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Decision

Matter of: Umicore Optical Materials USA, Inc.

File: B-415546; B-415546.2

Date: January 19, 2018

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Peter D. Verchinski, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly based price evaluation on unstated evaluation criterion is dismissed as untimely where protester failed to challenge the agency's methodology for evaluating price at the time the protester learned of agency's intent to use this methodology during discussions.

DECISION

Umicore Optical Materials USA, Inc., of Quapaw, Oklahoma, protests the Defense Logistic Agency's (DLA) award of a contract to 5N Plus Semiconductors LLC under request for proposals No. SP8000-17-R-0005, for storage and rotation of unfinished germanium wafers. Umicore primarily challenges the agency's evaluation of the offerors' prices.

We dismiss in part and deny in part the protest.

The RFP, issued on August 8, 2017, provided for the award of a fixed-price contract for the storage and rotation of germanium wafers for a base year and three 1-year options. Currently, DLA has a contract with Umicore for the storage of approximately 40,500 4-inch wafers, and a contract with 5N for the storage of approximately 61,500 4-inch wafers. The RFP here sought to consolidate the two contracts, such that the successful offeror would store all wafers (which would be provided as government furnished materials (GFM)), and would replace the current stock of 4-inch wafers with 6-inch

wafers.¹ The acquisition was conducted under Federal Acquisition Regulation (FAR) part 12, Acquisition of Commercial Items. Award was to be made to the offeror submitting the lowest evaluated price that was also technically acceptable under two evaluation factors: technical requirements and past performance. RFP, attach. D, Evaluation Criteria, at 1.

With regard to price, offerors were to submit contract line item number (CLIN) prices for wafer storage, contractor proposed wafer rotation, and government directed wafer rotation, for each year of contract performance. For example, the RFP provided pricing as follows (for the base year):²

| CLIN | Supplies/Services | Quantity | Unit | Unit Price | Amount |
|------|----------------------------------|----------|-----------------|------------|---------|
| 0001 | Germanium Storage | 12.000 | MO | \$_____ | \$_____ |
| 0002 | Rotation— Contractor Proposed | 1.000 | JB ³ | \$_____ | \$_____ |
| 0003 | Rotation— Government Directed | 1.000 | JB | \$_____ | \$_____ |

RFP at 4-10. The RFP explained that the agency envisioned that the majority, if not all, of the rotation out of 4-inch wafers and the replacement with 6-inch wafers was to be performed under the contractor proposed rotation (CLIN 0002), and that the government directed rotation (CLIN 0003) was there only in the event that the contractor proposed rotations proved ineffective. Tab 4, Q&A No. 14. The RFP also provided that, during each year of contract performance, the government may direct the awardee to rotate up to 25 percent of the awarded GFM volume. For the contractor proposed rotations, during each year, the contractor could propose rotations each quarter, but the “total volume (i.e., contained germanium in the wafers) of all Contractor proposed rotation actions . . . shall not exceed 25 [percent] of the awarded GFM volume of germanium contained in unfinished wafers.” RFP, SOW, at 3.

With regard to evaluating price, the RFP provided that

¹ The replacement of 4-inch wafers with 6-inch wafers was not to be done on a one-to-one basis. Rather, the RFP required that the volume of germanium remain constant during rotations. This meant that, in order for a larger, 6-inch diameter, wafer to be added to the inventory, more than one 4-inch diameter wafer would have to be removed. RFP, SOW, at 2-4.

² Each option year was to be priced in the same manner. RFP at 4-10.

³ While the RFP does not define this term, the protester states that the term is “job.” Protest at 6 n.5.

the Government will evaluate the Contractor's unit prices to determine if they are reasonable and in the best interest of the Government. The contractor is required to provide as clear and understandable as possible the costs associated [with] and appropriate to each item listed in the [Statement of Work]. . . . In accordance with [Federal Acquisition Regulation] 15.403-3, the contracting officer shall require submission of data other than certified cost or pricing data from the offeror to the extent necessary to determine a fair and reasonable price.

RFP, attach. D, Evaluation Criteria, at 3.

The agency received two proposals, Umicore's and 5N's, by the RFP's September 7 closing date. The agency evaluated both proposals under the non-price factors, and both proposals were found to be technically acceptable. The agency's pricing evaluation found, however, that the offerors had proposed prices based on different understandings of the RFP.

