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Decision

Matter of: MSC Industrial Direct Company, Inc.

File: B-411533.2; B-411533.4

Date: October 9, 2015

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Anne B. Perry, Esq., David S. Gallacher, Esq., Matthew W. Turetzky, Esq., and Christine R. Couvillon, Esq., Sheppard, Mullin, Richter & Hampton LLP, for W.W. Grainger, Inc., the intervenor.

Alissa J. K. Schrider, Esq., Kacie A. Haberly, Esq., and Tyler J. Mullen, Esq., General Services Administration, for the agency.

Matthew T. Crosby, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's corrective action is denied where the record reflects that after a prior protest, the agency took corrective action because it found the solicitation overstated its needs, and where agency acted within its discretion in deciding there was a reasonable possibility that the solicitation flaw prejudiced the prior protester.

DECISION

MSC Industrial Direct Company, Inc., protests corrective action taken by the General Services Administration (GSA) under request for quotations (RFQ) No. QS0A-4PL-150014 for industrial products and related services. MSC alleges that the procurement flaw underlying the corrective action was not prejudicial, and the corrective action therefore was improper.

We deny the protest.

BACKGROUND

On December 9, 2013, and in accordance with the procedures of Federal Acquisition Regulation subpart 8.4, the agency issued an RFQ to establish multiple blanket purchase agreements (BPA) with vendors holding contracts under GSA

Federal Supply Schedule (FSS) 51V, Hardware Superstore. Contracting Officer's Statement ¶ 4. The solicitation called for stocking and managing industrial product inventory for a number of geographically dispersed military fleet readiness centers (FRC). Id. ¶¶ 1-4. Under the solicitation, a BPA holder would operate brick-and-mortar and other types of storefronts at FRC locations. BPA §§ 2.0-2.4.¹ From these storefronts, FRC customers could purchase items from in-store inventory. Additionally, the BPA holder would be required to fill in-store or online "referral orders" for items not in stock. See id. § 2.5. The BPA included a provision generally requiring that for the referral orders, delivery to the FRC customer must be made within three calendar days after receipt of the order. See id. § 2.8.1.

After receiving and evaluating quotations, the agency, on June 16, 2014, established BPAs with four vendors, including MSC and W.W. Grainger, Inc. Contracting Officer's Statement ¶ 7. The BPAs did not authorize the vendors to begin performance or accept orders. Rather, the BPAs provided that GSA would hold further competitions by issuing RFQs to the BPA holders, selecting the quotations representing the best value to the government, and then awarding BPA modifications authorizing the vendors to begin performance and accept orders. BPA § 6.10.

Consistent with these procedures, the agency, on February 23, 2015, issued the RFQ at issue in this protest. The RFQ, as amended, sought quotations for requirements in four FRC areas: FRC Mid-Atlantic, FRC East, FRC Southeast, and FRC Southwest. RFQ § C.1.² The RFQ provided that the agency would issue up to two BPA modifications based on the quotations representing the best value to the government, considering price and the following three factors, listed in descending order of importance: specific technical experience--supply chain system capability; past performance; and local and small business utilization plan. Id. §§ E.3, E.4. The nonprice factors, when combined, were stated to be significantly more important than price. Id. § E.4.

The RFQ included a list--referred to as a market basket--of over 500 items that the agency anticipated the FRCs would require. See AR, Tab 8, RFQ amend. No. 005, attach. A, Market Basket List. The vendors were instructed to provide pricing for those items that were available through their FSS catalogs. See RFQ § E.4.4; AR, Tab 10, RFQ Questions and Answers, at 4. The vendors' pricing was to include all shipping charges. RFQ § E.1.4.C.

¹ Citations to the BPA refer to the conformed version that was issued as modification No. 003 to MSC's BPA. Agency Report (AR), Tab 5, MSC BPA, modification No. 003.

² Citations to the RFQ refer to the conformed version that was issued with RFQ amendment No. 006. AR, Tab 9, RFQ amend. No. 006.

The agency received and evaluated quotations from all four BPA holders by the RFQ's March 11 closing date. Contracting Officer's Statement ¶ 19. One quotation--submitted by a vendor referred to herein as Vendor A--was deemed not technically acceptable. Id. ¶ 20. Another quotation--submitted by a vendor referred to herein as Vendor B--was deemed less competitive than the quotations of MSC and Grainger. MSC's and Grainger's quotations were assigned equal ratings of outstanding under the nonprice factors. Id. ¶¶ 34, 36. Based on an evaluation of the market basket items priced in both firms' quotations, MSC's pricing was found to be 23 percent lower than Grainger's. Id. ¶¶ 39, 40. Since the two quotations were evaluated as essentially equal under the nonprice factors, and since MSC's pricing was evaluated as lower, the contracting officer selected MSC's quotation as representing the best value to the government. See id. ¶ 41. Therefore, on May 4, she issued two modifications to MSC's BPA--one authorizing performance in FRC areas Mid-Atlantic, East, and Southeast; and one authorizing performance in FRC area Southwest. See id. ¶ 42.

On May 13, Grainger filed a protest with our Office alleging that the agency's evaluation of quotations was flawed in various respects. On June 12, the agency filed a report responding to Grainger's claims. On June 16, Grainger's counsel notified the agency's counsel of a perceived discrepancy between the BPA's three calendar day referral order delivery requirement and a three business day delivery period specified in MSC's quotation. See AR, Tab 19, GSA Ltr. to GAO (June 22, 2015) at 1. The contracting officer confirmed the discrepancy. See Contracting Officer's Statement ¶ 47. This led her to re-examine the BPA's three calendar day delivery requirement. Id. ¶ 48. In doing so, she learned that the FRCs generally do not accept deliveries on weekends or federal holidays, meaning that a three business day (rather than calendar day) delivery period for referral orders would suffice.³ See id.

The contracting officer also found that the costs to meet a three calendar day delivery requirement versus a three business delivery requirement may be significant. See Contracting Officer's Statement ¶ 53; AR, Tab 19, GSA Ltr. to GAO (June 22, 2015), at 1. Because, as stated above, the vendors' pricing was to include the cost of shipping, the contracting officer reasoned that the three calendar day delivery requirement may have unnecessarily inflated the vendors' pricing. See AR, Tab 19, GSA Ltr. to GAO (June 22, 2015), at 1. On this basis, the agency decided to take corrective action by rescinding the modifications to MSC's BPA, amending the BPAs and the RFQ to reflect the agency's actual three business day delivery requirement, and re-soliciting quotations. Id. Based on this corrective

³ The BPA provided that for emergencies, orders could be placed on an "expedited" basis with special shipping terms; these emergency orders, however, would not be considered referral orders. See Contracting Officer's Statement ¶ 63.

action, our Office dismissed Grainger's protest as academic. See W.W. Grainger, Inc., B-411533.1 (June 24, 2015).

On July 2, MSC filed a protest with our Office alleging that the corrective action was improper because, according to MSC, Grainger could not have shown that it was prejudiced by the discrepancy between the BPA's three calendar day delivery requirement and the agency's actual three business day delivery requirement. Protest at 5-8.

On July 22, the contracting officer requested that the BPA holders submit quotation revisions reflecting any changes that were "directly related" to the amended delivery terms. AR, Tab 9, RFQ amend. No. 006, at 2-3.

On July 30, Grainger filed another protest with our Office, this time alleging that the request for quotation revisions unreasonably limited the type of price revisions vendors could submit. Grainger argued that vendors should be permitted to update their market basket lists and pricing to be consistent with the current prices and products offered in their FSS catalogs.

Before the due date for its report in response to Grainger's second protest, the agency decided to again take corrective action. In this instance, the agency decided to permit vendors to revise their quotations to reflect updates to their FSS catalog pricing and product availability. Based on the agency's corrective action, our Office dismissed Grainger's second protest as academic. See W.W. Grainger, Inc., B-411533.3 (Aug. 17, 2015).

On August 19, MSC filed its second protest with our Office. In this protest, MSC argued that the second round of corrective action improperly permitted broad and unnecessary pricing changes that would competitively prejudice the firm.

