



Decision

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Matter of: PDS Consultants, Inc.

File: B-419300

Date: December 16, 2020

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

DIGEST

1. Protest that the agency failed to reasonably evaluate whether the awardee would be able to meet staffing levels or optician certifications is dismissed as legally and factually insufficient where the protester’s allegations, even if unrebutted, fail to establish a violation of law by the agency because the solicitation did not provide for evaluation of staffing levels or optician certifications.
 2. Protest challenging contracting officer’s affirmative determination of responsibility for the awardee is dismissed where the assertion on which the protest is based does not constitute the type of allegation that triggers a review under our Bid Protest Regulations.
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DECISION

PDS Consultants, Inc., a service-disabled veteran-owned small business (SDVOSB) of Sparta, New Jersey, protests the award of a contract to Superior Optical Lab, Inc., an SDVOSB of Ocean Springs, Mississippi, under request for proposals (RFP) No. 36C24820R0087, issued by the Department of Veterans Affairs (VA), for prescription eyeglasses and optician services. The protester argues that the agency unreasonably evaluated the awardee’s technical proposal and challenges the agency’s responsibility determination.

We dismiss the protest.

BACKGROUND

On August 24, 2020, the VA issued the RFP, as a set-aside for SDVOSBs, for prescription eyeglasses and optician services for the VA's Veterans Integrated Service Network (VISN) 8 medical centers and care sites located in and around Orlando, Tampa, and Bay Pines, Florida. Req. for Dismissal at 1-2. The solicitation contemplated award of a fixed-price indefinite-delivery, indefinite-quantity contract for a term not to exceed 12 months. Protest, exh. 3, RFP at 5.

The RFP anticipated award to the offeror submitting the lowest-priced, technically acceptable (LPTA) proposal. RFP at 68. The solicitation provided for evaluation under two factors: proposed frame mix and price. *Id.* at 67-68. To be found technically acceptable, the solicitation provided that an offeror must submit with its proposal samples of all 116 of the frames listed in the solicitation. *Id.* at 68-69. With regard to price, the solicitation's instructions advised offerors to submit "all-inclusive prices" which "shall include all work and optician staffing to successful[ly] perform the requirements of the [statement of need] SON." *Id.* at 67. The RFP provided that the agency would evaluate price based on reasonableness. *Id.* at 69. The solicitation also provided that past performance was not an evaluation factor, but instead would be reviewed as part of the contracting officer's responsibility determination prior to contract award in accordance with Federal Acquisition Regulation (FAR) 9.104-1. *Id.* at 70.

The agency received seven proposals, including proposals from Superior and PDS, by the RFP closing date. Req. for Dismissal at 3; Protest, exh. 1, Unsuccessful Offeror Letter, at 1. After evaluating proposals, the agency identified the proposal submitted by Superior in the amount of \$2,443,048, as the lowest-priced, technically acceptable offer. *Id.* at 3; Req. for Dismissal, exh. 1, Contracting Officer Statement (COS) at 1. The contracting officer then determined that Superior was responsible based on the general standards of responsibility described in FAR 9.104-1, including a determination that Superior had a satisfactory performance record in accordance with FAR 9.104-1(c). *Id.*

On October 1, 2020, the agency notified PDS that Superior's proposal had been selected for award. Protest, exh. 1, Unsuccessful Offeror Letter, at 1. After receiving a debriefing, the protester filed this timely protest with our Office.

DISCUSSION

PDS challenges the technical evaluation, arguing that the agency "failed to recognize that Superior would be unable to meet the required staffing levels with the required certification" at Superior's low proposed price. Protest at 7. The protester also asserts that the awardee's low proposed price suggests there were latent ambiguities in the solicitation that prevented PDS and the awardee from competing on an equal basis. Protest at 9. PDS also argues that the agency's responsibility determination was unreasonable because it failed to consider "Superior's record of poor performance" in VISN 8. Protest at 9.

The agency and intervenor ask our Office to dismiss all three protest grounds, maintaining that they are legally insufficient, *i.e.*, fail to state a valid basis of protest; untimely; speculative; and/or involve a dispute that is not within the bid protest jurisdiction of our Office. Req. for Dismissal at 4-11; Intervenor Req. for Dismissal at 1-9. On this record, we agree and dismiss the protest grounds as discussed below.

PDS first argues that the technical evaluation was unreasonable because the agency failed to consider that Superior's proposal "took exception to the Solicitation's actual technical requirements." Resp. to Req. for Dismissal at 2. The protester maintains the awardee's low pricing evidences either that Superior intends to hire unlicensed opticians contrary to the requirements of the solicitation, or that Superior took exception to the solicitation requirement to provide licensed opticians. *Id.* The VA argues that the RFP's evaluation methodology for technical acceptability did not provide for the evaluation of staffing levels or assessing optician licensing, and therefore, this protest ground, even if true, fails to make the threshold showing that the VA failed to conduct an evaluation as required by the solicitation.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1934, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Techs., 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.

