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Decision

Matter of: Superior Optical Labs, Inc.

File: B-421496; B-421496.2

Date: June 9, 2023

John E. McCarthy Jr., Esq., and Zachary H. Schroeder, Esq., Crowell & Moring LLP; and Elizabeth H. Connally, Esq., Connally Law, PLLC, for the protester.

David S. Gallacher, Esq., and Emily S. Theriault, Esq., Sheppard Mullin Richter & Hampton LLP, for PDS Consultants, Inc., the intervenor.

Natica C. Neely, Esq., Department of Veterans Affairs, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation failed to provide a common basis for competition is denied where solicitation specified requirements for commercial items in reasonably unambiguous terms and protester failed to show how solicitation would have resulted in differing interpretations.
2. Protest that agency based price evaluation on defective quantity estimates and failed to reject awardee's unbalanced pricing is denied where agency reasonably based quantity estimates on data from recent orders under incumbent contract and where contracting officer determined that unbalanced pricing was not material because the risk that agency would order higher quantities of overpriced items was low.

DECISION

Superior Optical Labs, Inc., of Ocean Springs, Mississippi, a small business, protests the award of a contract to PDS Consultants, Inc., of Louisville, Kentucky, also a small business, under request for proposals (RFP) No. 36C26122R0056. The Department of Veterans Affairs (VA) issued the RFP for prescription eyeglasses for veterans in the VA Southern Nevada Health Care System and the VA Palo Alto Health Care System, in California. Superior argues that the VA misevaluated proposals and made an unreasonable source selection decision.

We deny the protest.

BACKGROUND

The RFP, issued May 20, 2022, sought proposals to supply an estimated 39,000 pairs of eyeglasses annually under an indefinite-delivery, indefinite-quantity contract for five 1-year ordering periods. Agency Report (AR), Tab 1, RFP at 5; Tab 2, RFP, amend. 6 at 3. As amended, the RFP required offerors to submit fixed prices for individual contract line item numbers (CLIN) for a single 5-year ordering period. Offerors were required to offer a minimum number of eyeglass frame designs from which veterans could select. Based on their selections, the VA would then place orders for the eyeglasses according to the veterans' prescribed lens optics and material.

The RFP provided that a contract would be awarded to the responsible offeror that submitted the lowest-priced technically acceptable proposal. AR, Tab 1, RFP at 103. The RFP listed an estimated quantity for each CLIN, and the price evaluation added the extended prices (each CLIN estimated quantity multiplied by its unit price) for all CLINs.¹ According to the solicitation, an offer could be found unacceptable if the “ordering period prices are significantly unbalanced.” *Id.* at 104. The RFP quantities were revised after receiving initial proposals because the contracting officer determined that the estimates needed to be revised based on additional information received from requiring officials and the contracting officer’s review of the incumbent contractor’s invoices for August 2022. Memorandum of Law (MOL) at 3-4. The contracting officer issued RFP amendments 5 and 6 to implement the revised estimated quantities and to request revised proposals. *Id.* at 4. The RFP stated that the estimated quantities in the original RFP did “not include projected increases or decreases,” and were instead “representative of current volume.” AR, Tab 1, RFP at 7. After amending the quantities, the agency stated that the quantities in the amended RFP “[we]re based on the best information available to the Agency and represent the Agency’s anticipated needs.” AR, Tab 2, RFP, amend. 6 at 3.

The RFP required unit pricing based on the type of lenses or add-on features for one of the locations (Southern Nevada or Palo Alto), resulting in 94 individual CLINs. As illustrative examples, for the Southern Nevada Health Care System, CLIN 0001AC was for a pair of eyeglasses with single-vision polycarbonate lenses, CLIN 0004AB was for a pair of eyeglasses with no-line progressive plastic-CR39 lenses, CLIN 0005AF was to add anti-reflective coating to a pair of eyeglasses (i.e., a separate upcharge), and CLIN 0006AD was for a single-vision hi-index lens only (i.e., an individual unmounted lens). AR, Tab 2, RFP amend. 5 at 17, 20, 22, and 24.

¹ As discussed in greater detail below, after issuing the initial RFP, the contracting officer determined that its quantity estimates were inaccurate, and revised them by amending the RFP. AR, Tab 2, RFP, amend. 5. Our discussion is based on the amended quantities.

