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Decision

Matter of: Remote Diagnostic Technologies, LLC

File: B-413375.4; B-413375.5

Date: February 28, 2017

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DIGEST

1. Protest challenging solicitation requirements as unduly restrictive is denied where the record supports the agency's assertion that the requirements are reasonably necessary to meet the agency's needs.
2. Protester is not an interested party to challenge other solicitation provisions or aspects of the procurement where the firm is unable to provide a product satisfying the solicitation's specifications.

DECISION

Remote Diagnostic Technologies, LLC (RDT) of Basingstoke, England, challenges the terms of request for proposals (RFP) No. SPE2D1-15-R-0005, issued by the Defense Logistics Agency (DLA) for deployable medical diagnostic equipment and related supplies and accessories. RDT argues that certain requirements in the solicitation, as amended in response to an earlier protest, are unduly restrictive of competition.

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

BACKGROUND

On September 11, 2015, DLA issued the RFP for a single, fixed-price contract for an indefinite quantity of deployable medical devices for monitoring patients' vital signs. RFP at 15. The RFP stated that the resulting contract was to support any DLA customer, to include the branches of the military services as well as several civilian agencies. RFP at 39. Members of the Army, Air Force, and DLA provided technical expertise in developing the solicitation and later served as members of the technical evaluation board to evaluate proposals. The monitors were primarily to be used in "aero-medical evacuation operations and in deployable ground medical facilities." Agency Report (AR), Tab 2, RFP Amend. 0006, at 2.

The solicitation stated that award would be made on a lowest-priced, technically acceptable basis. Id. at 6. In order to be evaluated as technically acceptable, an offeror's product had to meet each of the 33 minimum requirements identified in the RFP, and the offeror had to demonstrate a record of past performance that gave the agency a reasonable expectation of successful performance. RFP at 36-38, 57. On June 28, 2016, after evaluating proposals and concluding that Zoll Medical Corporation's (Zoll) proposal was technically acceptable and offered the lowest price, DLA awarded the contract to Zoll. Memorandum of Law (MOL) at 1.

On July 8, RDT filed a protest with our Office, challenging the agency's evaluation of Zoll's product as technically acceptable. RDT alleged that Zoll's proposed monitor did not meet five of the minimum requirements described in the RFP. July 8, 2016 Protest at 11-24. After RDT supplemented its protest grounds with a second protest filing, the agency proposed to take corrective action by revising its requirements, allowing offerors to compete under the new requirements by accepting new or revised proposals, and then making a new award decision. We dismissed those protests as academic, based on the proposed corrective action. Remote Diagnostic Technologies, LLC, B-413375, B-413375.2, Aug. 29, 2016 (unpublished decision).

On November 8, DLA issued Amendment 0006 to the RFP to clarify the minimum technical requirements for the monitors. MOL at 2-3. Amendment 0006 revised many of the technical specifications, including the five requirements at issue in RDT's initial protest. See id. at 4-7.

As relevant here, among the RFP's earlier specifications that were revised was a requirement that the monitor be capable of sending certain vital-sign information to an external printer. RFP, Amend. 0001, at 4. As modified by Amendment 0006, the RFP required that the monitors be able to print this patient data to an internal or accessory printer, and required such printer to be provided as a part of the monitor's standard configuration. RFP, Amend. 0006, at 3. This revised specification also included several other detailed, printer-related requirements.

Amendment 0006 established a closing date for receipt of initial proposals on November 28, 2016. On November 22, 2016, RDT filed this protest challenging several terms of the solicitation, alleging, for example, that the revised printer requirement described above was ambiguous. Protest at 16. DLA again revised the requirements related to the monitor's printing capabilities. RFP, Amend. 0008, at 3-4. The revised requirements reiterated that the monitor needed to be "appropriate for movement with the patient during aero-medical evacuation operations and in deployable ground medical facilities," and added other terms, such as requiring that an accessory printer meet certain size, weight, and power configurations, and that it use standard thermal print paper. Id. RDT filed a supplemental protest challenging the revised specifications of Amendment 0008 and adding arguments concerning the conduct of the procurement.

DISCUSSION

Throughout its protest, RDT complains that the agency revised the specifications both to "ensure Zoll's compliance," and to effectively preclude RDT from competing. See, e.g., Protest at 14-15. The protester alleges that the revised requirements are unreasonable and that the documentation provided with the RFP fails to demonstrate that these requirements reflect the agency's actual minimum needs. Comments at 14. RDT alleges that the revised printer requirement is unduly restrictive of competition because the requirement to use thermal paper is not necessary and excludes some printers that could otherwise satisfy the agency's requirements. Protest at 16; Supp. Protest at 6-7. RDT states that its own product, in fact, is not currently capable of meeting this requirement while still also meeting the size, weight, and power requirements defined in the RFP. Supp. Protest at 6. For the reasons that follow, we find no basis to sustain the protest on any of the grounds raised by RDT.

