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Decision

Matter of: Crawford RealStreet Joint Venture

File: B-415193.2; B-415193.3

Date: April 2, 2018

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Paula J. Haurilesko, Esq., Laura Eyester, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably found the protester's pricing to be unbalanced due to a faulty independent government estimate is denied, where the agency also compared the protester's pricing to other offerors.
 2. Protest that the agency unreasonably concluded that the protester's unbalanced pricing presented a risk to the government is denied, where the agency identified multiple reasons the pricing presented risk.
 3. Protester is not competitively prejudiced by the agency's application of an unstated evaluation criterion because the selection decision focused on the risk of the protester's unbalanced pricing and the benefits of the awardee's proposal.
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DECISION

Crawford RealStreet Joint Venture (CRJV),¹ of Marriottsville, Maryland, protests the award of a contract to Markon, Inc., of Falls Church, Virginia, under request for proposals (RFP) No. HQ0034-17-R-0028, issued by the Department of Defense,

¹ CRJV is comprised of two woman-owned small businesses: Crawford Consulting Services and KJMK Management, Inc., trading as RealStreet. Protest at 2.

Washington Headquarters Services (WHS), for construction management technical support services.

We deny the protest.

BACKGROUND

The RFP, issued on April 18, 2017, was set aside for small business concerns, and provided for the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for a wide range of planning, design, and construction management support services, primarily in the National Capital Region. Agency Report (AR), Tab 2, RFP, at 0129,² 0138; Tab 4, RFP amend. 2, at 0248, Performance Work Statement (PWS) at 0279, 0281. The RFP contemplated a period of performance of a base year and four option years. PWS at 0280.

The RFP stated that award would be made to the offeror whose proposal represented the best value to the government, considering technical, past performance, and price. RFP amend. 2, at 0258-59. Technical and past performance were equally weighted, and when combined were significantly more important than price. Id. at 0258. The technical factor was comprised of five equally-weighted subfactors: quality control plan, human capital management, flexibility and innovation, transition plan, and key personnel. Id. at 0259-60. The contract manager was identified as the only key position. PWS at 0260, 0283.

The RFP stated that offerors' prices would be evaluated for reasonableness, where reasonableness may be based on one or more price analysis techniques identified in Federal Acquisition Regulation (FAR) § 15.404-1, including, but not limited to comparison to the independent government estimate (IGE), other offerors, or commercial/industry prices. RFP amend. 2, at 0263. The RFP also stated that prices may be reviewed to identify any significant unbalanced pricing and, in accordance with FAR § 15.404-1(g), a proposal may be rejected if the contracting officer determines the lack of balance poses an unacceptable risk to the government. Id. The RFP also stated that an offeror's approach must be consistent with its price proposal. Id.

The RFP required offerors to complete a pricing sheet consisting of a separate contract line item number (CLIN) for each of 10 labor categories. RFP at 0140. The RFP included estimated workload data based on historical information. RFP amend. 2, at 0237. The RFP was amended on May 9, 2017 to, among other things, respond to prospective offerors' questions. Id. at 0264. In response to a question about whether WHS would adjust the pricing sheet to allow for other direct costs to cover the costs of safety-related personnel protection equipment, the agency instructed offerors to include

² WHS provided consecutive page numbers for the agency report. We cite to the agency's page numbers for the RFP and its amendments.

other direct costs in the billable rates for employees, and added a column entitled "Explanation of Billable Rate" to the pricing sheet.³ Id. at 0278, 0317.

WHS received proposals from six offerors, including CRJV and Markon. AR, Tab 10, Source Selection Decision Memorandum, at 10. In August 2017, CRJV received notice that WHS awarded the contract to Markon and protested to our Office. Protest (B-415193) at 1, 3. Subsequently, the agency advised our Office that it planned to conduct a new price evaluation and best-value determination, and on that basis we dismissed CRJV's protest as academic. Crawford RealStreet JV, LLC, B-415193, Sept. 29, 2017 (unpublished decision).

WHS reevaluated proposals and assigned the following ratings:⁴

	CRJV	Markon
Technical	Good	Outstanding
Quality Control Plan	Marginal	Outstanding
Human Capital Management	Good	Good
Flexibility & Innovation	Good	Outstanding
Transition Plan	Acceptable	Good
Key Personnel	Good	Outstanding
Past Performance	Substantial Confidence	Substantial Confidence
Price	\$44,465,278	\$59,435,306

AR, Tab 10, Source Selection Decision Memorandum, at 23, 47.

