U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Washington, DC 20548
Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

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Decision

Matter of: Innovation Associates, Inc.

File: B-414406

Date: June 6, 2017

Stuart B. Nibley, Esq., Amy M. Conant, Esq., and Erica L. Bakies, Esq., K&L Gates LLP, for the protester.
Cherie J. Owen, Esq., Fernand A. Lavallee, Esq., and Alexander M. Yabroff, Esq., Jones Day, for Arxium, Inc., an intervenor.
Jared P. Weissberger, Esq., and Lillian S. Weiss, Esq., Defense Logistics Agency, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that awardee's proposed solution for providing robotic pharmaceutical automation systems failed to meet several of the solicitation's minimum requirements is sustained where record shows that the offered system failed to meet two material requirements.

DECISION

Innovation Associates, Inc. of Johnson City, New York, protests the issuance of four delivery orders to Arxium, Inc. (AI), of Buffalo Grove, Illinois, under that firm's federal supply schedule (FSS) contract pursuant to request for quotations (RFQ) No. 1019219, issued by the Defense Logistics Agency (DLA) for robotic pharmaceutical equipment. Innovation Associates argues that AI's quotation was technically unacceptable, and therefore ineligible for award.

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

BACKGROUND

The RFQ was issued by DLA to acquire robotic pharmaceutical automation systems at four large-volume refill centers on behalf of the Air Force to be installed at various Air Force military treatment facilities. The solicitation contemplates the issuance of fixed-price delivery orders to the firm submitting the lowest-priced, technically acceptable

quotation.[1] RFQ at 3. The RFQ included a list of 64 minimum requirements, and several of these (discussed in detail below) are the subject of Innovation Associates' protest.

The agency received quotations from the protester and awardee in response to the RFQ. The agency evaluated the quotations, engaged in several rounds of discussions, and solicited, obtained and evaluated final quotations. The agency found both quotations technically acceptable and issued the delivery orders to AI based on its lower price. The record shows that AI quoted a total price of $4,487,573, while the protester quoted a total price of $4,494,706, for a difference of $7,133. Agency Report (AR) exh. 12, Award Document, at 3. After being advised of the agency selection decision and receiving a debriefing, Innovation Associates filed the instant protest.

PROTEST

Innovation Associates argues that the quotation submitted by AI is technically unacceptable for failing to meet a number of the RFQ's minimum requirements.[2] We have considered all of Innovation Associates' arguments, and sustain its protest for the reasons discussed below. We deny the remainder of Innovation Associates' arguments to the extent we do not specifically discuss them below. We note at the outset that, in reviewing protests challenging an agency's evaluation of quotations, our Office does not reevaluate the quotations or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria, as well as applicable statutes and regulations. ManTech Advanced Systems International, Inc., B-413717, Dec. 16, 2016, 2016 CPD ¶ 370 at 3.

"First Fill" Image

The RFQ requires the proposed solution to allow the pharmacist using the system to be able to view what is referred to as the "first fill" image of a prescription. The first fill image essentially is a digital reproduction of the original hand-written prescription that was submitted for fulfillment. The record shows that there are a large number of out-patient "retail" pharmacy locations (Air Force hospitals and pharmacies) that fill initial prescriptions, while the larger refill centers (for which the current equipment is being acquired) provide refills of the initially-filled prescriptions.

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[1] The RFQ contemplated the issuance of separate delivery orders for each of the four locations identified for installation of the systems, but advised firms that a single vendor would be selected for award of all four delivery orders. RFQ at 3.

[2] In its initial protest, Innovation Associates also maintained that the awardee did not have a valid FSS contract. In its comments responding to the agency report, Innovation Associates concedes that AI, in fact, had a valid FSS contract. We therefore do not consider this allegation further.

