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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Superior Optical Labs, Inc.; Diversified Ophthalmics, Inc.

File: B-294662; B-294662.2

Date: December 9, 2004

Colin H. Luke, Esq., Balch & Bingham, for the protesters.
Dennis Foley, Esq., and Philip Kauffman, Esq., Department of Veterans Affairs, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably did not question authority to bind offeror of individual who signed successful offer where offer designated him as contractor's administrative representative with binding authority to act on behalf of the contractor on administrative matters pertaining to the contract.
 2. Allegation that awardee violated Anti-Kickback Act and Federal Healthcare Anti-Kickback Act will not be considered by GAO because both statutes impose criminal penalties for their violation, and GAO has no jurisdiction over alleged violations of criminal laws.
 3. Protest of scoring of technical proposals is denied where it is apparent that protesters suffered no prejudice as a result of alleged evaluation errors.
 4. Federal Acquisition Regulation § 52.219-14 (Limitation on Subcontracting) has no application where solicitation is unrestricted.
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DECISION

Superior Optical Labs, Inc. and Diversified Ophthalmics, Inc. protest the rejection of their proposals and the award of a contract to Barnett & Ramel Optical Company (B&R) under request for proposals (RFP) No. 541-039-04, issued by the Department of Veterans Affairs (VA) for the provision of eyeglasses to VA beneficiaries in Ohio. The protesters take issue with the agency's evaluation of the proposals.

We deny the protests.

The RFP contemplated the award of a fixed-price requirements contract for a base and 4 option years. The contractor was to furnish eyeglass-dispensing services at nine different VA Medical Centers and outpatient clinics across Ohio. For each year, offerors were requested to furnish prices for an estimated quantity of frames and for estimated quantities of each of six different types of lenses (single vision glass/plastic, bifocal glass/plastic, and trifocal glass/plastic). Offerors were also requested to furnish prices for 14 line items representing estimated quantities of various upgrades and related items (e.g., anti-reflective coating).

The solicitation provided for award to the offeror whose proposal was most advantageous to the government, price and other factors considered. Proposals were to be evaluated in accordance with the following scheme:

1. Quality of Sample Frames--Sample frames shall be of quality nature and durable with warranty. Selection of frames shall be appropriate for male and female with current style. 30 POINTS
2. Technical Capabilities--Length of time in exact business, education certificates, distribution capabilities. Management methods used to insure accountability, timely and quality service. Rating will be based upon written management plan that shows how orders are tracked and processed and managed throughout the life cycle. 30 POINTS
3. Delivery of Prescriptions--How fast and to what extent can the offeror provide normal and expedited prescriptions. Rating will be based on information submitted pertaining to capability for normal and expedited prescriptions as well as verifiable references as it compares to offerors. Offerors must submit a[t] least (3) references for past performance history. 20 POINTS
4. Price--Pricing for estimated quantities shall be evaluated for price reasonableness based on competitive price offers. 20 POINTS

RFP at 39. The RFP further provided that technical and past performance, when combined, were significantly more important than price.

Three offerors submitted proposals by the April 9, 2004 closing date. Superior submitted three offers, a "high bid," a "low bid," and a "medium bid"; after VA notified it that only one would be reviewed, it designated its "medium bid" as the one to be evaluated.¹ Diversified submitted two offers, one for all of the locations covered by the RFP and the other for a subset of the locations; upon notification from VA that only one offer would be considered, Diversified designated the former as the one to be evaluated.

The evaluators assigned the proposals the following point scores:

¹ The three offers differed in the quality and pricing of the frames offered. In addition, the "medium bid" differed from the other two in its pricing of lenses.

	Superior	Diversified	Barnett & Ramel
Quality of sample frames (30 points)	22.75	30	27.88
Technical capabilities (30 points)	27	25.3	28
Delivery of prescriptions (20 points)	20	20	16.25
Technical factors subtotal	69.75	75.3	72.13
Price (20 points)	12.7	13.3	20
Totals	82.45	88.6	92.13

Agency Report at 5. According to the agency, Superior's total evaluated price was \$10,257,246.95, Diversified's was \$9,799,550.90, and B&R's was \$6,503,680.² The contracting officer determined that B&R's proposal represented the best value on the basis of the following considerations:

Based on the evaluation results, on technical points alone, Diversified was slightly higher than B&R, which in turn scored slightly higher than Superior. However, it was plainly evident that none of the offerors "stood-out" technically, nor were any of them significantly weak or deficient. In summary each vendor's offerings were as follows: one-year warranty; a fair range of frame styles; quality was adequate and equivalent; possessed adequate experience; similar turn around time and adequate methods in management methods in automation and quality assurance and follow-up; acceptable past performance references; and comparable delivery time. Since all offerors appear to

² We note that Diversified entered a sum in the blank for base year price that was half the total of its line item prices for the base year, *i.e.*, \$1,088,838.90 versus \$2,177,678. (While the discrepancy is not addressed in the record, we assume that Diversified did this because the solicitation identified the base year as covering the "time of award to September 30, 2004," and only approximately half a year remained until September 30 at the time Diversified submitted its offer in early April 2004.) B&R and Superior, in contrast, each entered a sum in the blank for base year price that equaled the total of their base year line item prices. If the full amount of Diversified's line item pricing for the base year is included in its evaluated price, its total evaluated price rises to \$10,888,390.

be substantially equal in technical ability, the rational business decision is to select the offeror that represents the most advantageous price to the VA. Analysis of pricing shows B & R's total cumulative price is between 3 and 4 million dollars less than the next lowest offeror. This price difference is significant and clearly demonstrates the most advantageous offer to the government.

