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Decision

Matter of: MSC Industrial Direct Company, Inc.

File: B-409585; B-409585.4; B-409585.9

Date: June 12, 2014

Joseph P. Hornyak, Esq., Elizabeth N. Jochum, Esq., and Gregory Hallmark, Esq., Holland & Knight LLP, for the protester.

Anne B. Perry, Esq., Jonathan S. Aronie, Esq., David S. Gallacher, Esq., Townsend L. Bourne, Esq., and Christine R. Couvillon, Esq., Sheppard Mullin Richter & Hampton LLP, and Robert A. Van Kirk, Esq., Edward C. Reddington, Esq., and Ryan H. Creighton, Esq., Williams & Connolly LLP, for W.W. Grainger, Inc.; Holly A. Roth, Esq., and Howard H. Yuan, Esq., Kelley Drye & Warren, LLP, for Capitol Supply, Inc.; and William E. Hughes III, Esq., and Emily A. Constantine, Esq., Whyte Hirschboeck Dudek SC, for SupplyCore Inc., intervenors.

Stephen T. O'Neal, Esq., General Services Administration, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging unbalanced pricing is denied where record fails to establish that any of awardees' Federal Supply Schedule prices were overstated.
 2. Objection to price evaluation scheme that was clearly set forth in the solicitation is untimely where not raised before closing date for receipt of quotations.
 3. Allegations that agency waived compliance with various solicitation requirements for awardees is denied where record establishes that protester suffered no prejudice as a result of alleged waivers.
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DECISION

MSC Industrial Direct Co., Inc. (MSC), of Melville, New York, protests the failure of the General Services Administration (GSA) to establish a blanket purchase agreement (BPA) with it under request for quotations (RFQ) No. 819581, for maintenance, repair, and office supplies. MSC argues that the prices of some of the successful vendors should have been rejected as unbalanced and that the

agency treated vendors unequally by waiving solicitation requirements in several instances.

We deny the protest.

BACKGROUND

The RFQ, which was issued on October 8, 2013 to GSA Multiple Award Schedule (MAS) 51 V contract holders, sought to establish multiple BPAs for maintenance, repair, and office (MRO) supplies as part of GSA's Federal Strategic Sourcing Initiative. The solicitation estimated that the total value of purchases to be made under the BPAs was more than \$1.8 billion (\$236 million annually). RFQ at 3. BPAs were to be established for three categories of supplies: hardware (Category 1), tools and tool cabinets (Category 2), and paints, adhesives, and sealants (Category 3).¹ For Category 1, the agency intended to establish a maximum of 11 BPAs, 8 of which were set aside for small businesses. For Categories 2 and 3, GSA intended to establish 6 BPAs per Category; 4 of the 6 BPAs in each Category were to be set aside for small businesses. The period of performance under the BPAs was to be one year, with four 1-year option periods.

The RFQ provided that quotations would be evaluated on a lowest-priced, technically acceptable basis, with the evaluation process consisting of an administrative compliance requirements review, a technical review, and a price evaluation. RFQ at 33. As part of the administrative compliance requirements review, the technical evaluation team was to verify that vendors: (1) provided

¹ The RFQ identified the following as examples of products in Category 1: screws, ladders, brackets, drill bits, welding equipment, hoses, valves, faucets, rollers, drop cloths, storage containers, protective goggles, earplugs, portable air conditioners, portable heaters, portable fans, humidifiers, dehumidifiers, pumps, compressors, generators, motors, lights, cables, extension cords, surge protectors, switch boxes, lanterns, flashlights, batteries, and battery chargers. The solicitation indicated that the hardware category was estimated to account for 75-85 percent of the overall MRO spending.

Examples of products in Category 2 are wrenches, shears, screwdrivers, scissors, saws, knives, hammers, drills, tool sets and kits, tool batteries, and tool cabinets. Category 2 is estimated to account for 10-20 percent of the overall MRO spending.

