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Decision

Matter of: Crown Point Systems

File: B-413940; B-413940.2

Date: January 11, 2017

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DIGEST

Protest that agency's price evaluation failed to reasonably assess the risk of awardee's understated pricing is denied where the solicitation did not provide for a price realism evaluation and the agency reasonably assessed the risk of unbalanced pricing with respect to the awardee's proposal as contemplated by the solicitation. Allegations of material misrepresentations by awardee are denied where the record does not establish that any statements in awardee's proposal were false.

DECISION

Crown Point Systems (CPS) of San Diego, CA, protests the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract to CounterTrade Products, Inc. (CTPI), of Arvada, CO, under solicitation No. N66001-R-0001, issued by the Department of the Navy's Space and Naval Warfare Systems Center Command, for electronics and information technology items. The protester challenges the award on the basis that the agency's unbalanced pricing analysis and evaluation of one of the technical evaluation factors were unreasonable, and that the awardee made material misrepresentations in its proposal.

We deny the protest.

BACKGROUND

The Navy issued request for proposals (RFP) No. N66001-R-0001 for approximately 1,500 commercial off-the-shelf items including a variety of small electronics, audio, and computer equipment. Agency Report at 1-2. The RFP contemplated the award of a single IDIQ contract and instructed offerors to submit fixed prices and product information for “brand name” items as the first sub-exhibit line item (sub-ELIN) under each of 1,441 exhibit line items (ELINs), and, optionally, to submit pricing for additional items “equal” to the brand name items as additional sub-ELINs. RFP at 30-31. The RFP further provided that all proposals would be evaluated using a four-step process. Id. at 34.

First, proposals would be evaluated for acceptability on the basis of unqualified assent to the terms of the RFP. RFP at 34. Second, acceptable proposals would be evaluated with respect to three technical evaluation factors: (1) supply chain risk management; (2) equal item submissions; and (3) past performance. Third, the agency would evaluate offerors’ prices. Id. Finally, the agency would conduct a price-technical tradeoff to determine which proposal represented the best value to the government. Id. For the purposes of the tradeoff, supply chain risk management was more important than equal item submissions, equal item submissions was more important than past performance, and when combined, the non-price factors were approximately equal to price. Id.

Of particular relevance to this protest, the RFP provided that the evaluation of the supply chain risk management factor involved an assessment of an offeror’s ability to reduce, mitigate, or eliminate the risk of “grey market” and counterfeit items from entering its supply chain. RFP at 32-33. The proposal submissions were to identify specific practices currently in place to reduce supply chain risk. At a minimum, offerors were to address: (1) the initiatives undertaken to identify and mitigate risks in the offeror’s supply chain as it relates to the prevention and detection of grey market and counterfeit items; (2) the verification process to confirm components supplied to the government are authentic and free of malware or any other adverse embedded anomaly that may pose a risk; and (3) any professional certifications earned that are associated with supply chain risk management practices. Id.

With respect to price, the RFP provided for an evaluation of price reasonableness and an analysis of unbalanced pricing. RFP at 36-37. Of note, the RFP defined unbalanced pricing as a case where, despite an acceptable total evaluated price, the price of one or more Sub-ELINs is significantly over or understated as indicated by the application of cost or price analysis techniques. RFP at 37. The RFP established that proposals would be evaluated for unbalanced pricing based on random sampling. Id.

The agency received four offers, two of which were evaluated as unacceptable because they did not provide prices for all required items. Agency Report at 4. As

a result, only CPS's and CTPI's offers were further evaluated. Id. CPS received an overall technical rating of outstanding with a total evaluated price of \$30,832,029, while CTPI received an overall technical rating of acceptable with a total evaluated price of \$19,331,286. Id. The agency then conducted a price reasonableness analysis, not at issue in this protest, and an unbalanced pricing analysis. Id. at 4-5.

