



## Decision

**Matter of:** Affirmative Solutions, LLC

**File:** B-402996

**Date:** September 8, 2010

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David S. Black, Esq., and Gregory R. Hallmark, Esq., Holland & Knight LLP, for the protester.

Melbourne A. Noel, Jr., Esq., Vanessa Calabrese, Esq., and Phillipa L. Anderson, Esq., Department of Veterans Affairs; and Thedlus L. Thompson, Esq., Michael D. Tully, Esq., and Nathan C. Guerrero, Esq., General Services Administration, for the agencies.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Agency request for manufacturer's commercial sales practice data from an offeror, which is an exclusive distributor/wholesaler for the manufacturer, to assist the contracting officer in making a price reasonableness determination as a prerequisite to making award of a Federal Supply Schedule contract for medical items, was proper where the offeror's sales to the general public were reasonably considered to be not significant.

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### DECISION

Affirmative Solutions, LLC of Atlanta, Georgia, protests the evaluation of its offer submitted in response to request for proposals (RFP) No. RFP-797-FSS-99-0025-R6, issued by the Department of Veterans Affairs (VA) for multiple-award Federal Supply Schedule (FSS) contracts to provide medical equipment and supplies.

We deny the protest.

### BACKGROUND

The General Services Administration (GSA) is normally responsible for FSS procurements, but it has delegated to the VA the authority for the procurement of items that come within FSS Group 65-II, Medical Equipment and Supplies, such as those being procured here. In this instance, the VA has issued a standing RFP, which

solicits offers from prospective firms on an open and continuous basis, for FSS contracts for FSS Group 65-II. The RFP contemplated the award of 5-year, fixed-price indefinite-delivery, indefinite-quantity contracts, with an economic price adjustment, under the GSA's FSS program.

Affirmative submitted an offer on October 12, 2009, as an exclusive distributor/wholesaler for the VA and the Department of Defense for products manufactured by Medtronic, Inc. Affirmative's offer was for 31,992 Medtronic items, largely spinal implant products as well as some surgical instruments.<sup>1</sup>

The FSS program gives federal agencies a simplified process for obtaining commonly used commercial supplies and services. Federal Acquisition Regulation (FAR) § 8.401(a). The procedures established for the FSS program satisfy the requirements for full and open competition. 10 U.S.C. § 2302(2)(c) (2006); Sales Res. Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 3. Before awarding any multiple-award FSS contract, the contracting officer must determine whether offered prices are fair and reasonable. 48 C.F.R. § 538.271(b) (2009).

The RFP included the GSA's standard Commercial Sales Practices Format for FSS contract awards, which offerors were required to complete as part of their proposals. The basic goal of the Commercial Sales Practices Format is to obtain appropriate and sufficient data, so that the contracting officer can perform a price analysis, determine price reasonableness, and develop objectives for negotiations. The Commercial Sales Practices Format requires offerors to "[p]rovide [for the previous year] the dollar value of sales to the general public at or based on an established catalog or market price." 48 C.F.R. § 515.408(b)(1). It also requires offerors to show the "total projected annual sales to the Government under this contract for the contract term, excluding options, for each SIN [Special Item Number] offered." 48 C.F.R. § 515.408(b)(2). Offerors were asked by the Commercial Sales Practices Format to provide information regarding their written discounting policies and to respond "yes" or "no" to the following question:

[A]re the discounts and any concessions which you offer the Government equal to or better than your best price (discount and concessions in any combination) offered to any customer acquiring the same items regardless of quantity or terms and conditions?

48 C.F.R. § 515.408(b)(2). The Commercial Sales Practices Format provides the following chart for offerors to complete for each SIN:

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<sup>1</sup> Medtronic does not currently have an FSS contract that includes the items offered in Affirmative's proposal.

Column 1 Customer	Column 2 Discount	Column 3 Quantity/Volume	Column 4 FOB Team	Column 5 Concessions

48 C.F.R. § 515.408(b)(4)(a). The instructions for this chart state:

Column 1-Identify the Applicable Customer or Category of Customer

A ‘customer’ is any entity, except the Federal Government, which acquires supplies or services from the Offeror. The term customer includes, but is not limited to original equipment manufacturers, value added resellers, state and local Governments, distributors, educational institutions (an elementary, junior high, or degree granting school which maintains a regular faculty and established curriculum and an organized body of students), dealers, national accounts, and end users.