Specifically, as relevant to this protest, Umicore provided pricing for the rotation of wafers as follows (for the base year and each option year):

| CLIN | Supplies/Services | Quantity | Unit | Unit Price | Amount |
|------|----------------------------------|----------|------|------------|-----------|
| 0002 | Rotation— Contractor Proposed | 1.000 | JB | [DELETED] | \$292,752 |
| 0003 | Rotation— Government Directed | 1.000 | JB | [DELETED] | \$713,255 |

Protest, exh. 3, Umicore Proposal, at 6-12. Under CLIN 0002, Umicore's proposal stated that this was a firm fixed price "for 25% of DLA Ge wafers at Umicore (40,491 wafers)." Id. Under CLIN 0003, Umicore's proposal stated that this was a firm fixed price "for 25% of total DLA Ge wafers (101,939 wafers)." Id.

5N's proposal provided pricing as follows (for the base year and all option years):

| CLIN | Supplies/Services | Quantity | Unit | Unit Price | Amount |
|------|----------------------------------|----------|------|------------|---------|
| 0002 | Rotation— Contractor Proposed | 1.000 | JB | [DELETED] | \$_____ |
| 0003 | Rotation— Government Directed | 1.000 | JB | [DELETED] | \$_____ |

AR, Tab 33, 5N Proposal, at 4-10. 5N's proposal stated that its unit price "equals 1 ea 6 [inch] wafer replacing the equivalent mass of 4 [inch] wafers." Id. While 5N's proposal left the "amount" blank, the proposal stated that the "[e]xtended price depends upon number of wafers rotated . . ." Id.

The agency found that the offerors' prices were not easily comparable to each other. AR, Tab 5, Price Negotiation Memorandum, at 4. In order to compare the two offerors' pricing, the CO concluded that she needed to see the pricing "represented as a price per wafer." Id. Consequently, on September 21, the contracting officer sent to each offeror a spreadsheet that the contracting officer had created, representing what the contracting officer believed was each offeror's pricing, including a price per wafer and total price. AR, Tab 10, Agency Representation of Umicore's Pricing; Tab 19, Agency Representation of 5N's Pricing. Along with the spreadsheet, the agency sent an identical email to each offeror, stating that

[t]he pricing structure provided on Standard Form 1449 will be used at time of award. However, DLA wants to clarify price per wafer. The attached spreadsheet was developed to get a better understand[ing] of your pricing proposal. If DLA misrepresented your pricing structure, please correct.

AR, Tab 6, Agency Email to Umicore, Sept. 21, 2017; Tab 16, Agency Email to 5N, Sept. 21, 2017. In its spreadsheets, the contracting officer calculated Umicore's total price to be \$4,058,649, and 5N's total price to be \$13,268,272. AR, Tab 10, Agency Representation of Umicore's Pricing; Tab 19, Agency Representation of 5N's Pricing.

Both offerors responded to the agency's email that same day. Umicore provided a brief explanation of its understanding of the requirements, stating that it was unsure if it was limited to only the number of wafers currently stored at its facility, and thus it made an offer "to include only the 40,491 wafers at our facility and another offer for the DLA stockpile total of 101,939." Protest, exh. 5, Umicore Email to Agency, Sept. 21, 2017. Umicore also provided a corrected version of the agency's spreadsheet. Protest, exh. 5.1, Umicore Price Proposal Spreadsheet. The spreadsheet showed Umicore's total price to be the same (\$4,058,649), and, as relevant to the protest, showed pricing for the rotation of wafers as follows (for the base year and each option year):

| CLIN | Supplies/Services | Total Wafers | QTY | Unit | Price per Wafer | Total Amount |
|------|-------------------------------------|--------------|--------|------|-----------------|--------------|
| 0002 | Rotation— Contractor Proposed | 40,491 | 10,123 | EA | [DELETED] | [DELETED] |
| 0003 | Rotation— Government Directed | 101,939 | 25,485 | EA | [DELETED] | [DELETED] |

Protest, exh. 5.1, Umicore Price Proposal Spreadsheet.

5N also provided an email response that day, which the agency promptly answered by stating that "[f]or the integrity of acquisition, please represent your price on the attached spreadsheet provided by the Government. Please note, you may adjust your price proposal if necessary." AR, Tab 18, Agency Email to 5N, Sept. 21, 2017. 5N then

provided a corrected version of the agency’s spreadsheet, which showed a new total price of \$4,620,277, and reflected a changed price per wafer (that is, 5N converted its price to reflect the price to rotate a 4-inch wafer, rather than a 6-inch wafer), as follows (for the base year and each option year):

| CLIN | Supplies/Services | Total Wafers | QTY | Unit | Price per Wafer | Total Amount |
|------|-------------------------------------|--------------|--------|------|-----------------|--------------|
| 0002 | Rotation— Contractor Proposed | 101,939 | 25,485 | EA | [DELETED] | [DELETED] |
| 0003 | Rotation— Government Directed | 101,939 | 25,485 | EA | [DELETED] | [DELETED] |

AR, Tab 20, 5N Spreadsheet.

On September, 22, the agency sent an identical confirmation letter to both offerors. AR, Tab 12, Umicore Confirmation Letter; Tab 21, 5N Confirmation Letter. The letter requested that each offeror confirm the following: that the offeror can store the inventory in its entirety; that the offeror can rotate the material in its entirety; and that for each period of performance, the government reserves the right to authorize only contractor proposed rotation, authorize only government directed rotation, authorize both contractor proposed and government directed rotation, and/or authorize no rotation. Id. Umicore provided the requested confirmation that same day.⁴ AR, Tab 13, Umicore Letter to Agency, Sept. 22, 2017.

After receipt of Umicore’s confirmation letter, the contracting officer contacted Umicore on Saturday, September 23, requesting that the firm “[p]lease make alter[ations] to the spreadsheet that you provided me on Thursday [September 21] to reflect your responses for price per wafer. You may adjust your pricing as well.” AR, Tab 7, Agency Email to Umicore, Sept. 23, 2017. Umicore responded by email the next day. In its email, Umicore explained that it had

updated the unit pricing to reflect what we understood the intent of the DLA rotations strategy to be. That is to exchange the Ge content that is currently in 4 [inch] wafers with the same volume of Ge in 6 [inch] wafers. This means the 101,939 current 4 [inch] wafers contain the same amount of Ge as [DELETED] 6 [inch] wafers. The total prices listed in the SF 1449 are correct but do not show how many 6 [inch] wafers are produced at that value. To make it more clear we added [] columns to show how many wafers would be produced in the 6 [inch] size.

⁴ 5N provided confirmation on September 25. AR, Tab 22, 5N Letter to Agency, Sept. 25, 2017.

AR, Tab 7, Umicore Email to Agency, Sept. 24, 2017. Along with this email, the protester submitted a spreadsheet, which included new columns showing the number of wafers in the 6 inch size. However, the spreadsheet continued to show that, under CLIN 0002, the protester was proposing to rotate a total of 25 percent of its current stock of wafers (40,491). AR, Tab 11, Umicore Spreadsheet; Protest, exh. 6.1, Umicore Spreadsheet. The protester's total price remained the same (\$4,058,649). Id.

Despite these multiple rounds of exchanges, the contracting officer determined that the offerors still lacked a uniform understanding of the statement of work. AR, Tab 5, Price Negotiation Memorandum, at 5. The contracting officer called both offerors in order to clarify pricing. According to the protester, on September 25 it received a phone call in which the contracting officer explained that she was "trying to put prices on a 'per wafer' basis in order to compare offers." Protest at 4. In response to the phone call, Umicore stated that it would "fix the quantity column of their spreadsheet." AR, Tab 5, Price Negotiation Memorandum, at 5. On September 26, Umicore submitted an email thanking the agency for allowing it the opportunity to clarify its proposal, and including a spreadsheet demonstrating that, under CLIN 0002, it would now rotate 25 percent of the total GFM (101,939 wafers). AR, Tab 8, Umicore Email to Agency, Sept. 26, 2017; Tab 14, Umicore Spreadsheet. The spreadsheet showed a new total amount of \$5,740,664, which reflected the increase in wafers to be rotated under CLIN 0002. AR, Tab 14, Umicore Spreadsheet. 5N responded that it understood that the government needed flexibility for rotation options, that the government will not exceed rotation of more than 100 percent of the inventory, and that 5N's "final representation of price is \$4,620,277." AR, Tab 5, Price Negotiation Memorandum, at 5.

After this round of exchanges, the contracting officer determined that each offeror correctly understood the requirements of the contract, and that 5N had submitted the lower-priced proposal (\$4,620,277 v. \$5,740,664). The agency made award to 5N on September 30, and Umicore received a debriefing on October 4. This protest was filed on October 12.