With respect to the unbalanced pricing analysis, the agency determined, with a high level of confidence and based on random sampling, that a majority of CTPI's quoted prices were likely to be reasonable.¹ Agency Report at 5. Specifically, with respect to potentially overstated prices, the agency determined that 59 out of 1,441 ELIN prices quoted by CTPI were higher than those of the other offerors, and therefore were potentially overstated. Id. The agency then compared a random sample of 37 of those 59 potentially overstated prices to the prices of other offerors, or to market prices, to assess whether the price was in fact overstated. Id. at 5-6. Based on the sample, the agency projected, with a 95% confidence level, that between 8 and 20 total ELINs were actually overstated, which is to say that the agency estimated that between 0.6% and 1.4% of CTPI's ELIN prices were overstated. Id.

With respect to potentially understated prices, the agency's analysis showed that 1,051 out of 1,441 ELIN prices quoted by CTPI were lower than the prices of all other offerors, and therefore were potentially understated. Agency Report at 6. The agency then compared a random sample of 89 of those 1,051 potentially understated prices to the prices of other offerors, or to market prices, to assess whether the prices were in fact understated. Id. Based on the sample, the agency projected, with a 95% confidence level, that between 85 and 294 of the total ELINs were actually understated, which is to say that the agency estimated that between 5.9% and 20.4% of CTPI's ELIN prices were understated. Id. Based on this analysis, the agency concluded that the risk posed by potential unbalanced pricing was not significant, and that awarding to CTPI would not result in the agency paying unreasonably high prices. See Id. at 7 and Business Clearance Memorandum at 17-19.

The agency then conducted a best-value tradeoff, concluding that the technical advantages offered by CPS's higher-rated proposal did not justify the 59.5% price difference and that CPTI's lower-rated, but significantly lower-priced proposal represented the best value to the government. Business Clearance Memorandum

¹ Random sampling is a statistical method used to make projections about a large group based on an examination of a portion of that group (the sample) selected at random. Among other factors, the size of the sample and the size of the total group contribute to how accurate the projection is likely to be. The "confidence level" is the estimated probability that the actual results will fall within the projected range of values. See generally GAO Cost Estimating and Assessment Guide, GAO-09-3SP, ch. 14 (Mar. 2009).

at 22. In that connection, the agency noted that the RFP provided that all non-price factors taken together were approximately equal in importance to price, and the differences underlying the different technical ratings did not warrant paying the significant price premium associated with an award to the protester. Id. The agency awarded the contract to CTPI on September 21, 2016, and provided CPS with a written debriefing on October 3. Thereafter, CPS filed this protest with our Office.

DISCUSSION

CPS challenges the agency's evaluation of CTPI's price proposal, the agency's evaluation of CTPI's proposal under the supply chain risk management factor, and alleges that CTPI's proposal contains material misrepresentations.² Because these protest grounds were introduced at different points in time and have different procedural postures, we address them separately.

Price Evaluation

CPS contends that the agency's price evaluation failed to consider the risk associated with CTPI's low and unbalanced pricing. Specifically, CPS notes, based on its independent analysis of pricing, that for a significant number of items, CTPI's pricing was dramatically lower than CPS's, and was lower than the other two offerors' prices. CPS also notes that, for a smaller number of items, CTPI's prices were dramatically higher than those of CPS and the other two offerors. Protester's Comments on the Agency Report at 1-2. According to CPS, this demonstrates that CTPI's pricing was unbalanced because it contained both significantly understated and overstated pricing, and that the agency failed to reasonably assess the risk to the government posed by CTPI's unbalanced pricing. Id. at 3. In response, the agency notes that, consistent with the terms of the solicitation, it assessed CTPI's proposal for unbalanced pricing based on random sampling. The agency explains that, when it analyzed the random samples, it found that the vast majority of CTPI's sampled prices were reasonable based on comparisons to other offerors or market prices. Agency Report at 5.