³ The solicitation also was amended to provide descriptions for each labor category, which included required education and years of experience. See RFP amend. 2, at 0300.

⁴ The RFP stated that proposals would be assigned the following adjectival ratings under the technical factor: outstanding, good, acceptable, marginal, and unacceptable. RFP amend. 2, at 0259. Offerors' past performance would be assigned the following ratings: substantial confidence, satisfactory confidence, neutral confidence, and limited confidence. Id. at 0262.

The evaluators compared CRJV's price to the IGE and other offerors' prices and determined that CRJV's total price was 23 percent lower than the IGE.⁵ AR, Tab 9, Price Analysis Memorandum, at 11. The evaluators further concluded that "CRJV's pricing was not considered reasonable given the available data on the market conditions and competition." Id. The evaluators further concluded that the performance risks of CRJV's lower prices included the inability to properly staff the task orders issued under the contract, the inability to agree with the government on a task order price, and the added risk to the government if the government is forced to issue a unilateral task order or acquire work from others outside the contract.⁶ Id. at 12.

The evaluators also reviewed CRJV's price proposal for unbalanced pricing, and concluded that CRJV's proposed labor rates for the contract manager and project manager 3 and 4 positions were unbalanced and created risks to the government. Id. at 15. The evaluators found that CRJV's labor rate for the contract manager was 69.8 percent higher than the IGE rate, and because the position is expected to be utilized each year, the government would pay higher prices. Id. The evaluators also found that CRJV's labor rates for the project manager 3 and 4 positions were, on average, 32 percent lower than the IGE rates. Id. The evaluators concluded that because the labor rates were so low, CRJV may avoid proposing the two more senior project manager positions for task orders, even when the positions are appropriate for the task. Id. The evaluators also concluded that the risk of CRJV retaining qualified project managers at the proposed rates posed a significant performance risk. Id. at 16.

The source selection authority (SSA) considered the evaluations of the offerors' technical, past performance, and price proposals in making his award decision. The SSA identified multiple benefits in Markon's proposal, such as an outstanding retention rate that exceeded contract performance requirements, a well thought out solution for transitioning incumbent personnel, and a contract manager who exceeded the minimum requirements. AR, Tab 10, Source Selection Decision Memorandum, at 66. The SSA acknowledged that CRJV's proposal was rated as good under the technical factor, but identified a number of weaknesses and significant weaknesses that could affect performance, such as insufficient controls over personnel work product that would increase the potential for inconsistent product execution; insufficient detail on vetting incumbent employees for re-employment, which would cause stability concerns; and

⁵ The IGE was developed using labor rates from as many as 11 General Services Administration Federal Supply Schedule contracts. AR, Tab 9, Price Analysis Memorandum, at 2.

⁶ The RFP describes the procedures for issuing a task order under the resulting contract, in which the contracting officer will issue a request for task order proposal to the contractor. RFP amend. 2, at 0243. If the government does not accept the contractor's proposal, the parties will negotiate to try to reach agreement. Id. at 0244. If the parties cannot reach agreement, the government may either procure the required services through other sources or unilaterally issue a task order to the contractor. Id.

insufficient detail on how CRJV would attempt to innovate project design and support activities. Id.

Additionally, the SSA acknowledged the risks associated with CRJV's high labor rate for its contract manager position and below market labor rates for its project manager 3 and 4 positions. Id. The SSA concluded that CRJV's pricing issues exposed the government to risks not found in Markon's proposal, and that these risks significantly outweighed CRJV's lower total evaluated price. Id. The SSA also indicated that, in view of the RFP's weighting of the evaluation factors, CRJV's low evaluated price was significantly less important than Markon's higher technically-rated proposal. Id. Ultimately, the SSA concluded that the many strengths of Markon's proposal outweighed the strengths, weaknesses, and risks found in CRJV's proposal, and selected Markon for award. Id. at 66-67.

On December 15, 2017, CRJV was notified that it had, again, not been selected for award, and this protest followed.

