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Decision

Matter of: Draeger, Inc.

File: B-418089.2; B-418089.3

Date: December 10, 2020

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DIGEST

Protest of agency's decision to cancel solicitation as part of corrective action taken in response to an earlier protest is denied where the agency demonstrates a reasonable basis for its decision to cancel and reassess its requirements.

DECISION

Draeger, Inc., of Telford, Pennsylvania, protests the corrective action taken by the Department of Veterans Affairs (VA) in response to Draeger's earlier protest challenging the award of a contract to another vendor under request for quotations (RFQ) No. 36C25919Q0613 for anesthesia integrated workstations. The protester contends that the agency's corrective action--specifically, its decision to cancel the RFQ and reassess its requirements--lacks a reasonable basis and is pretextual.

We deny the protest.

BACKGROUND

The RFQ, issued on September 11, 2019 and amended twice, contemplated the award of a fixed-price contract for six anesthesia integrated workstations for the VA Medical Center (VAMC) in Grand Junction, Colorado. Agency Report (AR), Tab 3, RFQ Inclusive of All Amendments (RFQ), at 12. Each workstation would include an anesthesia delivery system and an anesthesia monitoring system; the contractor would also be responsible for maintenance, warranty, and training. *Id.*

The RFQ was apparently issued on a brand-name-or-equal basis--although it did not list a brand name product. Instead, the solicitation advised vendors quoting “or equal product(s)” to comply with Federal Acquisition Regulation (FAR) provision 52.211-6, Brand Name or Equal,¹ and required the quoted product to meet 40 salient characteristics described in the RFQ in order to be found technically acceptable. *Id.* at 12-15; *id.* at 17-18. The RFQ contemplated the use of FAR part 13 simplified acquisition procedures and provided for award on a lowest-priced, technically acceptable basis. *Id.* at 16.

On or before September 24, 2019, the amended closing date for quotations, the agency received quotations from five vendors, including Draeger and Trillamed, LLC. Contracting Officer’s Statement, Oct. 14, 2020, at 2. The agency selected Trillamed for award, and Draeger filed its first protest with our Office on October 3, 2019, arguing primarily that Trillamed’s product did not meet a number of the salient characteristics required by the RFQ. The agency proposed to take corrective action, to include reevaluating quotations and making a new award decision, and we dismissed the protest as academic. *Draeger, Inc.*, B-418089, Oct. 22, 2019 (unpublished decision).

After the agency completed its reevaluation, the agency again awarded a contract to Trillamed,² and Draeger filed another protest with our Office on August 6, 2020. Prior to the due date for filing its agency report, the agency filed a letter notifying our Office of its intent to again take corrective action. In our decision dismissing the protest as academic, we noted the following:

In the letter, the agency states that after review of the record, Trillamed’s quotation “does not clearly address how its product meets all of the [s]olicitation’s salient characteristics.” The agency also states that these salient characteristics may not properly reflect the agency’s requirements. The agency concludes that it will therefore terminate the award, cancel the solicitation, reevaluate the agency’s requirements, and resolicit the procurement.

Draeger, Inc., B-418985, B-418985.2, Sept. 21, 2020 (unpublished decision) (internal citations omitted), *citing* Notice of Corrective Action and Request for Dismissal, B-418985, B-418985.2, Sept. 8, 2020, at 2.

This protest followed.

¹ The RFQ included language from, and incorporated by reference, FAR provision 52.211-6, Brand Name or Equal, as well as VA Acquisition Regulation clause 852.211-73, Brand Name or Equal. RFQ at 17-18.

² The agency awarded the contract to Trillamed under a new contract number, 36C25920P0626, in the amount of \$431,278.51. Contracting Officer’s Statement at 4-5; see *also* Memorandum of Law (MOL), Oct. 19, 2020, at 5 n.3.

DISCUSSION

Draeger raises various complaints about the agency's corrective action. Draeger contends that the agency's decision to cancel the RFQ is "fatally flawed, arbitrary, irrational, unreasonable and capricious." Protest at 2; *see also* Comments and Supp. Protest at 23 (claiming also that it was "an abuse of discretion"). Draeger argues that the agency should instead be required to evaluate the remaining quotations and make a new award decision. Protest at 17.

