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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: FitNet Purchasing Alliance

File: B-410797

Date: February 12, 2015

Raul Espinosa, FitNet Purchasing Alliance, for the protester.
Christopher S. Cole, Esq., Capt. Adam N. Olsen, Department of the Air Force, for the agency.
Brent Burris, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest arguing that solicitation should have been set aside for small businesses is dismissed as untimely because the face of the solicitation clearly established that the procurement was being conducted using full and open competition and protester did not file its protest until after the closing time for receipt of quotes.
 2. Protest that agency improperly rejected the protester's quote is denied where the protester failed to provide information required by solicitation clause implementing relevant provisions of the Buy American statute.
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DECISION

FitNet Purchasing Alliance (FitNet), of Saint Augustine, Florida, a small business, protests the award of a contract to Life Fitness, Inc. (Life Fitness), of Rosemont, Illinois, under request for quotations (RFQ) No. FA6633-14-Q-0009, issued by the Department of the Air Force for fitness equipment, to include delivery and installation.

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

BACKGROUND

The RFQ, issued on July 28, 2014, sought seventeen pieces of resistance training equipment on a brand-name-or-equal basis, with award to be made to the vendor submitting the lowest-priced, technically acceptable quote. RFQ at 1, 6. The RFQ

contemplated the award of a fixed-price contract and was issued on an unrestricted basis. Id.

As relevant to this protest, the solicitation incorporated by reference Department of Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7001, "Buy American and Balance of Payments Program." Id. at 5. The clause implements the Buy American statute, 41 U.S.C. §§ 8301-8305 (formerly the Buy American Act, 41 U.S.C. §§ 10a-10d), and the Department of Defense (DOD) Balance of Payments Program by establishing a preference for domestic end products over foreign end products, except for foreign end products of certain qualifying countries. The RFQ also contained DFARS clause 252.225-7000, Buy American--Balance of Payments Program Certificate, which required vendors to certify whether their proposed products were domestic end products from the United States, foreign end products from a qualifying country, or foreign end products from a non-qualifying country. Id.

The agency received quotes from two vendors--the protester and Life Fitness--by the solicitation's closing date of August 29, 2014. Agency Request for Dismissal (ARD) at 2. FitNet quoted a price for the fitness equipment of \$38,483.37, while Life Fitness quoted a price of \$50,275.91. Id. On September 3, the contracting officer requested via e-mail that both vendors complete and return the certification contained in DFARS clause 252.225-7000. Id. That same day, the Department of the Air Force received a completed certificate from Life Fitness, indicating that the items it quoted were domestic end products; the agency did not receive a response from the protester. Id. On September 5, the contracting officer sent FitNet a second e-mail, requesting the protester to complete the certificate and return it by September 9.¹ Id. The agency, however, never received a response from the protester. Id. As a result, the Department of the Air Force rejected FitNet's quote for failing to provide the required certification. Id.

On November 4, 2014, the agency provided FitNet with notice of award to Life Fitness and, following a requested debriefing, FitNet filed this protest on November 17.

¹ FitNet claims that it did not receive any communications from the contracting officer regarding the certification required under DFARS clause 252.225-7001. Protester's Comments at 1. The record reflects, however, that the contracting officer did in fact send FitNet two e-mails requesting the certification and that the agency received a read receipt for the second e-mail it sent to FitNet. Protest, Exhibit (Exh.) 6, Debriefing Letter, Attachments 1, 2. In any event, as discussed below, even if FitNet had submitted the required certification, it would not have received the award.

DISCUSSION

As an initial matter, we dismiss as untimely FitNet's contention that the agency should have set the solicitation aside for small business concerns since the procurement was valued between \$3,000 and \$150,000. Our Bid Protest Regulations require that a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1) (2014). Here, the RFQ provided that it was being issued on the basis of "Full and Open Competition." RFQ at 1. The FedBizOpps webpage where the RFQ was posted likewise indicated that the procurement was not set aside for small businesses where it included the designation "N/A" (for Not Applicable) under the headings "Original Set Aside" and "Set Aside." FedBizOpps Synopsis at 1. FitNet, however, did not challenge the agency's decision not to set aside the procurement until November 17, 2014, well after the August 29 closing date of the solicitation. As such, the protester failed to timely raise this basis for protest.

Next, FitNet contends that the agency erred in rejecting its quote for failing to certify whether its proposed products were domestic end products from the United States, foreign end products from a qualifying country, or foreign end products from a non-qualifying country. In this regard, FitNet argues that the RFQ did not include the relevant FAR clauses for application of the Buy American statute, to which such certifications apply, and even if the statute did apply, FitNet's quote still represented the lowest-priced, technically acceptable quote. Protester's Response to ARD at 1, 4-6. As discussed below, these arguments are without merit.

In support of its contention that the Buy American statute did not apply to the subject procurement, FitNet highlights the fact that the RFQ did not include FAR clause 52.225-1, Buy American--Supplies. Protest at 3, 7. FitNet, however, fails to recognize that the RFQ incorporated by reference DFARS clause 252.225-7001, which expressly states that it "implements 41 U.S.C. chapter 83, Buy American" and requires contractors to deliver only domestic end products, unless they certify that they are delivering other end products. In fact, DOD contracting officers are required to use DFARS clause 252.225-7001, instead of FAR clause 52.252-1. DFARS § 225.1101(2)(i). Thus, the RFQ made apparent that the Buy American statute applied.

Alternatively, FitNet contends that its quote should have been evaluated as lowest-priced even when the rules of the Buy American statute are applied. In this regard, the protester contends that its Taiwan-made equipment was exempt from the provisions of the Buy American statute, and even if its equipment was not exempt, its quote was entitled to award after applying the evaluation preference of the Buy American statute. Protest at 4-6. These arguments fail as they do not address the underlying reason why the protester's quote was rejected, and moreover, rely on flawed interpretations of the applicable regulations.