DISCUSSION

CRJV challenges the implementation of the agency's corrective action;⁷ specifically, CRJV argues that WHS unreasonably found that CRJV's prices were unbalanced and presented too great a risk to the government, and that the agency applied an unstated evaluation criterion. Although our decision does not specifically discuss all of CRJV's arguments, we have considered them all and find no basis to sustain the protest.⁸

⁷ Although CRJV frames its protest as a challenge to the agency's corrective action, CRJV's protest is actually a challenge to the reasonableness of the agency's reevaluation of price proposals and the resulting best-value tradeoff determination.

⁸ For example, CRJV argues that WHS treated it and Markon disparately in its unbalanced pricing analysis because the agency ignored the overstated prices for Markon's estimator and commissioning specialist positions. Supp. Protest at 11-12. The record shows that WHS found CRJV's labor rates for its contract manager--a key position--to be, on average, 69.8 percent higher than the IGE rate. AR, Tab 9, Price Analysis Memorandum, at 15. In comparison, Markon's labor rates for its estimator and commissioning specialist--non-key positions--were found to be between 23 and 35 percent above the IGE rates. Id. at 26. Accordingly, we conclude that the differences in the agency's unbalanced pricing analysis reasonably reflected the differences in the magnitude of the overstatements and type of position involved. See INDUS Tech., Inc., B-411919 et al., Nov. 20, 2015, 2015 CPD ¶ 359 at 6 (finding no disparate treatment where offerors were not similarly situated with respect to the magnitude and reason for cost overruns).

Unbalanced Pricing

CRJV contends that WHS relied on a defective IGE in determining that CRJV's proposed prices were unbalanced. Supp. Protest at 11. The protester argues that four of the seven labor rates upon which WHS based its IGE for the contract manager position were associated with labor categories that were not comparable to the RFP with respect to position description, educational requirements, and/or experience requirements. Id. at 2. For example, the agency used the labor rate for a contract administrator position, which CRJV contends requires only 10 years of contract administration experience compared to the 20 years of construction-related, engineering or architecture work experience required under the RFP. Id. at 3. CRJV also contends that an additional labor rate that WHS used in developing its IGE is not reflected in the Federal Supply Schedule contract that the agency identified as the source for the labor rate. Id. at 5. CRJV asserts that because of these errors and similar ones with respect to the project manager 3 and 4 positions, the agency's determination that CRJV's prices are unbalanced is unreasonable. Id. at 11. CRJV also generally objects to the agency's comparison of CRJV's prices to those of other offerors. Supp. Protest at 12.

WHS asserts that it reasonably determined that CRJV's prices for the contract manager, project manager 3, and project manager 4 positions were unbalanced. Memorandum of Law (MOL) at 11. The agency states that the validity of its IGE as a basis for evaluating prices was proven by the fact that the IGE was consistent with the labor rates submitted by all the offerors, with the exception of CRJV's prices for the three positions. Id. at 26, 28. WHS also states that it compared CRJV's labor rates with the other offerors' rates in addition to the IGE and identified the three labor rates in question as outliers. Id. at 28.

Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understated as indicated by the application of cost or price analysis techniques. FAR § 15.404-1(g)(1). The FAR identifies examples of price analysis techniques to include comparison of proposed prices received in response to the solicitation and comparison with IGEs. Id. § 15.404-1(b)(2).

Although the agency has provided no explanation or rationalization for the errors CRJV identified with respect to the IGE, we nonetheless conclude that the agency reasonably determined that CRJV's prices for the contract manager, project manager 3, and project manager 4 positions are unbalanced. The record shows that WHS compared CRJV's prices with those of other offerors, and found that the proposed labor rate for CRJV's contract manager was significantly higher, whereas the proposed labor rates for CRJV's project managers 3 and 4 were significantly lower. See AR, Tab 9, Price Analysis Memorandum, at 17. As noted above, the FAR explicitly provides for comparing offerors' prices as an acceptable price analysis technique. FAR § 15.404-1(b)(2). See Strategic Resources, Inc., B-406841.2, Nov. 27, 2012, 2012 CPD ¶ 346 at 11 (agency's price realism analysis was reasonable, despite flawed IGE, because the agency also used other price analysis techniques); Academy Facilities Mgmt.--Advisory Op.,

B-401094.3, May 21, 2009, 2009 CPD ¶ 139 at 14 (finding unnecessary to address challenge to IGE where the agency also compared offerors' prices to each other in conducting price realism analysis). Furthermore, CRJV has not demonstrated any impropriety in WHS's comparison of its prices to those of other offerors. Accordingly, we deny this protest ground.