A contracting agency has the discretion to determine its needs and the best methods to accommodate them. JLT Group, Inc., B-402603.2, June 30, 2010, 2010 CPD ¶ 181 at 2. In preparing a solicitation, a contracting agency must solicit offers in a manner designed to achieve full and open competition, and include restrictive provisions only to the extent necessary to satisfy the agency's minimum needs. 10 U.S.C. § 2305(a)(1)(A)(i)(B)(ii). Where requirements relate to issues of human safety or national security, however, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness. Nova Constructors, LLC, B-410761, Jan. 21, 2015, 2015 CPD ¶ 51 at 4. In seeking full and open competition, an agency is not required to construct procurements in a manner that neutralizes the competitive advantages of some potential offerors. Staveley Instruments, Inc., B-259548.3, May 24, 1995, 95-1 CPD ¶ 256 at 3-4. Moreover, a specification is not improper merely because a potential offeror cannot meet its requirements. Id. at 4. When a specification or requirement is challenged as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the

specification or requirement is reasonably necessary to meet the agency's needs. Nexagen Networks, Inc., B-411209.7, June 20, 2016, 2016 CPD ¶ 164 at 4. Our office will examine the adequacy of the agency's justification for the allegedly restrictive provision to ensure that it is rational and can withstand logical scrutiny. Id., citing SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7.

Here, with regard to RDT's insistence that the agency has modified the solicitation to ensure Zoll's compliance, we find the protest without merit. A protest that a specification was "written around" design features of a competitor's product fails to provide a valid basis for protest where the record establishes that the specification is reasonably related to the agency's minimum needs. Fisons Instruments, Inc., B-261371, July 18, 1995, 95-2 CPD ¶ 31 at 2. The relevant inquiry, therefore, is whether the amended specifications reasonably reflect the agency's needs, which we discuss below.

The agency defends the reasonableness of the requirements through the sworn statement of an Air Force deputy director who served as the lead technical panel member representing that service for both the review of the solicitation and the evaluation of proposals. Supp. MOL at 6-7; AR, Tab 4, Decl. of Deputy Director at 1. This official explains that the accessory printer is medically necessary in order to evaluate a patient's clinical status and to document events during evacuations that may include multiple modes of transportation and transfers of patient care among personnel. Id. at 1-2. The declaration observes that aircraft do not have printers and that the use of ground facility printers often is barred by Department of Defense cybersecurity rules. It explains, further, that immediate printing is "critical to ensure all records are included in each transfer of care." Id. at 1. In a second declaration, the deputy director notes that the use of thermal paper for the printers is the predominant technology for emergency responders, largely because it requires the use and replacement of only one "consumable," *i.e.*, the paper itself, as opposed to ribbons, ink, toner, and paper. Supp. MOL at 6-7; AR, Tab 15, 2nd Decl. of Deputy Director at 2.

In response, RDT does not meaningfully rebut the agency's arguments or otherwise demonstrate that the agency's explanation is unreasonable. Instead, RDT asserts that the Air Force official's declaration "is based on broad statements that go well beyond" the contemporaneous justification for the thermal paper requirement, and contends that the declaration is an "attempt to justify this restriction after the fact" that must be rejected. Protester's Supp. Comments, at 14.

We disagree. The RFP explicitly stated that the monitors would be used in military field hospitals and medical evacuations. RFP, Amend. 0008, at 4. The Air Force deputy director's declaration provides a detailed rationale for the specification that is credible and consistent with the contemporaneous record. Contrary to the protester's suggestion, the declaration is a post-protest explanation that our Office will consider. See Erickson Aero Tanker, B-411306.2, B-411306.5, July 29, 2015,

2015 CPD ¶ 226 at 9 n.6. Here, we find the submitted declaration credible, particularly since the protester has failed to present any argument that would call into question the substance and credibility of the declaration.

RDT, in its objections to the thermal paper requirement, also states that its own product cannot currently meet the specification. Protester's Comments at 14. Under our Bid Protest Regulations, a protester must be an actual or prospective offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a). Because we have concluded, above, that the specifications are reasonably necessary to meet the agency's minimum needs, and because RDT acknowledges that it cannot provide a monitor that meets all of the specifications as they are currently written, RDT is not an interested party to maintain the various additional protest grounds it has raised. RDT lacks the requisite legal interest in this regard because, even were we to sustain its protest on another basis, RDT would not be able to offer a compliant product and would therefore be ineligible for award. See DAI, Inc., B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 5. Accordingly, RDT's additional protest grounds are dismissed.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel