U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States



# Decision

**Matter of:** Steel Point Solutions, LLC

**File:** B-418224; B-418224.2

**Date:** January 31, 2020

Kevin J. Maynard, Esq., Kendra P. Norwood, Esq., and Gary S. Ward, Esq., Wiley Rein LLP, for the protester.
Matthew P. Moriarty, Esq., Ian P. Patterson, Esq., and Robert D. Kampen, Esq., Koprince Law, LLC, for Creative IT Solutions, LLC, the intervenor.
Colleen A. Eagan, Esq., Michelle L. Sabin, Esq., and Nati Silva, Esq., Defense Information Systems Agency, for the agency.
Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Protest that the agency unreasonably awarded a reprocurement contract for a term greater than the undelivered term remaining on the terminated contract is sustained where repurchasing services for a term greater than the undelivered term is inconsistent with applicable procurement regulations.

2. Protest that the agency unreasonably failed to evaluate whether awardee's pricing was realistic is denied where the solicitation did not expressly require the agency to conduct a price realism evaluation.

3. Protest that the agency unreasonably issued the reprocurement contract on the basis of quotations previously submitted is denied where the protester did not demonstrate that the agency improperly concluded that prices submitted were an accurate measure of expected competition.

## DECISION

Steel Point Solutions, LLC, of Calverton, Maryland, protests the award of a task order contract to Creative IT Solutions, LLC, of Fort Cobb, Oklahoma, under request for quotations (RFQ) No. 831812287, issued by the Defense Information Systems Agency (DISA) to reprocure communications support services after default by the original contractor. Steel Point alleges that DISA unreasonably awarded the contract to Creative IT Solutions because DISA should have conducted a new acquisition,

arbitrarily failed to evaluate quotations for realistic prices, and improperly made its tradeoff on a lowest-priced, technically acceptable basis.

We sustain the protest.

BACKGROUND

On September 12, 2018, pursuant to Federal Acquisition Regulation (FAR) part 8, DISA issued the RFQ for communications infrastructure design, implementation, and sustainment in an enterprise-computing environment. Agency Report (AR), Tab 2, RFQ at 1-2; Combined Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 5-6. DISA restricted competition to Historically Underutilized Business Zone (HUBZone) small businesses holding General Services Administration (GSA), Information Technology Schedule 70, Special Item Number 132-51 Federal Supply Schedule (FSS) contracts. AR, Tab 2, Conformed RFQ at 2. The RFQ contemplated the award of a fixed-price contract to be performed over a 6-month base period, and two 1-year option periods. Id. Award would be made to the vendor with the lowest-priced, technically acceptable (LPTA) quotation. Id.

In making the award, DISA would consider technical/management and price factors. AR, Tab 2, Conformed RFQ at 4. The technical/management factor was comprised of four subfactors, including: design services engineering; communications automation; network application support; and, minimum personnel qualifications matrix. Id. The RFQ advised that price quotations would be evaluated to determine whether quoted prices were reasonable and complete, and also advised that DISA may conduct a realism analysis. Id.

Five vendors submitted quotations by the November 13, 2018, closing date. COS/MOL at 7. Akira Technologies, Inc. quoted the lowest price ($34,461,714), Creative IT Solutions quoted the second lowest price ($47,362,819), and Steel Point quoted the highest price of the five vendors ($54,326,287). AR, Tab 8C, Original Price Negotiation Memorandum (PNM) at 5. After evaluating Akira's quotation as technically acceptable, DISA issued a task order to Akira on February 25, 2019. Id. at 6.

On June 1, Akira commenced performance under the contract. COS/MOL at 8. On July 24, the agency issued a corrective action report detailing Akira's inability to meet various staffing requirements. Id.; AR, Tab 11A.1a, Corrective Action Report at 1. After issuing a cure notice, DISA terminated its contract with Akira for cause on September 20. AR, Tab 11B.1b, Cure Notice at 1; AR, Tab 11C.1, Termination COS at 16.