Unbalanced Pricing Risk

CRJV also challenges the agency's analysis of the risks posed by the protester's unbalanced pricing. Protest at 10-11. CRJV argues that the agency's conclusion that CRJV's higher labor rate for the contract manager increases the risk that the agency will pay unreasonably high prices during contract performance is unreasonable, given Markon's \$15 million higher price. Protest at 11. In this regard, CRJV contends that the solicitation guaranteed a minimum level of effort for each labor category and WHS advised offerors that an estimated 40 task orders were issued over the last five years. CRJV Comments at 4, 11. The protester further contends that, as a result, the agency's concern that only the contract manager position would be utilized and give rise to an unreasonably high price for the government is unreasonable. Id. CRJV also argues that the agency's conclusion that CRJV will not propose individuals for the project manager 3 and 4 positions, leading to the government issuing a unilateral task order to CRJV, is unsupported. Protest at 10.

WHS asserts that it conducted its unbalanced pricing analysis in accordance with the FAR. WHS states that FAR § 15.404-1(g) requires the government to consider both the risk that award of the contract will result in paying unreasonably high prices for contract performance and performance risk. MOL at 24. WHS explains that the only task order guaranteed under the contract is for the contract manager, and that the other labor rates do not offset CRJV's overstated contract manager labor rate. 2nd Supp. MOL at 2, 10; AR, Tab 10, Source Selection Decision Memorandum, at 32. The contract manager task order is issued at the beginning of each contract year, and is paid by the government regardless of the task orders that follow, if any. 2nd Supp. MOL at 9. Therefore, WHS argues that CRJV's contract manager labor rate is a guaranteed cost to the government and thus is not comparable to the \$15 million difference in CRJV's and Markon's evaluated prices, which are a "fiction" created for evaluation purposes. Id. at 9-10.

Additionally, WHS states that the understated prices for CRJV's project manager 3 and 4 positions pose multiple risks to contract performance. Under the terms of the RFP, if the contract were awarded to CRJV, CRJV's labor rates would be incorporated into the contract and used for task orders issued under the contract. Id. at 11. WHS explains that, because CRJV's labor rates for the project manager 3 and 4 positions are below the market rates, the contractor would have difficulty retaining existing personnel and/or hiring qualified personnel at those labor rates. Id. at 13; AR, Tab 10, Source Selection Decision Memorandum, at 33. Thus, CRJV is at risk of high turnover for those positions, which could jeopardize contract performance where WHS is operating under a "no mission failure policy." 2nd Supp. MOL at 12-13; AR, Tab 10, Source

Selection Decision Memorandum, at 35. Alternatively, CRJV would have to pay market rates to retain or hire personnel and take a loss. 2nd Supp. MOL at 13.

Additionally, WHS explains that CRJV may try to utilize project manager 1 and 2 personnel--who are qualified to perform "basic to mid-level work"--in place of project manager 3 and 4 personnel, who are qualified to perform the most complex task orders. Id.; AR, Tab 10, Source Selection Decision Memorandum, at 35-36. WHS states that any attempt to utilize these less qualified personnel for tasks more appropriate for project manager 3 and 4 personnel poses a risk to contract performance. 2nd Supp. MOL at 13-14; AR, Tab 10, Source Selection Decision Memorandum, at 35-36. Finally, WHS explains that if CRJV were unwilling to propose project manager 3 and 4 personnel for task orders or to reach agreement with the agency to staff a task order, the agency would have to either issue a unilateral task order or procure the work outside CRJV's contract. 2nd Supp. MOL at 11, 14; AR, Tab 10, Source Selection Decision Memorandum, at 36. If WHS were to issue a unilateral task order to CRJV, the agency would be at risk of a later claim by CRJV or that the firm would abandon the work. 2nd Supp. MOL at 11-12.

Contracting officers may evaluate unbalanced pricing to determine if it increases performance risk and could result in the payment of unreasonably high prices. FAR § 15.404-1(g)(1). 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. Id. § 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. Crown Point Sys., B-413940, B-413940.2, Jan. 11, 2017, 2017 CPD ¶ 19 at 5. Our Office will review for reasonableness both an agency's determination as to whether an offeror's prices are unbalanced, and an agency's determination as to whether an offeror's unbalanced prices pose an unacceptable risk to the government. Gulf Master Gen. Trading, LLC, B-407941.2, July 15, 2013, 2013 CPD ¶ 210 at 5.