Examples of products in Category 3 are paints, adhesives, sealants, stains, varnishes, shellacs, and lacquers, as well as small specialized tools and equipment related to painting and finishing. This category is estimated to account for 4-8 percent of overall MRO spending. RFQ at 3-4.

assurances that the offered items were Trade Agreement Act (TAA) compliant; (2) demonstrated the ability to meet the RFQ's environmental sustainability requirements; (3) demonstrated the ability to provide order status and tracking capabilities through GSA *Advantage!*®; (4) provided assurance that the items would be compliant with the Berry Amendment; (5) furnished a required certification pertaining to unpaid delinquent federal tax liability and felony convictions under federal law; and (6) agreed to provide agency-specific reports at no additional cost. RFQ at 34-35.

Quotations meeting all of the administrative compliance requirements were then to be evaluated on a Go/No Go basis under a number of technical factors. Among the Go/No Go factors, vendors were to demonstrate the ability to provide 100 percent of the market basket items.² In this regard, the RFQ provided that GSA would perform "random sample verification . . . to ensure that products offered meet the descriptions and environmental attributes, are TAA and ETS [Essentially-the-Same] requirement compliant, and are on the Contractor's MAS 51V contract." RFQ at 36. The RFQ further provided that if a quotation did not offer all of the market basket items or offered items that did not meet the market basket item descriptions and the specified regulatory requirements, the quotation would receive a No Go rating. *Id.* The solicitation also provided that as part of the technical evaluation, the agency would evaluate vendors' past performance on a Go/Neutral/No Go basis, and that if a vendor had more than two poor and/or unsatisfactory ratings, the quotation would receive a No Go rating.

The RFQ required vendors to furnish prices for a specific list of items (identified as market basket items), and advised that the price evaluation would be based on the market basket items only, although the full catalogue of MRO supplies available on the vendor's MAS contract would be included and available under the resulting BPA. RFQ at 9. In responding to the protest, the agency explained that the market basket pricing strategy was chosen because the companies holding MAS 51 V contracts offer a broad range of products, making it impossible to conduct an apples-to-apples comparison of contractors' entire catalogues; requesting prices on a subset of approximately 300 high spend items only (*i.e.*, the market basket) made it possible for the agency to compare prices on a uniform pool of items.³ Agency Report (AR) at 3; Contracting Officer's Statement of Facts at 3. The solicitation required that non-market basket items offered as part of the contractor's BPA catalogue be priced at a discount greater than or equal to 3 percentage points below the calculated average discount off of MAS price. RFQ at 40. For example,

² As discussed below, the market basket items were a subset of items drawn from the MAS 51 V schedule, for which vendors were to submit discounted prices.

³ According to the agency, the market basket items constitute approximately 20% of the dollar value of government spending on MRO supplies. AR at 7.

the RFQ explained, “if the Average Market Basket Discount is 10% [from the vendor’s current MAS schedule price], then all Non-Market Basket items within that Category must receive at least a 7% discount off of the current MAS price.” Id.

The market basket items for each category, along with an estimated annual volume for each item, were listed on an MRO supplies quote sheet included as an attachment to the RFQ.⁴ Vendors were to provide the name of the manufacturer of the item, the model number (using either the manufacturer part number or the standard wholesaler part number), the UPC-A number, the item’s country of origin (to ensure TAA compliance), the vendor’s current GSA schedule price for the item, and the proposed BPA price. Vendors were also to provide aggregated sales discounts. Using the proposed BPA prices, the estimated quantities, and the proposed tiered discounts, the agency was to calculate a weighted total extended market basket value for each category.

Of relevance to the protest here, the agency was asked during the solicitation process whether Federal Acquisition Regulation (FAR) § 15.404-1, including, but not limited to, § 15.404-1(g) (pertaining to unbalanced pricing), applied to the procurement. In response, the agency stated that § 15.404-1 did not apply because the acquisition was being conducted under FAR § 8.4, but that unbalanced pricing increased performance risk and could lead to rejection of a quotation. RFQ, amend. No. PA003, at Q34.

The agency received 21 quotations by the amended closing date of December 5, 2013. The agency evaluated the quotations for compliance with both the administrative compliance requirements and the Go/No Go factors, and sought clarifications from each vendor. Twenty vendors responded (one withdrew its quotation). Based on the responses, GSA concluded that all quotations met the administrative compliance requirements. The agency further concluded, based on the responses and random sample verification, that all quotations were acceptable under the various Go/No Go technical factors.

