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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Baxter Healthcare Corporation

File: B-230580.5

Date: April 26, 1990

Justin D. Simon, Esq., Dickstein, Shapiro & Morin, for the protester.

E. L. Harper, Office of Acquisition and Materiel Management, Department of Veterans Affairs, for the agency. David Ashen, Esq., and John M. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Finding of price unreasonableness under multiple-award Federal Supply Schedule solicitation was reasonable where proposal did not offer either most favored customer pricing--prices equal to or lower than lowest commercial prices--when evaluated on a product-by-product basis or lowest net price available to the government.

DECISION

Baxter Healthcare Corporation protests the Department of Veterans Affairs' (VA) rejection of its proposal under request for proposals No. M2-Q1-88, a multiple award Federal Supply Schedule (FSS) solicitation for medical supplies. Baxter challenges VA's determination that Baxter did not offer prices equal to or lower than those offered its most favored customer (MFC), and the resulting rejection of its proposal due to unreasonable pricing.

We deny the protest.

Under multiple award schedules, contracts are negotiated with more than one supplier for delivery of commercial supplies and services that are comparable and of the same generic type, at prices based on discounts from commercial price lists. Federal Acquisition Regulation (FAR) § 38.102-2(a). Contracts are awarded only after the contracting officer determines that the prices, terms and

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conditions offered are fair and reasonable. FAR § 38.102-2(c). Generally, the determination of price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer; we will question such a determination only where it is clearly unreasonable or there is a showing of bad faith or fraud. See Sal Esparza, Inc., B-231097, Aug. 22, 1988, 88-2 CPD ¶ 168.

Although VA is authorized to award schedule contracts for certain medical items, the FSS program is directed and managed by the General Services Administration (GSA). FAR §§ 38.000 and 38.101(e). We thus consider an agency's determination of price reasonableness to be proper when it meets the standards established in GSA's Policy Statement on Multiple Award Schedule Procurement (Policy Statement), 47 Fed. Reg. 50,242 (1982), which established a goal of obtaining discounts from offerors' established catalog or commercial prices that are equal to or better than discounts the offerors extend to their MFC. 47 Fed. Reg. 50,244; see Credit Bureau Inc. of Georgia, B-220890, Feb. 27, 1986, 86-1 CPD ¶ 202. The Policy Statement does provide for awarding FSS contracts even where the discount offered the government is not equal to or greater than the MFC's discount, but only where the government's terms and conditions differ from those given to the MFC, for instance, "where the Government's overall volume of purchases does not warrant the best price." 47 Fed. Reg. 50,244.

The solicitation requested proposals for a 3-year contract to furnish medical equipment and supplies in 57 categories, or special item numbers (SIN), with each SIN category encompassing a number of separate but related individual items. Baxter, an incumbent FSS contractor, and two other firms submitted offers; Baxter's offer covered only SINS D-19 (physiological monitors) and D-26 (cardiac output apparatus). After extended negotiations, including an audit of Baxter's sales and pricing data conducted by the Defense Contract Audit Agency (DCAA), and the receipt of best and final offers (BAFOs), VA made award to Baxter for three items under SIN D-19.

With respect to the items Baxter offered under SIN D-26, the agency and DCAA were unable to discern a consistent policy by Baxter of granting discounts from published price lists; they determined that high quantity customers did not always receive the highest discounts, which often were granted to customers purchasing lesser quantities than the government. For example, for one type of catheter proposed under SIN D-26, Baxter offered VA (which previously had purchased 14,483 units) only a 40 percent discount from the list

price, even though it had granted one commercial customer purchasing only 4,900 units a 47.5 percent discount and another customer purchasing only 30 units a 50 percent discount. VA concluded that Baxter was not offering discounts equal to or greater than the discounts offered its MFCs. VA did reopen negotiations in response to a subsequent agency-level protest from Baxter, but these proved fruitless. The agency subsequently advised Baxter that no award would be made for any of the seven items it offered under SIN D-26 because its offered discounts were not advantageous to the government. Baxter thereupon filed this protest with our Office.

