

TECHNICALLY UNACCEPTABLE IS STILL UNACCEPTABLE

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A recent Marine Corps procurement, using competition among Federal Supply Schedule (“FSS”) vendors and a Request for Quotation (“RFQ”) rather than a Request for Proposal (“RFP”), demonstrates that a technically unacceptable item cannot receive award regardless of the type of procurement. *J. Squared, Inc., dba University Loft Co.*, B-407302, Dec. 17, 2012. It also shows the perils of protesting without the benefit of stopping the procurement.

The Marine Corps issued a solicitation for 288 metal beds, requesting quotations for a purchase order through the FSS that would be issued on a lowest priced technically acceptable basis. The specifications stated, among other things, that the bed had to be a “Tool Free Hook Assembly.” The Marine Corps awarded to Dehler Manufacturing, after determining that its bed was technically acceptable and was the lowest priced quote. However, Dehler’s drawing did not describe the method for attaching the side rails to the end boards in assembling the bed. University Loft protested that the Dehler bed had to be assembled using nuts and bolts, rather than through a “tool free hook assembly.”

In fact, the bed was fastened using two nuts and bolts, not a hook assembly. The Marine Corps argued that the bed complied with the specifications because “a hook assembly can ...describe a bed rail that, like Dehler’s, ‘catches on’ or ‘hooks over’ a protruding bolt.” The Government Accountability Office (“GAO”) rejected that interpretation, stating that competition in the FSS requires reasonable evaluations, and awards must be consistent with the terms of the solicitation. Where there are clearly stated technical requirements that are material to government needs, any quote that fails to conform to such a material solicitation requirement is technically unacceptable and cannot form the basis for an award.

GAO sustained the protest because it found that the Marine Corps never evaluated the bed’s assembly method, and Dehler’s bed does not include a curved hook as required by the specification. The Marine Corps’ interpretation was simply unreasonable, and its evaluation was inadequate.

The sad part of this story is the ending. University Loft originally submitted an agency protest, but when the Marine Corps denied it, a new protest was submitted to the GAO. Having waited, there was no “automatic stay” of the contract, as required by the Competition in Contracting Act (“CICA”) CICA has a short time frame to protest to the GAO in order to get the stay. When GAO issued its ruling, all the Dehler beds had been delivered and installation was complete. Accordingly, there was no way to award the contract to University Loft. Instead, GAO recommended that University Loft be reimbursed for the costs of preparing its quotation, as well as the costs of filing and pursuing the protest.

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This article does not provide legal advice as to any particular transaction

TIPS: It is probably best to submit a post award protest to the GAO, and take advantage of the CICA stay, which stops the performance of the contract. Then, if you win the protest, you have the potential of winning the award.