
United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: WKF Friedman Enterprises

File: B-411208

Date: June 16, 2015

Matthew Lyon for the protester.

Darin R. Morency, Esq., Defense Logistics Agency, for the agency.

Paula A. Williams, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly failed to include certain provisions in the solicitation is denied where protester does not show that failure to include those clauses will cause it competitive prejudice.

DECISION

WKF Friedman Enterprises (WKF), of Clayton, California, protests the terms of request for proposals (RFP) No. SPRDL1-15-R-0083, issued by the Defense Logistics Agency (DLA), DLA Land Warren,¹ for a quantity of level winder winches. WKF contends that the solicitation is unduly restrictive of competition.

We deny the protest.

The procurement is being conducted on behalf of the United States Army, Tank Automotive Command (TACOM). Issued on February 11, 2015, as a small business set-aside, the RFP requested offers for seven level winder winches with an option to buy an additional seven units. The winches, identified by National Stock Number (NSN) 2590-01-028-4543, are to be manufactured in accordance with TACOM Drawing No. 10867175 Rev. K, and will be used as replacement parts for the M88 recovery vehicles. Contracting Officer's Statement of Facts at 2, 5. The solicitation provides for award on an "all or none" basis. RFP at 3.

¹ DLA Land Warren is a DLA depot level reparable (DLR) procurement detachment of DLA Land and Maritime. Contracting Officer's Statement of Facts at 1.

Of relevance to this protest, the RFP incorporated by reference Federal Acquisition Regulation (FAR) § 52.211-5, which provides in pertinent part as follows:

- (c) A proposal to provide unused former Government surplus property shall include a complete description of the material, the quantity, the name of the Government agency from which acquired, and the date of acquisition.
- (e) Used, reconditioned, or remanufactured supplies, or unused former Government surplus property, may be used in contract performance if the Contractor has proposed the use of such supplies, and the Contracting Officer has authorized their use.

RFP at 33; FAR § 52.211-5(c), (e). The solicitation also incorporated TACOM § 52.211-4047, which provides as follows at subsection (c):

Used, reconditioned, remanufactured supplies, unused former Government surplus property, or residual inventory shall not be used unless the contractor has proposed the use of such supplies, and the Contracting Officer has authorized their use.

Id. at 61.

On March 9, prior to the RFP's March 18 closing date, WKF filed this protest challenging the terms of the solicitation. Specifically, the protester argued that the agency should have included Defense Logistics Acquisition Directive (DLAD) § 52.211-9000 and § 52.211-9003 in the solicitation, rather than TACOM § 52.211-4047. According to the protester, the difference between the referenced DLAD provisions and the TACOM clause is that the DLAD provisions require consideration of surplus material, whereas the TACOM clause does not. The protester also objects to the RFP's "all or none" provision, arguing that the provision prevented it from competing for the award despite the fact that it had "34 units of Exact Product New Surplus stock available on hand for delivery." Protest at 2.

On March 12, 2015, WKF emailed the contracting officer to express its interest in the procurement and attached a completed Other than New Material Worksheet for the surplus items it planned to propose. Agency Report (AR) exh. 4, Protester's Email to Contracting Officer (Mar. 12, 2015); exh. 5, WKF's Other than New Material Worksheet. On March 17, the contracting officer informed the protester that the agency's engineering support activity (ESA) had determined that the surplus items offered by WKF were unacceptable because they were manufactured more than 20 years ago. Id. exh. 6, Agency Email to WKF at 3 (Mar. 17, 2015). On March 18, WKF submitted its offer to supply the initial requirement for seven units, and the optional quantities. Id. exh. 7, WKF's Standard Form 33 at 5, 8 (Mar. 18, 2015).

WKF maintains that DLAD § 11.304-91(a)(1) requires the inclusion of DLAD § 52.211-9000 and § 52.211-9003 in the RFP here. As noted by the protester, this section instructs as follows:

When the clause at FAR 52.211-5 is used, the contracting officer shall insert the provision at 52.211-9003, Conditions for Evaluation of Offers of Government Surplus Material, and the clause at 52.211-9000, Government Surplus Material, in solicitations, including when the acquisition is conducted using FAR Part 12; unless offers of surplus material will not be considered pursuant to 11.304-91(b), in which case the contracting officer shall not insert the provision and clause in the solicitation. (Emphasis added).

Protest at 1.

In response, DLA argues that it complied with DLA procurement policy when it omitted the DLAD provisions at issue from the solicitation. DLA explains that as a result of the November 8, 2005, Base Realignment and Closure, the DLA Component Acquisition Executive issued a Joint DLR Policy to guide the transfer of DLR procurement functions from the military services to the DLA DLR procurement detachments. The agency further explains that pursuant to this guidance, DLA Land Warren is to continue to use the “currently available Military Services policies, procedures, and clauses set forth in the FAR, DFARS, and [applicable] Military Service-level procurement policy directives” until a new contract writing system is implemented there. Contracting Officer’s Statement at 6.

The protester’s complaint is essentially an objection to an internal agency policy; as such, it is a matter for resolution by the concerned agency, and not through the bid protest process. See RMS Indus., B-246082 et al., Jan. 22, 1992, 92-1 CPD ¶ 104 at 2; East West Research, Inc., B-238316, Apr. 18, 1990, 90-1 CPD ¶ 400 at 2. Moreover, even assuming for the sake of argument that the distinction between the DLAD provisions and the TACOM clause asserted by the protester is supported, i.e., the former DLAD provisions require the contracting officer to consider offers of surplus property, whereas the latter clause gives the contracting officer the discretion not to consider such offers, the record here fails to demonstrate that the protester suffered any prejudice as a result of the RFP’s inclusion of the TACOM clause rather than the DLAD provisions. Prejudice is a required element of every viable protest, and where none is shown, we will not sustain a protest. Inchcape Shipping Servs. Holding, Ltd., B-403399.3, B-403399.4, Feb. 6, 2012, 2012 CPD ¶ 65 at 5 n.5. Here, the record establishes that the contracting officer did, in fact, refer the information provided by the protester pertaining to the surplus property that it intended to offer to the ESA for evaluation. In other words, even to the extent that the TACOM clause did not require the contracting officer to make such a referral, she nonetheless did so.

Likewise, the record establishes that the protester suffered no prejudice as a result of the “all or none” provision to which it objects. Protest at 3. As noted above, prejudice is an essential element for any viable protest, and where prejudice is not demonstrated, we will not sustain a protest. In its initial protest, WKF conceded that it had 34 units of surplus material on hand, which is more than twice the total number of units solicited. As a consequence, it is clear that the challenged provision did not preclude the protester from competing.²

The protest is denied.

Susan A. Poling
General Counsel

² In addition, WKF is not an interested party to challenge the “all or none” provision as unduly restrictive since, as the agency points out, WKF submitted an offer for the total quantity of winches solicited. We have held that a prospective offeror generally lacks standing to challenge a solicitation provision as unduly restrictive in cases where it can meet the requirement set forth in the solicitation. Such a challenge would be, in essence, on behalf of other potential firms who are economically affected by the provision’s allegedly restrictive nature. Westinghouse Elec. Corp., B-224449, Oct. 27, 1986, 86-2 CPD ¶ 479 at 4-5.