Because the agency still required the communications support services, it determined that reprocurement from the original competition and quotations was warranted. AR, Tab 13, Reprocurement PNM at 1 ("The Contracting Officer determined that reprocurement from the original competition and quotations was warranted prior to termination."). The agency identified Creative IT Solutions as quoting the second lowest

price, and evaluated its quotation as technically acceptable. Id. at 6. After Creative IT Solutions extended the validity of its quotation, on October 17, the agency issued a task order for a 6-month base period and two 1-year option periods. Id. This protest followed.[1]

DISCUSSION

Steel Point raises various allegations challenging the agency's reprocurement contract under Federal Acquisition Regulation (FAR) § 49.402-6(b), "Repurchase against contractor's account." Steel Point's principal allegation challenges the length of the procurement contract, arguing that the agency effectively conducted a new acquisition by ordering more than the undelivered services remaining on the agency's contract with Akira. Steel Point also challenges the agency's evaluation and selection of Creative IT Solutions for the reprocurement contract. In response, the agency argues that commercial item procedures under FAR § 12.403(c) authorize the agency to conduct this reprocurement rather than conduct a new competition, and contends that its selection of Creative IT Solutions was reasonable. We discuss Steel Point's primary allegations below. [2]

While recognizing, as a general rule, that the statutes and regulations governing regular procurements are not strictly applicable to reprocurements after default, our Office will review a reprocurement to determine whether the contracting agency acted reasonably under the circumstances. Maersk Line, Ltd., B-410445, B-410445.2, Dec. 29, 2014, 2015 CPD ¶ 16 at 4.

By way of background, most reprocurements are conducted pursuant to FAR § 49.402-6 because that is the standard default provision applicable to fixed-price contracts. Pursuant to that provision, an agency has considerable discretion to repurchase goods and services for a substitute contract. Indeed, where the agency seeks to repurchase goods or services in a quantity not exceeding the undelivered quantity remaining on the original contract, it may use any acquisition method, provided that it observes competition to the maximum extent practicable. FAR § 49.402-6(b). However, where the agency seeks to repurchase goods or services in a quantity exceeding the undelivered quantity remaining on the original contract, its discretion is more limited, and it must treat that repurchase as a new acquisition. Id. Thus, the standard default provision allows the agency to enter into a contract for the undelivered

[1] During the pendency of the protest, DISA notified our Office that it had determined that urgent and compelling circumstances did not permit waiting for our decision, and therefore authorized performance of the contract pursuant to 31 U.S.C. § 3553(d)(3)(C). AR, Tab 16, DISA Letter to GAO, at 1. DISA explained that the communication networks supported by this procurement are critical to active military operations, training exercises, and other mission essential functions. Id.

[2] We have reviewed all of Steel Point's allegations, but discuss only the major points of contention. To the extent we do not specifically address an allegation, it is denied.

portion of the original contract, provided that competition to the maximum extent practicable is observed, but the agency may not use this authority to enter into what would effectively be a new non-replacement contract. See United States Pollution Control, Inc., supra at 4 (reprocurement contract not a new acquisition because it was for the same services and for the period of performance remaining on the original contract).

This procurement, however, does not involve the standard default provision because the original solicitation contemplated the award of an order placed against the FSS, and therefore, the acquisition was conducted pursuant to FAR part 8 procedures. AR, Tab 2, Conformed RFQ at 2; FAR § 8.403(a)(1). As a result, the original contract was terminated pursuant to FAR §§ 8.406-4(a)(1)[3] and 12.403 rather than the authorities under part 49 of the FAR.[4] Thus, FAR § 49.402-6(b) is only applicable as guidance, and only to the extent that it does not conflict with specific procedures applicable to commercial item acquisitions. FAR § 12.403(a); see also Essan Metallix Corp., B-310357, Dec. 7, 2007, 2008 CPD ¶ 5 at 2.

Although the agency is not required to follow FAR § 49.402-6(b) for this reprocurement, we nevertheless think that the agency is subject to some of the same restrictions that provision sets forth. Chiefly, while an agency has authority to enter into reprocurement contracts for the undelivered quantity or term, it does not have authority to enter into

---

[3] Section 8.406-4(a)(1) of the FAR provides:

> An ordering activity contracting officer may terminate individual orders for cause. Termination for cause shall comply with FAR 12.403, and may include charging the contractor with excess costs resulting from repurchase.

