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# Decision

**Matter of:** AvKARE, Inc.

**File:** B-417250

**Date:** April 18, 2019

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Julie M. Nichols, Esq., Roeder, Cochran, Phillips, PLLC, for the protester.  
Jennifer Claypool, Esq., Department of Veterans Affairs, for the agency.  
Joshua R. Gillerman, Esq., and Tania Calhoun, Esq., Office of the General Counsel,  
GAO, participated in the preparation of the decision.

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## DIGEST

Protest that the agency improperly cancelled the solicitation is denied where the agency had a reasonable basis for the cancellation.

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## DECISION

AvKARE, of Pulaski, Tennessee, protests the agency's cancellation of request for proposals (RFP) No. 36E79719R0003, issued by the Department of Veterans Affairs (VA) for the provision of sildenafil citrate tablets. The protester argues that the agency's decision to cancel the solicitation was unreasonable.

We deny the protest.

## BACKGROUND

The RFP, issued on November 13, 2018, as a commercial item solicitation pursuant to the procedures of Federal Acquisition Regulation (FAR) part 12, contemplated the award of a fixed-price requirements contract, to be performed over a 1-year base period and four 1-year options, for the provision of sildenafil citrate tablets at varying dosages and quantities. Agency Report (AR), Contracting Officer's Statement (COS) at 1-2. The procurement sought to furnish a supply of the drug for the VA, as well as for the Federal Health Care Center, State Veterans Homes, Department of Defense, Indian Health Service, and the Bureau of Prisons. AR, Tab 6, RFP at 5. The solicitation explained that the objective of the contract was "to ensure [the] availability and consistency of product for nationwide usage and to obtain volume-based, committed use pricing." Id.

Award was to be made to the firm submitting the lowest-priced, technically acceptable (LPTA) offer. RFP at 48. Relevant here, the RFP stated that proposals would be evaluated in accordance with the policies and procedures of FAR part 25, Foreign Acquisition, explaining that the agency would only consider offers of U.S.-made end products or designated country end products, unless it failed to receive any such offers or the offers received were insufficient to fulfill the requirements. RFP at 4. Also relevant, the RFP provided that if the offeror was not the manufacturer of the product, it was required to submit a letter of commitment from the manufacturer assuring an uninterrupted source of supply sufficient to satisfy the agency's requirements for the contract period. Id. at 45.

The VA received five proposals in response to the solicitation. COS at 2. The agency rejected two proposals because the offered products were manufactured in India, a non-designated country under FAR part 25. AR, Tab 10, Technical Evaluation, at 1-2. A third proposal was found technically unacceptable for failure to provide a National Drug Code (NDC) number that was unique to the offeror, as was required by the RFP. Id. at 1.

The agency established a competitive range and held discussions with the two remaining offerors, AvKARE and Offeror 2. COS at 2. The purpose of discussions was to highlight the need for these offerors to provide letters of commitment from their respective manufacturers. Id. Both AvKARE and Offeror 2 requested extensions of the due date for the submissions of final proposal revisions (FPR). Id. at 3. The agency denied both requests for extension. COS at 3.

AvKARE timely submitted an FPR that included a letter of commitment assuring uninterrupted supply from its manufacturer. COS at 3. Offeror 2 did not submit an FPR. (In its request for an extension, Offeror 2 stated that it was working to obtain the letter of commitment from its manufacturer but it had been delayed). AR, Tab 12, Offeror 2 Extension Request, at 1. Ultimately, due to its failure to submit the letter of commitment, the agency rejected Offeror 2's proposal. COS at 3.

After eliminating Offeror 2, AvKARE was the only firm remaining with a technically acceptable proposal. Id. The agency reviewed AvKARE's proposed price of \$181,704,077 and concluded that it was not fair and reasonable. COS at 3-4. The agency's conclusion was based on a comparison between AvKARE's price, the government estimate, and Offeror 2's price. Id. at 4.

The government estimate, \$85,195,455, was calculated by multiplying current prices on the open market, derived from a pharmaceutical database, by the estimated annual requirements here. Thus, AvKARE's price was nearly \$100 million more than the government estimate. AR, Tab 16, Price Analysis, at 1. Offeror 2's proposed price was \$54,766,106, or roughly \$127 million less than AvKARE's proposed price. AR, Tab 11, Price Analysis Comparison, at 1.

Since the agency found that AvKARE--the only offeror that submitted a proposal that complied with the solicitation's terms--had not proposed a fair and reasonable price, the agency decided not to make an award under the solicitation. COS at 4. On January 4, the agency sent AvKARE a notice advising that it had decided not to make an award. AR, Tab 19, No Award Letter, at 1. The agency then determined to cancel the solicitation and resolicit, "in hopes of having [Offeror 2] or another similarly-priced compliant supplier participate in a future solicitation." COS at 4. To that end, the agency generated a new procurement request for the sildenafil citrate tablets and sent market research surveys to eight potential vendors identified by the Pharmacy Benefits Manager (PBM) as being capable of participating in the procurement. AR, Tab 21, Procurement Request, at 1; AR, Tab 22, Market Research Surveys, at 1. AvKARE's protest followed.

## DISCUSSION

AvKARE contends that the agency's decisions not to award a contract and to cancel the solicitation were unreasonable. Protest at 8-12. The protester also argues that the agency unreasonably concluded that its price was not fair and reasonable. Id. at 10-11; Comments at 8-12. AvKARE further asserts that it was unreasonable for the agency to cancel the solicitation for the prospect of increased competition, particularly because the agency's requirements have not changed. Protest at 10-12; Comments at 13-15. For the reasons that follow, while we find that the agency's price analysis was flawed, we nonetheless conclude that the agency had a reasonable basis to cancel the solicitation.

A determination of price reasonableness is a matter of agency discretion, involving the exercise of business judgment, which our Office will not question unless it is shown to be unreasonable. Selecta Corp., B-252182, May 26, 1993, 93-1 CPD ¶ 421 at 2; Sletager, Inc., B-240789.6, Oct. 11, 1991, 91-2 CPD ¶ 328 at 2. In determining price reasonableness, an agency may consider a number of factors, including prior contract history and the government estimate. Vitronics, Inc., B-237249, Jan. 16, 1990, 90-1 CPD ¶ 57 at 2-3; see FAR §§ 13.106-3, 15.404-1(b). While it is up to the agency to decide upon some appropriate and reasonable method for the evaluation of offerors' prices, an agency may not use an evaluation method that produces a misleading result. See Bristol-Myers Squibb Co., B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 4; AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 22.

The record shows that the agency's conclusion that AvKARE's proposed price was not fair and reasonable was based on invalid benchmarks for its price evaluation: the government estimate and Offeror 2's price. To develop the government estimate, the agency multiplied the estimated annual requirements by the open market prices obtained from a pharmaceutical database. AR, Tab 5, Acquisition Plan, at 4. The problem with this methodology is that the open market prices obtained from the database included prices from products manufactured by non-designated countries, despite the RFP's prohibition on offers comprised of such products.

The agency states that “[a]lthough the agency may have improperly us[ed] open market prices to determine price reasonableness, the open market prices are only one factor VA used to determine price reasonableness.” Supp. Response at 1. However, the only other factor considered was the agency’s comparison of AvKARE’s price to Offeror 2’s price, despite the fact that Offeror 2 was found technically unacceptable for failure to obtain a letter of commitment from a manufacturer committing to an uninterrupted source of sufficient supply. The record therefore demonstrates that the agency’s price analysis relied exclusively on comparisons of AvKARE’s proposed price to two benchmark prices that could not properly form the basis of award under the solicitation.

The agency’s analysis here is analogous to one reviewed in Lifecycle Construction Servs., LLC, B-406907, Sept. 27, 2012, 2012 CPD ¶ 269 at 8. In that decision, we sustained a protest challenging an agency’s price realism evaluation where, in performing its analysis, the agency compared the protester’s price to a median price that included proposed prices which the agency had determined were unacceptable, ineligible for award, and/or unreasonably high. We found that this median could not reasonably be relied upon as a “valid benchmark” for comparison for the purposes of the agency’s price evaluation. Id. Similarly here, the agency’s estimate, as well as Offeror 2’s price, cannot reasonably be used as valid benchmarks for comparison because they both reflect prices that include sources of supply that do not comply with all of the terms of the solicitation, terms which likely increased AvKARE’s price. Id.; see also Kilda Group, LLC, B-409144, B-409144.2, Jan. 29, 2014, 2014 CPD ¶ 80 at 5-6 (disapproving of the agency including two unacceptable offerors when calculating its median price for the purposes of its price realism evaluation).

Despite this flawed analysis, however, we still find that the agency has provided a reasonable basis not to make an award and to cancel the solicitation. As a general rule, in a negotiated procurement the contracting agency need only demonstrate a reasonable basis to cancel a solicitation after receipt of proposals, as opposed to the “compelling reason” required to cancel an invitation for bids (IFB) after bids have been opened. Integrity Nat’l Corp., B-411582, Sept. 1, 2015, 2015 CPD ¶ 278 at 4; Vire Consulting, Inc., B-408148.2, Nov. 26, 2013, 2013 CPD ¶ 272 at 3. The standards differ because, in procurements using sealed bids, competitive positions are exposed as a result of the public opening of bids, while in negotiated procurements there is no public opening. Integrity Nat’l Corp., supra. (citing CFM Equip. Co.--Recon., B-251344.2, Aug. 30, 1993, 93-2 CPD ¶ 134 at 3).

Our Office has stated that cancellation of a solicitation other than an IFB is proper, even after one or more of the other offeror’s prices have been revealed, where the agency has a reasonable basis to cancel, and the record contains plausible evidence or a reasonable possibility that a decision not to cancel the solicitation would be prejudicial to the government or the integrity of the procurement system. See Noelke GmbH, B-278324.2, Feb. 9, 1998, 98-1, CPD ¶ 46 at 3-4. Additionally, we have found that the prospect of increased competition, and the potential for lower prices, generally provides a reasonable basis for the agency to cancel a request for proposals. Computers Universal, Inc., B-410790.2, Feb. 25, 2015, 2015 CPD ¶ 83 at 2.

The RFP expressly stated that one of the objectives of the procurement was to obtain “volume-based, committed use pricing.” RFP at 5. The contracting officer states that “because [Offeror 2’s] offer was \$127 million less than AvKARE’s offer, VA determined to cancel and resolicit in hopes of having [Offeror 2] or another similarly-priced compliant supplier participate in a future solicitation.” COS at 4. The agency asserts that it would be unreasonable for the agency not to cancel and resolicit for “even the prospect of saving over \$100 million.” Supplemental Response at 2.

AvKARE responds that adequate competition already exists under the present procurement and the agency has no reasonable basis to think that it will obtain better prices in the future from offerors that have to comply with all of the RFP’s terms and conditions. Comments at 13-15; Comments on Supp. Response, at 4. Further, AvKARE contends that the agency’s attempt at achieving more competition is a pretext to give Offeror 2 another opportunity to meet the requirements. Comments at 4. AvKARE argues that our decision in Rand & Jones Enterprises Co., Inc., B-296483, August 4, 2005, 2005 CPD ¶ 142 at 4, supports the proposition that it is unreasonable to cancel a solicitation after receipt of offers in order to re-procure an item for the purpose of potentially obtaining a better price where the underlying requirements have not changed.

AvKARE overstates the limited finding of Rand & Jones Enterprises Co., Inc., *supra*. In that decision, we sustained a protest of the agency’s decision to cancel a solicitation because “the record contained no evidence, or even argument, that the government or the integrity of the procurement system would be prejudiced if the RFP were not cancelled and award were made thereunder.” *Id.* at 4. We noted that the agency’s only proffered basis for cancellation was that the RFP did not contain evaluation factors, a justification which we found unreasonable given the fact that the agency anticipated resoliciting for the requirement by issuing an IFB under which award would be made solely on the basis of price. *Id.* In essence, the basis given for the cancellation decision did not withstand logical scrutiny.

In contrast, the agency here has provided a reasonable explanation as to why it would be prejudiced if the RFP were not cancelled and it made award--that it may be paying substantially more than is necessary for the requirement, particularly in light of the goal of obtaining volume-based pricing due to the efficiencies to be derived from a national requirements contract. AR, Tab 5, Acquisition Plan, at 3. While, as noted above, the record shows that the agency’s price analysis was flawed, it nonetheless also supports the agency’s assertion that there is a reasonable possibility that a decision not to cancel the solicitation would be prejudicial to the agency’s objectives given the potential for overpayment. See Noelke GmbH, *supra*.

Moreover, the agency notes that although Offeror 2 was initially unable to provide a commitment letter of sufficient supply, it has indicated that it may be able to do so in a subsequent procurement. In addition, through its market research, the agency received interest from four other firms--three of which had not previously competed--that would be interested in participating in the procurement and are in the process of acquiring the

capacity to provide U.S.-made products. COS at 5. As such, the agency has represented, and the record confirms, that canceling and resoliciting for the requirement may enhance competition, given the possibility that additional offerors may be able to provide products that comply with the terms of the solicitation. See Computers Universal, Inc., supra.

Under these circumstances, we find that the agency has provided a reasonable basis to support its decision to cancel the solicitation.

The protest is denied.

Thomas H. Armstrong  
General Counsel