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Decision

Matter of: Superior Optical Labs, Inc.

File: B-421311; B-421311.2

Date: March 15, 2023

John E. McCarthy Jr., Esq., and Zachary H. Schroeder, Esq., Crowell & Moring LLP, and Elizabeth Haws Connally, Esq., Connally Law, PLLC, for the protester. David Gallacher, Esq., Emily Theriault, Esq., and Adam Bartolanzo, Esq., Sheppard Mullin Richter & Hampton LLP, for PDS Consultants, Inc., the intervenor. Natica Chapman Neely, Esq., Department of Veterans Affairs, for the agency. Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Post-award protest that the agency failed to solicit proposals in accordance with its actual needs is dismissed as untimely.
2. Protest that a wide pricing disparity evidenced different understandings of the requirement causing the agency to evaluate proposals on an uncommon basis is denied where the record shows that the competing proposals were based on the same commercial items and services, the same product descriptions, and the same estimated quantities.
3. Protest challenging the contracting officer's unbalanced pricing analysis as unreasonable is denied where the record shows that the analysis complied with applicable regulation and was otherwise unobjectionable.
4. Protest that the contracting officer's affirmative determination of responsibility violated applicable regulation is denied where the record does not demonstrate the alleged regulatory violation.
5. Protest challenging the best-value tradeoff decision is denied where the record demonstrates that the agency recognized the benefits associated with the higher-rated proposal and determined that such benefit did not justify paying the price premium associated with it.

DECISION

Superior Optical Labs, Inc. (Superior), a service-disabled veteran-owned small business (SDVOSB) of Ocean Springs, Mississippi, protests the award of a contract to PDS Consultants, Inc., an SDVOSB of Louisville, Kentucky, under request for proposals (RFP) No. 36C24721R0067, issued by the Department of Veterans Affairs (VA) for prescription eyeglasses and optician services. The protester challenges the procurement in a number of ways.

We deny the protest.

BACKGROUND

On August 25, 2021, the VA issued the RFP as a set-aside for SDVOSBs under the commercial products and services procedures of Federal Acquisition Regulation (FAR) part 12 and the negotiated contracting procedures of FAR part 15. Agency Report (AR), Exh. 1, RFP at 1, 149-151; see *also* Memorandum of Law (MOL) at 1-2. The RFP sought proposals for the provision of prescription eyeglasses and onsite licensed optician services within the VA healthcare network covering the states of Alabama, Georgia, and South Carolina, referred to as Veterans Integrated Service Network (VISN) 7. RFP at 59.

The RFP contemplated the award of a single fixed-price contract with a 1-year base period and four 1-year option periods. *Id.* at 60, 149. The type of contract awarded would be contract line item number (CLIN)-specific; that is, the CLINs covering onsite licensed optician services would be awarded on a requirements basis, and all other CLINs would be awarded as an indefinite-delivery, indefinite-quantity (IDIQ) contract with fixed-price orders issuing under the IDIQ contract. *Id.* at 149. Award would be made using a two-stage evaluation.

Proposals would first be evaluated as acceptable or unacceptable under a technical acceptability standard factor. *Id.* at 151. This would consist of evaluating two sample eyeglass frame kits submitted by each offeror.¹ *Id.* at 79-81, 142, 151. Proposals earning an acceptable rating under this factor would advance to the next stage of the competition where they would be evaluated under two additional factors, experience and price, with experience being considered more important than price. *Id.* at 151.

Under the experience factor, offerors were instructed to submit “a narrative describing [their] specific experience providing prescription eyeglasses manufacturing and/or

¹ To evaluate the sample frame kits, the RFP stated: “The VA will evaluate an Offeror’s Technical Acceptability related to the two identical sample frame kits by reviewing the submitted two sample frame kits and determining whether the two sample frame kits are identical and whether each sample frame kit meets or exceeds all stated requirements within the solicitation’s Instructions to Offerors.” RFP at 151.

onsite licensed optician services[.]” *Id.* at 143. The VA would then “evaluate an Offeror’s Experience by assessing the Offeror’s narrative response[.]” *Id.* at 151.

Under the price factor, offerors were instructed to submit certain required documentation to include a completed price schedule (also referred to as the schedule of supplies/service) for all CLINs listed in section B.3 of the RFP. *Id.* at 141-142; see *also id.* at 15-59 (section B.3 of the RFP). The price schedule was depicted as a chart where each row was pre-filled with the respective CLIN, product name, product description, estimated unit quantity, and the unit basis (here, one item equaled one unit). *Id.* at 15-58. Each row of the price schedule contained blank columns where offerors were to insert their proposed unit pricing for each CLIN. *Id.* The VA would then evaluate price by multiplying an offeror’s proposed unit prices for each CLIN by the RFP’s estimated unit quantities for the respective CLIN, then use those resulting values to find the respective offeror’s estimated total price for each performance period. *Id.* at 151. An offeror’s estimated total prices for each performance period would then be added together to arrive at that offeror’s total evaluated price, which would be the value used in conducting the experience/price tradeoff. *Id.* Proposals were due by August 27, 2021. *Id.* at 169.

