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Decision

Matter of: Pitney Bowes, Inc.

File: B-416787

Date: December 6, 2018

William A. Shook, Esq., The Law Offices of William A. Shook PLLC, for the protester. Major Ronald Herrmann, and Scott N. Flesch, Esq., Department of the Army, and Sarah Park, Esq., General Services Administration, for the agencies. Evan D. Wesser, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that the agency erred in allowing the awardee to quote equipment under a special item number (SIN) from the awardee's Federal Supply Schedule (FSS) contract rather than the SIN under which the solicitation was issued is denied where the solicitation did not identify an applicable SIN, and the awardee's equipment was available under the awardee's applicable FSS contract.

DECISION

Pitney Bowes, Inc., of Washington, D.C., protests the award of a contract to Neopost USA Inc., of Milford, Connecticut, under request for quotations (RFQ) No. 1284010, which was issued by the Department of the Army under the General Services Administration (GSA) Federal Supply Schedule (FSS) Schedule No. 36, for postage meter equipment. Pitney Bowes alleges that the Army unreasonably allowed Neopost to quote items from a different special item number (SIN) under its Schedule No. 36 contract rather than the SIN under which the RFQ was issued.

We deny the protest.

BACKGROUND

On May 9, 2018, the Army issued the RFQ for multiple commercial-off-the-shelf postage metering machines for approximately 40 Continental United States installations. RFQ,

Performance Work Statement (PWS), at 1.¹ The RFQ was issued via GSA's e-Buy system to holders of SIN 50-205 under Schedule No. 36, but the RFQ did not incorporate or reference SIN 50-205 or otherwise identify an applicable SIN. See, e.g., Agency Report (AR), Tab 3, GSA e-Buy RFQ Summary; Contracting Officer's Statement of Facts (COSF), ¶ 2(b).² The RFQ provided that the Army sought both an "equipment rental/lease contract" and an "Operating Lease Plan (OLP)," but did not define either of these contractual arrangements. RFQ, PWS, ¶¶ 1, 1.2.3.³ The RFQ anticipated the award of a fixed-price contract, with a 1-year base period, and four 1-year options. Id., ¶ 1.4. Award was to be made on a lowest-priced, technically acceptable basis, considering technical, past performance, and price. RFQ, Instructions to Offerors, at 1-2.

Both Pitney Bowes and Neopost timely submitted quotations in response to the RFQ. Relevant here, neither quotation referenced SIN 50-205. Rather, Pitney Bowes' quotation expressly represented that it was submitted pursuant to Schedule No. 36, SIN 51-1001, while Neopost's quotation did not identify a particular SIN. See COSF, ¶ 2(e).⁴ The Army proceeded to analyze both quotations to confirm that the offerors' respective proposed equipment was on their respective Schedule No. 36 contracts, and the agency evaluated both quotations as technically acceptable. Id. Specifically, with respect to Neopost, the Army found that the required equipment was available under SIN 51-58B of Neopost's Schedule No. 36 contract. See Legal Memo. at 7-8; AR, Tab 23, GSA eLibrary Contract Listing for Schedule No. 36, SIN 51-58B. On June 1,

¹ The RFQ was amended three times; references herein are to the RFQ as amended.

² A SIN is a group of generically similar (but not identical) supplies or services that are intended to serve the same general purpose or function. Federal Acquisition Regulation (FAR) § 8.401. GSA represents that buyers may use the GSA e-Buy system to notify all sellers listed under a particular SIN category or a lesser number of sellers, but sellers that were not notified via e-Buy may nevertheless submit a quotation for an RFQ placed under their awarded SINs. GSA Brief at 2 n.2.

³ As a general matter, agencies typically issue orders against, or establish blanket purchase agreements under, a FSS contract. See FAR § 8.405. As the parties here referred to the resulting award as a contract, we use that nomenclature herein.

⁴ Pitney Bowes concedes that its quotation referenced SIN 51-1001, but contends that the reference was erroneous. Specifically, the protester contends that it previously bid on a different procurement issued pursuant to SIN 51-1001, and then used its prior quotation as a template for its quotation in response to this RFQ while inadvertently failing to change the references from SIN 51-1001 to SIN 50-205. The protester effectively argues that the agency should have reasonably inferred its intentions based on its proffered pricing and terms and conditions. See, e.g., Comments at 3 n.2. While we do not believe the protester's error was reasonably apparent to the agency, for the reasons set forth herein, the SIN Pitney Bowes used to offer its equipment is irrelevant to the resolution of the protest.

the Army originally selected Pitney Bowes' quotation for award. Following an agency-level protest filed by Neopost, however, the agency determined that corrective action was appropriate. Specifically, the Army cancelled the award to Pitney Bowes, amended the RFQ to more clearly state the agency's requirements with respect to the technical specifications for certain of the required equipment, and solicited revised quotations. Id., ¶¶ 2(f)-(l).

Pitney Bowes and Neopost timely submitted revised quotations. As with their initial quotations, Pitney Bowes' proposal represented that its quotation was submitted pursuant to SIN 51-1001, while Neopost's quotation did not reference any particular SIN. See AR, Tab 11, Pitney Bowes Technical Quotation, at 1, 5; Tab 12, Pitney Bowes Price Quotation, at 1, 5, 6; Tab 13, Neopost Quotation. As it had done when evaluating the vendors' initial quotations, the Army reviewed the vendors' respective Schedule No. 36 terms and conditions, as opposed to just SIN 50-205, to confirm that the equipment was on the vendors' respective contracts. COSF, ¶¶ 2(m)-(n). Both quotations were again rated technically acceptable, and Neopost's proposed price of \$522,165 was the lowest-priced quotation. Thus, the Army selected Neopost's quotation for award. AR, Tab 15, Unsuccessful Offeror Notice, at 1. Following a debriefing and agency-level protest, which was denied, Pitney Bowes filed this protest with our Office.

DISCUSSION

Pitney Bowes primarily alleges that the Army erred in finding Neopost's quotation to be technically acceptable where Neopost proposed equipment under SIN 51-58B of its Schedule No. 36 contract, but where the RFQ was issued under SIN 50-205. The protester argues that the agency's waiver of this material solicitation requirement was unreasonable and prejudicial, because the terms and conditions of contracts awarded under SIN 50-205 do not contemplate early termination charges, while contracts awarded under SINS such as 51-58B or 51-1001 do, thus causing Pitney Bowes to propose a higher price to account for the associated performance and pricing risks.⁵

The Army primarily responds that the RFQ neither specified an applicable SIN nor precluded vendors from offering equipment on rental or leasing terms in accordance with the terms and conditions of their respective Schedule No. 36 contracts. In this regard, the Army argues that it reasonably evaluated quotations to ensure the availability of the items under, and compliance with the applicable terms and conditions

⁵ Pitney Bowes raised other collateral arguments. While our decision does not specifically address every argument, we have carefully reviewed all of the arguments and find that none provides any basis on which to sustain the protest. Additionally, our Office previously dismissed a number of the protester's initial protest allegations as untimely on the basis that Pitney Bowes failed to raise those arguments in its earlier, unsuccessful agency-level protest. See Pitney Bowes, Inc., B-416787, Sept. 28, 2018 (unpublished decision).

of, the vendors' respective Schedule No. 36 contracts, as opposed to limiting vendors to quoting only equipment under SIN 50-205.

Pursuant to 4 C.F.R. § 21.3(j), our Office invited GSA to participate in the protest. On November 14, GSA submitted a brief in support of the Army's position.⁶ Specifically, GSA agreed that where the RFQ was silent on an applicable SIN, the relevant inquiry should be whether the quoted items are listed on a schedule contractor's pricelist pursuant to FAR § 8.402(b) and, accordingly, within the scope of the vendor's schedule contract, not whether the items were included under a specific SIN. For the reasons that follow, we find no basis on which to sustain the protest.

Specifically, we agree with the Army and GSA that where, as here, the RFQ does not specifically limit goods or services to those under a particular SIN, the relevant question should be whether the offered goods or services are under the schedule contractor's applicable schedule contract. Pursuant to FAR § 8.402(b), all GSA schedule contractors must publish an authorized FSS pricelist that contains all supplies and services offered by the contractor under its contract. In addition, this section of the FAR requires the pricelist to include the pricing and terms and conditions pertaining to each SIN that is on the vendor's schedule contract. Although the FSS contracts are organized by SINS, FAR subpart 8.4 does not include any provision specifically requiring an agency to identify an applicable SIN when ordering from a schedule contract, or otherwise restrict a vendor's ability to propose items only from a single SIN.

In this regard, we find unpersuasive Pitney Bowes' reliance on FAR § 8.402(f) to support its argument that an item not listed under a particular SIN should be considered analogous to an open market item. That provision provides that "[f]or administrative convenience, an ordering activity contracting officer may add items not on the Federal Supply Schedule (also referred to as open market items) to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order" if certain conditions are satisfied. *Id.* (emphasis added). Thus, under the plain meaning of FAR § 8.402(f), in order to be an open market item, the item must not be on the vendor's schedule contract. There is no support in the plain text of the regulation to restrict the phrase "not on the Federal Supply Schedule" to require an item be listed under a specific SIN.

Additionally, Pitney Bowes fails to articulate what RFQ requirements Neopost offered under SIN 51-1001 that fail to satisfy or are otherwise not in compliance with the RFQ. While the protester argues that SIN 50-205 does not include terms allowing for early termination charges, while other SINS under the Schedule No. 36 contract do allow for such charges, Pitney Bowes fails to identify any provision in the RFQ which precluded such terms and conditions. Therefore, on the record presented and in the absence of

⁶ Our Office invited the protester and Army to respond to GSA's position. Neither party elected to respond.

any basis to find that Neopost's quotation failed to satisfy or was in conflict with any of the RFQ's applicable requirements, we find no basis on which to sustain the protest.

Pitney Bowes' protest also relies on other problematic arguments. For example, the protester's initial protest alleged that Neopost's quotation should have been rejected as technically unacceptable because its "SIN 50-205 meters are only offered at a per month rental price and not at an operating lease price as required by the Solicitation." Protest at 4. Thus, Pitney Bowes initially argued that the basis for the alleged unacceptability of Neopost's offered meters under SIN 50-205 was the absence of leasing terms. In its comments, however, the protester appears to have abandoned its initial line of argument, and instead argued that the solicitation actually sought rentals, and Neopost's quotation, which offered leasing terms, was therefore technically unacceptable. Specifically, the protester argued that "there is no Operating Lease Plan under the special terms and conditions of SIN 50-205 but there are rental terms," and that Pitney Bowes' quotation was for a "long-term rental with no termination penalty consistent with SIN 50-205." Comments at 3. Thus, Pitney Bowes subsequently argued that the basis for the alleged unacceptability of Neopost's quotation was its use of leasing terms, instead of rental terms as required by the RFQ. Setting aside the timeliness problems with Pitney Bowes' piecemeal presentation of the protest arguments, Pitney Bowes' positions taken in its initial protest and subsequently in its comments are entirely contradictory, and therefore we do not find a reasonable basis on which to sustain the protest.

Similarly, the protester argued throughout its pleadings that there are material differences between a rental, which does not include early termination penalties, and a lease, which does include early termination penalties. See, e.g., Protest at 4 n.1. In its comments, however, Pitney Bowes argues that it reasonably construed the requirement for an "operating lease plan" to mean a rental. Comments at 3. If rentals and leases are materially different contractual arrangements, as Pitney Bowes alleged, but the protester simultaneously and unilaterally determined that they were effectively synonyms, this interpretation would present a patent ambiguity. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error. Where, as here, a patent ambiguity is not challenged prior to submission of solicitation responses, we will not consider subsequent untimely arguments asserting the protester's own interpretation of the ambiguous provisions. FFLPro, LLC, B-411427.2, Sept. 22, 2015, 2015 CPD ¶ 289 at 11. An offeror that competes under a patently ambiguous solicitation does so at its own peril, and cannot later complain when the agency proceeds in a manner inconsistent with one of the possible interpretations. Sheritech Pharmacy Piedmont, LLC, B-413945, Nov. 7, 2016, 2016 CPD ¶ 325 at 4 n.2.

The protest is denied.

Thomas H. Armstrong
General Counsel