Agencies have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition. *See American Warehouse Sys., LLC*, B-412543, Mar. 1, 2016, 2016 CPD ¶ 66 at 3; *Domain Name Alliance Registry*, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 8. The details of implementing corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the challenged action. *See Government Contracting Servs., LLC*, B-416696.2, May 6, 2019, 2019 CPD ¶ 170 at 5; *DGC Int'l*, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3; *Northrop Grumman Info. Tech., Inc.*, B-404263.6, Mar. 1, 2011, 2011 CPD ¶ 65 at 3.

Further, while a contracting agency must have a reasonable basis to support a decision to cancel an RFQ, *see Progressive Servs. Corp.*, B-404183, B-404251.2, Jan. 11, 2011, 2011 CPD ¶ 18 at 2, a reasonable basis to cancel exists when, for example, an agency determines that a solicitation does not accurately reflect its needs. *MedVet Dev. LLC*, B-406530, June 18, 2012, 2012 CPD ¶ 196 at 2-3. So long as there is a reasonable basis for doing so, an agency may cancel a solicitation no matter when the information precipitating the cancellation first arises, even if it is not until quotations have been submitted and evaluated. *Chase Defense Partners*, B-418803, Aug. 10, 2020, 2020 CPD ¶ 268 at 2.

We have fully considered the record and the parties' arguments, including those that are in addition to or variations of those specifically discussed below, and find no basis to sustain Draeger's protest.

Here, the agency explains that, in reviewing the procurement record in response to Draeger's earlier protest, the contracting officer "identified a flaw in the solicitation"--specifically, the contracting officer "realized that the solicitation did not comply with the FAR and contained ambiguities about the agency's requirements." MOL at 8, *citing* Contracting Officer's Statement. The agency points out that, although the RFQ was issued on a brand-name-or-equal basis, it "failed to identify the brand name, which is required by the FAR." *Id.*, *citing* RFQ and FAR 11.104(b) ("Brand name or equal purchase descriptions must include, *in addition to the brand name*, a general description of those salient physical, functional, or performance characteristics of the brand name item that an 'equal' item must meet to be acceptable for award.") (emphasis added by the agency).

Further, the agency argues that its uncertainty about its requirements affected the evaluation. The record shows that none of the other quotations were found to be technically acceptable, and, as the agency explains: “Because the solicitation omitted the brand name product, there was no way for the agency to determine if an offeror was technically acceptable. . . . It became evident that the VAMC did not have a name brand product in mind and that the salient characteristics did not actually describe a specific product.” MOL at 8, *citing* Contracting Officer’s Statement; *see also* AR, Tab 6, Technical Evaluation Team Consensus Report, May 7, 2020, at 6-7; AR, Tab 7, Award Decision, July 29, 2020, at 4-6.

In response to comments from the protester, the agency provided this additional insight into its procurement:

The solicitation as written does not accurately reflect the agency’s needs. Worse, the agency’s actual needs are unknown. The identified flaws go beyond the agency’s failure to identify a brand name product in the solicitation for this purported brand-name-or-equal procurement. In reviewing the protest(s) associated with this procurement, it has become readily apparent that no one in the contracting activity or at the Grand Junction VAMC knows specifically how the salient characteristics listed in the solicitation came to be nor can the Grand Junction VAMC confirm that the listed salient characteristics actually represent the legitimate needs of the VAMC.

Agency Response to Comments and Supp. Protest, Nov. 5, 2020, at 3.

Under these circumstances, we find no basis to object to the agency’s decision to take corrective action. Where, as here, the agency has represented that its earlier procurement actions were flawed--indeed, that it does not know its actual needs or the origin of the solicitation’s requirements--we find it reasonable for the agency to take corrective action to address its errors and assess its needs. In this regard, we note that, as a general rule, an agency has the discretion to determine its needs and the best way to meet them. *See Platinum Servs., Inc.; WIT Assocs. Inc.*, B-409288.3 *et al.*, Aug. 21, 2014, 2014 CPD ¶ 261 at 5, *citing USA Fabrics, Inc.*, B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 4.

Nonetheless, Draegar advances several complaints about the agency’s corrective action and procurement, none of which we find persuasive. For example, the protester claims that “the VA seems bent on avoiding if at all possible having to make an award to Draeger for the instant requirement,” and that “[t]he rationale offered by the VA . . . points to pretext as a basis for cancel[l]ation in order to (i) avoid an embarrassing decision by the GAO on the merits of [the earlier protest], (ii) pursue an alternate path forward so that it can make a future award to Trillamed, and (iii) avoid having to award the contract to Draeger under the instant synopsis.” Protest at 5, 10; *see also* Supp. Comments at 15 (reiterating its view that “one could easily call [the agency’s] explanation what it actually is: pretextual.”). In this regard, the protester also questions

the record and the agency's conclusion that none of the other quotations, including the one submitted by Draeger, were technically acceptable.³

Where, as here, a protester has alleged that the agency's rationale for cancellation is but a pretext--i.e., that the agency's actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest--we will review the reasonableness of the agency's actions in canceling the acquisition. *Miller, Davis, Marter & Oppen, P.C.*, B-242933.2, Aug. 8, 1991, 91-2 CPD ¶ 176 at 4. Even if it can be shown that personal animus or pretext may have supplied at least part of the motivation to cancel the procurement, the reasonableness standard applicable to cancellation of a solicitation remains unchanged. See, e.g., *Lasmer Indus., Inc.*, B-400866.2 *et al.*, Mar. 30, 2009, 2009 CPD ¶ 77 at 4.

On this record, we find no basis to conclude that the agency's actions are pretextual. We agree with the agency's view that, "[w]hile [the p]rotester argues that its product does in fact meet the salient characteristics listed in the solicitation, this matters very little when it cannot even be determined whether the salient characteristics meet the needs of the Grand Junction VAMC." Agency Response to Comments and Supp. Protest at 5. Moreover, to the extent the protester argues that it should receive the award, we find no basis to consider its protest. The objective of our bid protest function is to ensure full and open competition for government contracts, and as a general matter, our Office does not consider it appropriate to review a protest that an agency should procure items from a particular firm. See, e.g., *Bell Helicopter Textron, Inc.*, B-241037, Oct. 12, 1990, 90-2 CPD ¶ 289 at 2.

As another example, the protester complains that "[t]he VA has not only failed to state specifically how its requirements have changed since April 2019, but has also failed to explain how or in what way the solicitation fails to meet its needs--needs that were researched and established by VAMC Grand Junction officials [prior to the issuance of the RFQ]." Supp. Comments at 6-7. The fact that the agency has not finalized the exact changes that it intends to make to its requirements does not demonstrate that the agency's decision to cancel the RFQ is unreasonable. See, e.g., *VIRE Consulting, Inc.*, B-408148.2, Nov. 26, 2013, 2013 CPD ¶ 272 at 4 (noting that the fact that the agency had not established the exact measure necessary to meet its requirements did not demonstrate that its decision to cancel the procurement was unreasonable or based upon an improper pretext).

In sum, Draeger's disagreement with the agency does not provide a basis to sustain the protest. The agency has conceded that its procurement was flawed and that, fundamentally, "the agency's actual needs are unknown." Agency's Response to

³ We note that, as the protester points out and as the record shows, other vendors quoted the same product as Draeger, which is also manufactured by Draeger. AR, Tab 6, Technical Evaluation Team Consensus Report, May 7, 2020, at 6-7; see also Comments and Supp. Protest at 2, 27 (arguing that "the exclusion of Draeger (and any other offerors who proposed [Draeger's product]) . . . [was] equally flawed").

Comments and Supp. Protest at 3. Under these circumstances, we see no basis to disturb the agency's decision.

The protest is denied.

Thomas H. Armstrong
General Counsel