PDS, Superior, and a third offeror submitted timely proposals that were evaluated as technically acceptable. AR, Tab 3, Source Selection Decision Document (SSDD) at 5.² PDS's total evaluated price was \$8.9 million, and Superior's was \$12.5 million. *Id.*

The contracting officer, who also served as the source selection authority, analyzed PDS's CLIN prices to identify any that were more than 25 percent above or below the government estimate. That analysis showed 35 CLINs where the firm's price was greater than 25 percent above, and 31 CLINs that were more than 25 percent below, the corresponding estimate and, on that basis, the contracting officer determined that PDS's pricing was unbalanced. *Id.* at 10-11. However, the contracting officer then determined that PDS's unbalanced pricing was not material because there was a low risk that the agency would order a significantly larger number of the overpriced CLINs than the estimated quantities that had been used to calculate PDS's overall evaluated price, and because the agency could order from other sources if it needed significantly more than the estimated quantities for items that the analysis identified as overpriced.³ *Id.* at 11-14. The contracting officer also assessed there was no risk to the VA due to underpriced CLINs because past performance for the VA in the region and nationally showed no history of PDS being unable to perform due to underpricing. *Id.* at 14.

On February 21, 2023, the agency notified Superior that the contract had been awarded to PDS. Following a debriefing, Superior filed this protest.

DISCUSSION

Superior's arguments can be arranged into two areas. First, the protester argues that the RFP was defective because it did not provide for competition on a common basis and contained inaccurate quantities that resulted in an unreasonable calculation of total evaluated prices. Second, Superior contends that the VA should have rejected PDS's proposal because its pricing was materially unbalanced. We address the specific arguments below and conclude that none provide a basis to sustain the protest.

² The third offeror also submitted an acceptable proposal. However, its total evaluated price was higher than Superior's, *id.*, and the proposal is otherwise irrelevant to the issues in the protest.

³ In a statement submitted to our Office, the contracting officer contends that after this protest was filed, the agency performed additional analysis, which showed that Superior's proposal also offered unbalanced pricing. That is, certain (unidentified) line items were significantly below the government estimate while other (also unidentified) were significantly above the estimate. AR, Tab 17, Contracting Officer's Statement (COS) at 1. Putting aside the fact that the analysis was prepared after the protest was filed, the contracting officer's analysis did not conclude that the alleged unbalanced pricing would be material. *Id.* Consequently, we place no significance on this aspect of the agency's arguments in reaching our decision.

Common Basis for Competition

Superior argues that price differences between PDS and Superior show that the RFP did not result in competition on a common basis, and should have alerted the VA of the need to revise the RFP to better define the agency's requirements. Protest at 5-6. Superior contends that the record shows PDS's pricing was nearly 29 percent lower than Superior's and that PDS would not have proposed to perform at a loss of millions of dollars, so the difference must be based on "a distinctly different understanding of the requirements."⁴ Protest at 5.

The VA argues that the items specified in the RFP are well-defined commercial items (eyeglasses frames, lenses of specific properties and materials, and common add-on lens treatments or coatings), and for none of them has Superior identified a specific explanation for offerors having different interpretations. The VA contends that Superior bases its ground of protest entirely on the fact that PDS offered lower prices than the protester did, and that even a significant price difference does not demonstrate that the competition here was defective. MOL at 7.

An agency's description of its requirements in a solicitation must be free from ambiguity and describe the agency's minimum needs accurately so that competition can be held on an equal basis. *Verizon Bus. Network Servs., Inc.*, B-419271.5 *et al.*, Apr. 26, 2021, 2021 CPD ¶ 191 at 5. Nothing in the record here, including the difference in prices, provides a basis to conclude that the competition did not occur on a common basis. As the VA notes, the requirement identified commercial items in fairly precise terms, whereas Superior has identified no specific imprecision to substantiate its claim that either competitor misinterpreted the RFP, other than the difference in their prices.⁵ Considering the record here, the price difference provides no basis to conclude that the competition was not on a common basis. See *Superior Optical Labs, Inc.*, B-421311, B-421311.2, Mar. 15, 2023, 2023 CPD ¶ 72 at 7 (denying similar ground of protest). Accordingly we deny this ground of protest.

⁴ Superior acknowledges that the RFP did not provide for a price realism assessment and disclaims asserting any ground of protest on that basis. Instead it asserts that it is "facially unreasonable" to accept that PDS intended to offer such low pricing unless PDS lacked a common understanding of the RFP. Protest at 5.

⁵ Superior argues that a sample of invoices from PDS's incumbent contract shows that the firm may be pricing frames and each lens as individual items. Comments & Supp. Protest at 6. While the VA disputes that contention, even if the contention were valid, it would merely show how the incumbent contract is being administered, and would not show that *this* RFP could plausibly be interpreted to permit the alleged pricing approach--charging both for a complete pair of eyeglasses and again for each lens.

