



Decision

Matter of: Missouri Machinery & Engineering Company

File: B-403561

Date: November 18, 2010

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DIGEST

In a commercial item acquisition for the repair and overhaul of pumps, protest requiring vendors to be an original equipment manufacturer's authorized repair facility is sustained, where the agency does not show that the restriction on competition is necessary to meet its needs.

DECISION

Missouri Machinery & Engineering Company, of St. Louis, Missouri, protests the terms of request for quotations (RFQ) No. HSCG40-10-Q-19039 issued by the Department of Homeland Security, United States Coast Guard, for the repair and overhaul of air conditioning, bilge, and fire pumps on 110-foot coastal patrol boats.

We sustain the protest.

BACKGROUND

The Coast Guard's 110-foot patrol boats are used for a variety of operations, such as search and rescue, counter-drug and counter-migrant operations, human trafficking prevention, general law enforcement, and homeland security. Agency Report (AR), Tab 6, Justification for Other than Full and Open Competition (J&A), at 2. These patrol boats have been in service for 18 to 26 years, and the Coast Guard expects them to remain in service for another 10 to 12 years. *Id.*, Tab 7, Determinations and Findings (D&F), at 1; Contracting Officer's Technical Representative's (COTR) Statement, Oct. 1, 2010, at 1.

The RFQ, issued as a commercial item acquisition set aside for small businesses, contemplates the establishment of at least two fixed-price blanket purchase agreements for the repair and overhaul of air conditioning pumps, bilge pumps, and fire pumps. RFQ at 4. These pumps, all Gould model 3655 centrifugal pumps, are original equipment on these patrol boats. AR, Tab 9, COTR's Statement, Sept. 13, 2010, at 1. The air conditioning pumps are used to provide cooling water for the operation of the air conditioning system, refrigeration equipment, and electronics on board the patrol boats. Id. at 3. The bilge pumps are used to "dewater" the patrol boats in the event of flooding, and the fire pumps are used in emergency situations for fire fighting, dewatering flooded spaces, and backup cooling water for the main propulsion diesel engines in the event one of the engine cooling pumps fails. Id.

Vendors were informed that the blanket purchase agreements would be established on a low-priced, technically acceptable basis. RFQ at 4, 100-01. The RFQ provides that, to be technically acceptable, quotations must certify that the vendor is a Gould authorized repair facility and that only genuine Gould, original equipment manufacturer (OEM) parts are to be used in the overhaul and repair of the pumps. Id. at 100. The RFQ also requests that vendors provide past performance information for up to five contracts for similar work in the past 3 years and identify the average number of labor hours required to overhaul the pumps. Id. at 101.

The RFQ also provides a statement of work describing the services to be provided under the blanket purchase agreement. Among other things, vendors will be required to disassemble, clean, and inspect pumps to determine their overall condition, as well as to prepare detailed reports and repair plans for overhauling or repairing the pumps. RFQ at 7. Vendors were informed that overhauling the pumps was intended to restore them to a condition equal to a new Gould pump model 3655. Id. The RFQ also describes a number of tests that vendors were required to conduct on overhauled pumps. Id. at 9.

Vendors were requested to submit base year and option year prices for various parts and prices for the repair and overhaul of the pumps. See, e.g., RFQ at 15-16 (contract line item No. 1, base year, air conditioning pump). The RFQ provides that repaired/overhauled pumps must be delivered within 30 calendar days after final approval of the pump's test and inspection report (which was required to be delivered within 90 days of final approval of the firm's disassembly and inspection report and repair plan for the pump). See, e.g., id. The RFQ also provides that, after overhaul is completed, the pumps will be warehoused for up to 2 years for future use; they will not be installed immediately. See id. at 12, 38, 63.

Prior to issuing the RFQ, the Coast Guard executed a J&A to limit the competition to Gould authorized repair facilities and require the use of OEM parts; the limitation was based on the authority set forth at Federal Acquisition Regulation (FAR) § 6.302-1. AR, Tab 6, J&A. This regulation allows for other than full and open competition when the supplies or services required by the agency are available from

only one or a limited number of responsible sources, and no other type of supplies or services will satisfy agency requirements.