Baxter primarily objects that VA improperly evaluated its MFC pricing by considering MFC status on a product-by-product basis, rather than on the basis of a single MFC for an entire SIN. According to the protester, requiring an MFC price for each item is inconsistent with the Policy Statement goal of obtaining discounts equal to or greater than the discount offered the offeror's most favored "customer;" Baxter argues that this reference to a singular "customer" indicates that GSA intended to require only a single MFC for each SIN, not one for each item under a SIN. Baxter states that no commercial customer receives the lowest price on every item, and that its commercial sales to any one customer are negotiated on the basis of a total package of products, not on a product-by-product basis. Baxter maintains that when prices are evaluated on the basis of SIN-26 as a whole, it is clear that VA will receive favorable prices relative to Baxter's commercial customers.

We find Baxter's position untenable. The Policy Statement does not mandate evaluation of MFC pricing only on a SIN basis or preclude determination on a product-by-product basis. In this regard, GSA's own interpretation and implementation of its Policy Statement, as set forth in its Federal Supply Service Multiple Award Schedules Desk Guide, defines an MFC as "that customer or class of customers which receives the best discount and/or price arrangement on a given item from a supplier." (Emphasis added.) Desk Guide, section AA. The Guide makes clear elsewhere that "item" refers to an individual product and not to a SIN or category of products; the Guide states that "identical items are those that are the same in all respects, including brand name, model number, and technical characteristics." Desk Guide, section M.

Furthermore, as Baxter itself acknowledges, the solicitation provided that the award decision may be made on a product-by-product basis, not a SIN basis. The RFP (1) required the submission of catalogs or price lists and the listing of

sales and commercial discounts for specific, proposed products; (2) established a minimum level of anticipated purchases as a precondition to award for any particular product; and (3) provided that the agency may make multiple awards for the listed articles or services, but cautioned that it would award "only one contract for each specific product" in the event of multiple offers of identical products. In these circumstances, the agency properly based its determination of reasonable pricing on a product-by-product review.

Moreover, even when evaluated on a SIN basis--that is, on the basis of the combined price Baxter charges a particular commercial customer for all seven products it offered under SIN D-26--as Baxter asserts should have been done, it appears that Baxter was not consistently offering MFC pricing to the agency. For example, Baxter offered one chain of hospitals a combined price lower than the price it offered VA, even though the volume of sales to the chain (in number of units) was lower than Baxter's volume of prior sales to VA for each of the seven products. Specifically, for one product, Baxter charged the chain 47 percent less than the prices it offered VA, even though prior sales of the product to VA (in units) were 417 percent higher.

Baxter explains that apparent discrepancies in the prices it offered VA relative to the prices offered its commercial customers merely reflect differing terms and conditions; while a number of Baxter's commercial contracts include commitments to purchase specified minimum quantities or a variety of products, the VA solicitation provides that "no guarantee is given that any quantities will be purchased under a contract." Given, however, that nothing in the record suggests that the prior high level of VA sales will diminish, or that the solicitation estimates of future sales are overstated, we think the agency reasonably determined that there were no materially different terms or conditions under Baxter's commercial contract that warranted the significantly lower prices offered some of those commercial customers, notwithstanding VA's significantly larger volume purchases. Thus, even if MFC pricing is considered on a SIN-basis, the agency reasonably concluded that the pricing offered VA was unreasonable.

Baxter claims VA improperly failed to determine whether, notwithstanding its failure to offer MFC pricing, Baxter was offering the net low price to the government and therefore should have been placed on the schedule pursuant to an instruction in the Policy Statement that "every effort should be made to include products with the lowest net price on the schedule." 47 Fed. Reg. 50,248. However, other

offerors quoted lower prices for products comparable to six of the seven products proposed by Baxter under SIN D-26. The agency therefore properly concluded that there were lower prices available in the competitive open market, and properly excluded Baxter from the schedule.

Baxter also questions whether VA satisfied another Policy Statement provision requiring that the contracting officer weigh the effect that the rejection of an offer will have on meeting the government's needs. 47 Fed. Reg. 50,244. However, it is clear from the foregoing that VA believes its needs will be met under SIN-26 at prices lower than Baxter's.

The protest is denied.



for James F. Hinchman
General Counsel