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Decision

Matter of: MEDI/e-Imagedata Corporation

File: B-410018

Date: September 30, 2014

Eric Van Schyndle, Esq., Quarles & Brady, LLP, for the protester.
Paul W. Bowen, Esq., and Amy M. Conant, Esq., K&L Gates LLP, for NMS Imaging, Inc., the intervenor.
William B. Blake, Esq., Department of the Interior, for the agency.
Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that awardee's product did not meet the terms of the solicitation is denied where protest is essentially an untimely challenge to a patent ambiguity in the solicitation and where the protester has not otherwise shown that the awardee's product is unacceptable.

DECISION

MEDI/e-Imagedata Corporation, of Millersville, Maryland, protests the award of a delivery order to NMS Imaging, Inc., of Silver Spring, Maryland, by the Department of the Interior, National Park Service, under request for quotations (RFQ) No. 877728-AZO for the purchase of one camera microfilm scanner. MEDI argues that the agency improperly awarded the order to NMS as the firm's scanner does not meet the specifications stated in the solicitation.

We deny the protest in part and dismiss it in part.

BACKGROUND

The RFQ, issued on May 22, 2014, solicited quotations for the purchase of one camera microfilm scanner for use by the agency's offices at Colonial National Park, Yorktown, Virginia. RFQ at 1. The RFQ contemplated the award of a fixed-price contract on a lowest-priced, technically-acceptable basis. Id. The RFQ set forth 14

specifications the scanner was required to meet. RFQ at 2. At issue here is the requirement that the scanner have a “Camera - minimum 25 megapixels.”¹ Id.

Four quotations were received, including those submitted by MEDI and NMS. Agency Report (AR), exh. 6, Award Memorandum, at 1. NMS offered a scanner which the firm asserted has a maximum image size of 80 megapixels. AR, exh. 3, NMS Imaging, Inc. Quotation, at 2, 10. The quotation also stated that its proposed system gathers over 30 megapixels of optical data from [DELETED]. Id. at 10. The agency determined that NMS submitted the lowest-priced, technically-acceptable quotation, and made award to the firm at a price of \$8,555. After its agency-level protest was denied, MEDI filed the instant protest in our Office.

DISCUSSION

MEDI argues that the NMS scanner system does not satisfy the solicitation’s requirement that the camera have a “minimum 25 megapixels.” Protest at 3. The firm’s argument is essentially a challenge to the agency’s interpretation of the requirement.

Specifically, MEDI argues that this requirement contains terms that the digital camera industry would understand as calling for a camera “that outputs a minimum of 25 million unique pixels to be used to form an image. . . without any software interpolation or manipulation is [sic] employed.” Protester Comments at 2. The protester asserts that the scanner offered by NMS does not meet this requirement because it uses a 5 megapixels camera, and achieves an 80 megapixels image size through interpolation.² Id. According to MEDI, image size is not the same as camera resolution, and only the latter is called out in the specification. Id. The agency responds that it articulated a 25 megapixels camera requirement because it

¹ MEDI also argues that NMS’ scanner does not meet the requirement to have an optical zoom lens of 7x to 105x. Protest at 3. We dismiss this protest ground as untimely. MEDI became aware of the award to NMS on or about June 17, 2014, and filed an agency-level protest the following day. In that agency-level protest, MEDI only alleged that the awardee’s camera did not meet the minimum 25 megapixels requirement. Since MEDI did not raise this issue in its agency-level protest, and the issue is not otherwise timely, it is untimely raised in our Office. Bid Protest Regulations, 4 C.F.R. §§ 21.2(a)(2)-(3) (2014); see MediaNow, Inc., B-405067, June 28, 2011, 2011 CPD ¶ 133 at 2 (dismissing protest as untimely where issue, not otherwise timely, was not raised in agency-level protest).

² MEDI defines interpolation as the insertion of predicted pixels into an image not derived from the camera sensor itself. See Declaration of MEDI Vice President at ¶ 32-34.

concluded based on its market research that the protester's scanner and the awardee's scanner could meet the requirement. AR, Declaration of Technical Evaluator, at 1. In deciding that both scanners met this requirement, the agency asserts that it did not differentiate between camera resolution or image size because it regarded the term "megapixel" as a standard measure of image quality. Id. at 1-2. It is on this basis that the agency found the NMS scanner to be technically acceptable. Id. at 2.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Alluviam LLC, B-297280, Dec. 15, 2005, 2005 CPD ¶ 223 at 2. As the solicitation does not provide a definition for the relevant terms, we will accord them their plain meaning. See Eagle Creek Marina, B-405220, Sep. 16, 2011, 2011 CPD ¶ 193 at 3.