[4] Section 12.403(a) of the FAR provides:

> The clause at 52.212-4 permits the Government to terminate a contract for commercial items either for the convenience of the Government or for cause. However, the paragraphs in 52.212-4 entitled “Termination for the Government’s Convenience” and “Termination for Cause” contain concepts which differ from those contained in the termination clauses prescribed in part 49. Consequently, the requirements of part 49 do not apply when terminating contracts for commercial items and contracting officers shall follow procedures in this section. Contracting officers may continue to use part 49 as guidance to the extent that part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4.

contracts for quantities or terms exceeding the undelivered quantity or term remaining on the original contract. To illustrate, FAR § 12.403(c)(2) provides as follows:

> The Government's rights after a termination for cause shall include all the remedies available to any buyer in the marketplace. The Government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess reprocurement costs together with any incidental or consequential damages incurred because of the termination.

FAR § 12.403(c)(2); see also FAR clause 52.212-4(m) (in the event of a termination for cause, the contractor is liable to the government for any and all rights and remedies provided by law).[5] Thus, the agency's repurchase authority is restricted to any remedy available to a buyer in the marketplace.

One remedy available in the commercial marketplace is described as "cover." Cover authorizes the buyer to purchase goods in substitution for those due from the seller and then recover from the seller the price differential between the original and substituted goods. See generally Uniform Commercial Code, § 2-712; see also Chemical Equip. Corp., ASBCA No. 21574, 78-1 BCA ¶ 12940 (even if the contract did not include the standard default clause, the government would be able to "cover" by repurchasing the goods and recovering its losses from the seller). Indeed, FAR § 12.403(c)(2) specifically contemplates the concept of "cover" as the government's preferred remedy. Cf. Erny Supply Co., ASBCA No. 20260, 75-2 BCA ¶ 11612 (observing that the standard default clause provides a similar remedy to the UCC concept of "cover"). Thus, as set out in FAR § 49.402-6(b), the agency may enter into a reprocurement contract for the quantity undelivered on the original contract in order to cover its requirement. That said, we see no authority to enter into a reprocurement contract for more than the undelivered quantity because that would exceed the legal remedy of "cover."

Having established that FAR § 12.403(c) provides the applicable standard, we now address Steel Point's principal allegation, and conclude that the length of the reprocurement contract exceeded the undelivered term remaining on the original contract. In our view, the reprocurement contract should have been for no more than approximately 26 and one-half months because Akira performed for approximately three

[5] The agency explained that Akira's termination was conducted pursuant to FAR clause 52.212-4(m) because, even though Akira's schedule contract included General Services Administration Acquisition Manual clause 552.212-4(m), that clause references the FAR commercial item acquisition default clause, FAR clause 52.212-4(m). Supp. COS/MOL at 18-19, n.8.

and one-half months before its contract was terminated.[6] Although DISA asserts that it "received nothing of merit" from Akira, we do not find that position persuasive because the record shows that Akira was compensated for its performance, Akira had at least some staff performing contract duties, and Akira provided at least some of the contract deliverables. Supp. COS/MOL at 21; see also AR, Tab 11C.2a, Akira Contract Modification P00001 at 2; AR, Tab 11C.1, Termination COS at 8, 14-15; cf. United States Pollution Control, Inc., supra at 4 (agency's reprocurement contract did not constitute a new acquisition under FAR § 49.402-6(b) because it covered the same services and the remaining period of performance, including the option period, under the original contract). Furthermore, the agency has not provided any evidence (e.g., affidavits from appropriate agency officials) substantiating its assertion that Akira effectively did not perform any of its duties. See Supp. COS/MOL at 21. Accordingly, we conclude that the length of the reprocurement contract improperly exceeds the length of time remaining on Akira's contract, and, as a result, allows the agency to receive an additional three and one-half months of performance above the level contemplated in the RFQ.[7]

Steel Point also raises various allegations that DISA unreasonably selected Creative IT Solutions for the reprocurement contract. We do not find any of these contentions provide a basis to sustain the protest. Steel Point primarily contends that the agency should have conducted a price realism evaluation. Protester's Supp. Comments at 6-8.