With respect to requiring the use of OEM parts, the J&A states that the use of unauthorized parts not manufactured in accordance with OEM specifications, materials, and tolerances could cause equipment failure, rendering the patrol boat unable to complete mission requirements and possibly placing the crew in danger. AR, Tab 6, J&A, at 2. With respect to limiting the competition to Gould authorized repair facilities, the J&A states that the proprietary data needed to overhaul the pumps is not available to the public.¹ *Id.* at 3. The J&A recognizes that “there are several authorized Contractors who can provide overhaul services, however the use of OEM parts is required” and specifically notes that, although Missouri Machinery is not a Gould authorized repair facility, the company has “successfully repaired these pumps in the past.” *Id.* at 3, 4.

DISCUSSION

Missouri Machinery argues that the Coast Guard’s requirement that the vendor here must be an authorized Gould repair facility unduly restricts competition. The record shows that the Coast Guard limited competition to authorized repair facilities because it lacks the data necessary to assure that non-authorized repair facilities adequately perform the work, assumes that only authorized repair facilities will have access to OEM parts, and recognizes that only work completed by an OEM authorized repair facility will be warranted by Gould.

The Competition in Contracting Act of 1984 requires full and open competition in government procurements except where otherwise specifically allowed by the statute. 10 U.S.C. § 2304(a)(1)(A) (2006). One exception to this competition requirement is where the agency’s requirements can be performed by only one or a limited number of sources. 10 U.S.C. § 2304(c)(1); FAR § 6.302-1. However, where, as here, an agency uses non-competitive procedures under 10 U.S.C. § 2304(c), it is required to execute a written J&A with sufficient facts and rationale to support the use of the cited authority. 10 U.S.C. § 2304(f)(1); FAR § 6.302-1; Signals & Sys, Inc., B-288107, Sept. 21, 2001, 2001 CPD ¶ 168 at 9. Our review of the agency’s decision to conduct a procurement under the exceptions to full and open competition focuses on the adequacy of the rationale and conclusions set forth in the J&A. Pegasus Global Strategic Solutions, LLC, B-400422.3, Mar. 24, 2009, 2009 CPD ¶ 73 at 7.

¹ In this regard, the J&A notes that the Coast Guard did not purchase the manufacturing drawings, specifications, and other technical data pertaining to the pumps in the 1980s and is unable to purchase them now. AR, Tab 6, J&A, at 2-3. The J&A also explains that the scope of manufacturing, special tools, and equipment required to manufacture the parts is unknown. *Id.* at 3.

Here, the record does not support the Coast Guard's decision to limit this competition to Gould authorized repair facilities.

Although the Coast Guard contends that it lacks the data to judge whether non-authorized facilities, such as Missouri Machinery, can adequately perform the overhaul and repair work, the J&A also concedes that Missouri Machinery has in the past successfully performed overhaul and repair work for the agency on these Gould pumps. See AR, Tab 6, J&A, at 4. In this regard, Missouri Machinery points to numerous examples, where the firm has successfully repaired these pumps for the Coast Guard since 2003. See Protest at 1; Missouri Machinery Answers to GAO Questions, Sept. 30, 2010, at 1-4. Missouri Machinery states that these pumps, which have been on the market for many years, are not complex, high-technology items that require proprietary data to perform repairs and overhaul. Comments at 2.

While the agency does not deny that Missouri Machinery has successfully performed past contracts to repair and overhaul these pumps,² it suggests that Missouri Machinery will need more time to repair and overhaul pumps than would an authorized repair facility (allegedly 4 to 5 times the number of hours according to the contracting officer and 7 times according to the COTR).³ See CO's Statement at 4; COTR's Statement, Oct. 1, 2010, at 3. Even if this is true, the Coast Guard does not explain--and neither the RFQ nor the J&A indicate--any need for urgency. In this regard, the RFQ provides for a long time frame for repair and overhaul, and further states that the repaired pumps will be warehoused for as long as 2 years. See, e.g., RFQ at 12, 17. In addition, while a longer repair time may well cause Missouri Machinery's quote to be less likely to prevail in a competition--for example, by increasing its labor costs--this issue does not provide a basis for excluding the company before the competition is underway.

