U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: Sancilio & Company, Inc.

File: B-414579

Date: May 15, 2017

Robert P. Mino, Esq., for the protester.
Maura C. Brown, Esq., Department of Veterans Affaris, for the agency.
Pedro E. Briones, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed where nothing in the record suggests that agency had any reason to doubt the awardees' certification of compliance with the Trade Agreements Act

DECISION

Sancilio & Company, Inc. (SCI), of Riviera Beach, Florida, protests the award of a contract to Liberty BioScience LLC (Liberty) of New York, New York, under request for proposals (RFP) No. VA797P-16-R-0100, issued by the Department of Veterans Affairs (VA) for fish oil capsules. Sancilio alleges that the VA should have rejected Liberty's proposal as technically unacceptable for not complying with the Trade Agreements Act (TAA).

We dismiss the protest because, as filed with our Office, it does not establish a valid basis for challenging the agency's action.

As relevant to SCI's protest, the solicitation incorporated by reference Federal Acquisition Regulation (FAR) clause 52.225-5, which implements the TAA requirement that only end products of the United States and designated countries can be provided. RFP at 27; FAR § 52.225-5, Trade Agreements (Feb 2016); 19 U.S.C. §§ 2501-2582. Also relevant here, the RFP required offerors to "provide a separate and distinct eleven-digit National Drug Code (NDC) Number and/or Universal Product Code (UPC) number for the line item offered, unique to the offeror." RFP amend. 2, at 1; see RFP, Scope of Contract (Scope), §§ 5, 7. The RFP also required that all product information pertaining to all items offered under the solicitation, including the offeror's unique NDC

code, must be submitted to First Data Bank (FDB), RxNorm, and Medispan prior to the effective date of contract performance.[1] Scope § 3. The solicitation, which provided for award on a lowest price, technically-acceptable basis, stated that an offer would be considered technically acceptable if it met several criteria, including that the NDC or UPC number of each product offered is unique to the offeror. RFP amend. 2, at 4.

SCI contends that the award was improper and contrary to the terms of the RFP, because the NDC number for Liberty's proposed fish oil capsules allegedly corresponds to a drug company located in the People's Republic of China, which is not a TAA designated country. Protest at 4. SCI maintains, among other things, that the VA should have rejected Liberty's proposal as technically unacceptable for not providing an NDC number unique to the distributor or for providing "a falsified NDC number[.]" Id. at 4-5 (citing the code for the Chinese company as listed in the Food and Drug Administration's on-line directory of NDCs).

As a threshold matter, the VA requests that our Office dismiss the protest as untimely, because it was filed on April 12, 2017, which is 15 days after the agency informed SCI on March 28 that it was not awarded the contract.[2] Request for Dismissal at 5. Moreover, the VA maintains that SCI's April 3 request for a debriefing was also untimely, because the request was submitted 6 days after the March 28 notice. Id., citing FAR § 15.506(a)(1) (requiring an agency to provide an offeror with a debriefing when it is requested within 3 days of the offeror receiving notice of award); SCI Email to Contracting Officer (CO), Apr. 3, 2017. In this respect, the VA suggests that while the contracting officer chose to honor the untimely request and provided a debriefing to SCI, the protester cannot rely on the debriefing exception to GAO's timeliness rules because a debriefing was not required here. See Request for Dismissal at 5.

Contrary to the VA's assertion, the March 28 notice did not inform SCI of the NDC number which forms the basis of the entire protest; rather, SCI learned the NDC number on April 11, when the contracting officer provided the number to SCI following its debriefing.[3] See Notice of Award, Mar. 28, 2017; CO Email to SCI, Apr. 11, 2017, at 1.

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[1] According to the VA, these three entities (FDB, RxNorm, and Medispan) are used to identify products by outside insurance companies for VA claims processing. Contract Specialist Statement at 1.

[2] Under our rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. 4 C.F.R. § 21.2(a)(2).

[3] The notice of award published on the Federal Business Opportunities (FedBizOps) website on March 30 also does not identify an NDC number. www.fbo.gov/?s=opportunity&mode=form&tab=core&id=ef0ff53c031ac0c0a38ba402930d0843&_cview=0 (last visited May 9, 2017).

Therefore, SCI's protest is timely because it was filed within 10 days of when SCI first learned its basis of protest on April 11, regardless of whether the debriefing was required. 4 C.F.R. § 21.2(a)(2); Trifax Corp., B-279561, June 29, 1998, 98-2 CPD ¶ 24 at 4-5 ("An offeror that learns the basis for protest as a result of such a non-required briefing is not precluded from subsequently filing a timely protest based on information learned at that debriefing."). Even where a disappointed offeror does not secure a required debriefing, it continues to retain its right to file a timely protest based on information obtained during a debriefing that was not required. Raith Eng'g & Mfg. Co., W.L.L., B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9 at 3.