In reviewing protests challenging an agency's evaluation of quotations, our Office does not reevaluate quotations or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria, as well as applicable statutes and

---

[6] A six-month base period and two 1-year option periods equal 30 months total. Subtracting three and one-half months from 30 months roughly equates to 26 and one-half months.

[7] Steel Point also challenges the agency's decision to include the two 1-year option periods in the agency's reprocurement contract. Protester's Supp. Comments at 19-20. Steel Point argues that the agency may only include option periods in a reprocurement contract when the agency can cite unusual and compelling circumstances to justify such inclusion. See Protester's Supp. Comments at 19-20 (citing Master Security, Inc., B-235711, Oct. 4, 1989, 89-2 CPD ¶ 303). We deny this allegation because the protester has not provided us with any legal basis to conclude that the agency was not permitted to include the option periods it purchased originally when awarding a reprocurement contract to cover its requirements, pursuant to FAR § 12.403(c). Instead, the protester's argument only stands for the proposition that an agency may not include option periods without citing unusual and compelling circumstances after issuing the reprocurement contract on a sole-source basis pursuant to FAR § 49.402-6(b). Thus, because the instant reprocurement was not awarded on a sole-source basis and was not conducted under FAR § 49.402-6(b), we do not find the protester's argument persuasive.

regulations. Information Ventures, Inc., B-407478.4, July 17, 2013, 2013 CPD ¶ 176 at 5.

We do not agree with Steel Point's assertion that the agency should have conducted a price realism evaluation. We note first that the underlying solicitation did not require the agency to perform a price realism evaluation. Our decisions explain that, when awarding a fixed-price contract, an agency is not required to perform a price realism analysis where a solicitation only states that the agency "reserves the right" to conduct an analysis; rather, under such circumstances, the decision to conduct a price realism analysis is a matter within the agency's discretion. Bauer Techs., Inc., B-415717.2, B-415717.3, June 22, 2018, 2018 CPD ¶ 217 at 7. Thus, because the solicitation contemplated the award of a fixed-price contract and provided that the "Government reserves the right, but is not obligated, to conduct a realism analysis," we conclude that the agency had no actual obligation to conduct a price realism analysis. AR, Tab 2, Conformed RFQ at 4. Although the protester argues that the agency should have conducted a price realism evaluation in light of Akira's default, we find no basis to question the agency's determination since the RFQ did not limit the agency's discretion when determining whether a price realism evaluation was warranted. Accordingly, we deny this protest allegation.

Steel Point also challenges the agency's evaluation of Creative IT Solutions' technical quotation and the price evaluation for the third lowest-priced vendor. Protester's Comments and Supp. Protest at 6-11. We conclude, however, that Steel Point is not an interested party to maintain these aspects of its protest. Under our Bid Protest Regulations, a protester must be an interested party to pursue a protest before our Office. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party if it would not be next in line for award if its protest were sustained. Vertical Jobs, Inc., B-415891.2, B-415891.4, Apr. 19, 2018, 2018 CPD ¶ 147 at 8.

Here, even if the protester were correct as to the agency's evaluation of Creative IT Solutions' quotation or the price evaluation of the third lowest-priced vendor, the record shows that there is another intervening vendor. AR, Tab 13, PNM, at 6. Despite its argument challenging the agency's failure to conduct a price realism analysis, Steel Point has not separately challenged the agency's evaluation of the fourth lowest-priced vendor.[8] Thus, the fourth lowest-priced vendor would be next in line for award if Steel Point's challenges to Creative IT Solutions and the third lowest-priced vendor were correct. We therefore dismiss these aspects of Steel Point's protest.

Finally, Steel Point challenges the agency's decision to make the reprocurement award on the basis of the second lowest-priced quotation received in the original competition instead of reopening the competition on a full and open basis. Specifically, Steel Point argues that the agency should have recompeted the requirement because the prices

[8] Steel Point argued that the fourth lowest-priced vendor's quoted price was unrealistic. Because we conclude that the agency was not required to perform a price realism evaluation, we deny this challenge.

quoted for the original competition were no longer valid since 11 months had passed between when prices were submitted and the reprocurement contract was awarded. Protester's Comments and Supp. Protest at 15-17.

We disagree. In our view, the original competition provides a reasonably accurate measure of any reprocurement competition because pricing for both competitions would have been based on the same GSA schedule rates. See COS/MOL at 18 ("The original base period of the Akira contract required a price quotation spanning a period of time represented by [Fiscal Year] 2019 – [Fiscal Year] 2020; therefore, a reprocurement contract with a similar base period that started November 1, 2019, would include GSA schedule rates from a similar period.").

In addition, Steel Point argues that the 11-month period between when prices were submitted and the reprocurement contract was awarded means that vendors' may have different financial situations, and may quote new prices. We view this argument as predicated on pure speculation rather than any identifiable change in market conditions. Steel Point has not demonstrated that the agency had a basis to conclude that vendors' financial situations were different, such that the agency would have expected a new competition to bring different prices. See International Tech. Corp., B-250377.5, Aug. 18, 1993, 93-2 ¶ 102 at 5 (reprocurement was reasonable when agency had no reason to believe that the original competition no longer remained an accurate index of the competitive environment). Moreover, the protester has not argued that it would have revised its price if it were given the opportunity to submit a new quotation. See Protester's Comments and Supp. Protest at 17. Accordingly, we deny the protest allegation.[9]

COMPETITIVE PREJUDICE

Based on the foregoing, we conclude that the agency exceeded its authority when it awarded this reprocurement contract for a longer period of time than the balance of the length of the original contract issued to Akira. We sustain the protest on this basis. In order to sustain a protest, our Office must find that, but for the agency's action, the protester would have had a substantial chance of receiving award (i.e., the protester must demonstrate that it suffered competitive prejudice). Glacier Tech. Sols., LLC, B-412990.2, Oct. 17, 2016, 2016 CPD ¶ 311 at 12. Under this standard, the protester

[9] To the extent the protester challenges the agency's decision to procure the services on an LPTA basis, we dismiss this allegation as untimely. Our Bid Protest Regulations provide that any challenges to the terms of the solicitation must be filed prior to the receipt of initial quotations. 4 C.F.R. § 21.2(a)(1); Fisher Sand & Gravel Co., B-417496, July 26, 2019, 2019 CPD ¶ 280 at 6-7. Thus, Steel Point's allegation that using the LPTA source selection methodology was unreasonable should have been filed prior to the November 13, 2018, closing date. While Steel Point argues that its allegation is timely because it challenges the agency's decision to reprocure on that basis, we do not find that argument convincing because the agency made its selection pursuant to the terms of the original RFQ.

need not demonstrate that it was likely or even probable that it would have received award; rather, the protester need only demonstrate a reasonable possibility of competitive prejudice.

Here, there is no dispute in the record that Steel Point is a legitimate supplier and stands ready to compete for these services. Protest at 1. By issuing the reprocurement contract for a term that is longer than the undelivered quantity and the period of performance contemplated by the underlying RFQ, DISA prevented Steel Point from having an opportunity to compete for these services during the additional term of the contract. This missed opportunity to compete constitutes prejudice. See Southeastern Chiller Servs., Inc., B-254925, Jan. 28, 1994, 94-1 CPD ¶ 49 at 3 (protester's missed opportunity to compete for a contract constituted competitive prejudice).

RECOMMENDATION

Since the agency concluded that urgent and compelling circumstances did not permit waiting for our decision, performance of this contract continued during the course of this protest. As a result, we recommend that the agency limit the length of the reprocurement contract, so that its duration does not exceed the length of performance remaining on Akira's contract. We also recommend that the agency reimburse the protester its costs associated with filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Thomas H. Armstrong
General Counsel