We conclude that PDS's protest, as filed, does not establish a valid basis for challenging the agency's actions. The protester argues that the agency's evaluation was improper because it failed to assess optician licensing and staffing level as part of the technical acceptability evaluation. As noted above, the solicitation provided that proposals would be evaluated for technical acceptability based on a single non-price evaluation factor--proposed frame mix. To be found technically acceptable, the RFP required that an offeror submit with its proposal 116 sample frames identified in the solicitation.¹ See RFP at 68-69. The RFP did not require consideration of optician licensing or staffing level for a determination of technical acceptability. *Id.* As such, the protester's argument that the VA failed to adequately evaluate the awardee's optician

¹ The sample frames listed included, for example: minimum of 40 men's frames, minimum of 40 women's frames, minimum of 20 unisex frames, minimum of 5 large frame sizes for men's frames (size 54 to 60), minimum of 3 frames with short bow lengths for men's frames (size 125 to 130), and minimum of 8 women's metal frames with hinges and adjustable nosepieces. RFP at 68-69.

licensing and staffing level fails to reasonably establish that a violation of statute or regulation has occurred.² Accordingly, this protest ground is dismissed.³

We also dismiss PDS's allegation that the awardee's low proposed price suggests there were latent ambiguities in the solicitation that prevented PDS and the awardee from competing on an equal basis. Protest at 9-11. PDS points to the awardee's lower proposed price and claims that, a different interpretation by the awardee of certain provisions regarding staffing levels "may have contributed to" the awardee "understaffing in its proposal with unlicensed opticians." Protest at 9-10. Other than pointing to the awardee's lower proposed price, however, the protester's allegation is based entirely on unsupported speculation that the awardee may have interpreted the solicitation differently than PDS. As noted more fully above, a protest that does not include allegations or evidence sufficient to establish the likelihood that the protester will prevail in its claim of improper agency action, fails to state a valid basis of protest and will be dismissed. *Kodiak Base Operations Servs., LLC, B-414966 et al.*, Oct. 20, 2017, 2017 CPD ¶ 323 at 3; 4 C.F.R. § 21.5(f).

Finally, the protester challenges the contracting officer's affirmative determination of responsibility for the awardee. The protester argues that Superior has a "record of poor performance" in VISN 8 that the contracting officer failed to consider in his responsibility determination, which should have raised serious concerns. For example, according to the protester, the affirmative responsibility determination was flawed because the contracting officer failed to consider that Superior "actively work[ed] against PDS's

² The agency and intervenor also both request dismissal of this protest ground--that Superior's proposed price is too low for the awardee to perform the requirement--arguing that, because the RFP contemplated award of a fixed-price contract, the agency was not required to evaluate whether proposed prices were too low. We agree. When awarding a fixed-price contract, an agency is only required to determine whether the offered prices are fair and reasonable. FAR 15.402(a); *Per Aarsleff A/S et al.*, B-410782 *et al.*, Feb. 18, 2015, 2015 CPD ¶ 86 at 17. Arguments that the agency did not perform an appropriate analysis to determine whether prices are too low, such that there may be a risk of poor performance, concern price realism not price reasonableness; price realism is not required to be evaluated by the agency unless the solicitation provides for such an analysis. *SDV Solutions, Inc.*, B-402309, Feb. 1, 2010, 2010 CPD ¶ 48 at 4. Here, there is no dispute that the RFP did not require a price realism analysis. Thus, to the extent that the protester asserts that the agency failed to consider whether the awardee's price was too low, this allegation fails to state a basis of protest. As such, this protest ground is also dismissed on this basis.

³ To the extent the protester contends the solicitation was flawed because it did not require the agency to consider optician licensing and staffing level in its technical evaluation, this argument is untimely. 4 C.F.R. § 21.2(a)(1) (arguments challenging terms of the solicitation must be filed prior to the closing date for the submission of proposals to be considered timely).

ability to transition a VA contract from Superior to PDS,” which the protester asserts, “negatively impacted PDS’s ability to perform the follow-on contract.” Protest at 9.

Our Office generally will not consider a protest challenging the agency’s affirmative determination of an offeror’s responsibility. 4 C.F.R. § 21.5(c). We will only decide a protest challenging an agency’s affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. We have further explained that the information in question must concern very serious matters, for example, potential criminal activity or massive public scandal. *IBM Corp.*, B-415798.2, Feb. 14, 2019, 2019 CPD ¶ 82 at 10-11.

We conclude that the protester has failed to present such allegations here. As noted above, the contracting officer determined that Superior was responsible based on the general standards of responsibility described in FAR 9.104-1, including a determination that Superior had a satisfactory performance record in accordance with FAR 9.104-1(c). COS at 1. Based on this record, the protester’s assertions regarding the awardee’s prior performance are not sufficient, without more, to rise to the level needed to trigger a review by our Office. Accordingly, we conclude that the information cited by the protester does not meet our threshold for review of affirmative responsibility determinations, and this protest ground is therefore dismissed as well.

The protest is dismissed.

Thomas H. Armstrong
General Counsel