In order to create the first fill images, the Air Force uses an approved "system of record" known as PharmASSIST Symphony Workflow Software. Letter of Protest, exh. K, Air Force Announcement of Approval of PharmASSIST System as Approved System of Record. This system scans the paper prescriptions using a Symphony scanner and stores them in a Symphony server that must be accessed in order to display the first fill images. Protest, exh. J, Declaration of Innovation Associates' Director of the Program Office. The first fill images are accessed by the Symphony Central Fill System using a capability called Script Image Synchronization. Id. The PharmASSIST/Symphony system is proprietary to the protester and is used at retail pharmacy operations located at approximately 75 Air Force installations worldwide. Protest, exh. L, PharmASSIST Maintenance Contract. All parties agree that this is an essential safety feature of the systems being acquired; allowing the pharmacist to view the first fill image ensures that the refill actually is for the drug and dosage that originally was prescribed.

The protester argues that AI cannot meet the requirement to allow the pharmacist to view the first fill images because it has no means to access the Symphony data base to retrieve the first fill images, nor has it proposed an alternative method for creating and/or retrieving the first fill images. The protester therefore maintains that AI does not meet this minimum requirement.

The agency responds that nothing in the RFQ required an ability to retrieve the first fill images, and that the RFQ only required firms to demonstrate an ability to view the first fill images. The agency states:

> Innovation's claim relies on reading into the requirement a capability to retrieve the image from the outpatient retail site. That is not part of the requirement. Innovation is correct that many Air Force outpatient pharmacies use Innovation's PharmAssist software to store scanned copies of first fill images. Therefore, it is possible that Arxium [AI] will be unable to access Innovation's proprietary database system. However, even if Arxium's solution were unable to retrieve scanned images from Innovation's proprietary system, it is of no import. Retrieval was not an element of Minimum Requirement 23. To meet Minimum Requirement 23, Arxium must provide a solution that allows a pharmacist at the refill center to view the image and prescription data, when available or when provided by the Air Force. The requirement does not state that a vendor's solution must have the ability to retrieve the image.

Agency Report at 5 (emphasis supplied).[3] DLA therefore maintains that AI meets the requirement.

[3] For the record, the words "when available or when provided by the Air Force" are not found in the RFQ's statement of minimum requirements, as set forth below.

We sustain this aspect of Innovation Associates' protest. The RFQ provided as follows: "When verifying prescriptions, the solution shall allow the pharmacist to view the first fill image of the original written prescription and display electronic prescription data to assist in rapid verification." RFQ Minimum Requirement No. 23. Prior to quotations being submitted, the agency published a question and answer relating to this requirement. That question and answer provided as follows:

> **Question:** Minimum Requirement #23: Since these are refill center systems supporting multiple outpatient pharmacies, please clarify if the solution must be capable of retrieving the "first fill image" from the system used at the outpatient pharmacy.
>
> **Answer:** As stated in Minimum Requirement #23: **"**When verifying prescriptions, the solution shall allow the pharmacist to view the first fill image of the original written prescription and display electronic prescription data to assist in rapid verification."

RFQ, Question No. 23.

The agency's answer just restated the RFQ's requirement, which did not address whether the system had to be capable of retrieving the image.

We find implicit in the requirement to view the first fill image that the pharmacist will necessarily need to retrieve the image as well. Simply stated, we do not understand--and the agency has not explained--how the pharmacist will be able to view the image without retrieving it, and there is nothing in the record to show that AI has the ability to retrieve the first fill images currently stored in the Air Force's approved system of record for digital first fill images. AI did not include any information in its quotation to show that it has the ability to retrieve the first fill images by, for example, obtaining a license from the protester to employ its proprietary Script Image Synchronization system. AI also did not include information in its quotation showing that it was offering an alternative means either of retrieving the currently extant first fill images or creating new first fill images, or that such an alternative means has been approved as an alternative system of record.