Nevertheless, we dismiss SCI's protest because it fails to establish the likelihood that the VA violated applicable procurement laws or regulations. The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Tech., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4), (f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here, SCI's entire protest is based on an incorrect NDC number provided to SCI following its debriefing. The VA states that Liberty's proposal provided a twelve-digit UPC number that was registered to Liberty Science for fish oil, and that Liberty submitted that UPC number to FDB, RxNorm, and Medispan as required by the RFP. Contract Specialist Statement at 1. The VA explains that, based on industry guidelines, the three entities (FDB, RxNorm, and Medispan) truncate the twelve-digit UPC numbers into an eleven-digit number that is similar in format to an NDC number. Id. In this case, the VA, in its post-debriefing email to SCI, mistakenly identified the truncated UPC number for Liberty as an NDC number. See id. By coincidence, Liberty's truncated UPC number (which is not Liberty's NDC number) also happens to match the NDC number of a Chinese drug company. See id. The VA otherwise asserts that Liberty's product was TAA compliant at the time of award and remains TAA compliant.[4] VA Email to Parties, Apr. 28, 2017.

[4] If prior to award an agency has reason to believe that a firm will not provide compliant products, the agency should go beyond a firm's representation of compliance with the TAA; however, where the contracting officer has no information prior to award which would lead to such a conclusion, the contracting officer may properly rely upon an offeror's representation without further investigation. Leisure Lift, Inc., B-291878.3; B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 8; E.D.I., Inc., B-251750, B-252128, May 4, 1993, 93-1 CPD ¶ 364 at 5.

SCI does not dispute the VA's explanation that the NDC number provided to SCI was incorrect and based on Liberty's truncated UPC number. See SCI Response to Contract Specialist Statement (SCI Response), at 1-3. Rather, SCI surmises that "the logical conclusion [from the VA's explanation] is that either the [contract] was awarded based on an NDC code, amended post-award to a UPC code, or Liberty was awarded the contract by submitting an eleven-digit UPC code, despite the requirement for UPC codes to contain twelve digits." Id. at 1. In this respect, SCI claims that according to its research, "Liberty did not place a code on file with Medispan until March 1, 2017, which would have been well after the final Solicitation deadline to VA." Id. at 2.

First, contrary to SCI's assertion, and consistent with the VA's explanation, the awardee's proposal identified a twelve-digit UPC number and confirmed that the number is unique to Liberty BioScience LLC. See Liberty Proposal at 3; Liberty Final Proposal Revision (FPR) at 5.[5] Second, consistent with the VA's assertion, Liberty's proposal certified that its product is TAA-compliant. Liberty FPR at 6. Third, contrary to the protester's apparent belief, nothing in the RFP provided that the agency would assess TAA compliance based on the proposed product's NDC number. Fourth, the solicitation did not require offerors to submit an NDC number to Medispan (or FDB and RxNorm) prior to proposal submission, as SCI suggests; rather, as stated above, NDC numbers were to be submitted to those entities "prior to effective date of contract performance." Scope § 3.

Finally, the VA states that based on SCI's concerns as outlined in its protest, the agency requested that Liberty recertify that it will provide a TAA-compliant product. Contract Specialist Statement at 2. The VA states that Liberty recertified that the raw material for its product comes from Peru--a TAA designated country--and that the material is weighed, mixed, measured, and put into capsule form by United Pharma, LLC, which is located in California. Id. Thus, to the extent that SCI's protest may have raised any doubts about whether Liberty's product is TAA-compliant, the awardee's recertification, submitted in response to the protest, satisfies the agency's duty of inquiry. See, e.g., Bridgeport Machs., Inc., B-265616, Dec. 6, 1995, 95-2 CPD ¶ 249 at 2-3 (denying protest where awardee, in response to protest, submitted statement explaining the firm's proposed process for incorporating domestic components); Manufacturing Tech. Assocs., Inc., B-251759, Apr. 5, 1993, 93-1 CPD ¶ 293 at 3-4 (denying protest where there was no evidence in awardee's offer from which the contracting officer should have been on notice that a foreign product would be furnished and where the agency obtained, in response to the protest, information regarding domestic and foreign components of the awardee's product).

[5] SCI was not represented by counsel who could obtain access to non-public information, such as Liberty's proposal, pursuant to the terms of a protective order. However, consistent with our Bid Protest Regulations, our Office reviewed Liberty's proposal in camera. See 4 C.F.R. § 21.4(b).

Notably, SCI does not dispute Liberty's TAA recertification (or, for that matter, the initial certification in its proposal). In fact, SCI states that it "is aware of United Pharma, LLC, and recognizes they make product in California[.]" SCI Response at 1. Although SCI speculates that it has "reason to believe that they [United Pharma] make the bulk of their product in Vietnam[,]" the protester concedes that it is "unable to determine if United Pharma LLC is manufacturing product in their California facility or their Vietnam facility[.]" Id. at 3. Without more, SCI's unsupported allegations amount to nothing more than mere speculation, which provides no reason to question the VA's reliance on the awardee's certification of TAA compliance. See Leisure Lift, Inc., supra, at 8-9.

The protest is dismissed accordingly. See 4 C.F.R. § 21.5(f); E.D.I., Inc., supra, at 5 (dismissing protest where nothing in the record suggests that agency had any reason to doubt the awardees' certifications of TAA compliance).

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