Contracting Officer's Narrative Statement, Sept. 28, 2004, at 1. VA awarded B&R a contract on August 17 and sent the protesters letters notifying them of the award on August 24. The protesters subsequently requested and received debriefings, whereupon they protested to our Office.

Diversified and Superior raise multiple objections to the award to B&R. Their first two complaints pertain to the status of the individual who signed B&R's offer. The protesters allege that the signatory is not an authorized officer or employee of B&R, and that he thus lacked the authority to bind B&R. They also allege that the signatory represented B&R on a contingent fee basis, in violation of the Anti-Kickback Act of 1986, the Federal Healthcare Anti-Kickback Act, and subpart 3.4 of the Federal Acquisition Regulation (FAR).

We find the foregoing arguments to be without merit. The first rests upon the incorrect premise that only an officer or employee has the authority to bind a corporation, which is not the case.³ A duly authorized agent may also bind a corporation, provided evidence of his authority to do so is furnished to the agency. See FAR § 4.102(e) ("When an agent is to sign the contract, . . . the agent's authorization to bind the principal must be established by evidence satisfactory to the contracting officer."). The agency reports that it had no reason to question the authority of the individual in question to sign the offer on behalf of B&R given that in its proposal, B&R designated him as its "contractor administrative representative," with "binding authority to act on behalf of the Contractor on administrative matters pertaining to this contract." B&R Proposal at 18. The protesters have demonstrated neither that the agency's reliance upon this representation was unreasonable nor that the individual in question in fact lacked the authority to bind B&R.

With regard to the protesters' contingent fee argument, FAR subpart 3.4 (Contingent Fees) does not apply to this procurement because it is an acquisition of commercial items. See FAR § 12.503(a)(2). Further, we will not consider the protesters' allegations regarding violations of the Anti-Kickback Act and the Federal Healthcare Anti-Kickback Act since both statutes impose criminal penalties for their violation, see 41 U.S.C. § 54 (2000), 42 U.S.C. § 1320-7b(b) (2000), and our Office has no jurisdiction over alleged violations of criminal laws. Such allegations should be referred to the Department of Justice since the interpretation and enforcement of the

³ B&R represented in its offer that it was a corporate entity.

criminal laws of the United States are functions of the Attorney General and the federal courts. Corbin Superior Composites, Inc., B-236777.2, Jan. 2, 1990, 90-1 CPD ¶ 2 at 6.

The protesters also raise a number of objections to the evaluation of the technical proposals. They object to the scoring of the proposals under subfactors pertaining to frame warranty, frame selection, frame quality, length of time in business, educational certificates, automation, past performance, distribution capability, and delivery time.⁴ While we believe that several of the protesters' allegations have merit,⁵ we also believe that the protesters suffered no prejudice as a result of errors in the technical evaluation. Given the strength of the technical point score awarded B&R's proposal and the contracting officer's determination that the proposal lacked any significant weaknesses or deficiencies, we see no reasonable possibility that, even if the protesters' challenges to the technical evaluation were sustained, the contracting officer would determine either of their proposals to be significantly superior to B&R's. As indicated above, the contracting officer viewed the proposals as essentially equal technically, notwithstanding the difference in the technical scores, a judgment that was within his discretion to make. See Omega World Travel,

⁴ The evaluators translated the commentary furnished in the solicitation into the following subfactor scoring scheme:

- Quality of Sample Frames (30 points): warranty (10 points); frame selection (number of frame styles-5 points, variable colors-2 points, variable sizes-3 points); durability/quality (10 points)
- Technical Capabilities (30 points): Length of time in business (5 points); related education certification (5 points); distribution capabilities--turn-around time (5 points), manufacturing and distribution capability (5 points); management methods--automation/tracking/inventory control (5 points), quality assurance (5 points)
- Delivery of prescriptions: delivery time (5 points); references (15 points)
- Price (20 points)

⁵ We agree, for example, that there was no reasonable basis for the evaluators to have assigned Diversified a lower score than the other two offerors under the distribution capability subfactor, and that some of the evaluators appear to have lacked a reasonable basis for their assignment of point scores under the educational certificates subfactor. We also agree that there appear to have been errors on the point score summary sheet with regard to the number of points that one evaluator (referred to as SY in the record) intended to assign B&R under the frame selection subfactor and the number of points that she intended to assign Superior under the quality of frames subfactor.

Inc., B-283218, Oct. 22, 1999, 2002 CPD ¶ 5 at 4. We also see no reasonable possibility that the contracting officer would determine that either protester's technical proposal would be worth a price premium of approximately one-third, or over \$3.5 million. Accordingly, we see no reasonable possibility that the contracting officer would conclude that a proposal other than B&R's represents the best value to the government.

Similarly, while the protesters complain that the evaluators improperly weighted the subfactors under the delivery of prescriptions factor by assigning three times as much weight to the references subfactor as to the delivery time subfactor (i.e., 15 points vs. 5), the record demonstrates that the protesters, who received better scores than B&R under the references subfactor and equivalent scores under the delivery time subfactor, not only were not prejudiced, but indeed benefited, from the allegedly improper weighting.

Next, the protesters argue that the estimated quantities for the 14 upgrade/related item line items are "so inflated . . . as to make any pricing comparison meaningless and irrelevant." Protest at 3. According to the protesters, while the solicitation advised that pricing was to be based on estimated quantities of 5,000 for each line item, "[t]he actual history of the utilization of these upgrades is much less than 5,000 and is, in some cases, miniscule." Id.

We will not consider this argument because it was not raised in a timely manner. It was apparent on the face of the solicitation that the estimated quantity for each of the line items in question was 5,000; accordingly, to be timely, any protest of the estimates would have needed to be raised prior to the time set for receipt of proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2004) (to be timely, protest based on alleged solicitation impropriety must be raised prior to the time set for receipt of proposals).

The protesters further point out that a cover letter to B&R's proposal stated that:

For frame prices, we will put a frame in the corresponding package at double the price found in the latest issue of Frames Weekly, the industry catalogue for optical frames.

The protesters argue that this statement "appears to contradict and/or supplement the pricing contained in a portion of [B&R's] pricing proposal." Protesters' Comments, Oct. 18, 2004, at 4.

The protesters fail to specify which portion of B&R's pricing proposal the statement allegedly contradicts and/or supplements, and we see no inconsistency between the statement and the rest of B&R's proposal. As the opening sentence to the cover letter makes clear, the statement in question pertains to B&R's proposed pricing for

on-site retail sales. The RFP countenanced such sales and the provision of price lists pertaining to them, stating as follows:

At the contractor's discretion, they may enter into a separate agreement with the Veterans Canteen Service (VCS) in order to do commercial sales on VA premises. Any agreement with the VCS shall not impact the cost schedule for services on this contract. If the contractor proposes to do commercial sales on VA property, they must also submit a commercial price list of the items and upgrades they intend to sell along with this solicitation.

RFP at 13.

Diversified and Superior also complain that despite the fact that the RFP incorporated FAR § 52.212-1, which at paragraph (e) encouraged offerors "to submit multiple offers presenting alternative terms and conditions or commercial items for satisfying the requirements of this solicitation" and assured them that "each offer submitted [would] be evaluated separately," their alternate offers were not considered.

Again, the protesters' complaint is untimely. Diversified and Superior were notified of the information giving rise to this ground of protest (*i.e.*, that the agency intended to review only one offer from each) on April 16; thus, pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), to be timely, any protest based on this information would have needed to be filed within 10 days after April 16.

Finally, the protesters complain that B&R indicates in its proposal that it intends to subcontract all dispensing services to [deleted]. The protesters allege that this subcontracting arrangement violates FAR § 52.219-14 (Limitations on Subcontracting) and FAR § 52.203-6 (Restrictions on Subcontractor Sales to the Government), both of which were incorporated into the solicitation by reference. RFP at 29.

The Limitations on Subcontracting clause applies only to solicitations (or portions thereof) that are set aside for small business competition or the 8(a) program. See FAR § 19.508(e) ("The contracting officer shall insert the clause at 52.219-14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed \$100,000"). See also FAR § 19.811-3(e) ("The contracting officer shall insert the clause at 52.219-14, Limitations on Subcontracting, in any solicitation and contract resulting from this subpart [*i.e.*, subpart 19.8 (The 8(a) Program)]"). Accordingly, since the solicitation at issue here was unrestricted, the clause has no application to it (despite the fact that it was incorrectly incorporated by reference).

With regard to FAR § 52.203-6, the protesters have furnished no argument in support of their allegation that B&R's stated intention to subcontract with [deleted] would violate the clause, and we see no basis for such an argument. Section 52.203-6 prohibits a contractor from entering into an agreement with an actual or prospective subcontractor, or otherwise acting in a manner, "which has or may have the effect of restricting sales by such subcontractors directly to the Government of any item or process (. . .) made or furnished by the subcontractor under this contract or under any follow-on production contract." There is no evidence in the record here that B&R has entered into an agreement with [deleted], or otherwise acted in a manner, that violates the above provision.

The protests are denied.

Anthony H. Gamboa
General Counsel