirements for" the 17-inch and 19-inch flat panel/LCD models. Agency Supplemental Report (ASR), exh. 1, Enhanced Vision Technical Proposal--Relevant Pages, at 2. The proposal specifically stated that the Merlin machines included the auto focus on/off switch, which allowed the camera to stay focused on a fixed point, and that the user could easily turn the auto focus feature on or off with a simple rocker switch. Id. at 3. The proposal also indicated that the auto focus switch was easily accessible directly under the front panel on the machine, that it provided rapid response to changes in magnification and depth of field, and that it responds instantly and quietly to adjustments made by the user. Id. at 2.

The technical evaluation panel evaluated Enhanced's Merlin CCTV sample, and found that there was a labeled, rocker-arm auto focus switch on the underside of the front left corner of the monitor that engaged and disengaged the auto focus feature. AR, Tab 7, Declaration of Technical Evaluation Panel Chairperson, at 1. The chairperson of the evaluation panel further explains that the panel found that the auto focus and the control worked reliably, with a screen display indicating that the unit was in non-auto focus mode when appropriate. Id. The agency also has furnished a photograph of the offered product, which shows a labeled auto focus

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Memorandum, at 3-4. Additionally the engineer was informally advised by FCC personnel that until the FCC determines that a product is non-compliant, there is no basis to remove the product from competition. Id. at 3. Finally, Enhanced has submitted the FCC order and consent decree (issued in response to Freedom's FCC complaint) terminating its investigation without finding that Enhanced violated FCC emissions requirements and reaching agreement with the awardee regarding its labeling practices. Id. at 1, 8.

switch on the underside of the monitor. AR, Tab 14, Photograph of Auto Focus Switch, at 1. Based on this information, we find that the agency reasonably determined that the Enhanced product met the requirement.

Freedom raises numerous ancillary arguments regarding the auto focus feature that we find are without merit. For example, it maintains that the agency's findings are not substantiated by the record because the agency provided none of Enhanced's product descriptive literature in response to the protest. Protester Comments at 9. Indeed, Freedom asserts that none of Enhanced Vision's descriptive literature, product brochures, user manuals, or website information lists or describes any auto focus on/off feature or control for any of its Merlin LCD products and that, therefore, the VA "could not reasonably have determined that the Merlin has an auto-focus on/off feature" Protester Supplemental Comments at 13. However, as noted, the solicitation did not provide that the evaluation of offered products would be based solely on descriptive product literature; rather, it provided that, as here, sample CCTVs would be evaluated and that required technical information should be included in the technical proposal if the descriptive literature did not address all of the technical requirements. The documentation submitted by the agency, including relevant pages from Enhanced's technical proposal and a summary of its evaluation of Enhanced's sample CCTV regarding the auto focus, are sufficient to support VA's determination that Enhanced's offered product met the auto focus requirement.

The protester also argues that while Enhanced Vision may have provided a demonstration model with the auto focus feature, "there is no evidence that [the awardee] has, or had, a commercially available product that incorporates the required auto-focus on/off feature and control." Protester Comments at 3. Freedom Scientific argues that the demonstration model has not been announced for marketing purposes and is not commercially available or sold in substantial enough quantities in commercial markets to qualify as a commercial item.² Protester Comments at 12 n.3; Protester Supplemental Comments at 11.

In commercial item procurements, offerors properly may modify their products to meet government requirements, and the product as modified does not have to have been sold or offered for sale to qualify as a commercial item. Federal Acquisition Regulation (FAR) § 2.101; NLB Corp., B-286846, Feb. 26, 2001, 2001 CPD ¶ 67 at 5. (We note that Enhanced has advised our Office that three of its existing models are currently marketed with the auto focus feature, and that this feature was in fact

² Freedom also states that it received an anonymous e-mail claiming that Enhanced did not intend to provide VA with the same Merlin model that it demonstrated. Protester Comments at 2. This unsupported allegation from an unidentified source does not provide a valid basis for questioning the agency's selection decision.

previously offered on its Merlin line of products. Intervenor Supplemental Comments, exh. 1, Declaration of the President, at 1. Enhanced simply rewired the auto focus feature back into the device. Id.)

The protest is denied.

Lynn H. Gibson
Acting General Counsel