DISCUSSION

Umicore primarily argues that the agency improperly evaluated proposals using an unstated evaluation factor. As explained below, we find that the protester's challenge to the agency's allegedly unstated evaluation criteria is untimely, and that the protester's other miscellaneous arguments provide no basis to sustain the protest.⁵

The protester first argues that the agency improperly evaluated offerors' pricing based on a per wafer price that was not disclosed in the solicitation, and which was inconsistent with the pricing evaluation scheme contained therein. Protest at 6. The

⁵ While we do not address every argument raised by the protester in this decision, we have considered them all and concluded that none provides a basis to sustain the protest.

protester further alleges that it was unreasonable for the agency to compare offerors' prices using a per wafer price because the solicitation allowed for offerors to submit wafers of different thicknesses, such that an offeror with a thicker wafer would require fewer wafers to perform the contract, and thus have a higher per wafer price. Protest at 8. In contrast, the agency argues that the RFP's price evaluation scheme permitted the agency to evaluate prices on a per wafer basis, and that any challenge to the reasonableness of the agency's use of a price per wafer evaluation scheme is untimely.

We need not resolve the issue as to whether the protester's or agency's interpretation of the solicitation provisions is the only reasonable interpretation, because, as argued by the protester, the protester's interpretation of the solicitation results in a patent ambiguity. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error (e.g., where the solicitation provisions appear inconsistent on their face). Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 11. When a communication from a contracting officer--even if not designated a solicitation amendment--conflicts with the plain language of the solicitation, the ambiguity created is a patent ambiguity. Input Solutions, Inc., B-294123, Aug. 31, 2004, 2004 CPD ¶ 185 at 3-4. A patent ambiguity must be protested prior to the next closing time for the submission of proposals in order to be considered timely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); Ashe Facility Servs., Inc., supra.

Here, Umicore was informed by the agency that the agency intended to conduct its price evaluation using a price per wafer comparison no later than September 25, when the CO informed the firm in a telephone conversation that she intended to compare offerors' pricing on a per wafer basis. Furthermore, this conversation was consistent with repeated earlier attempts by the agency to ascertain Umicore's price per wafer by requesting that Umicore correct any mistakes in the agency's spreadsheet, which was designed to ascertain Umicore's price per wafer. Given this, we find that the protester knew, no later than September 25, that the agency intended to conduct its price evaluation using a price per wafer comparison.

To the extent the protester believed that such a price evaluation scheme was incompatible with the price evaluation laid out in the solicitation, Umicore was required to file its protest of any such patent ambiguity prior to the next closing time for receipt of proposals. Furthermore, to the extent the protester believed that an evaluation on a per wafer basis was an unreasonable method for evaluating price (because the RFP permitted offerors to provide wafers of varying thickness), the protester was also required to raise this protest ground prior to the closing time for receipt of proposals. Here, the record is unclear as to whether Umicore was given a specific closing time following the agency's telephone call on September 25. Given this, we find that, at the latest, the protester had 10 days from September 25 to file its protest. See Del-Jen Educ. & Training Group/Fluor Federal Solutions LLC, B-406897.3, May 28, 2014, 2014 CPD ¶ 166 at 7-9 (where the agency does not provide an opportunity to submit revised proposals after the alleged solicitation defect becomes known, an offeror is obligated to protest the issue within 10 days after knowing of the basis of protest). Since these protest grounds were not filed until October 12, we dismiss these grounds as untimely.

The protester asserts that these grounds were timely filed because they were filed within 10 days of receiving Umicore's requested, and required, debriefing. However, because the purpose underlying the debriefing exception to our timeliness rules for negotiated procurements is not present in a solicitation impropriety challenge (*i.e.*, to preclude the filing of a protest before actual knowledge that the basis for protest exists), we have declined to apply the debriefing timeliness rules under circumstances such as those found here. See Protect the Force, Inc.--Recon., B-411897.3, Sept. 30, 2015, 2015 CPD ¶ 306 at 3-5; Del-Jen Educ. & Training Group/Fluor Federal Solutions LLC, *supra*, at 7; see 4 C.F.R. § 21.2(a)(2). Consequently, we find that Umicore's time to file its protest was not tolled by its debriefing.

The protester raises several additional arguments in its comments on the agency's report. For example, the protester argues that the agency was required to reject 5N's proposal because 5N's proposal failed to include certain material terms--namely, the required firm fixed prices; that the agency improperly allowed the awardee to revise its proposal; and that the agency treated the offerors disparately during the exchanges. We find these allegations provide no basis to sustain the protest.

First, with regard to the protester's contention that the agency was required to reject 5N's proposal for failing to include the required prices, we note that 5N, in fact, included fixed unit prices in its proposal. While the awardee did not include an "amount" in its proposal, its proposal explained (with regard to CLIN 0002) that the "[e]xtended price depends upon the number of wafers rotated per contractor recommendation in accordance with SOW 3.3.2 [pertaining to contractor proposed rotations]," and (with regard to CLIN 0003) that the "[e]xtended price depends upon the number of wafers rotated up to maximum as specified in SOW paragraph [3.3.1] [pertaining to government directed rotations]." ⁶ AR, Tab 33, 5N Proposal, at 4-10. Given that the awardee explained its pricing methodology in its proposal--specifically, explaining why it had not included a price for "amount"--we find that 5N's proposal did not fail to include any required material terms. See Omnicell, Inc., B-414021, B-414021.2, Jan. 23, 2017, 2017 CPD ¶ 42 at 4 (proposal language that does not cast doubt on the firmness or enforceability of proposed prices can be accepted).

In any event, as explained above, the agency engaged in several rounds of exchanges with the offerors after receipt of the proposals. Throughout the record the parties have referred to these rounds of exchanges as clarifications; however, we find that the agency's conduct consisted of discussions with the offerors. In this regard, we have consistently held that the acid test of whether or not discussions have occurred is whether the offeror has been afforded an opportunity to revise or modify its proposal. Archer Western Federal JV, B-410168.2, B-410168.3, Nov. 12, 2014, 2014 CPD ¶ 351

⁶ The awardee's proposal appears to reference the wrong section of the statement of work here. That is, the proposal references section 3.1.1. However, it is clear from the context that the protester intended to refer to 3.3.1.

at 5-6. Here, while the record demonstrates that the agency's exchanges with the offerors sought to "clarify" the offerors' pricing, each offeror was specifically given the opportunity to revise its pricing during these exchanges, if it desired. Given this, we find that the agency engaged in discussions. Furthermore, with regard to the protester's allegation that the agency improperly allowed the awardee to revise its proposal through clarifications, as explained, the agency's conduct did not constitute clarifications, but rather discussions, and thus the awardee was permitted to make price revisions.⁷

Finally, the protester alleges that the agency treated offerors disparately during the discussions. The protester alleges that the agency acted improperly by creating a spreadsheet for 5N that included "additional numbers," not included in 5N's worksheet. Protester's Comments at 10. The protester points out that the agency's spreadsheet provided a number for the "total wafers," the maximum number of wafers to be rotated in a year, and the "total amount." Id. The protester asserts that, the "total amount," was an amount that offerors were to include in their proposal, and thus it was improper for the agency to provide that number to the awardee. The protester alleges that, in contrast to these actions regarding 5N's proposal, the agency did not inform Umicore of the weak areas in its proposal--specifically, its high price.

In conducting discussions with offerors, agencies may not engage in what amounts to disparate treatment of the competing offerors. HP Enter. Servs., LLC; Aon Nat'l Flood Servs., B-413967 et al., Jan. 17, 2017, 2017 CPD ¶ 26 at 9. In this regard, when holding discussions, procuring agencies are not permitted to engage in conduct that favors one offeror over another. FAR § 15.306(e)(1). An agency must, at a minimum discuss deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. FAR § 15.306(d)(3). Additionally, a contracting officer may, in his or her discretion, inform an offeror that its price is considered by the government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. FAR § 15.306(e)(3).

We find nothing improper with the agency's actions. As explained above, the agency's spreadsheet sought to understand the offerors' pricing, and provided that offerors could correct the spreadsheet if the agency's understanding of the offerors' pricing was incorrect. Moreover, the agency did this for both offerors, filling in prices that the agency believed reflected the offerors' proposed pricing. For example, for Umicore's proposal, the agency created the "additional numbers" of Umicore's price per wafer. Given that the agency did this for both firms, and requested that both firms confirm the same set of numbers, we find the agency's actions did not constitute disparate treatment. With regard to the protester's argument that the agency was required to inform the firm of its high price, there is nothing in the record to indicate that the agency

⁷ We note that Umicore was also specifically given the opportunity to revise its price, and the quantity of wafers it proposed to rotate under CLIN 0002, such that Umicore's proposal met the solicitation's requirements. In revising its quantity of wafers, Umicore also changed its price from \$4,058,649 to \$5,740,664.

viewed Umicore's price as unreasonably high, and Umicore, like 5N, was advised that it could alter its price. Unless an offeror's proposed price is so high as to be unreasonable or unacceptable, an agency is not required to inform an offeror during discussions that its proposed price is high in comparison to a competitor's proposed price, even where price is the determinative factor for award. Joint Logistics Managers, Inc., B-410465.2, B-410465.3, May 5, 2015, 2015 CPD ¶ 152 at 4.

The protest is dismissed in part, and denied in part.

Thomas H. Armstrong
General Counsel