The agency also did not advise firms prior to the submission of quotations that the first fill image minimum requirement would only be imposed when the first fill images were available or furnished by the Air Force, which is the position set out in the agency's report (quoted above). The protester explains that, as part of its quotation, it included approximately $[deleted] in costs associated with outfitting two locations with script image synchronization capabilities. The protester maintains that it could have reduced its quotation by this amount had it known that it would only have to meet the first fill image requirement when the first fill images were available or provided by the Air

Force.[4] Inasmuch as the protester's quotation was only approximately $7,000 higher than the awardee's quotation, the agency's relaxation of this minimum requirement for the awardee was prejudicial to the protester. We therefore sustain this aspect of Innovation Associates' protest.

Nesting Stations

Another minimum requirement relates to providing what are termed "nesting stations." The RFQ provided that if the offered solution used "totes" or "pucks" it also required the firm to provide "nesting stations."[5] The totes are labeled with radio frequency identification (RFID) chips or, in the case of the awardee's system, a [deleted]. The nesting station is defined by the RFQ as an area on the conveyer system that has a nesting reader attached to it. RFQ at 6; Question and Answer No. 40.

The record shows that the agency determined that the awardee satisfied the requirement for a nesting station by offering a [deleted] scanner placed on a workstation desktop. AR, exh. 10, AI Final Technical Report, at 71-72. AI's system includes a [deleted] "license plate" affixed to the tote; the tote is placed on the workstation desktop and the [deleted] is read by the [deleted] reader. Id.

The protester maintains that the agency relaxed this requirement in accepting the awardee's solution. According to the protester, the term "nesting station" is an industry standard term that describes a device into which the totes are placed for purposes of reading the identifying information. The protester maintains that it offered nesting stations into which its totes are placed, and the nesting station reads an embedded RFID chip and populates the workstation with information relating to the contents of the tote. The protester maintains that, had it known that another solution (such as the one offered by the awardee) was acceptable, it could have significantly reduced its price. According to the protester, its nesting stations cost approximately $[deleted] a piece, and the RFQ identifies a requirement for 36 nesting stations.

We sustain this aspect of Innovation Associates' protest. The agency essentially takes the position that the solution offered by the awardee was the functional equivalent of a

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[4] We point out that there is no information in the record showing whether the Air Force has intellectual property rights in the data set comprising the first fill images currently stored in Innovation Associates' PharmASSIST system, or that the Air Force has a different repository of this data set independent of the data set in Innovation Associates' system, such that the Air Force could provide the information to a third-party contractor. In fact, there is nothing in the record to show that there even exists an alternative approved system of record for storing first fill images.

[5] Both the protester and the awardee offered solutions that employ "totes." A tote is essentially a shoebox-sized container into which individual prescriptions are deposited and aggregated for subsequent processing.

nesting station, and it was unobjectionable for it to have accepted that solution. While the agency may be correct that the awardee's solution is functionally equivalent, the RFQ used a specific term--nesting station--to describe the agency's requirements. The record shows that this is an industry standard term, and that the protester was led to believe that it was required to offer a nesting station solution in order to satisfy the RFQ's requirements. In addition, the record shows that the awardee itself defined the term nesting station in responding to a discussion question posed by the agency. The awardee defined a nesting station as follows:

> A nesting station is a system fixture utilized to identify processing totes at a workstation via an RFID reader that scans an RFID chip attached to the tote. In this process, the technician removes the tote from the conveyor, places it in the nesting station and the RFID reader scans the chip and populates the workstation screen User Interface with the tote order data.

AR, exh. 10, AI Final Technical Report, at 72 (emphasis supplied).[6]

Here, as discussed, the RFQ clearly called for nesting stations, which is a term understood in the industry as describing a particular hardware configuration. While the agency may be correct that the solution offered by the awardee is functionally equivalent, it is clear that the protester read the requirement of the RFQ as being limited to providing a nesting station solution as understood in the industry. Where, as here, an agency's requirements change or are relaxed, the agency is required to amend the solicitation to provide all firms an opportunity to compete on a common basis. CACI Technologies, Inc.--Costs, B-407923.3, Aug. 14, 2014, 2014 CPD ¶ 321 at 5. In light of these considerations, we sustain this aspect of Innovation Associates' protest.