The Buy American statute establishes a preference for the acquisition of domestic end products over foreign end products. The preference is implemented by adding, solely for evaluation purposes, a specified percentage premium to the price of foreign end products if there is an offer of a domestic end product that is not otherwise lowest-priced. For civilian agency procurements, the price adjustment is either 6 or 12 percent.² For DOD procurements, the price adjustment is 50 percent. DFARS § 225.105. If the price of the domestic offer remains higher than the price of the foreign offer after applying the evaluation preference, the price of the domestic offer is deemed to be unreasonably high and award is made to the foreign offer. FAR §§ 25.103(c), 25.105(c); DFARS §§ 225.103(c), 225.502(c)(ii)(E)(2).

To the extent FitNet argues that its quote should have been evaluated as lowest-priced under the Buy American provisions, the argument is misplaced. The quote was rejected based on FitNet's failure to submit the certification required under DFARS clause 252.225-7000.³ Although FitNet asserts that its quote indicated that the equipment it offered was manufactured in Taiwan, DFARS clause 252.225-7000 required vendors to provide more than just the place of manufacture. As noted above, under DFARS clause 252.225-7000, vendors were required to certify their proposed products as domestic end products, qualifying country end products, or other foreign end products. The protester does not dispute that it did not provide this information. Furthermore, the RFQ informed vendors that if they failed "to furnish required representations or information" their quotes "may be excluded from consideration." RFQ at 6. Under these circumstances, we find that the agency reasonably rejected the protester's quote for failing to include the required certification. It is an offeror's responsibility to submit a well-written quote, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency. See, e.g., Int'l Med. Corps, B-403688, Dec. 6, 2010, 2010 CPD ¶ 292 at 7.

² The price of the foreign offer, inclusive of duty, is increased by 6 percent if the lowest domestic offer is from a large business concern, and by 12 percent if the lowest domestic offer is from a small business concern. See FAR § 25.105(b).

³ The debriefing letter the agency provided to FitNet indicates that the protester's quote was found unacceptable because it did not include the required certification under DFARS clause 252.225-7000 and also because under the Buy American provisions, the protester's Taiwan-made products were unacceptable since they were not domestic or qualifying country end products. Protest, Exh. 6, Debriefing Letter, 1-2. With regard to the latter reason, the agency's determination was incorrect; the Buy American statute provides for preferential treatment of domestic and qualifying country end products, but does not prohibit the acquisition of foreign country end products from non-qualifying countries. Yohar Supply Co., B-225480, Feb. 11, 1987, 87-1 CPD ¶ 152 at 2.

Moreover, even assuming the agency had considered FitNet's quote with the understanding that its equipment was manufactured in Taiwan, it would not have been evaluated as lowest-priced under the applicable Buy American regulations. According to FitNet, products manufactured in Taiwan are exempt from the provisions of the Buy American statute. Protester's Response to ARD at 4-6. The protester's argument, however, confuses the term "qualifying country" under the DFARS, with the term "designated country" under the World Trade Organization Government Procurement Agreement (WTO GPA).

An exception to the Buy American statute exists where the head of an agency has determined that application of the statute would be inconsistent with the public interest. 41 U.S.C. § 8302(a); FAR § 25.103(a); DFARS § 225.103(a). Consistent with this exception, DOD has exempted from the Buy American statute end products from countries that have entered into "a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries [have] agree[d] to remove barriers to purchases of supplies produced in the other country." See DFARS § 225.003(10) (defining and identifying qualifying countries); DFARS § 225.872-1 (exempting qualifying country end products from the Buy American statute). Thus, in DOD procurements, the prices of end products from qualifying countries are not subject to the price adjustment normally applied to foreign end products under the Buy American statute. DFARS § 225.502(c). Taiwan is not listed as a qualifying country. DFARS § 225.003(10).

Taiwan is, however, a designated country for the purposes of the WTO GPA. See FAR § 25.003 (defining designated countries to include WTO GPA countries and listing Taiwan as a WTO GPA country). Products from designated countries are exempt from the provisions of the Buy American statute if the WTO GPA is applicable. FAR § 25.402(a)(1). The WTO GPA, however, is only applicable to procurements for supplies valued at \$204,000 or more, FAR § 25.402(b), which is well above the value of the procurement at issue. As such, the WTO GPA was not applicable and the protester's Taiwan-made fitness equipment was not exempt from the Buy American statute.⁴

FitNet also asserts that its quote should have been evaluated as the lowest-priced even after application of the price preference established by the Buy American

⁴ To the extent the protester contends that its proposed equipment should have been considered a domestic end product because it contained steel and other components made in the United States, this argument is without merit. Under DFARS clause 252.225-7001, domestic end products are only those products that are mined, produced, or manufactured in the United States. As such, a product manufactured in another country with United States-made components does not qualify as a domestic end product.

statute. In this regard, FitNet relies on the evaluation preferences prescribed in FAR § 25.105(b), arguing that even if its quote price is increased by 12 percent, it is still lower than the awardee's quote price. Protest at 4. As discussed above, however, the DFARS, which applies to this Air Force procurement, provides for a larger price adjustment than the FAR, requiring contracting officers to increase the evaluated price of foreign end products by 50 percent. DFARS § 225.105. Accordingly, after applying the 50 percent price preference, the protester's evaluated price would not be lower than the awardee's evaluated price.

The protest is dismissed in part and denied in part.

Susan A. Poling
General Counsel