The VA received four proposals by the submission deadline. AR, Exh. 2, Source Selection Decision Document (SSDD) at 2. After completing its initial compliance review, the agency proceeded to evaluate the sample frame kits submitted by three offerors.² *Id.* at 5. Each of the competing sample frame kits earned a rating of acceptable under the technical acceptability standard factor, allowing all of the remaining offerors to advance to the final stage of the competition, the experience/price tradeoff. *Id.* at 5-6. The final stage evaluation results are as follows:

	Experience³	Total Evaluated Price
Superior	Good	\$29,952,247
PDS Consultants	Satisfactory	\$9,718,111
Offeror C	Unsatisfactory	\$40,248,858

AR, Exh. 10, Debriefing at 5.

The contracting officer--acting as the source selection authority (SSA)--reviewed the results of the final stage of the evaluation and concluded that the proposal submitted by PDS Consultants represented “a better value to the Government over Superior’s

² One proposal was found non-complaint with the RFP’s instructions and was eliminated from the competition; notice of elimination was delivered on September 13, 2021. AR, Exh. 2, SSDD at 2.

³ In evaluating proposals under the experience factor, the agency used a rating scale of good, satisfactory, marginal, or unsatisfactory, where “good” represented the highest possible rating and where “unsatisfactory” represented the lowest. AR, Exh. 2, SSDD at 3-4.

higher-priced proposal, despite Superior's proposal having a higher rating for Factor 1 – Experience.” AR, Tab 2, SSDD at 12. Based on this analysis, the contracting officer selected PDS Consultants for award. *Id.* at 12-14. Following the experience/price tradeoff decision, the contracting officer affirmatively determined that PDS Consultants was a responsible contractor. *Id.* at 38. Accordingly, the agency made award to PDS Consultants. *Id.*

On November 23, 2022, the agency notified Superior of the award to PDS Consultants. AR, Exh. 8, Unsuccessful Offeror Notice at 2. Later that day, Superior requested a debriefing pursuant to FAR section 15.506. AR, Exh. 9, Req. for Debriefing at 3-4. On November 25, the agency provided Superior with a written debriefing. AR, Exh. 10, Debriefing at 1. On December 5, Superior timely filed this protest with our Office.

DISCUSSION

Superior challenges the procurement on multiple fronts. Our decision addresses the protest grounds in the following order: (1) the agency failed to solicit proposals in accordance with its actual needs; (2) the agency's evaluation was unreasonable because proposals were not evaluated on a common basis; (3) the agency's unbalanced pricing assessment of PDS Consultant's proposal was unreasonable; (4) the contracting officer's responsibility determination violated applicable regulation; and (5) the agency's experience/price tradeoff decision was unreasonable. For the reasons discussed below, we deny the protest.⁴

Challenge of the RFP's Estimated Quantities is Untimely

Using information contained in the independent government cost estimate (IGCE) produced with the agency report, Superior challenges the RFP's estimated unit quantities, arguing that they do not reflect the agency's actual needs in VISN 7. Comments & Supp. Protest at 3-6; Supp. Comments at 2-4. Superior argues that “[w]hen an agency solicits offers for a requirements contract on the basis of estimated quantities, the agency must base its estimates on the best information available.”⁵ Comments & Supp. Protest at 3 (citing *InfraMap Corp.*, B-405167.6, Feb. 6, 2012, 2012 CPD ¶ 66). Superior alleges that the agency failed to meet that obligation by including in the RFP total estimated unit quantities that were significantly lower than the total unit quantities included in the IGCE, which was developed using historical data. *Id.* at 3-6.

⁴ Superior raises other collateral arguments. While our decision does not discuss each argument raised, we have considered them all and find no basis to sustain the protest. Additionally, we note that certain challenges have been expressly withdrawn by the protester. See Comments & Supp. Protest at 16 n.7.

⁵ We note that while the CLINs covering optician services would result in a requirements contract, all of the CLINs dealing with the provision of goods based on estimated quantities would result in an IDIQ contract. See RFP at 149.

The protester notes that the IGCE included an estimated annual unit quantity of 150,792 total units for the base year and included the same estimate for each of the four option years. *Id.* at 4-5 (citing AR, Exh. 2, SSDD at 108 (showing IGCE)). The protester compares the IGCE's estimated annual unit quantities with the RFP's estimated annual unit quantities which total 87,262 units for the base year, 87,316 units for the first option year, and decrease to 70,567 units for each subsequent option year. *Id.* at 5. According to the protester, the disparity between the RFP's total estimated quantities and the VA's actual historical experience as demonstrated by the values in the IGCE show that the solicitation failed to reflect the agency's actual needs. *Id.* at 6.

