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Decision

Matter of: Omnicell, Inc.

File: B-414021; B-414021.2

Date: January 23, 2017

James S. Phillips, Esq., James S. DeSordo, Esq., and Julie M. Nichols, Esq., Argus Legal, PLLC, for the protester.

William A. Shook, Esq., for CareFusion Solutions, LLC, the intervenor.

Randy W. Stone, Esq., M. Aaron Lee, Esq., and David R. Smith, Esq., Defense Health Agency, for the agency.

Gabriel D. Soll, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's quotation included conditional language that violated the solicitation's requirement for fixed prices is denied where the protested language does not make the awardee's pricing conditional.
 2. Protest that awardee's quotation is based on unbalanced pricing is denied where the protester has not made the threshold showing that one or more of the quotation's prices was over or understated.
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DECISION

Omnicell, Inc., of Mountain View, California, protests the establishment of a blanket purchase agreement (BPA) with CareFusion Solutions, LLC, of San Diego, California, under request for quotations (RFQ) No. HT0011-16-R-0021, issued by the Defense Health Agency (DHA) for automated pharmacy dispensing cabinets and related services for use across the military health system. Omnicell challenges the agency's evaluation of CareFusion's quotation under both the price and technical factors.

We deny the protest.

BACKGROUND

The RFQ was issued on August 15, 2016, seeking to establish a single fixed-price BPA with a vendor holding a General Services Administration (GSA) Federal Supply Schedule (FSS) contract under schedule 65, for medical equipment and supplies. RFQ at 16. The solicitation sought quotations to provide a sophisticated pharmaceutical dispensing cabinet system, referred to as the Pharmacy Inpatient Automation Solution--Automated Dispensing Cabinets (PIAS-ADC), and related services. RFQ at 13. The RFQ included a performance work statement (PWS) that described 45 functional requirements as well as the additional features, services, training, and testing requirements for the PIAS-ADC system. Id. at 71-78. The RFQ stated that the BPA was to be established based on the lowest-priced, technically acceptable (LPTA) quotation. Agency Report (AR), Tab 18, RFQ, Amend. 5, at 51-52.

Quotations were initially due on September 6, 2016. Memorandum of Law (MOL), at 2. However, following a protest challenging the basis on which prices would be evaluated under that RFQ, the agency announced that it would amend the solicitation to address the pricing issue and permit vendors to submit revised quotations. Id. Since this corrective action rendered the protest academic, our Office dismissed it. CareFusion Solutions, LLC, B-413679, Sept. 13, 2015 (unpublished decision).

On September 16, the agency issued amendment 5, which retained the general requirements for the PIAS-ADC from the initial procurement, but added supplemental pricing instructions. AR Tab 18, RFQ, Amend. 5, at 49. The RFQ, as amended, included pricing instructions for what the agency identified as a "first call." In this case, the first call is analogous to a sample task order for work that could be required under the BPA.¹ An attachment to the PWS relating to the first call identified the pharmaceutical dispensing equipment in use at 25 military health system facilities, and sought prices for a full replacement and baseline deployment of the identified equipment during the base year of the BPA. Id. at 49; AR, Tab 23, PWS Exhibit 2, First Call List. The amended RFQ advised that quotations would be evaluated for award purposes based on the total price proposed for the first call, including all option periods. RFQ, Amend. 5, at 51-52.

The agency responded to several questions from prospective vendors regarding the requirements and pricing for both the BPA and the first call. AR, Tab 20, RFQ, Amend. 7, at 3-4. Regarding whether a "full replacement [was] required to replace all equipment in all sites," DHA responded that vendors were to propose "an

¹ The contracting officer states that the agency's intent with regard to this first call was to ensure that vendors were competing equally by having vendors propose to provide identified replacement systems for 25 facilities. MOL at 3.

approach that meets the PWS requirements,” but did not specify the approach. Id. at 3. Vendors were advised that the pricing sheet was not broken out by military treatment facility, but instead by product description, or equipment that might be ordered by the agency. Supp. MOL, at 2. The agency further clarified that the first call pricing was for evaluation purposes only, and that it intended to use the fixed pricing from the successful vendor’s pricing sheets to place orders for the life of the BPA in any additional sites. Id. at 3-4.

The RFQ described a price evaluation process by which DHA would calculate the price of the first call based on vendors’ unit prices for the equipment identified, and on the specific quantities proposed. The agency planned to then rank quotations in order of the calculated total prices. AR Tab 18, RFQ, Amend. 5, at 51. The RFQ also stated that the price evaluation would consider whether a quotation was unbalanced.² Id. at 52. The lowest-priced quotation would then be evaluated for technical acceptability.³ Id. If the quotation was found technically acceptable, the BPA would be established without technically evaluating higher-priced quotations. Id.

DHA received quotations only from Omnicell and CareFusion by the September 24 due date. MOL, Attach. 1, Contracting Officer’s Statement of Facts (SOF), at 1. CareFusion’s quotation offered a [DELETED] percent discount from its established FSS prices and took no exception to the RFQ’s terms. AR, Tab 8, CareFusion Quotation, at 12, 15, 22. As required by the RFQ, CareFusion’s quotation included a price list into which it had inserted fixed prices, applying the discount from its FSS schedule contract. Id. at 146-161. It also submitted the supplemental pricing sheets, providing a breakdown of all equipment, with pricing, to meet the PWS requirements for the sample first call. AR, Tab 12, CareFusion Supp. Pricing Sheet. Of relevance to this protest, CareFusion’s quotation included the following sentence: “Final equipment configurations and pricing cannot be determined until walkthroughs of each site are completed.” AR, Tab 8, CareFusion Quotation, at 146-161.

² Unbalanced pricing was defined in the RFQ as occurring when, “despite an acceptable total evaluated price, the price of one or more contract line items including the [b]asic ordering period and out-year ordering periods, is significantly overstated, or understated.” AR Tab 18, RFQ, Amend. 5, at 52. The RFQ warned that pricing found to be unbalanced may be rejected if the government determines the lack of balance to pose an unnecessary risk. Id.

³ Technical acceptability was to be determined by an evaluation of the vendor’s approach to meeting the requirements of the first call, as well as the vendor’s plans for transition of equipment, management, and quality control. Id. at 53.

After evaluating the vendors' quotations for the first call, DHA concluded that CareFusion's quotation offered the lowest price. In accordance with the RFQ's source selection process, the agency then evaluated CareFusion's quotation for technical acceptability, and determined that it represented the lowest-priced, technically acceptable quotation. The agency established the BPA with CareFusion on September 30. MOL, at 4. Omnicell received a debriefing on October 12, and filed this protest on October 14.

DISCUSSION

Omnicell protests several aspects of DHA's evaluation of CareFusion's quotation. The protester alleges, for example, that the agency improperly accepted conditional pricing from CareFusion, rather than the fixed prices required by the solicitation. Protester's Comments and Supplemental Protest at 12-19. Omnicell also alleges that the agency failed to analyze CareFusion's proposed pricing for unbalancing; improperly found the awardee's quotation technically acceptable; evaluated the quotations unequally; and provided vendors unequal access to information. Protest at 19-25; 30-32. We have reviewed each of Omnicell's arguments in the context of the record, and discuss its primary arguments below. Although we do not address every argument raised, we conclude from our review that none provides a basis to sustain the protest.

Omnicell protests that CareFusion's quotation conditioned its price, and was therefore unacceptable. Comments and Supplemental Protest, at 12-19. Omnicell's allegation is based on the statement in CareFusion's quotation that "[f]inal equipment configuration and pricing cannot be determined until walk-throughs of each site are completed." *Id.* at 15-16. The agency disagrees and contends that CareFusion's quotation provides fixed unit prices, consistent with the RFQ's instructions. Supp. MOL at 2-6.

Generally, the requirement to propose fixed prices is a material term or condition of a solicitation requiring such pricing. See Dev Technology Grp., B-412163, B-412163.5, Jan. 4, 2016, 2016 CPD ¶ 10 at 5; citing Advanced Techs. & Labs. Int'l., Inc., B-411658 et al., Sept. 21, 2015, 2015 CPD ¶ 301 at 10. Where a solicitation requests offers on a fixed-price basis, an offer that is conditional cannot be accepted for award. *Id.* However, proposal language that does not cast doubt on the firmness or enforceability of proposed prices can be accepted. See Innovative Management & Technology Approaches, Inc., B-413084, B-413084.2, Aug. 10, 2016, 2016 CPD ¶ 217 at 12.

Here, we do not find the agency's acceptance of CareFusion's quotation improper. The statement in CareFusion's quotation does not address the pricing of individual elements to be installed at the military health facilities; these are determined by the unit prices submitted on CareFusion's pricing sheet. See AR, Tab 9, CareFusion Pricing Sheet. Rather, the effect of the quoted statement is to acknowledge that the

equipment and total price of an order is based on the configuration of equipment in the call, and to inform the agency that other configurations may be required based on the conditions found at the sites, and may result in different final prices. We do not read the statement to mean that CareFusion is taking exception to a requirement of the solicitation but rather to acknowledge that final pricing will be based on the configuration of equipment ultimately ordered.⁴ As a result, we conclude that the protester has not shown that the awardee's quotation included language that establishes that the awardee's price was conditional in any meaningful way, and deny this basis for protest.

To the extent Omnicell argues that CareFusion did not submit fixed prices, DHA disagrees. Supp. MOL, at 2. The agency notes, in this regard, that CareFusion included the per-item pricing sheets required by the solicitation; offered a fixed discount from its FSS contract's prices in several places in its quotation; and included affirmative statements regarding its intention that its prices were fixed.⁵ Id. at 3-4; see AR, Tab 8, CareFusion Quotation, at 12, 15, 22.

Here, too, we find that CareFusion's quotation did not create any meaningful doubt about the firmness or enforceability of the prices offered.⁶

⁴ For the record, we note that Omnicell's own quotation included language that similarly recognizes the difference between the equipment and fixed prices submitted in the first call price sheet, and the actual orders that might be placed later. In a section titled "Omnicell Legal Notices," the protester's quotation states,

[a]s Omnicell receives additional technical information regarding your site(s), the RFQ responses are subject to modification by us. Such modifications may result in an increase in Omnicell's pricing proposal"

AR, Tab 4, Omnicell Quotation, at 81. Remarkably, notwithstanding the similarity between the "conditional pricing" alleged in the awardee's quotation and the above language in Omnicell's quotation, Omnicell insists that there is "no evidence that Omnicell conditioned the pricing it provided in its own firm, fixed-price [quotation]." Protester's Supp. Comments, at 10.

⁵ Specifically, the quotation included a [DELETED] percent discount from established FSS prices for the offered equipment. Id. at 12, 15; AR, Tab 12, CareFusion BPA Supplemental Price List. This discount is also reflected repeatedly on the completed pricing worksheets. AR, Tab 8, CareFusion Quotation, at 146-161. CareFusion also includes unequivocal statements that it accepts the terms of the solicitation, which include the fixed-price nature of the solicitation and resulting BPA. AR, Tab 8, CareFusion Quotation, at 15, 163.

⁶ To the degree that this protest ground challenges the ability of the agency to meaningfully evaluate differing quotations based on the approach identified by the agency in its amended solicitation, we dismiss the allegation as untimely. Our
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Omnicell also alleges that DHA failed to properly conduct or document an analysis to determine whether CareFusion's pricing was unbalanced, as required by the RFQ. Protest at 25-30. Omnicell states it suspected unbalanced pricing during the debriefing when the government declined to comment on CareFusion's pricing for all potential locations. Id. at 29. Omnicell further argues that there is no evidence in the record to support that DHA performed the requisite evaluation. Comments and Supplemental Protest, at 20-21. DHA responds that it considered whether CareFusion's price quotation was unbalanced and documented its findings. MOL, at 14-16.

As a general matter, unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated. Federal Acquisition Regulation (FAR) § 15.404-1(g)(1).⁷ Unbalanced pricing may increase risk to the government, but agencies cannot reject an offer solely because it is unbalanced. Triumvirate Envtl., Inc., B-406809, Sept. 5, 2012, 2012 CPD ¶ 255 at 5. Thus, we have found that when an unbalanced offer is received, the agency is required to consider the risks to the government associated with the unbalanced pricing, including the risk that the unbalancing will result in unreasonably high prices during performance of the contract, when making an award decision. Id. Our Office reviews the reasonableness of an agency's determination about whether a firm's prices are unbalanced, and an agency's determination as to whether the unbalanced prices pose an unacceptable risk. Id. citing Semont Travel, Inc., B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 3.

Here, the protester fails to make the threshold showing required to prevail on this allegation, namely that one or more of the prices was over or understated. See InfoZen, Inc., B-411530, B-411530.2, Aug. 12, 2015, 2015 CPD ¶ 270 at 7. Not only does Omnicell fail to demonstrate unbalanced pricing, but the record confirms that the agency considered the balance of CareFusion's pricing and determined that

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timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1); see AmaTerra Envtl. Inc., B-408290.2, Oct. 23, 2013, 2013 CPD ¶ 242 at 3.

⁷ Although the procurement at issue was not conducted under FAR Part 15, to the extent the agency incorporated concepts set forth in FAR Part 15 into the RFQ, such as those related to unbalanced pricing, we look to FAR Part 15 for guidance in analyzing the reasonableness of the agency's actions. See Triumvirate Envtl., Inc., B-406809, Sept. 5, 2012, 2012 CPD ¶ 255 at 5 n. 3.

its proposed flat-discount from its GSA pricing avoided “escalation in any of the option years.” AR, Tab 3, Price Analysis, at 2.

As stated above, Omnicell has raised a variety of other complaints that we have fully reviewed and either dismiss as procedurally flawed⁸ or deny because they are without merit.⁹

The protest is denied.

Susan A. Poling
General Counsel

⁸ For example, Omnicell challenged the ability to meet several of the RFQ’s functional requirements of CareFusion products that the awardee had not, in fact, offered in its quotation. Protest at 18-19. *Id.* The argument fails to state a valid basis of protest, since it is based on unfounded speculation; and is therefore dismissed. *See MacAulay-Brown, Inc.*, B-413311, B-413311.2, Sept. 29, 2016, 2016 CPD ¶ 279 at 9. One specific allegation relating a business-to-business support requirement, to which the agency responded and to which response Omnicell failed to comment, was abandoned and is therefore also dismissed. *See Enterprise Solutions Realized, Inc.; Unissant, Inc.*, B-409642, B-409642.2, June 24, 2014, 2014 CPD ¶ 201 at 9 n. 6.

⁹ For example, Omnicell alleges that none of CareFusion’s products possess the proper certifications to meet the RFQ’s cybersecurity requirements. We do not reach the question of whether or not CareFusion’s product has any certifications or accreditations as we agree with the agency that compliance with the DOD instructions regarding cybersecurity are not required for award. As a general matter, requirements for contractors to obtain necessary licenses or permits during performance generally do not need to be satisfied as a condition for award. *See ThyssenKrupp Elevator Corp.*, B-410456, Dec. 14, 2014, 2014 CPD ¶ 18 at 4-5. Here, we conclude that certification or accreditation is a future requirement for the selected PIAS-ADC solution contractor, and not a condition of award.