In reviewing protests of an agency's evaluation and source selection decision, our Office will not reevaluate proposals; rather, we review the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria, and applicable procurement laws and regulations. M&S Farms, Inc., B-290599, Sept. 5, 2002, 2002 CPD ¶ 174 at 6. In

² Although this decision does not address every argument raised by CPS, we have reviewed all of the protester's challenges and find that none provides a basis to sustain the protest.

this case, we find CPS's contention that the agency's price evaluation and risk assessment were unreasonable to be without merit.

As an initial matter, to the extent CPS's argument can be understood to suggest that the agency should have assessed the risk that CTPI's low prices posed to the agency, CPS is describing a price realism analysis, which was not contemplated by the solicitation, and is therefore without merit. A price realism evaluation, which involves an assessment of whether a price is too low, is conducted for the purpose of assessing a vendor's understanding of the contract requirements or to assess the risk inherent in a vendor's proposal or quote. Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 8. In order to conduct a price realism analysis, an agency must provide for such an analysis in the solicitation, and in this case the RFP did not provide for such an assessment. See Ball Aerospace & Techs. Corp., supra, at 8. Therefore, had the agency performed a price realism analysis, it would have been improper.

Alternatively, to the extent CPS's argument can also be understood as suggesting that the agency's unbalanced pricing analysis was unreasonable, that argument is also without merit, because the agency's analysis is well-supported by the record and consistent with the terms of the solicitation. Instead, CPS relies on its own reevaluation of CTPI's pricing using a methodology that is inconsistent with the methodology established by the terms of the solicitation.

With respect to unbalanced pricing generally, the Federal Acquisition Regulation (FAR) requires that contracting officers analyze offers with separately-priced line items or subline items, to detect unbalancing. FAR § 15.404-1(g)(2). Where unbalancing is detected, the contracting officer must then consider the risk posed, including the risk of paying an unreasonable price, and must consider whether to reject the offer if the risk is unreasonable. See FAR § 15.404-1(g)(2)-(3). While both understated and overstated prices are relevant to the question of whether unbalanced pricing exists, the primary risk to be assessed in an unbalanced pricing context is the risk posed by overstatement of prices because low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. See AIS Engineering, Inc., B-410246, B-410246.2, Nov. 21, 2014, 2015 CPD ¶ 5 at 3.

Here, the RFP provided that unbalanced pricing would be assessed based on random sampling, not a direct analysis of all prices. RFP at 37. In this regard, the agency's application of random sampling and the conclusions drawn from that sampling appear both reasonable and consistent with the methodology set forth in the solicitation. The agency provided a detailed description of its methods and results as well as significant underlying documentation, which support the reasonableness of the evaluation. See Business Clearance Memorandum at 17-22 and Price Analysis at 73-167.

As described above, the record reflects that with respect to both potentially overstated and understated prices, the agency found, with a high level of confidence, that a majority of CTPI's quoted prices were likely to be reasonable. Agency Report at 5. The agency estimated that between 0.6% and 1.4% of the 1,441 ELIN prices that CTPI quoted were overstated. Id. at 5-6. Similarly, the agency estimated that between 5.9% and 20.4% of the 1,441 ELIN prices that CTPI quoted were understated. Id. While the agency's estimates show that a significant minority of CTPI's prices may, in fact, be understated, as noted above, the primary risk to be assessed in an unbalanced pricing context is the risk posed by overstatement of prices. In this case, the agency estimated that only a very small percentage of CTPI's prices were likely to be overstated. As a result, the agency reasonably concluded that the risk posed by potential unbalanced pricing was not significant, and that awarding to CTPI would not result in the agency paying unreasonably high prices. See Id. at 7, and Business Clearance Memorandum at 17-19.

CPS argues that the agency's unbalanced pricing evaluation was flawed because it failed to take into account the magnitude of the price differences for various categories of items identified by CPS.³ Protester's Comments on the Agency Report at 1-3. We are unpersuaded by CPS's argument, because it focuses on prices other than those identified by the agency as part of its random sampling, and is, in effect, a request that our Office reevaluate the awardee's proposal on a basis other than that described in the RFP. We decline to do so, and deny this protest ground.

Supply Chain Risk Management Factor

CPS argues that, in light of several original equipment manufacturer (OEM) letters expressing concern about CTPI's pricing and status as an authorized reseller, the agency's assessment of CTPI's technical proposal was unreasonable with respect to the supply chain risk management factor. Supplemental Protest at 5. According to CPS, the OEM letters demonstrate that CTPI will not be capable of obtaining goods through authorized channels and that the Navy did not reasonably assess the risk posed by CTPI's proposal of introducing gray market or counterfeit goods into the Navy's supply chain. Id. at 5-6. This protest ground is untimely.

On October 14, Brocade, an original equipment manufacturer (OEM) of certain items to be supplied under the contract, contacted CPS and, according to CPS,

³ Initially, CPS suggested that the agency erroneously included cost information from two offerors found to be unacceptable, but CPS did not address the agency's response to this protest ground in its comments on the supplemental agency report. We therefore conclude that CPS has abandoned this protest ground. SRM Grp., Inc., B-410571, B-410571.2, Jan. 5, 2015, 2015 CPD ¶ 25 at 8 n.5.

expressed concern about CTPI's pricing and status as an authorized reseller of its products. Affidavit of CPS President at 2. Approximately 10 days later, on October 24, CPS began contacting other OEMs to determine if they had similar concerns about CTPI. Id. at 1. On October 26, CPS states that it received e-mails from three other OEMs⁴ expressing concern either about CTPI's pricing or CTPI's status as an authorized reseller of their products. Affidavit of CPS President at 2-3.

On November 4, a representative of Brocade sent an e-mail to the Navy expressing concern about CTPI's pricing and forwarded a copy to CPS, and CPS shared this e-mail with several other OEM representatives who had privately expressed concerns to CPS. CPS Response to GAO Request for Answers of December 12, 2016. Representatives from three other OEMs⁵ also sent e-mails of concern to the Navy on November 4, 6, and 8, respectively, expressing concerns about CTPI's pricing, and in some cases suggesting that CTPI was not an authorized reseller of their products. Affidavit of CPS President at 2-3. On November 14, CPS filed a supplemental protest alleging that the agency's assessment of CTPI's proposal under the supply chain risk management technical evaluation factor was unreasonable in light of the OEM letters. Supplemental Protest at 5.

With respect to timeliness, CPS alleges that its supplemental protest is timely because it only definitively learned of the OEMs' concerns when they sent their letters of concern to the Navy on November 4, 6, and 8. Supplemental Protest at 1. CPS suggests that the e-mail it received from Brocade on October 14 was not sufficient notice of the issue, as Brocade products, alone, only represent a small portion of the total cost of the contract. Protester's Response to Request for Dismissal at 2-3. CPS suggests that a protest founded on that basis alone would have been dismissed as speculative or legally insufficient. Id. CPS, notes, however that the products from all 5 OEMs discussed in its supplemental protest taken together represented approximately 60% of the value of the contract, which provided a firmer basis for protest. Id.

Our Bid Protest Regulations require a detailed statement of the legal and factual grounds of a protest, and CPS is correct that we will not generally entertain protests grounded on speculation or rumor. See Ervin and Associates, Inc., B-278850, Mar. 23, 1998, 98-1 CPD ¶ 89 at 5. However, where a protester files supplemental protest grounds, each new ground must independently satisfy the timeliness requirements of our Bid Protest Regulations, which do not contemplate the piecemeal presentation or development of protest issues. FR Countermeasures, Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 at 9. In general, protests other than

⁴ CPS did not produce the e-mails in question, but stated that it received e-mails from representatives of Pure Storage, HP Enterprise, and Dell.

⁵ Representatives of Oracle, NetApp, and Nutanix sent e-mails to the Navy.

protests of defects in a solicitation, must be filed within 10 days of when the protester knew or should have known the basis for protest. Additionally, a protester has an affirmative obligation to diligently pursue information providing the basis for the protest, Automated Med. Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 at 2-3, and a protester's failure to utilize the most expeditious information-gathering approach may constitute a failure to meet its obligation in this regard. See, e.g., United International Investigative Services, Inc., B-286327, Oct. 25, 2000, 2000 CPD ¶ 173 at 3. CPS's supplemental protest does not meet this standard.

CPS concedes that it received several additional contacts from other OEMs expressing concerns prior to November 4. Specifically, in addition to the e-mail from Brocade on October 14, CPS indicates it received e-mails from three different OEMs on October 26 expressing concerns, either about CTPI's pricing or CTPI's status as an authorized reseller. Affidavit of CPS President at 2-3. While several of these OEMs ultimately did not contact the Navy with their concerns, the fact that four separate OEMs expressed concern to CPS should have alerted CPS to the factual basis of this protest ground by October 26, at the latest. Therefore we conclude that CPS knew or should have known this basis of protest by October 26, and the protest ground was untimely because it was filed 19 days later on November 14.

Additionally, we note that CPS failed to diligently pursue this basis of protest prior to October 26. The protester learned of the award to CTPI on September 21, and received a debriefing on October 3. At that point, CPS knew the identity of the awardee and that its price was (in the aggregate) much lower than its own pricing. CPS filed its protest with our Office on October 7. On October 14, a Brocade representative contacted CPS to alert CPS to the precise issues that form the basis of CPS's supplemental protest, albeit only with respect to a small portion of the total contract value. Affidavit of CPS President at 2. However, according to CPS's own account, it made no further inquiries with any other OEMs until after October 24, over a month after award and several weeks after CPS's initial protest with our office was filed. Id. With respect to establishing key facts supporting this basis of its protest, reaching out to the OEMs immediately following award, or, at the latest, immediately after Brocade contacted CPS expressing concern, would clearly have been the most expeditious avenue of inquiry. On these facts, we find that this protest ground was not diligently pursued and is untimely. As a result, we dismiss it. See, e.g., Thomas May Constr. Co., B-255683, Mar. 23, 1994, 94-1 CPD ¶ 210 (delay in pursuing available information about awardee until three weeks after bid opening not diligent pursuit); Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 5; MILVETS Systems Tech., Inc., B-411721.2, B-411721.3, Jan. 14, 2016, 2016 CPD ¶ 42 at 8 (protester challenging an award on one ground should diligently pursue information which may reveal additional grounds of protest).

Material Misrepresentations

On December 1, the agency provided relevant excerpts of CTPI's technical proposal as part of its response to the supplemental protest. On December 7, CPS raised a new protest ground alleging that CTPI's proposal included a material misrepresentation concerning CTPI's proposed approach to supply chain risk management. Protester's Comments on Supplemental Agency Report at 1. Specifically, CPS argues that the following specific representations in CTPI's proposal constitute material misrepresentations: (1) CTPI's statement that it "stays within approved channels;" (2) CTPI's statement that its policy requires that sales executives always supply quotes from OEM authorized distributors and certified channels; and (3) CTPI's description of its procedural checklist for its account managers which states they should "always source equipment directly from authorized manufacturer channels."⁶ Protester's Comments on Supplemental Agency Report at 4-5.

In response, CTPI notes that in many cases it purchases products from authorized second-tier distributors rather than directly from OEMs. Declaration of CTPI Chief Operating Officer at 2. CTPI also provided specific evidence refuting the claims made by the various OEM representatives. For example, in response to an Oracle representative's claim that CTPI has no documented history of being an authorized reseller, CTPI points out that it is listed on Oracle's website as a registered partner, and furnished a list of Oracle products previously resold to the federal government by CTPI. Declaration of CTPI Chief Operating Officer, Exhibits A and B. Similarly, CTPI refutes claims from a Brocade representative that CTPI had no documented quote history, by producing a letter of authorization from Brocade indicating that CTPI is an authorized reseller of Brocade products, and noting that for this contract CTPI received quotes from [deleted], an authorized Brocade distributor. Declaration of CTPI Chief Operating Officer, Exhibits C and D.

An offeror's material misrepresentation in its proposal can provide a basis for disqualifying the proposal and canceling a contract award based on the proposal. Integration Techs. Group, Inc., B-291657, Feb. 13, 2003, 2003 CPD ¶ 55 at 2-3. A misrepresentation is material where the agency relied on it and it likely had a significant impact on the evaluation. Sprint Communications Co. LP; Global Crossing Telecommunications, Inc.--Protests and Recon., B-288413.11,

⁶ CPS also claims that CTPI's agreement to a solicitation requirement for 30-day delivery of items was also misleading, as CTPI would have trouble meeting such a deadline without agreements already in place with OEMs. This argument is unequivocally a question of affirmative responsibility, which our Office does not generally consider, and, as argued, does not present a valid basis for protest. 4 C.F.R. § 21.5(a), (c).

B-288413.12, Oct. 8, 2002, 2002 CPD ¶ 171 at 4. For a protester to prevail on a claim of material misrepresentation, the record must show that the information at issue is false. Vizada Inc., B-405251 et al., Oct. 5, 2011, 2011 CPD ¶ 235 at 9; Commercial Design Group, Inc., B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 at 6.

We have generally declined to recommend that the agency disqualify an offeror when an offeror makes statements concerning plans or events that will occur in the future, in part because the question of an awardee's capability or ultimate success in performing under the contract are matters of affirmative responsibility or contract administration, which our Office does not review. See, e.g., Government of Harford County, Maryland, B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81 at 11 (finding no material misrepresentation where awardee made representations concerning plans for solidifying necessary agreements, and where the RFP did not require proof of existing agreements); R&D Maintenance Servs., Inc., B-292342, Aug. 22, 2003, 2003 CPD ¶ 162 at 4 (disqualification not required where awardee proposed to perform work in-house, but later revised approach to make use of subcontractors), and Supreme Foodservice GmbH, B-405400.6, B-405400.7, Mar. 27, 2013, 2013 CPD ¶ 93 at 8 (declining to find a material misrepresentation where the validity of awardee's representations is contingent upon future events because it is a matter of contract administration).

In this case, CPS has not shown that CTPI made representations that were false. Specifically, there is a mismatch between the statements that CPS claims to be false and the evidence provided by CPS. CTPI did not represent in its technical proposal that it had obtained pricing directly from OEMs or authorized distributors in advance, nor did the RFP require offerors to do so.⁷ See CTPI Technical Proposal and Supplemental Agency Report at 7. Instead, CTPI represented in its proposal that it intends to "stay within authorized channels" and has in place certain internal policies effectuating that intent,⁸ consistent with the RFP's requirement that offerors

⁷ While we need not reach the issue of CTPI's relationships with OEMs or authorized distributors, we note that, during the course of this protest, CTPI has provided convincing evidence and sworn testimony that it does in fact have relationships with either the OEMs in question or other authorized channels. While some OEM representatives indicated that CTPI had not requested pricing from them or any of their authorized distributors, those statements are contradicted by CTPI's later provided evidence. CPS did not attempt to rebut CTPI's evidence with respect to certain OEMs, and with respect to those OEMs for which CPS offered a rebuttal, CPS relied heavily on inference and sources of limited probative value (e.g. chat box transcripts with pseudonymous sales personnel). See, e.g., CPS Response to GAO Request for Answers of December 12, 2016, Attachment 1.

⁸ CPS does not suggest that CTPI misrepresented the contents of its policies, rather CPS contends that CTPI is unlikely to be able to successfully implement such a policy or has already failed to do so.

outline supply chain risk management initiatives undertaken and their verification process. Whether CTPI will perform as promised is a question of contract administration. See Neopost USA Inc., B-404195, B-404195.2, Jan. 19, 2011, 2011 CPD ¶ 35 at 5 n.5, and United Concordia Companies, Inc., B-404740, April 27, 2011, 2011 CPD ¶ 97 at 10. As CPS failed to provide evidence demonstrating that CTPI made any material misrepresentations, we deny this protest ground.

The protest is denied.

Susan A. Poling
General Counsel