The VA requests dismissal of this ground as an untimely challenge to the terms of the solicitation. Supp. MOL at 2-8. The VA argues that the issue raised by Superior--that the RFP's total estimated quantities are not reflective of the agency's actual needs because they do not match the agency's historical experience in VISN 7--was obvious in the terms of the solicitation and readily apparent prior to the time set for receipt of proposals. *Id.* at 2-3. In this regard, the VA notes that the RFP's statement of work (SOW) says that "VISN 7 furnishes an estimated 150,800 pairs of eyeglasses annually to eligible veterans[,]” and includes a chart detailing estimated annual unit quantities for VISN 7 totaling 150,800. *Id.* at 3 (citing RFP at 59). The agency explains that the RFP's price schedule included total estimated unit quantities lower than the historical quantities contained in the SOW, and argues that this disconnect was obvious in the terms of the solicitation. *Id.* at 4. As Superior did not raise this challenge until after the time set for receipt of proposals, the VA contends that it is untimely. *Id.* at 7-8. We agree.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Our timeliness rules require that a protest based upon alleged solicitation improprieties that are apparent prior to the time set for receipt of proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); *Office Depot, LLC*, B-419809, B-419809.2, Aug. 5, 2021, 2021 CPD ¶ 301 at 5.

We conclude that Superior's protest ground challenging the solicitation's total estimated unit quantities as non-reflective of the agency's actual needs is an untimely solicitation challenge. The disparity between VISN 7's historical experience and the estimated quantities to be procured was readily apparent from the terms of the RFP. See RFP at 15-59. The SOW contained information on quantities previously procured in VISN 7 which differed from the estimated quantities listed in the RFP's price schedule. *Id.* The IGCE did not provide new or different information on the VA's historical experience in VISN 7 compared to what was provided in the SOW. In this regard, the IGCE showed VISN 7's historical experience as requiring 150,792 units annually, while the SOW showed 150,800 units annually--a difference of just 8 units. Superior therefore did not

need to review the IGCE in order to raise this challenge.⁶ Accordingly, as Superior did not raise this challenge until after the time set for receipt of proposals, we dismiss it as untimely. 4 C.F.R. § 21.2(a)(2).

The Agency Evaluated Price on a Common Basis

Superior argues that the agency's price evaluation was unreasonable because it failed to evaluate proposals on a common basis. Protest at 5-7; Comments & Supp. Protest at 14-16. In short, Superior alleges that the difference in pricing submitted by the competing firms reflects that offerors were not competing against a "common baseline of requirements." Protest at 6. According to Superior, since offerors must have been competing against different requirements, the agency cannot be certain as to the level of performance included in each offer. *Id.* at 5-6; Comments & Supp. Protest at 14-15 (citing *IBM-U.S. Federal*, B-407073.3 *et al.*, June 6, 2013, 2013 CPD ¶ 142). For this reason, Superior contends that the agency's evaluation of proposals was unreasonable.⁷

In response, the VA argues that its price evaluation was reasonable and based on clearly defined requirements. MOL at 5-8. The VA asserts that the RFP clearly listed each required product or service, and included clear estimated quantities. *Id.* at 7-8. Countering Superior's challenge, the agency contends that "the subject procurement is a fixed-price procurement for the manufacture and provision of well-understood, common commercial products and services, i.e., prescription eyeglasses and licensed optician services." *Id.* at 7. The agency argues that the solicitation was clear, and that "price difference, and nothing more" is not evidence of differing understandings of the requirement. *Id.* at 8.

It is a fundamental principle of government procurement that competitions be conducted on an equal basis. *Verizon Bus. Network Servs., Inc.*, B-419271.5 *et al.*, Apr. 26, 2021, 2021 CPD ¶ 191 at 5. That is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. *Id.* We will consider post-award protests to the terms of a solicitation where the record shows that the solicitation was ambiguous in a manner that prevented offerors from competing on a common basis. *Nelnet Diversified Sols., LLC*, B-418870.2 *et al.*, Oct. 19, 2020, 2020 CPD ¶ 329 at 15. In addition, our Office has consistently found that a disparity in pricing alone is insufficient to show that offerors submitted proposals based on different understandings

⁶ The IGCE did provide data on historical utilization at the CLIN-level which was not included in the RFP; however, Superior's supplemental protest ground is not based on CLIN-level data, rather, it is based on the annual totals. See Comments & Supp. Protest at 3-6.