DISCUSSION

As stated above, MSC challenges both rounds of corrective action taken by the agency. With regard to the corrective action taken in response to Grainger's initial protest, MSC argues that Grainger was not prejudiced by the discrepancy with the BPA's delivery terms, and, therefore, the corrective action was improper. Protest at 6-8; Comments at 7-12. In connection with this claim, MSC points out that its quotation was evaluated as essentially equal to Grainger's under the nonprice factors, but Grainger's evaluated price was approximately 23 percent higher. Protest at 6. MSC argues there is "no convincing evidence" that the change in delivery terms (i.e., the change from calendar days to business days) could have the effect of lowering Grainger's price to be competitive with MSC's price. Comments at 2.

MSC raises several specific arguments to support its claim. For example, MSC argues that the vast majority of sales under the BPA will be from store inventory, rather than referral orders.⁴ Comments at 9. Since vendors pay shipping costs only for referral orders, MSC reasons that the changed delivery terms would not materially affect Grainger's overall evaluated price. Id. MSC further hypothesizes that the lower costs associated with a three business day delivery requirement would reduce the differential in the firms' evaluated pricing from 23 percent to 16 percent, meaning MSC's quotation still would be considerably lower-priced.⁵ Id. at 9-10.

In response, the agency reiterates that it took corrective action because the BPA--and by extension, the RFQ--included a calendar day delivery requirement that did not reflect the agency's actual requirements. See AR at 9. The agency describes how the costs to meet a three calendar day delivery requirement (e.g., shipping premiums associated with overnight, weekend, or holiday deliveries) are greater than the costs to meet a three business day delivery term. See id. at 11. With regard to whether the discrepancy with the delivery requirement was prejudicial to Grainger, the agency states that the accelerated timeframe and higher delivery costs associated with a three calendar day delivery requirement "indicates a reasonable possibility" that Grainger suffered prejudice. See id.

As a general rule, agencies have broad discretion to take corrective action where the agency has determined that such action is necessary to ensure fair and impartial competition. Greentree Transp. Co., Inc., B-403556.2, Dec. 7, 2010, 2010 CPD ¶ 293 at 2. The details of implementing the corrective action are within the sound discretion and judgment of the contracting agency, and we will not object to any particular corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. P'ship for Response and Recovery, B-298443.4, Dec. 18, 2006, 2007 CPD ¶ 3 at 3. We have recognized a limited exception under which we will object to an agency's corrective action if the record establishes either that there was no impropriety in the original evaluation and award decision, or where there was an actual impropriety, but it was not prejudicial

⁴ As the basis of this argument, MSC cites a document showing that for the sole FRC area where historical sales data was available, the average level of referral orders was 18 percent over four years, with the highest level being 35 percent in the most recent year, and the lowest level being 5 percent four years ago. Comments at 9 (citing AR, Tab 23, FRC Southeast Sales Data, at 1).

⁵ MSC's hypothesis is based on a calculation in which MSC's counsel makes a number of assumptions regarding future referral order levels, the type and cost of shipping services that Grainger would choose, and the way that Grainger would structure its fulfillment of orders affected by a three calendar day delivery requirement. Comments at 9-10.

to any of the offerors. Security Consultants Group, Inc., B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53 at 2-3. Where an agency discovers that a solicitation overstates its needs, the proper remedy generally is revision of the solicitation to reflect the agency's actual needs, affording offerors an opportunity to respond to the revision. Brisk Waterproofing Co., Inc., B-256138.3, June 30, 1994, 94-1 CPD ¶ 394 at 3-4.

On the record here, we see no basis to object to the agency's corrective action. The agency has explained how the BPA--and by extension the RFQ--imposed a delivery requirement that was both inconsistent with the agency's actual requirements and overly restrictive. In this regard, the agency has explained that it does not require the three calendar day delivery period specified in the BPA because the FRCs do not accept nonemergency deliveries on weekends or holidays. The agency also has explained how meeting the more restrictive three calendar day requirement would be more costly because it sometimes would require accelerated order processing and overnight, weekend, or holiday shipping services. Finally, we observe that Grainger's quotation included numerous references to suggest that the firm intended to meet a three calendar day delivery requirement.⁶ Based on these circumstances, we conclude it was within the agency's discretion to decide there was a reasonable possibility that the flaw in the solicitation resulted in prejudice to Grainger.

MSC raises various other arguments as to why, in its view, Grainger could not have been prejudiced by the BPA's three calendar day delivery requirement. We have considered all of them, and we conclude, based on the record, that none furnishes a basis on which to sustain the protest.

For example, MSC, as discussed above, offers a calculation attempting to show that the lower costs associated with the three business day delivery requirement would reduce the differential between MSC's and Grainger's pricing only from 23 to 16 percent. Comments at 10. However, MSC's calculation is based on MSC's subjective assumptions of how Grainger would structure its pricing under a solicitation with the more relaxed, three business day delivery requirement, and MSC's projections regarding the number of referral orders that might be placed in the future. Id. at 9-10. The agency disagrees with MSC's premise that relatively few purchases would result in referral orders, pointing out the uncertain data on which the protester's assertions are based. Supp. AR at 6. The agency also points out that the RFQ did not require vendors to break out shipping costs and, therefore, it cannot know for certain how the change in the delivery requirements would affect

⁶ As the agency points out, Grainger's quotation was not entirely clear as to how the firm interpreted the three calendar day delivery requirement because although the quotation included numerous references to "same day," "next day", and "two day" delivery, it also included a reference to "5 to 7 day delivery." AR at 10 (quoting AR, Tab 13, Grainger Quotation, at 5-8, 22-23).

the vendors' pricing. Contracting Officer's Statement ¶ 56. Given the uncertainties regarding the manner in which vendors incorporated costs associated with the three calendar day shipping requirement into their pricing, we will not sustain the protest on the basis of MSC's calculation or on the basis that the agency should have attempted to engage in a similar mathematical exercise.

MSC also contends, as another example of a lack of prejudice to Grainger, that notwithstanding the three calendar day delivery requirement in the BPA, the vendors construed the RFQ's delivery requirement to be three business days. Comments at 7-8. Because, according to MSC, the vendors originally structured their quotations as if the delivery requirement was three business days, the agency's decision to officially change the requirement to three business days would have no material effect on the vendors' pricing. Id.

The record, however, shows the premise underlying this allegation to be untrue. Specifically, and as discussed above, Grainger's quotation included numerous references to "same day," "next day", and "two day" delivery, suggesting that the firm intended to meet the three calendar day delivery requirement. See AR, Tab 13, Grainger Quotation, at 5-8, 22-23. Additionally, the quotation of Vendor B plainly represented that the firm would meet the three calendar day delivery requirement. See AR, Tab 22, Vendor B Quotation, at 3-4. Accordingly, we see no merit in this allegation.

We also see no merit in MSC's challenge against the agency's decision to take corrective action in response to Grainger's second protest. As discussed above, the agency initially limited vendors' price revisions to those directly traceable to the changed delivery terms. However, pursuant to the corrective action that followed Grainger's second protest, the agency permitted vendors to update their market basket lists and pricing to be consistent with their current FSS catalogs. MSC argues that permitting the broader changes was unnecessary and would competitively prejudice the firm. Supp. Protest at 4-5; Supp. Comments at 2-4.

In response, the agency states that since the time quotations originally were submitted, it learned that both MSC and Grainger made changes to their FSS contract offerings, including the deletion of some market basket items and price reductions for others. Supp. AR at 9. The agency further responds that permitting the broader price revisions will allow the agency to more accurately evaluate the likely cost to the government of the items being procured. Id. at 10. Finally, the agency states that it is aware there must be some cutoff date after which changes to vendors' FSS pricing or offerings will not be considered, but an extension of the cutoff date was appropriate here because the agency learned that the vendors' 5-month old, pre-protest pricing had become "stale." Id.

Based on the record here, we find that the decision to permit the broader revisions was well within the range of the agency's discretion. As discussed above, following

Grainger's initial protest, the agency discovered that the solicitation included an overly restrictive delivery requirement. After attempting to remedy this procurement flaw, the agency later learned that the narrowly-tailored corrective action it intended to implement would result in an evaluation of pricing that was no longer accurate relative to the pricing on the vendors' FSS schedules. We see nothing objectionable in the agency's decision to remedy this secondary issue by permitting vendors to submit broader revisions to their quotations.

The protest is denied.

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General Counsel