48 C.F.R. § 515.408(c). Offerors are also informed that, if they are a dealer or reseller “without significant sales to the general public,” then the same information required by the Commercial Sales Practices Format would be required to be submitted for the manufacturers, “if the manufacturer’s sales under any resulting contract are expected to exceed \$500,000.” 48 C.F.R. § 515.408(b)(5). “Th[is] information is required in order to enable the Government to make a determination that the offered price is fair and reasonable.” *Id.* The RFP finally advised that offerors may be required to provide additional supporting information requested by the contracting officer, but only “to the extent necessary to determine whether the price(s) offered is fair and reasonable.” 48 C.F.R. § 515.408(a)(3).

The contracting officer reviewed Affirmative’s offer as well as the other information requested and submitted. She determined that the “commercial sales” identified by Affirmative were insignificant based on the following:

Commercial sales to only two commercial customers who are not representative of national accounts such as GPOs [Group Purchasing Organizations], state and local government, etc., are considered insignificant when compared to the Government’s purchasing requirements for spinal related implants. Affirmative’s sales totaling \$3.6 million to two commercial customers compared to sales to the government of \$29.6 million is also considered insignificant. Further, two customers with \$3.6 million in sales is very insignificant and not representative of Medtronic’s [fiscal year] 2009 sales from its spinal business of \$3.4 billion.

Contracting Officer Statement at 3. Consequently, the contracting officer determined that in view of the significant purchases that could be made under this contract, “documented evidence of Medtronic’s commercial sales practices” was needed to ensure a “solid basis for award and a sound determination of price reasonableness.”<sup>2</sup> Id.

On May 12, the contracting officer advised Affirmative that its commercial sales, totaling approximately \$3.6 million to two commercial customers, were considered “insignificant compared to [its] previous 12-month government sales history.” The contracting officer therefore requested commercial sales practice data of Medtronic, including its commercial price list, a copy of Affirmative’s distribution agreement with Medtronic, and a request that Medtronic provide the same information required of other offerors under the Commercial Sales Practices Format. Agency Report, Tab 12, Email from Contracting Officer to Affirmative (May 20, 2010).

On May 21, Affirmative informed the contracting officer that the manufacturer’s commercial sales practice data would not be provided because Medtronic “is unwilling to provide this proprietary information.” Protest at 2. In response, on that same date, the VA advised Affirmative that it would “reject” Affirmative’s offer if it did not provide the requested manufacturer information. Protest at 3; Protester’s Comments at 3. This protest followed.

## ANALYSIS

Affirmative argues that the agency improperly concluded that Affirmative lacked “significant sales to the general public,” and that the agency’s request for data about the commercial sales of the manufacturer was unreasonable. In this regard, the protester first contends that the VA was required to consider sales of commercial items to both Government and non-Government customers as a reseller’s “sales to the general public” in determining whether these sales were “significant” under 48 C.F.R. § 515.408(b)(5), which Affirmative claims GSA does in making awards under other FSS contracts. We disagree.

As noted above, the Commercial Sales Practices Format included in the solicitation is GSA’s mechanism for evaluating whether FSS vendors are offering fair and reasonable commercial item prices. As quoted above, the instructions for the Commercial Sales Practices Format expressly provide that sales to the Federal

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<sup>2</sup> The contracting officer also noted that while Affirmative positively responded to the question as to whether the discounts that Affirmative offered to the Government were equal or better than its best price offered to any customer for the same items, the information submitted reflected that Affirmative had provided discounts to the hospitals that it had not provided the Government. Contracting Officer’s Supp. Statement at 2.

Government are not counted in determining commercial sales to the general public. While the protester has provided evidence that the GSA has previously considered Federal Government sales in determining whether offered prices were reasonable in awarding other FSS contracts, we solicited the views of the GSA, which advised that “the Commercial Sales Practices Format requires offerors for FSS contracts to provide sales information for non-government customers, and specifically prohibits such sales information for sales to federal government customers.” GSA Report at 7. We find that the VA reasonably decided not to consider Affirmative’s sales to the Federal Government in determining whether or not it had significant levels of commercial sales to the general public under 48 C.F.R. § 515.408(b)(5).

Affirmative next argues that even if the contracting officer only considered Affirmative’s \$3.6 million in sales to two non-government hospitals, that amount, by itself, should have been considered significant. According to the protester, the GSA has regularly concluded under 48 C.F.R. § 515.408(b) that a reseller’s sales of \$3 million or less in commercial items constitutes “significant” sales to the public.

In response, the contracting officer stated:

In a vacuum, disclosed commercial sales of \$3,650,471 for a Small Disadvantaged Veteran Owned Small Business who provides no value added services, such as Affirmative, might be considered to be significant. However, other factors became relevant as the potential FSS contract valuation escalated well beyond the Offeror’s estimation and, consequently, Affirmative’s commercial sales were assessed by the [contracting officer] to be insignificant. Such factors include 1) reported annual federal Government open market purchases of \$29.6 million are much higher than commercial sales of \$3.6 million; 2) commercial sales of \$3.6 million to two private facilities are vastly insignificant when compared to Medtronic’s [fiscal year] 2009 sales of \$3.4 billion for the spinal product line being offered, and 3) terms afforded to two “Medical Centers” are typically not representative of the terms provided to the largest customers (such as GPOs and national accounts) in a sales base of \$3.4 billion.

Contracting Officer’s Supp. Statement at 2.

The GSA states that it has provided no specific guidance to contracting officers about whether disclosed public sales are significant, to assist them in determining whether to request manufacturer data to ascertain whether the prices are fair and reasonable. The GSA states such contracting officer determinations are discretionary, taking into account information available through contractor disclosures and market research. Agency Report, Tab 18, Declaration of GSA Representative (July 7, 2010), at 4.

We agree that a determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer; therefore, we will question such a determination only where it is clearly unreasonable or there is a showing of bad faith or fraud. Concepts Bldg. Sys., Inc., B-281995, May 13, 1999, 99-1 CPD ¶ 95 at 5. A contracting agency may reasonably conclude that offered prices are unreasonable under a multiple-award FSS procurement where the vendor provides insufficient data to support the allowance of such costs. American Seating Co., B-230171.36, Aug. 31, 1989, 89-2 CPD ¶ 195 at 5-6.

Based on our review, we find that the VA, in exercising its business judgment, reasonably determined that Affirmative's sales to the general public were not significant.<sup>3</sup> Specifically, it was reasonable to consider the relatively small amount of these two commercial sales to individual hospitals compared to the \$3.6 billion in total sales of these products by the manufacturer. See 48 C.F.R. § 538.270(c) (agency should consider such factors in determining Government's price negotiation objectives). In the VA's view, volume sales to entities such as national accounts would be far more relevant than Affirmative's limited commercial sales to two hospitals in assessing whether prices are fair and reasonable. See Contracting Officer's Supp. Statement at 1. Moreover, the contracting officer explains that because Affirmative reports insignificant sales to the general public, she was unable to determine if the prices offered are based on the manufacturer's commercial list price, a manufacturer's suggested retail price, or some other discounted starting point established by Affirmative as a dealer/reseller. Id. at 3. In sum, we think that the VA could reasonably determine that manufacturer information was required to

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<sup>3</sup> As noted by the GSA in response to the protester's assertion, the fact that an offeror is a small business does not mean that there should be some lesser standard in determining whether the offered prices are fair and reasonable.

determine whether the offered prices were fair and reasonable because the public sales were not considered significant under the circumstances.<sup>4</sup>

The protest is denied.

Lynn H. Gibson  
Acting General Counsel

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<sup>4</sup> We also note that GSA regulations provide for contracting officers to ask for additional information in order to determine if an offered price is fair and reasonable when “deviations from [the] written policies or standard commercial sales practices disclosed in the chart on the [vendor’s] Commercial Sales Practices Format are so significant and/or frequent that the Contracting Officer cannot establish whether the price(s) offered is fair and reasonable.” 48 C.F.R. § 515.408(c). The discrepancies in Affirmative’s responses regarding whether the government would receive the same discounts as Affirmative’s commercial customers seem to fall within this guidance.