The agency then evaluated vendors’ pricing and conducted a reverse auction⁵ by requesting and accepting two rounds of revised pricing submissions. Based on the

⁴ The Category 1 market basket contained 216 items; the Category 2 basket consisted of 93 items, and the Category 3 basket was comprised of 26 items.

⁵ Regarding a reverse auction, the solicitation noted that the agency may “publish the best offered price information to all contractors with the aim of aiding them in more effectively revising their quotations.” RFQ at 38.

final round of revised pricing, the following 11 vendors were selected to receive BPAs for Category 1:⁶

Vendor	Extended Market Basket Price
Noble Supply & Logistics	\$2,084,857
W.W. Grainger, Inc.	\$2,103,309
MJL Enterprises, LLC	\$2,146,282
Premier & Companies, Inc.	\$2,518,211
The Office Group, Inc.	\$3,917,942
WECsys, LLC	\$4,216,947
SPS Industrial, Inc.	\$4,305,885
Capitol Supply, Inc.	\$4,456,046
Wrigglesworth Enterprises, Inc.	\$4,675,131
Galaxie Defense Marketing Services	\$4,948,525
SupplyCore, Inc.	\$5,114,778

Award Decision Document, Feb. 27, 2014, at 1. The protester's evaluated price for the Category 1 market basket of [deleted] was 14th low. For reasons unrelated to the instant protest, the agency subsequently canceled the Category 1 BPAs established with SPS Industrial, Inc. and SupplyCore, Inc., and established BPAs with the 12th and 13th lowest-priced vendors, Document Imaging Dimensions and Complete Packaging & Shipping Supplies.

Further, based on the final round of revised pricing, the following six companies were selected to receive BPAs for Category 2:

Vendor	Extended Market Basket Price
Noble Supply & Logistics	\$481,916
W.W. Grainger, Inc.	\$486,443
Premier & Companies, Inc.	\$509,168
The Office Group, Inc.	\$761,177
WECsys, LLC	\$795,352
SPS Industrial, Inc.	\$846,592

Id. at 2. The protester's price for the Category 2 market basket (of [deleted]) was 13th low.

Finally, based on the final round of revised pricing, the following six companies were selected to receive BPAs for Category 3:

⁶ All of the companies selected to receive BPAs, with the exception of W.W. Grainger, are small businesses.

Vendor	Extended Market Basket Price
Noble Supply & Logistics	\$29,457
W.W. Grainger, Inc.	\$30,475
MJL Enterprises, LLC	\$31,051
WECsys, LLC	\$64,806
The Office Group, Inc.	\$64,859
SPS Industrial, Inc.	\$67,811

Id. MSC's evaluated price for the Category 3 market basket items was [deleted], which was 11th low.

By letter of February 28, 2014, the contracting officer notified the protester that its quotation had not been selected and that BPAs would be established with the above vendors. MSC protested to our Office on March 10.

DISCUSSION

MSC argues that despite the RFQ's admonition that unbalanced pricing might lead to rejection of a quotation, Grainger and several other vendors quoted prices that were grossly unbalanced as between the market basket and the non-market basket items. The protester contends that Grainger and the other firms manipulated the market basket analysis by dramatically reducing their schedule prices for the market basket items prior to submitting their quotes, which allowed them to achieve low evaluated prices, but without offering meaningful discounts for the non-market basket items.

For example, regarding the hardware category, based on the discounts offered from its GSA schedule prices for the market-basket items, MSC committed to a non-market basket discount threshold of [deleted]. Because the other vendors had drastically cut their GSA schedule prices for the market basket items prior to submitting their quotes, the discounts they had to offer for the non-market basket items were much smaller. Specifically, Grainger committed to a non-market basket discount threshold of only [deleted], and Wigglesworth, WECsys, The Office Group, and Premier committed to non-market basket discount thresholds of [deleted] respectively. AR, Tab 6. In other words, these vendors achieved low evaluated prices without committing to offering significant discounts on the non-market basket items. According to MSC, the government may ultimately pay higher prices overall as a result of the successful vendors' pricing strategy.

Unbalanced pricing exists where the prices of one or more line items are significantly overstated, despite an acceptable total evaluated price (typically achieved through under pricing of one or more other line items). General Dynamics--Ordnance & Tactical Sys., B-401658, B-401658.2, Oct. 26, 2009,

2009 CPD ¶ 217 at 5. To prevail on an allegation of unbalanced pricing, a protester must show that one or more prices in the allegedly unbalanced quotation are overstated; that is, it is insufficient for a protester to show simply that some line item prices in the quotation are understated. See Academy Facilities Mgmt.--Advisory Opinion, B-401094.3, May 21, 2009, 2009 CPD ¶ 139 at 15. This is so because low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. Id.

Here, MSC's allegation of unbalanced pricing has no basis. As an initial matter, we find MSC's argument to be fundamentally misplaced since it is premised on a comparison of vendor's market basket item prices with their non-market basket prices. Such a comparison has no basis in the solicitation since it did not provide for evaluation of the non-market basket items. Moreover, the protester does not establish that any prices offered by Grainger (or any other successful vendor) are overstated. Indeed, given that the market basket prices of all successful vendors are offered at a discount from the vendors' schedule prices, which have already been determined fair and reasonable, see FAR § 8.404(d) (GSA has already determined the prices of supplies under schedule contracts to be fair and reasonable), it is not apparent how these vendors' BPA prices could be overstated.

The true thrust of MSC's challenge is that the agency's methodology for evaluating prices was improper since it does not ensure the selection of the quotations that will ultimately prove to be least costly to the government.

This complaint, however, constitutes an objection to the price evaluation scheme set forth in the RFQ, which put vendors on notice that the price evaluation would be based on the market basket items only. To be timely, any objection to the clearly articulated price evaluation scheme would have needed to be raised prior to the closing date for receipt of quotations. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2013), Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 4-5; General Dynamics--Ordnance & Tactical Sys., supra, at 6. Because MSC instead waited until after the source selection decision had been made to object to the price evaluation scheme, its complaint is untimely and not for consideration.⁷

⁷ We also note that the protester's argument is premised on the assumption that the non-market basket prices of vendors committing to high discount rates will be lower than the non-market basket prices of vendors committing to lower discount rates. Given that the prices for non-market basket items are affected by the same two variables as the prices for market basket items--i.e., the vendors' schedule prices, and the scope of the vendors' discounts from those prices--it cannot be determined which vendors' prices will be lowest after application of the discounts, absent information as to vendors' schedule prices for the non-market basket items. In other words, the accuracy of the protester's assumption cannot be verified based on the information furnished in the quotations. We further note that agencies are

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MSC also challenges the agency's technical acceptability evaluation for the Category 2 items, arguing that the agency treated vendors unequally by waiving the dimensional specifications set forth in the RFQ for item T097(reversible jaw vise). The record reflects that the agency gave all vendors a Go rating for the item because it believed that the only item available that would meet the specifications is not TAA compliant (since it is made in China), and that listing such an item would have been improper because it could not have been considered acceptable. See, e.g., Award Decision Document at 45. The protester challenges the agency's decision arguing that it, and several other vendors, listed compliant items that are not made in China. MSC argues that the agency should either have rejected the quotations of vendors offering noncompliant products, or revised the RFQ and allowed all vendors to resubmit a new item for T097.

We need not decide whether the agency properly waived compliance with the various dimensional specifications for item T097 because it is clear from the record that the protester suffered no prejudice as a result of any such error. In this connection, the agency points out that when MSC's unit price for item T097 is multiplied by the estimated quantity for the item, the value of item T097 that can be attributed to MSC's total market basket is [deleted], whereas the difference between MSC's total market basket price for Category 2 (of which item T097 is part) and the total market basket price of the highest-priced successful vendor is [deleted]. In other words, even if the protester had been given the opportunity to substitute a far less expensive item for the one on which it originally quoted, its overall Category 2 market basket price would still have been substantially higher than the overall Category 2 market basket prices of all successful vendors. Since prejudice is a required element of every viable protest, where it is not shown, we will not sustain a protest. Maywood Closure Co., LLC, B-408343 et al., Aug. 23, 2013, 2013 CPD ¶ 199 at 6.⁸

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required to comparatively price all delivery orders exceeding \$3,000, RFQ at 26. Thus, if, as the protester asserts, lower discount thresholds correlate with higher non-market basket item prices, the vendors with the lower thresholds will have to increase their non-market basket item discounts to prevail in the delivery order competitions.

⁸ MSC raises a similar argument with regard to Category 1 item H157 (medium duty two-stage air compressor). That is, the protester argues that while the agency decided not to evaluate the item for compliance with the stated technical specifications (since the specifications were misstated in the RFQ), the agency did not notify vendors who had submitted items meeting the specifications that compliance was waived, thereby depriving them of the opportunity to submit alternative items for purposes of the market basket price evaluation. As with regard to item T097 above, the agency has demonstrated the value of item H157 that can
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MSC also complains that the agency waived specifications pertaining to product size for two items in the Category 3 market basket for some vendors. Specifically, the protester argues that the RFQ identified the item to be provided as P010 as “Gray 5.4 fl oz Silicon Rubber Adhesive Sealant,” and the item to be provided as P011 as a 6 oz. adhesive spray, yet SPS, The Office Group, and WECsys offered 10+ fl. oz. products for the former item, and The Office Group and WECsys offered 10 oz. products for the latter item. The agency stated that it “did not believe that this oz. discrepancy was a sufficient reason to give this item a No Go.” Award Decision Document at 53, 61, 68.⁹ In a similar vein, the protester complains that the agency waived the specification pertaining to handle length for item T086 (wire twister/cutter, non-reversible) in evaluating Grainger’s quotation. It also complains that GSA waived the requirement that a quoted item be on the vendor’s schedule 51 V contract prior to the RFQ’s closing date for one Category 2 and two Category 3 items offered by Grainger, and for one Category 1 and two Category 2 items offered by Capitol Supply.¹⁰

We dismiss all of the above allegations pertaining to Category 2 and Category 3 items on the basis that the protester, which is 13th in line for award for Category 2 and 11th in line for award for Category 3, is not an interested party to raise the objections. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3551-3556 (2006), only an “interested party” may protest a federal procurement; that is, a protester must be an actual or prospective bidder or

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be attributed to MSC’s total market basket for Category 1 is far less than the difference between MSC’s total market basket price for the category and the total market basket price of the highest-priced successful vendor. See Agency Report of Second Supplemental Protest, May 16, 2014, at 12. As a consequence, it is clear that the protester suffered no prejudice as a result of the agency’s failure to give it the opportunity to submit an alternative item.

⁹ We agree with the agency’s finding in this regard. We fail to see how these products, which provide more than the stated quantity in the RFQ, would fail to meet the government’s minimum requirement.

¹⁰ MSC raised additional allegations of non-compliance with RFQ requirements in its original and first supplemental protests, arguing, for example, that several vendors offered non-TAA compliant products for several items numbers. The agency responded to these allegations in its report, maintaining that all of the items identified by the protester met the requirements of the RFQ. AR at 16. In commenting on the agency report, the protester did not take issue with, or seek to rebut the agency’s position with regard to these items; accordingly, we consider these complaints to be abandoned. TPMC--Energy Solutions Envtl. Servs. 2009, LLC, B-408343.2 et al., Aug. 23, 2013, 2013 CPD ¶ 215 at 8.

offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Where, as here, a protester would not be in line for contract award were its protest to be sustained, it is not an interested party to protest. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57. With regard to the sole allegation pertaining to Category 1, i.e., that the agency improperly permitted Capitol Supply to add an item meeting the specifications for H157 to its schedule contract after the RFQ closing date, the record reflects that Capitol Supply in fact had proposed an item on its schedule at the time it submitted its quote, but changed the item on its MAS schedule based on agency clarifications. Moreover, as explained above, see n.7 supra, the agency ultimately decided not to evaluate this item because the solicitation provided vendors with an inaccurate item description. AR at 15; Award Decision Document at 23. Thus, it is irrelevant that Capitol Supply did not have an item meeting the specifications for H157 on its schedule contract until after the RFQ closing date. Had Capitol Supply proceeded with the original item from its schedule, it would have been found acceptable.¹¹

The protest is denied.

Susan A. Poling
General Counsel

¹¹ MSC also objected to the agency's evaluation of the past performance of Capitol Supply and Noble Supply & Logistics. While we do not address the arguments raised in this decision, we considered them and conclude that they do not provide a basis to sustain the protest.