⁷ The protester clarifies that it is not claiming PDS Consultant's price was unrealistically low. Protest at 7. Rather, Superior argues that "it is so facially unreasonable that PDS [Consultants] would have proposed such a low price for the full five-year term" that offerors must have submitted pricing on an uncommon basis. *Id.*

of the requirement. See e.g., *Verizon Bus. Network Servs., Inc.*, *supra* at 6; *Centerra Grp., LLC*, B-414768, B-414768.2, Sept. 11, 2017, 2017 CPD ¶ 284 at 5-6.

We have no basis to sustain this protest ground. We agree with the agency that the RFP clearly described the requirements by listing the name of each commercial product or service sought, providing a description of the required product or service, and providing estimated quantities. See RFP at 15-58. We further conclude that the record demonstrates proposals were submitted using the same estimates for the same products and services. AR, Exh. 3, Superior Proposal Part 1 at 7-31 (Superior's pricing); AR, Exh. 4, PDS Consultants Proposal Part 1 at 38-81 (PDS Consultants' pricing). In light of this, Superior's argument relies solely on the difference in pricing between the protester and the awardee. On this record, we have no basis to conclude that offerors were competing based on different requirements or otherwise on an uncommon basis.

Superior also contends that PDS Consultant's specific approach to pricing the CLINs covering optician services at [DELETED] was "enough to demonstrate that offerors were competing against different requirements." Comments & Supp. Protest at 14. Here, we note that this procurement would result in a fixed-price contract and expressly allowed offerors to price any CLIN as low as \$0.00. See RFP at 15, 149. Based on the clear terms of the RFP, we do not find that PDS Consultant's proposed pricing for optician services is evidence that offerors were competing on an uncommon basis. It is well-established that a firm, in its business judgement, properly may submit pricing that is extremely low or even below-cost, and the ability to perform at the offered price is a matter of contractor responsibility. See e.g., *U.S. Facilities, Inc.*, B-418229, B-418229.2, Jan. 30, 2020, 2020 CPD ¶ 65 at 5. Additionally, this protest ground is contradicted by the record which shows that regardless of the proposed price, each offeror priced optician services using the same estimate of 44 full-time equivalents (FTEs), with each FTE based on 2,080 hours annually. AR, Exh. 3, Superior Proposal, Part 1 at 12, 17, 22, 27, 31; AR, Exh. 4, PDS Consultants Proposal Part 1 at 46, 55, 63, 72, 81. Accordingly, this protest ground is denied.

The VA's Unbalanced Pricing Analysis was Unobjectionable

Superior next challenges the agency's unbalanced pricing analysis. Comments & Supp. Protest at 6-12; Supp. Comments at 4-7. As discussed below, we deny this protest ground.

Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly over or understated as indicated by price analysis techniques. FAR 15.404-1(g)(1). The greatest risks associated with unbalanced pricing can occur when the evaluated price is the aggregate of estimated quantities to be ordered under separate line items of an indefinite-delivery contract. *Id.* 15.404-1(g)(1)(iii).

The FAR requires that contracting officers analyze offers containing separately priced line items or subline items for unbalanced pricing. FAR 15.404-1(g)(2); *Office Depot, LLC, supra* at 6. Where unbalanced pricing is detected, the contracting officer must then consider the risk posed, including the risk of paying an unreasonable price, and whether to reject the offer if the risk is unreasonable. FAR 15.404-1(g)(2). While both understated and overstated prices are relevant to the question of whether unbalanced pricing exists, the primary risk to be assessed in an unbalanced pricing context is the risk posed by overstatement of prices because low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. *Office Depot, LLC, supra*; *VetPride Servs., Inc.*, B-419622, B-419622.2, June 7, 2021, 2021 CPD ¶ 226 at 6.

The manner and depth of an agency's price analysis is a matter within the agency's discretion. *Defense Base Servs., Inc.*, B-416874.3, B-416874.4, Aug. 19, 2019, 2019 CPD ¶ 304 at 5. It is up to the agency to decide on an appropriate method for evaluating cost or price in a given procurement. *Id.* In reviewing a protest challenging an agency's price evaluation, we will review the record to ensure that the price evaluation was reasonable and consistent with the solicitation and applicable procurement law and regulation. *Id.*

Where unbalanced pricing is detected, the FAR requires that contracting officers:

- (i) Consider the risks to the Government associated with the unbalanced pricing in determining the competitive range and making the source selection decision; and
- (ii) Consider whether award of the contract will result in paying unreasonably high prices for contract performance.

FAR 15.404-1(g)(2). The FAR does not identify the precise manner in which a contracting officer is to evaluate proposals for risk associated with unbalanced pricing. *See id.* Likewise, the solicitation did not specify a method for evaluating proposals for risk associated with unbalanced pricing. *See RFP* at 150-151 (evaluation of proposals).

Here, because offers included separately priced line items, the agency analyzed each offer for unbalanced pricing. AR, Exh. 2, SSDD at 35-38. In conducting this analysis, the agency determined that an offered unit price "should be close to the average market price[.]" and that prices found to be 15 percent higher or lower than the average market price would be considered unbalanced. *Id.* at 35.

In reviewing PDS Consultants' proposal, the contracting officer found the offered pricing for a number of CLINs to be understated, and the offered pricing for five other CLINs to be overstated. *Id.* at 35-38; 102-103. The contracting officer concluded that PDS Consultants' pricing was unbalanced and proceeded to assess that firm's pricing for risk. *Id.* at 35-36.

In assessing the understated CLINs for risk, the contracting officer concluded that awarding a contract to PDS Consultants at the prices offered did not pose an unacceptable risk of paying unreasonably high prices during contract performance. *Id.* In reaching this conclusion, the contracting officer determined:

If the amount VISN 7 purchases for these CLINs exceeds the estimated quantities used for the purpose of evaluating proposals . . . those purchases will be made at prices less than what I have determined to be the average market price for those items. Because this is a fixed price contract, the risk and responsibility for contract costs lies entirely with PDS [Consultants], who fully bears the cost risk[.]

Id. at 36. The contracting officer further concluded that PDS Consultants' proposal presented no risk that the firm would be unable to perform the requirements of the contract. *Id.* at 38.

In assessing the overstated CLINs for risk, the contracting officer concluded that the risk of paying unreasonably high prices during contract performance was present, but that such risk was not unreasonably high or otherwise unacceptable. *Id.* at 36. In reaching this conclusion, the contracting officer outlined the following three reasons for accepting the risk presented by the overstated CLINs.

First, the contracting officer found that the estimated unit quantities for the overstated CLINs were reliable, and that paying PDS Consultants' price for those CLINs at the estimated volume presented a very low risk that the government would pay unreasonably high prices for contract performance overall. *Id.* Second, the contracting officer determined that even if VISN 7 encountered an unexpected increase in demand of 50 percent for the products covered by the overstated CLINs, based on PDS Consultants' overall pricing, there was very low risk that the government would pay unreasonably high prices for contract performance overall. *Id.* at 36-37. Third, the contracting officer found that because this procurement would result in an IDIQ contract for all items other than optician services (optician services would result in a requirements contract, RFP at 149), if demand for the products covered by the overstated CLINs reached an unacceptably high level, the government would be free to stop placing orders under the IDIQ contract and seek a new vehicle to procure the required items. *Id.* at 37. Based on these three reasons, the contracting officer ultimately concluded that PDS Consultants' pricing did not present unacceptable risk to the government, and that the offered pricing was reasonable. *Id.* at 38.

Risk Associated with Understated CLINs

The protester challenges the contracting officer's conclusion that PDS Consultants' understated CLINs did not present unreasonable risk. Comments & Supp. Protest at 11-12; Supp. Comments at 5. Without detailing the risks it perceives to be present, the protester argues that "the Agency seemingly undertook no reasonable consideration of the risk resulting from PDS [Consultants'] understated pricing[.]" Comments & Supp.

Protest at 11. As explained below, we find no basis to disturb the contracting officer's risk assessment on this basis.

Here, we find that the contracting officer considered the risk associated with the understated CLINs identified in PDS Consultants' proposal, and reasonably concluded that there was no risk of paying unreasonably high prices during contract performance. As stated in the unbalanced pricing analysis, this procurement will result in a fixed-price contract where PDS Consultants, not the government, will bear the risk associated with low pricing, and any increase in orders of the items covered by the understated CLINs will result in the government paying below-market rates for those items. AR, Exh. 2, SSDD at 36. The agency further considered the risk that PDS Consultants may not be able to perform at the offered price and found no risk present. *Id.* at 38. In our view, the agency's risk assessment of the understated CLINs was unobjectionable. See FAR 15.404-1(g)(2).

Risk Associated with Pricing for Optician Services

The protester argues that the contracting officer's risk assessment was unreasonable for not specifically addressing PDS Consultants' proposed pricing of [DELETED] for optician services. Comments & Supp. Protest at 11-12; Supp. Comments at 5. Superior alleges that PDS Consultants will pay their opticians on commission alone, resulting in an incentive for the opticians to sell higher-margin items covered by the overstated CLINs rather than selling low-priced items covered by the understated CLINs, and that this represents an unaccounted for risk. Comments & Supp. Protest at 7-8 ("Since PDS [Consultants'] opticians will be paid on commission, they will undoubtedly be motivated to sell the high margin items, or else they will not get paid."); Supp. Comments at 5. Superior bases this allegation on a job advertisement seeking opticians to work for PDS Consultants in Washington, District of Columbia (D.C.), stating that opticians will be eligible to receive commission. See Protest, exh. 6, Job Advertisement at 1-7.

We find no reason to disturb the contracting officer's risk assessment on this basis. While the protester is correct that the awardee's pricing for optician services was not explicitly addressed in the unbalanced pricing analysis, the CLIN associated with optician services was identified as understated and thus was reasonably captured by the contracting officer's analysis of the understated CLINs. We further note that the RFP contemplated the award of a fixed-price contract and expressly allowed offerors to propose prices as low as \$0.00 for any CLIN. RFP at 15, 149. Accordingly, under the terms of this solicitation, low pricing for optician services standing alone, even pricing as low as \$0.00, does not provide our Office with a basis to disturb the contracting officer's risk assessment.

Further, the job advertisement forming the basis of this challenge covers Washington, D.C., a geographic area outside of VISN 7. See RFP at 59 (VISN 7 covers the states of

Alabama, Georgia, and South Carolina). Accordingly, it is irrelevant to this protest as it does not provide evidence of how PDS Consultants will pay its VISN 7 opticians.⁸

Risk Associated with Overstated CLINs

The protester challenges the contracting officer's conclusion that PDS Consultants' overstated CLINs did not present unreasonable risk. Comments & Supp. Protest at 11-12; Supp. Comments at 5. Superior notes that the agency's analysis accounted for an increased demand of up to 50 percent for CLINs with estimated quantities of 2 units (*i.e.*, an increase of 1 unit annually), and argues that based on PDS Consultants' pricing strategy, it is likely that these CLINs will see an increased demand of greater than 50 percent. *Id.* Superior suggests that such increased demand will derive from "commission paid opticians" who will "drive the Veterans to purchase higher-priced Add-On CLINs in lieu of the lower cost [options]." Comments & Supp. Protest at 11.

We conclude that the contracting officer's risk assessment satisfied the FAR's requirements to consider the risks to the government associated with the unbalanced pricing, and whether award of the contract will result in paying unreasonably high prices for contract performance. See FAR 15.404-1(g)(2). We further conclude that considering an increased demand of 50 percent for the items covered by the overstated CLINs was an unobjectionable way to assess the risk associated with PDS Consultants' overstated pricing. As described in the unbalanced pricing analysis, an increase in demand of 50 percent for the items covered by the overstated CLINs would represent "abnormal and unprecedented demand growth for VISN 7[.]" AR, Exh. 2, SSDD at 36.

While Superior contends that the agency cannot reasonably consider a 50 percent increase in demand for items covered by CLINs with an estimated annual quantity of 2 units to be abnormal or unprecedented, Superior does not point to any specific evidence in support of its position. In this regard, Superior does not explain why the agency's evaluation should have anticipated a larger than 50 percent increase in demand for these items. Further, this protest ground is based on the unsupported conclusion that PDS Consultants will pay opticians on commission alone, and that these opticians will drive sales for items covered by the overstated CLINs. See Comments & Supp. Protest at 11-12. As discussed above, nothing in the record shows that opticians will be paid on a commission-only basis.

Based on our review of the record, we find reasonable the agency's assessment of risk associated with the unbalanced pricing detected in PDS Consultants' proposal. This protest ground is denied.

⁸ The job posting also expressly states that PDS Consultants offers "top pay and great benefits . . . along with commission[.]" See Protest, exh. 6, Job Advertisement at 1. By the plain terms of the advertisement, an optician would receive pay and benefits in addition to commission, not merely commission alone. Thus, the suggestion that this job posting demonstrates that any of PDS Consultants' opticians will be paid on commission alone is, in the most favorable light, a misstatement.

The Agency's Responsibility Determination was Unobjectionable

Prior to awarding the contract, the contracting officer affirmatively determined PDS Consultants to be responsible. AR, Exh. 2, SSDD at 122. Superior argues that the contracting officer violated applicable regulation in reaching this responsibility determination, and asserts that PDS Consultants should have been found nonresponsible and ineligible for award. Comments & Supp. Protest at 12-14; Supp. Comments at 7-8. As discussed below, we deny this challenge.

The RFP included FAR provision 52.222-25, Affirmative Action Compliance. RFP at 158. Where, like here, this provision is included in a solicitation, offerors are required to represent one of the following: (a) it has developed and has on file, or it has not developed and does not have on file, at each establishment, affirmative action programs required by the rules and regulation of the Secretary of Labor (41 C.F.R §§ 60-1, 60-2); or (b) it has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor. FAR 52.222-25.

As relevant here, contractors are required to develop and maintain an affirmative action program if, for example, they employ 50 or more people and hold a contract valued at \$50,000 or more. See 41 C.F.R. § 60-2.1(b)(1). The relevant regulation also requires the following:

If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention . . . that the contractor does not have an affirmative action program at each of its establishments . . . or has substantially deviated from such an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer must declare the contractor/bidder nonresponsible . . . unless the contracting officer otherwise affirmatively determines that the contractor is able to comply with the equal opportunity obligations.

41 C.F.R. § 60-2.2(b).

Here, the record included a file titled "Contractor Responsibility Assessment" which contained a representation that PDS Consultants has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor. AR, Exh. 2, SSDD at 123, 186. This particular document reflected the certifications and representations that PDS Consultants has made on the System for Award Management (SAM).⁹ See *id.* at 139, 186. However,

⁹ SAM is located at <https://www.sam.gov>, and is designated as the governmentwide point of entry. FAR 2.101. SAM allows public access to synopses of proposed contract actions, solicitations, and associated information. *Id.*

PDS Consultants' proposal represented that it has developed and has on file, at each establishment, affirmative action programs as required. AR, Exh. 4, PDS Proposal, Part 2, at 62.

Superior argues that based on information contained in the record, the contracting officer violated 41 C.F.R. § 60-2.2(b)¹⁰ by finding PDS Consultants responsible. Comments & Supp. Protest at 12-14; Supp. Comments at 7-8. Superior first points to the portion of the responsibility determination which lists contracts held by PDS Consultants. Comments & Supp. Protest at 13 (citing AR, Exh. 2, SSDD at 122). The protester contends that this information shows that PDS Consultants employs 50 or more people and holds a contract valued at more than \$50,000, making it subject to the regulatory requirement to develop and maintain an affirmative action program. *Id.* at 12-13; see *also* 41 C.F.R. § 60-2.1(b) ("Who must develop affirmative action programs.").

Superior then argues that the contracting officer's responsibility determination violated applicable regulation by failing to consider the information contained in the contractor responsibility assessment--specifically the SAM representations and certifications--which suggested that PDS Consultants does not have an affirmative action program because it did not have any contracts that required such a program. *Id.* The protester argues that based on the information in the record, the contracting officer should have concluded that: PDS Consultants was subject to the regulatory requirement to develop and maintain an affirmative action program; PDS Consultants does not have an affirmative action program as required; and therefore PDS Consultants was nonresponsible. *Id.* at 13; Supp. Comments at 7-8.

The agency defends its responsibility determination as reasonable. Supp. MOL at 14-16. The agency argues that the contracting officer did not violate applicable regulation in finding PDS Consultants responsible because the firm's proposal represented that it has developed and has on file affirmative action programs as required. *Id.* at 15. According to the agency, the information in the SAM representations and certifications in the contractor responsibility assessment was the result of a technical error with the SAM database and it does not support a conclusion that the contracting officer violated 41 C.F.R. § 60-2.2(b). *Id.* at 15-16, 16 n.15. The agency further argues that the protester relies solely on the information from the SAM representations and certifications and has not challenged the representations made in PDS Consultants' proposal. Supp. MOL at 15. We have reviewed the record and find no basis to sustain this challenge.

Determinations of responsibility involve subjective business judgments that are within the broad discretion of the contracting agency. *Huffman Bldg., P, LLC*, B-418752, Aug. 21, 2020, 2020 CPD ¶ 288 at 5. Our Office generally will not consider a protest challenging an agency's affirmative determination of an offeror's responsibility. 4 C.F.R.

¹⁰ Superior cites 41 C.F.R. § 60-2.1(b) as the applicable regulation. However, based on the material quoted, it appears that Superior is citing section 60-2.2(b) of that title.

§ 21.5(c). However, we will review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. *Id.*; see also *FCi Fed., Inc.*, B-408558.4 *et al.*, Oct. 20, 2014, 2014 CPD ¶ 308 at 7.

As an initial matter, the protester has presented evidence that it alleges demonstrates that the contracting officer violated an applicable regulation, 41 C.F.R. § 60-2, in making the responsibility determination. See 4 C.F.R. § 21.5(c). Accordingly, we will consider this challenge.

Based on our review, we find no basis to sustain the protest. The record does not demonstrate that the contracting officer violated 41 C.F.R. § 60-2.2(b) by declaring PDS Consultants responsible in this scenario. The record does not support a conclusion that evidence was presented to the contracting officer conclusively demonstrating that PDS Consultants either does not have, substantially deviated from, or failed to develop and implement a required affirmative action program, such that the contracting officer was required by regulation to find PDS Consultants nonresponsible. In this regard, PDS Consultants' proposal represented that the firm has developed and has on file, at each establishment, affirmative action programs as required. AR, Exh. 4, PDS Proposal, Part 2, Adobe PDF page 62. We find the agency's reliance on the representations made in PDS Consultants' proposal regarding its affirmative action programs was reasonable. In addition, as the agency contends, Superior has not challenged these representations or otherwise demonstrated that they were somehow inaccurate or incorrect. Accordingly, we have no basis to disturb the affirmative determination of responsibility. This protest ground is denied.¹¹

The Experience/Price Tradeoff Decision was Reasonable

Superior challenges the agency's tradeoff decision as unreasonable for failing to sufficiently justify selecting for award the lower-rated, lower-priced proposal. Protest at 8-10; Comments & Supp. Protest at 16-19. Based on our review of the record, we conclude that the agency's tradeoff decision was reasonable.

As previously discussed, the RFP contemplated award based on an experience/price tradeoff where experience was considered more important than price. RFP at 150-151.

¹¹ Superior also complains about the agency's review of PDS Consultants' representation made pursuant to FAR clause 52.222-26, Equal Opportunity, and argues that "it should have been at least a factor in the responsibility determination." Comments & Supp. Protest at 13-14. To the extent this complaint represents a basis of protest, we find that does not challenge definitive responsibility criteria, nor does it allege that the contracting officer failed to consider available relevant information or otherwise violated statute or regulation. Therefore, we conclude it represents a challenge to an affirmative determination of responsibility that we do not consider. 4 C.F.R. § 21.5(c).

In conducting the tradeoff, the SSA concluded that PDS Consultants' lower-rated, lower-priced proposal was a better value to the government than Superior's higher-rated, higher-priced proposal. AR, Exh. 2, SSDD at 12. The SSA found that both offerors "currently provide prescription eyeglasses manufacturing services to the VA, indicating that they both have experience providing the services required[.]" *Id.* The SSA recognized that Superior's experience with manufacturing eyeglasses is more substantial than PDS Consultants' experience as a manufacturer. *Id.* However, the SSA explained that both offerors had experience which showed that they "fulfill a total annual order volume that far exceeds the estimated annual volume of this procurement and are clearly experienced providers[.]" *Id.* The SSA further concluded that both offerors currently perform contracts for the VA which include the provision of licensed optician services, and that both offerors demonstrated "similar experience" providing optician services.

While Superior was found to have demonstrated more experience as a manufacturer of eyeglasses, the agency concluded that PDS Consultants demonstrated sufficient experience as a manufacturer. *Id.* at 13. The SSA explained that while PDS Consultants did not have as much manufacturer experience as Superior, PDS Consultants' 3 years of manufacturer experience combined with their 21 years as a non-manufacturer will likely give that firm "the necessary skills and lessons learned to continue providing these services to the VA with minimal performance risk[.]" *Id.*

In making the tradeoff decision, the SSA recognized that the RFP gave more weight to the experience factor than the price factor. *Id.* Notwithstanding this evaluation scheme, the agency found that "Superior's additional years of prescription eyeglasses manufacturing experience do not warrant paying a substantially higher price (208 [percent]) . . . as [Superior does] not bring substantial or significant enough benefit to the Government to justify paying a premium price[.]" *Id.* The SSA ultimately concluded that the proposal submitted by PDS Consultants represented the best value to the government. *Id.* at 14.

Source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of technical and price evaluation results. *World Airways, Inc.*, B-402674, June 25, 2010, 2010 CPD ¶ 284 at 12. In a negotiated procurement, an agency may properly select a lower-rated, lower-priced proposal where it reasonably concludes that the price premium involved in selecting the higher-rated proposal is not justified in light of the acceptable level of technical competence available at a lower price. *DynCorp Int'l, LLC*, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 22. An award decision in favor of a lower-rated, lower-priced proposal must acknowledge and document any significant advantages of the higher-priced, higher-rated proposal, and explain why they are not worth the price premium. *Id.* A protester's disagreement with the agency's determinations, without more, does not establish that the evaluation or selection decision was unreasonable. *Id.*

As discussed above, the record reflects that the SSA considered the relative merits of the competing proposals and determined that Superior's higher-rated, higher-priced proposal was not worth the price premium. AR, Exh. 2, SSDD at 12-14. In this regard, the SSA recognized Superior's deeper experience as a manufacturer of eyeglasses as compared with PDS Consultants' manufacturing experience. *Id.* However, the SSA explained that despite Superior's greater experience in this area, PDS Consultants' proposal demonstrated that it has sufficient manufacturing experience to meet the requirements of the instant procurement, and the agency has confidence in the firm's ability to successfully perform. *Id.* at 12-13. The SSA explained that Superior's experience represented a slightly lower degree of risk to the agency as compared with PDS Consultants' experience, but that this "minimal reduction in contract performance risk" was not sufficient to justify paying the 208 [percent] price premium associated with Superior's proposal. *Id.* at 13.

On this record, where the SSA clearly acknowledged the benefits associated with the protester's higher-rated, higher-priced proposal, but concluded that its benefits did not merit paying the price premium, we find no basis to sustain the protest. Accordingly, this protest ground is denied.

The protest is denied.

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