Price Evaluation and Unbalanced Pricing

Superior next argues that the VA failed to use accurate quantity estimates in the amended RFP which rendered invalid the price comparison based on those estimates, and which allowed PDS to propose unbalanced pricing based on its incumbent knowledge of more accurate quantities than those provided in the RFP. That is, PDS allegedly was able to propose high prices for CLINs where it could reliably expect the agency to order more items than the RFP estimate, and undercharge for CLINs where the estimated quantity exceeded what the agency would order. *Comments & Supp. Protest* at 4-7. Specifically, after the contracting officer determined that the initial RFP quantities were inaccurate (a conclusion that Superior supports), the contracting officer used invoices from the incumbent contract for the month of August 2022 to tabulate one month of demand; extrapolated to establish estimates for the 5-year ordering period in the RFP; and issued amendments 5 and 6 to the RFP to apply the revised estimates and request revised proposals. For CLINs where there were no orders in the invoices, which were lens-only CLINs, the contracting officer used an estimated quantity of five. *Supp. AR*, Tab 19, *Supp. COS* at 2.

Superior contends that the contracting officer lacked sufficient basis to establish estimates for the 5-year ordering period contemplated by the RFP.⁶ *Comments & Supp. Protest* at 6-7. In particular, Superior contends that for 12 special lens/add-on CLINs, the contracting officer's estimated quantity of five was actually based on data from May 2020, which it notes was shortly after the onset of the COVID-19 pandemic. The firm also argues that using one month of invoices from the incumbent contract was not a valid basis to estimate quantities for the 5-year period of this RFP. *Id.* at 6-7. The protester contends that the VA should have reviewed orders from a period of "at least 12 months" to estimate quantities for the contract. *Id.* at 7.

The VA argues that the contracting officer lacked any better data source, and that it was reasonable to select a recent month of invoices to establish estimates. Beyond the fact that reviewing invoices for 12 or more months would have been a significant burden (some 39,000 separate orders for individual pairs of glasses), the agency contends it would also have produced less reliable estimated quantities because the time period would extend back to 2021 when appointments for eye exams were down due to impacts from the COVID-19 pandemic. *Supp. MOL* at 14 n.16. The agency argues that

⁶ The VA and PDS contend that we should dismiss Superior's challenge to the estimates in the RFP as untimely because the protester knew the revised quantity estimates stated in amendment 5 to the RFP, and knew the way they would be applied to calculate prices, but failed to protest the accuracy of the estimates before the closing time for submission of revised proposals. *Supp. MOL* at 16 n.1; *Intervenor Supp. Comments* at 2-3. Neither the VA nor PDS has shown that Superior knew or should have known the basis the contracting officer used to establish the revised quantity estimates until the process was explained in the agency report. Superior's supplemental protest challenging the estimates was filed within 10 days of receipt of the agency report and was thus timely. 4 C.F.R. § 21.2(a)(2).

the contracting officer's estimates were based on reasonable judgment from the most reliable information available. Supp. AR, Tab 19, Supp. COS at 4. With respect to the quantity estimate of five for the 12 special lens/add-on CLINs mentioned above (where the August 2022 invoices did not show any orders), the contracting officer acknowledges that the figure was provided in May 2020 data, but explains that additional discussion with the officials who oversee eyeglass prescribing at both locations supported the estimate because the physicians only prescribe those CLINs when medically necessary, in compliance with VA policy. *Id.* at 2.

In evaluating prices for an indefinite-quantity contract, we have stated that the accuracy of the quantity estimates in the RFP is "a key consideration." *Accumark, Inc.*, B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 at 4. Where prices are evaluated using accurate estimated quantities, then evidence of mathematical unbalancing generally does not present a risk that the government will pay unreasonably high prices for contract performance. *Id.*

While disputing the reasonableness of the estimates provided in the RFP here, Superior has not shown that the contracting officer could have obtained more reliable estimates. To the contrary, the VA has provided a reasonable explanation of why August 2022 was a reasonable source of data principally because it was recent and as removed as feasible from the effects of the pandemic. Nor has Superior shown that an estimate of five units over 5 years was an unreasonable way (particularly in context of the much higher quantities for other CLINs) to ensure that pricing of CLINs for which there were no orders in August 2022 were included in the price evaluation.

Finally, the contracting officer assessed the risk that apparent unbalancing in PDS's pricing could result in the agency paying unreasonable prices and concluded that the risk was low. The contracting officer's reasoning was supported by a judgment that the quantity estimates were sufficiently accurate that the risk that VA prescribers would order from the overpriced CLINs significantly more often than estimated, to an extent that would be material, was small. That basic conclusion was within the contracting officer's discretion and was supported by the data available. See *Semont Travel, Inc.*, B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 3 (denying protest where agency reasonably determined that offeror's unbalanced prices did not pose an unacceptable risk to the government). We find no basis to sustain Superior's challenges to the price evaluation or the determination that PDS's pricing was not materially unbalanced.

The protest is denied.

Edda Emmanuelli Perez
General Counsel