As discussed above, the agency did not differentiate between camera resolution or image size because it regarded the term "megapixel" as a standard measure of image quality. AR, Declaration of Technical Evaluator, at 1-2. For their part, MEDI and NMS both agree that the term "megapixels" is understood to describe the number of pixels a camera sensor can capture.³ Declaration of Director, NMS Supplier, at 1-2; Declaration of MEDI President at ¶ 5-6. However, NMS states that no desktop micrographic view and scan product camera on the market has a camera sensor that captures an image of 25 megapixels, an assertion that the record does not contradict. Declaration of Director, NMS Supplier, at 2. In fact, the record shows that the camera sensor resolution for each firm's scanner is 5.1 megapixels (for the NMS scanner) and 6.6 megapixels (for the MEDI scanner). Declaration of Director, NMS Supplier, at 1-2; Declaration of MEDI Vice President at ¶ 28-30. Thus, the parties must have (or should have) understood that the camera megapixels requirement was unachievable simply by use of a camera sensor, and some other method must be used to meet the minimum requirement.

In resolving this incongruity, MEDI argues that "camera resolution is stated in megapixels as the number of pixels captured by the sensor, or if [DELETED] technology is being used, the megapixels stated is the total number of pixels that is captured by the camera when using [DELETED] technology." Declaration of MEDI President ¶ 5-6. Thus, in addition to the definition articulated by both MEDI and NMS, linking megapixels to the camera sensor, MEDI would add the use of "[DELETED];" a concept that is not apparent from the face of the solicitation. MEDI

³ A pixel, or picture element, is "any of the small discrete elements that together constitute an image," with a megapixel equaling one million pixels. Merriam-Webster Online Dictionary; Declaration of Director, NMS Supplier, at exh. 1, att. A.

also asserts that linking the megapixels requirement to the camera sensor would permit [DELETED], as it captures various images of unique pixel data, but would exclude interpolation. See Declaration of MEDI Vice President at ¶ 32-34.

There is nothing apparent from the terms “camera” and “megapixels” that would render the agency’s interpretation of the specification unreasonable. Even if we were to credit MEDI’s and NMS’ interpretations of the relevant terms, we are left with one interpretation, which ties the megapixels requirement to the camera sensor; a requirement apparently no one in the industry could meet, and another interpretation that permits use of techniques apart from the camera sensor itself to achieve the agency’s megapixel requirement. As the record shows that the relevant terms are open to interpretation, this raises the question of whether the solicitation is ambiguous.

An ambiguity exists if a specification is susceptible to more than one reasonable interpretation that is consistent with the solicitation, when read as a whole. Poly-Pacific Techs., Inc., B-293925.3, May 16, 2005, 2005 CPD ¶ 100 at 3. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 11. Where a patent ambiguity is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the term. 4 C.F.R. § 21.2(a)(1); U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10.

On this record, we conclude that the solicitation was patently ambiguous and that MEDI was aware or should have been aware that the requirement was susceptible to varying reasonable interpretations. In this regard, MEDI knew that the ordinary convention in the industry was to represent camera megapixels in terms of the camera sensor itself. MEDI was also aware of the various means available to increase the megapixels in images, and was further aware of its competitors’ products and the methods they employed to increase image quality. If MEDI had any question as to the meaning of the specification, it was required to protest prior to the time set for receipt of quotations, and failed to do so. 4 C.F.R. § 21.2(a)(1).

In any event, MEDI has not shown why the scanner proposed by NMS, which captures 30 megapixels of unique pixel data through [DELETED] of its camera sensor, does not meet its own interpretation of the solicitation. MEDI states that “[t]he specification calls for a camera that outputs a minimum of 25 million unique pixels to be used to form an image.” Protester’s Comments at 2. We understand MEDI’s position to be that so long as the camera outputs 25 million unique pixels, it would meet the solicitation’s requirements. MEDI was specifically asked by our Office to address why this feature of NMS’ proposed scanner does not meet the solicitation’s minimum requirements, but provided no meaningful response. Thus, even under its own interpretation of the solicitation, MEDI has given us no basis to

conclude that the scanner proposed by NMS did not meet the minimum requirements set forth in the solicitation.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel