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Decision

Matter of: Red One Medical Devices, LLC

File: B-419030; B-419030.3

Date: November 16, 2020

Maria Panichelli, Esq., Obermayer Rebmann Maxwell & Hippel LLP, for the protester. Jennifer Claypool, Esq., Department of Veterans Affairs, for the agency. Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Proposals that did not demonstrate compliance with the solicitation requirements were reasonably eliminated from consideration for award.

DECISION

Red One Medical Devices, LLP, a service-disabled veteran-owned small business (SDVOSB) of Savannah, Georgia, protests the award of a contract to LMH Hawthorne Healthcare, Inc. d/b/a/ Pisces Healthcare (Pisces) under request for proposals (RFP) No. 36C79119R0004, issued by the Department of Veterans Affairs (VA) for orthotic soft goods and prosthetic supplies. Red One complains that the agency unreasonably evaluated its proposal as unacceptable.

We deny the protest.

BACKGROUND

The agency issued the solicitation on April 8, 2019, for orthotic soft goods and prosthetic supplies. RFP at 7. The solicitation contemplated the award of multiple fixed-priced, indefinite-delivery, indefinite-quantity contracts with a 1-year base period and four 1-year option periods. *Id.* at 8. The maximum order amount, to be shared among all awarded contracts, is \$200 million. RFP amend. 04 at 4. The solicitation included 44 line items, each of which would be independently evaluated and awarded. RFP at 8-9. Offerors were permitted to submit a proposal for one or more line items. *Id.* at 113. As relevant here, line items 29, 30, and 31, which were set aside for SDVOSBs, were for compression stockings. *Id.* at 8.

The solicitation included minimum technical requirements that each requested item was required to meet. *Id.* at 67-98. Offerors were required to submit documentation and/or descriptive literature to demonstrate that the items they were offering met the minimum technical requirements. *Id.* at 107-109. The solicitation advised offerors that the agency would first evaluate, on an acceptable/unacceptable basis, the documentation and descriptive literature submitted to determine that the offered item meets the minimum technical requirements. *Id.* at 113. Items that were evaluated as unacceptable would not be further considered. *Id.* If the proposed items were evaluated as acceptable, the proposal would be evaluated under the following factors: technical, past performance, and price. *Id.* Contracts would be awarded for each line item to the responsible offeror that submitted the lowest price for the item. *Id.*

The solicitation required that the compression stockings for line items 29, 30, and 31 have an ankle measurement range of 7 to 14 inches. RFP amend. 8 at 6-7. In response to these line items, Red One proposed to provide compression stockings with a minimum ankle circumference of 7 inches and a maximum circumference of 13.75 inches. Red One Technical Proposal Volume 2 at 9-12. The VA concluded that Red One's proposed items did not meet the minimum technical requirements and eliminated Red One's proposal following the preliminary evaluation. Agency Reply, Sept. 16, 2020, Exh. 5, Phase One Product Evaluation. After a debriefing, Red One filed this protest with our Office.

DISCUSSION

Red One protests that the agency unreasonably rejected its proposal for line items 29, 30, and 31. First, Red One questions whether the agency actually rejected the items for failing to meet the ankle circumference requirement. Resp. to Req. for Dismissal at 3-6. In this regard, Red One notes that during its debriefing it was told that its proposal for line items 29, 30, and 31 was rejected because it failed to meet a different minimum technical requirement--the length-to-knee requirement.¹ *Id.* at 4. Second, Red One

¹ At its debriefing, Red One was told that its proposal was rejected for line items 29 and 30 because the offered compression stockings did not meet the requirement (15-18 inches) for length. Protest at 18. The agency did not provide any information with respect to item 31. *Id.* In its request for dismissal, the agency acknowledged that this information was incorrect. Req. for Dismissal at 10.

In its initial protest, Red One asserted that if its offered compression stocking did not meet the length requirement then neither did Pisces's stocking, and that the compression stockings offered by Pisces did not come in white, as required by the solicitation. Protest at 24-30. In its request for dismissal, the agency provided relevant excerpts from Pisces's technical proposal which demonstrated that the items proposed by Pisces met the length requirement, and were available in white. Req. for Dismissal at 6-9. Red One did not substantively respond to the agency's position but instead argued that the awardee's manufacturer lacks Food and Drug Administration (FDA) clearance to manufacture, repackage, or re-label any of the hosiery procured under line

complains that the evaluation documents show that two of four evaluators found that its proposed items did not meet the ankle circumference requirement, but that one evaluator found the item unacceptable for failing to meet size requirements, without specifying which requirement. Protester's Resp. to GAO's Req. for Additional Information, Sept. 17, 2020, at 2 (*citing* Agency Resp. to Protester, Sept. 16, 2020, Exh. 1, Technical Evaluation Worksheets for Line Item 29; Exh. 2, Technical Evaluation Worksheets for Line Item 30; Exh. 3, Technical Evaluation Worksheets for Line Item 31). Red One also notes that one evaluator determined that its offered items were acceptable. *Id.* Red One further notes that the consensus evaluation report does not specify which size requirement Red One's items failed to meet. *Id.* (*citing* Agency Resp. to Protester, Sept. 16, 2020, Exh. 4, Technical Evaluation Consensus Report; Exh. 5, Phase One Product Evaluation). Finally, while Red One acknowledges that the maximum ankle circumference on its offered compression stockings was 13.75 inches, it contends that its stocking complies with industry standard which allows a deviation of +/- 0.25 inches. Resp. to Req. for Dismissal at 6-7. In other words, the protester argues "that a compression stocking such as those proposed by Red One for [line items] 29, 30, and 31, listed at an ankle measurement range of 7-13.75 inches will, in fact, accommodate an ankle measuring 14 [inches]." *Id.* at 6.

We have considered all of Red One's arguments and find that none provides a basis for sustaining the protest. We discuss several arguments below.

In reviewing protests challenging the rejection of a proposal for consideration for award, it is not our role to reevaluate proposals; rather our Office examines the record to determine whether the agency's judgment was reasonable and in accordance with the solicitation criteria and applicable procurement statutes and regulations. *Wolverine Servs. LLC*, B-409906.3, B-409906.5, Oct. 14, 2014, 2014 CPD ¶ 325 at 3. In a negotiated procurement, a proposal that fails to conform to the material terms and conditions of the solicitation is considered unacceptable and may not form the basis for award. *Id.* at 3-4.

The VA's mistake in telling Red One during its debriefing that its proposed items failed to meet the knee length requirement does not prohibit the agency from rejecting Red One's proposal. An agency may properly reject a proposal where it has a valid reason for doing so even if the agency initially advised the protester of the wrong reason its proposal was rejected. See *Innovative Refrigeration Concepts*, B-253983, Oct. 26, 1993, 93-2 CPD ¶ 260 at 3. Red One does not dispute that the compression items it offered have a maximum ankle circumference of 13.75 inches, which is less than the maximum 14 inches specified in the solicitation. Accordingly, the agency properly rejected the proposal. The fact that the items may be acceptable under industry

items 29, 30, and 31. Resp. to Req. for Dismissal at 7-8. Accordingly, we consider these issues abandoned. See *Jacobs Tech, Inc.*, B-413389, B-413389.2, Oct. 18, 2016, 2016 CPD ¶ 312 at 5. We later address Red One's argument regarding FDA clearance in the decision.

standards does not make them acceptable under a mandatory solicitation requirement that they do not meet.

On September 15, in its response to the agency's request to dismiss the protest, Red One for the first time asserted that the awardee, Pisces, is not authorized to provide the products it offered for line items 29, 30, and 31. Red One argues that the products offered by Pisces, which are manufactured by Ames Walker Brand, are not listed by the FDA as medical support stockings which prevent pooling of blood in legs. Resp. to Req. for Dismissal at 8. This basis of protest is untimely. Under our bid protest regulations, to be timely a protest not based on a solicitation impropriety must be filed within 10 days after the protester knows, or should know the basis for protest. 4 C.F.R. § 21.2(a)(2). Red One knew the items that Pisces was offering on August 14, when the agency notified the protester of the awarded model numbers and that Pisces's manufacturer for line items 29, 30, and 31 was Ames Walker Brand. Protest at 19. Red One's challenge filed on September 15, more than 10 days later, is untimely.

Similarly, Red One's supplemental protest filed on September 25 that the items Pisces proposed under line items 29, 30, and 31 did not meet the requirements for calf circumference is untimely. See Supp. Protest at 4-6. Red One knew this basis of protest no later than August 14, when the agency notified the protester of the awarded model numbers and that Pisces's manufacturer for line items 29, 30, and 31 was Ames Walker Brand. Protest at 19. Accordingly, we dismiss these allegations.

The protest is denied

Thomas H. Armstrong
General Counsel