The Coast Guard also argues that it must limit this competition because it assumes that only a Gould authorized repair facility will be able to provide the required OEM parts. CO's Statement, at 3. Missouri Machinery does not dispute that OEM parts are needed, but argues that it is untrue that only authorized repair facilities can

² The Coast Guard states that it is unable to identify any problems with the quality of Missouri Machinery's repairs because the agency does not track such work. Contracting Officer's (CO) Statement at 4.

³ The Coast Guard has provided inspection reports for Missouri Machinery and another vendor in support of its assertion that Missouri Machinery takes longer to repair and overhaul these pumps than does an authorized Gould dealer. AR, Tabs 10, 11. However, in our view, these documents do not show that the authorized dealer performed the repair and overhaul services faster than Missouri Machinery. Missouri Machinery also disputes the agency's assertion in this regard. Comments at 3.

obtain them. In fact, the protester states that it used OEM parts in its past contracts for these pumps. Missouri Machinery Answers to GAO Questions, Sept. 30, 2010, at 5. Moreover, during the course of this protest, our Office asked the Coast Guard for confirmation of Gould's position vis-à-vis the OEM parts. In response, Gould stated that its authorized repair facilities will willingly sell replacement OEM parts to non-authorized facilities. See COTR's Email to Agency Counsel, Sept. 29, 2010, at 1. Thus, the record shows that the assumptions underlying this reason for limiting competition are unfounded.

Finally, the Coast Guard argues that only work completed at a Gould authorized repair facility can receive a warranty from Gould.⁴ Legal Memorandum, at 3. In this regard, we note that the RFQ requires vendors to provide a standard commercial warranty at no additional cost. See RFQ at 83. Missouri Machinery states that it warrants its service work in accordance with the warranty terms in the RFQ, and in the same way that a Gould authorized repair facility warrants this work. Missouri Machinery Response, Oct. 8, 2010. We see nothing about the warranty requirements here that justifies restricting this competition to Gould authorized repair facilities.

In short, none of the reasons set forth by the Coast Guard in the J&A justify the agency's decision to limit this competition to Gould authorized repair facilities. Therefore, we find that the agency's restriction of the competition to OEM authorized repair facilities is not reasonable, and we sustain Missouri Machinery's protest on this basis.

Finally, Missouri Machinery protests the RFQ's requirement to provide pricing for OEM parts that would be used in the repair and overhaul of the pumps. The protester contends that the pricing requirement provides Gould authorized facilities with a competitive advantage. In this regard, the protester does not suggest it is unable to obtain pricing, but contends that the only sources for such pricing are Gould-authorized facilities--i.e., the protester's potential competitors for this work. We find no merit to this argument. An agency is not required to equalize a competitive advantage that a firm may enjoy because of its own particular business circumstances, where that advantage does not result from a preference or unfair action by the government. JBG/Naylor Station I, LLC, B-402807.2, Aug. 16, 2010, 2010 CPD ¶ 194 at 4-5. In addition, the fact that the protester will have to procure OEM parts from Gould-authorized dealers does not mean the requirement to price the parts is unfair.

⁴ Although the Coast Guard argues in its legal memorandum that the agency was concerned about warranty issues, there are no warranty concerns raised in the J&A.

RECOMMENDATION

We recommend that the Coast Guard either amend the solicitation to remove the requirement that the vendor be a Gould authorized repair facility, and establish a new date for receipt of quotations, or prepare a new J&A document that adequately justifies any decision to limit the pool of competition for these services. We also recommend that Missouri Machinery be reimbursed its reasonable costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2010). The protester's certified claims for such costs, detailing the time expected and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Lynn H. Gibson
Acting General Counsel