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Decision

Matter of: Korrekt Optical, Inc.

File: B-299582.4; B-299582.5

Date: September 7, 2007

Kristen E. Ittig, Esq., and Caitlin K. Cloonan, Esq., Arnold & Porter LLP, for the protester.

Dennis Foley, Esq., Department of Veterans Affairs, for the agency.

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DIGEST

1. Protest that awardee's proposal failed to comply with material solicitation requirement and thus could not form the basis for an award is denied where record demonstrates that awardee's proposal did comply with the requirement.
 2. Where solicitation provided for award to the proposal determined most advantageous to the government, price and other factors considered, and agency reasonably determined proposals to be essentially equivalent with regard to the non-price factors, selection of the awardee's proposal based on its lower price was reasonable.
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DECISION

Korrekt Optical, Inc. protests the award of a contract to Safe-Lite Optical Company under request for proposals (RFP) No. VA-246-07-RP-0002, issued by the Department of Veterans Affairs (VA) to provide eyeglasses to eligible veterans at VA Medical Centers in Veterans Integrated Service Network 6. The protester contends that Safe-Lite's proposal was materially deficient for failing to offer the required number of frame styles. The protester also takes issue with the evaluation of its own proposal and the agency's determination that all proposals were essentially equal technically.¹

¹ In its initial protest, Korrekt also alleged that Safe-Lite's prices were materially unbalanced. The agency responded that while Safe-Lite had proposed pricing lower than its competitors on several items, it had proposed a significantly higher price on only a single item (i.e., glass progressive lenses) for which the estimated quantity

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We deny the protest.

BACKGROUND

The RFP contemplated the award of a fixed-price requirements contract for eyeglasses incorporating various different types of lenses (e.g., single vision, bifocal, progressive, trifocal, and high index), which are to be fabricated upon receipt of prescriptions furnished by the VA clinics.² The solicitation provided for award to the offeror whose proposal was determined to be most advantageous to the government, price and other factors (defined in the RFP as technical capability/quality and past performance) considered, with the non-price factors of greater importance than price.

Nine proposals were received by the February 1, 2007 closing date. Two of the nine were immediately excluded from further consideration because the offerors had failed to include sufficient technical information. A technical evaluation panel (TEP) rated the remaining seven technical proposals under 15 criteria pertaining to product quality, five criteria pertaining to technical capability, a single criterion pertaining to quality assurance, and four criteria pertaining to past performance/experience.³

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was only one per year. Consistent with the requirements of Federal Acquisition Regulation (FAR) § 15.404-1(g)(2), the contracting officer considered the risks associated with Safe-Lite's pricing, and concluded that, given that the overall difference between Safe-Lite's price and the next low price was \$1.7 million, there was no risk that Safe-Lite's high pricing on this one item would result in Safe-Lite's overall price not being low. In its comments on the agency report, the protester stated that it would not further pursue this ground of protest. Protester's Comments, July 23, 2007, at 7 n. 2.

² While the RFP clearly contemplated that the contractor would furnish eyeglass frames with the lenses (see, e.g., RFP § 5.11, which provides in relevant part that "[w]hen fulfilling prescriptions, the contractor shall provide completely assembled eyeglass frames"), it requested unit prices for lenses, lens treatments, and lens cases only; that is, it did not request separate unit pricing for frames.

³ Each of five evaluators rated each proposal under each criterion on a scale of 1 (representing unacceptable) to 5 (representing excellent). The criteria pertaining to product quality were conformance to prescription; prescription verification; delivery verification; lens strengthening; lens coating; lens variety; lens materials; ANZI Z80 standards; frame style variety; frame size variety; frame material variety; frame styles updated; frame durability; frame comfort; and frame adaptability. The criteria pertaining to technical capability were ability to meet 14-day delivery standard; ability to make expedited deliveries; ability to make adjustments to eyeglasses;

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The proposal that received the highest overall point score for the product quality factors was assigned 35 points; each of the other proposals was then assigned a point score reflecting the percentage of the highest score that its score represented. For example, because its technical point score was 78 percent of the highest score received, Korrekt's proposal was assigned a technical score of 27.3 (78 percent of 35). In like fashion, the proposal that received the highest point score for technical capability was assigned 15 points, the proposal that received the highest point score for quality assurance plan was assigned 5 points, and the proposal that received the highest point score for past performance was assigned 10 points, with the other proposals receiving proportionately fewer points based on the relationship of their scores to the highest score received.