Robotic Arms and Collation Lanes

As a final matter, we note that Innovation Associates challenges the award to AI because, according to the protester, AI did not offer robotic arms, as required by the solicitation. Innovation Associates also maintains that the agency relaxed a requirement that the filled prescriptions be deposited "directly" into the totes after being filled because the AI solution segregates the filled prescriptions into "collation lanes" before depositing the prescriptions into the totes. Innovation Associates maintains that it could have offered an alternate, less expensive, solution had it known that it did not have to meet these requirements.

[6] The agency provided our Office with a copy of the e-mail transmitting the awardee's response to the agency's inquiry regarding AI's solution to the nesting station requirement but did not provide our Office with the letter embodying the awardee's statement. Nonetheless, the statement quoted above is reproduced in the agency's technical report evaluating the AI-offered solution.

We find no merit to these contentions. Although the RFQ specified a quantity of "robotic arms", it also more broadly stated that the proposed solution was required to include a "robotics dispensing cabinet" which the solicitation defined as follows:

> A robotics dispensing cabinet is an automated medication dispenser that does not require a human to manually manipulate a prescription vial in order for the vial to be filled with medication but instead, usually employs a robotic arm (or other robotic device) to direct the vial to the medication dispensing cell in order to be filled and shall provide automated (non-manual) application of vial labeling.

RFQ at 5 (emphasis supplied). See also RFQ Question and Answer Nos. 12 and 48, in which the agency declined to provide a precise definition of "robotic arm" and left it to the vendors' business judgment to decide what solution to offer. To the extent that the protester believed that robotic arms (as opposed to "other robotic devices") were required under the terms of the RFQ, the solicitation contemplated other solutions.

In addition, as noted, the record shows that AI proposed a solution that employed "collation lanes" where the prescriptions are segregated before being deposited into the totes. However, the fact that the prescriptions are first segregated as part of the process of depositing them into the totes does not demonstrate that the prescriptions are not deposited "directly" into the totes.[7]

RECOMMENDATION

In light of the discussion above, we sustain IA's protest. We recommend that if DLA can amend the RFQ to relax certain requirements in a manner consistent with this decision, that it should do so, and then solicit, obtain and evaluate revised quotations.[8] In the alternative, if the agency concludes that the awardee's quotation does not satisfy one or more of its requirements and those requirements cannot be relaxed or revised, we recommend that the agency terminate the delivery orders issued to AI and issue delivery orders to the protester, if otherwise proper.[9] Finally, we recommend that the

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[7] In any event, if the agency elects to reopen the acquisition, IA will be afforded an opportunity to respond to the agency's requirements as defined at that time.

[8] We recognize that the Air Force effectively may have locked itself into a solution that only the protester can provide in view of the limitations associated with the agency's PharmASSIST approved system of record for storing the digital first fill images. Such a situation, while inconsistent with the overarching requirement for full and open competition, does not mean that the agency can simply waive the minimum requirement stated in the solicitation. Accordingly, the agency either can enforce the minimum requirements included in the solicitation or revisit them.

[9] During the course of the protest, the agency advised our Office that it had partially overridden the Competition in Contracting Act stay of performance in order to have one

(continued...)

agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester should submit its certified claims for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained in part and denied in part.

Susan A. Poling
General Counsel

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of the delivery orders performed. E-mail from the Agency to Our Office and Counsel, May 23, 2017. The agency advised that this override was in the best interests of the government. Id. Where, as here, an agency overrides the stay of performance in the best interests of the government, our Office is required to recommend corrective action without regard to any cost or disruption from terminating, recompeting, or reawarding the contract. 31 U.S.C. § 3554(b)(2).