Offeror point scores and evaluated prices were as follows:

Offeror	Product Quality	Technical Capability	Quality Assurance	Overall Technical	Past Performance	Price
Safe-Lite	33.25	13.65	3.5	50.4	10	\$4,873,141
Korrekt	27.3	14.25	4.75	46.3	9.7	\$6,638,915
Offeror A	31.85	15	5	51.85	10	[deleted]
Offeror B	32.2	14.1	5	51.3	9.6	[deleted]
Offeror C	28.35	13.05	3.5	44.9	8.8	[deleted]
Offeror D	35	14.7	4	53.7	8.9	[deleted]
Offeror E	27.65	13.2	3.5	44.35	7.9	[deleted]

Price Negotiation Memorandum at 3-5; Contracting Officer's Statement of Record at 2. The contracting officer selected Safe-Lite's proposal for award and notified other offerors of his decision. Following a debriefing, Korrekt protested the award to our Office. We dismissed the protest as academic after the agency notified us that it would review the evaluation of proposals and prepare a revised source selection decision.

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management team; and safeguarding patient healthcare information. The criterion pertaining to quality assurance was overall quality assurance plan, while the criteria pertaining to past performance and experience were record of past VA performance; record of past non-VA performance; number of years of experience as a company; and number of years of experience of staff.

After performing a review of the evaluation documentation, the contracting officer determined that none of the proposals contained significant weaknesses or deficiencies and that none had demonstrated a “qualitative technical superiority;” accordingly, he considered them essentially equivalent technically and again selected Safe-Lite’s proposal for award on the basis of its lowest price. After receiving notification of the award and a debriefing, Korrekt again protested to our Office.

DISCUSSION

Korrekt argues that Safe-Lite’s proposal failed to comply with a material solicitation requirement pertaining to the number of frame styles offered and thus was ineligible for award. In this connection, a proposal submitted in response to an RFP that fails to conform to one or more of the solicitation’s material requirements is technically unacceptable and cannot form the basis for an award. Farmland Nat’l Beef, B-286607, B-286607.2, Jan. 24, 2004, 2004 CPD ¶ 31 at 8.

The item in question provided as follows:

SPECIAL NOTE -- FRAME SELECTION --Provide with your offer frame samples in the following styles: twenty-five 25 Men’s Frames, fifteen 15 Women’s Frames, 15 Unisex Frames, and 5 Safety Frames (Unisex Frames) in available temple, eye and bridge sizes and colors. Frame selection will include a mix of metals with plastic, spring hinges, and a minimal [sic] of five (5) large frame sizes (54-60).

RFP at A-7. The protester maintains that it is clear from the debriefing letter, which identified a total of 37 frame models offered by the awardee, that Safe-Lite offered only 37 frame selections, rather than the required total of 60.

The VA explains in response that although it was not apparent from the debriefing letter, which identified only the make and model of the frames offered by Safe-Lite, the awardee did in fact furnish a total of 60 sample frames. The contracting officer explains that the discrepancy between the number of models identified in the debriefing letter (37) and the number of samples requested (60) is attributable to variations in materials, special features, and sizes among the samples submitted by Safe-Lite; that is, as we understand the agency’s explanation, Safe-Lite’s samples included more than one variation of certain model numbers. The agency further argues that the above-cited provision regarding the number of frames to be furnished was intended not as a requirement, but rather as guidance as to the “suggested number of frames to allow the TEP to evaluate the overall quality of the frames being offered.” Contracting Officer’s Statement of Record at 5.

We need not address the latter argument because we agree with the agency that the RFP did not include a requirement that each frame sample be of a different model, which is in essence what the protester is arguing. That is, the RFP did not preclude

offerors from submitting, or the agency from considering, multiple versions of a particular frame model—for example, frames of the same model composed of different materials—as separate samples. While, as the protester asserts, this means that an offeror could comply with the instruction for 60 samples by offering a limited number of different models, each in multiple variations, the extent to which such an approach resulted in a desirable range of frame choices would be a matter for the agency’s consideration in its technical evaluation.

Next, the protester argues that the contracting officer unreasonably determined offerors’ proposals to be essentially equivalent technically. The protester asserts that the proposals were not equal to one another, but were in fact quite different, each with its own technical strengths and weaknesses.

The fact that each of the proposals had its own strengths and weaknesses does not mean that the contracting officer could not reasonably have determined the proposals to be essentially equivalent technically overall. The agency does not assert that there were no technical differences whatsoever among the proposals; its position is that none of the proposals offered technical advantages or disadvantages sufficient to distinguish it from the other proposals for purposes of the source selection determination. One of the determinations to be made by agency source selection officials is whether differences in technical merit among proposals are significant, and there is nothing inherently unreasonable in a selection official determining that they are not. See NKF Eng’g, Inc.; Stanley Assocs., B-232143, B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497 at 7. In any event, we fail to see how the protester was prejudiced by the contracting officer’s determination that its proposal, which had received a lower overall technical rating than Safe-Lite’s, was essentially equivalent to Safe-Lite’s technically.

Next, Korrekt takes issue with the evaluation of its own offer, arguing that its proposal should have received higher point scores under the evaluation criteria pertaining to variety of frame styles, sizes, and materials.

To the extent that the protester is arguing that based on the selection of frames that it offered, its proposal should have been regarded as not simply equivalent to Safe-Lite’s proposal technically, but as superior to it, it is clear from the record that the contracting officer did not regard frame selection as an area in which it would be possible for any proposal to be so significantly superior to the others as to have an impact on the source selection determination. In this connection, the contracting officer observed in his contemporaneous addendum to the Price Negotiation Memorandum that even assuming that any of the offerors had “maxed out in scoring” on the evaluation subfactors pertaining to variety of frame styles, sizes, and materials, “that would not have been enough to impact source selection.” Addendum to the Price Negotiation Memorandum at 2. We do not find unreasonable the contracting officer’s position that frame variety was simply not a significant enough

consideration, in the context of the numerous subfactors relating to product quality, to have a meaningful impact on source selection.

Next, the protester asserts that the agency failed to perform an adequate evaluation of offerors' past performance. Korrekt argues that the contracting officer represented in the Price Negotiation Memorandum that past performance data were used only to confirm past performance and to determine whether any vendor had encountered any serious problems or deficiencies. The protester contends that this implies that the agency used the past performance data only to confirm that each offeror had a "clean" past performance record, which was inconsistent with its responsibility under the FAR to perform a comparative assessment of offerors' past performance.

We think that the protester has mischaracterized the contracting officer's statements. In the Price Negotiation Memorandum, the contracting officer represented that the TEP, as discussed more fully below, had evaluated and rated each firm's past performance, and that he had then sought to confirm the absence of negative performance on the part of any offeror by sending performance surveys to each offeror's references. In other words, the contracting officer did not represent that the TEP had confined its evaluation to determining whether offerors had encountered serious problems; what he represented was that he had sought additional past performance information, which he had used only to confirm that none of the offerors had encountered serious problems, as indicated by the agency's initial evaluation.⁴ Accordingly, the record does not support the protester's assertion that the agency used past performance information only to confirm that offerors had a "clean" record of performance.

Korrekt further argues that the contracting officer represented in his statement that since responses to his requests for past performance surveys were "light" and no adverse information pertaining to any of the offerors was received, "the past performance rating was generally high for each of the seven vendors." Id. The protester contends that if the agency did not receive past performance surveys pertaining to all offerors, all of them should not have received high past performance ratings; rather, the protester argues, the offerors for whom no information was received should have received ratings of neutral.

The record shows that it is the contracting officer's assertion that the past performance ratings for each of the seven vendors were "generally high" that is misleading. The reason that all of the past performance ratings were on the upper

⁴ The contracting officer explained in a statement submitted in response to this protest that the TEP had based its evaluation on information bearing on past performance contained in the offerors' proposals and information known to them personally. Contracting Officer's Statement of Record at 2.

end of the rating scale is not that all of the proposals received generally high ratings under the evaluation subfactors pertaining to past performance/experience; the reason that all of the point scores were on the upper end of the scale is that, as previously explained, the agency's rating methodology involved assigning the proposal (or proposals) that received the highest overall point score under the past performance/experience subfactors the maximum possible score of 10, and then assigning other proposals point scores based on the percentage of the highest score that their scores represented. In other words, a high score under the past performance/experience factor did not necessarily indicate that an offeror had received generally high ratings with regard to past performance and experience; all that it indicated was that the offeror's overall point score for the factor was among the highest received. Here, the highest point score received for the past performance/experience factor was 75 (of 100), and the other scores ranged from 59 to 73.⁵ We do not think that such scores can reasonably be termed high. Moreover, the majority of the scores assigned under each of the two subfactors pertaining to past performance specifically (as opposed to experience) were in fact 3s, the mid-point on the rating scale of 1-5, and the highest average score under the two past performance subfactors was 3.6. In other words, the record does not support a finding that as a result of a lack of adequate past performance information, the evaluators simply assigned all offerors high scores for past performance.

Finally, Korrekt argues that the contracting officer failed to document adequately the basis for his source selection decision. We disagree. It is clear from the record that the basis for his decision was that all of the proposals were essentially equivalent technically and that price was therefore the determinative factor in the selection of an awardee.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁵ The proposals of Safe-Lite and Offeror A each received scores of 75; accordingly, each proposal was assigned the maximum possible score of 10. Korrekt's proposal received a point score of 73, which represented 97 percent of the maximum score (of 75) received; accordingly, its proposal was assigned a past performance score of 9.7. The lowest-rated proposal received a point score of 59, which represented 79 percent of the maximum score attained; thus, the proposal was assigned a rating of 7.9