On this record, we have no basis to question the reasonableness of WHS's conclusion that CRJV's unbalanced pricing posed significant risks to the government. With respect to the overstated labor rates for the contract manager position, the agency reasonably found that CRJV's proposed prices might not actually result in the lowest-priced proposal, given that the only guaranteed task order is the initial task order for the contract manager, which would run for the duration of each contract year. See Gulf Master Gen. Trading, LLC, supra (agency reasonably determined protester's unbalanced pricing presented risk to government if option years not exercised); cf. Kellie W. Tipton Constr. Co., B-281331.3, Mar. 22, 1999, 99-1 CPD ¶ 73 at 6 (agency reasonably determined awardee's apparently high labor rates remained lower than protester's over the first nine delivery orders). Moreover, as discussed above, the record shows that the agency reasonably considered the risks posed by CRJV's understated labor rates for the project manager 3 and 4 positions. The protester's

disagreement with the agency's judgment does not provide a basis to sustain the protest.

Unstated Evaluation Criterion in Price Evaluation

CRJV contends that WHS applied an unstated evaluation criterion in determining that CRJV's price was not fair and reasonable because its price was unsupported and too low. Protest at 7. In this regard, CRJV argues that the solicitation contained no requirement for offerors to provide support for their proposed labor rates. Id.; CRJV Comments at 8. While the protester argues that the agency unfairly applied an unstated requirement that prices be supported, it does not argue that the agency appears--in our view--to have conflated the concepts of price reasonableness and price realism.

As an initial matter, it is well established that before awarding a fixed-price contract, an agency is required to determine that the price offered is fair and reasonable. FAR § 15.402(a). An agency's concern in making a price reasonableness determination focuses on whether the offered prices are too high, rather than too low. U.S. Electroynamics, Inc., B-414678, Aug. 1, 2017, 2017 CPD ¶ 252 at 5. Although not required, an agency may also provide for a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror's low price reflects its understanding of the contract requirements or the risk inherent in an offeror's approach. Grove Res. Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5.

Agencies may not conduct a price realism analysis without first advising offerors that the agency intends to do so. Triad Int'l Maint. Corp., B-408374, Sept. 5, 2013, 2013 CPD ¶ 208 at 8. Where there is no relevant evaluation criterion pertaining to realism, a determination that an offeror's fixed-price is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to successfully perform the contract at its offered price. See Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 4-6; Milani Constr., LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87 at 4-6.

Here, the solicitation stated that offerors' prices would be evaluated for reasonableness. RFP amend. 2, at 0263. There is no language in the solicitation indicating that the agency would perform a price realism analysis. Further, although WHS claims that it only evaluated proposals for reasonableness and did not conduct a price realism analysis, Supp. MOL at 3, the record demonstrates otherwise.

Specifically, the agency compared CRJV's prices for the base period and each option period with the IGE, and determined that CRJV's total price was approximately 23 percent less than the IGE and the available competition, and on this basis CRJV's price was not considered reasonable. AR, Tab 9, Price Analysis Memorandum, at 11. However, as explained above, price reasonableness pertains to whether the price is too high, not too low. U.S. Electroynamics, Inc., *supra*. Thus, the agency erred in concluding that CRJV's low price was unreasonable.

Moreover, the record does not support the agency's position that offerors should have understood that they should provide supporting documentation for their prices. During the course of this protest, WHS argued that by not providing a page limit for the pricing volume of offerors' proposals, it signaled to offerors that they must be able to fully explain and justify their pricing. 2nd Supp. MOL at 17. WHS also notes that the pricing spreadsheet included a column entitled "Explanation of Billable Rates" which "encouraged but not required" offerors to explain their pricing. Id. at 18. The agency contends that, on this basis, CRJV "missed an opportunity" to support its pricing. Id.

We disagree. First, WHS has identified no statutory provision, nor any other authority for the proposition that the absence of a page limit puts offerors on notice of a requirement to provide support for their proposed prices. Additionally, as noted above, the "Explanation of Billable Rates" column was added to the pricing sheet specifically to address the inclusion of other direct costs in the labor rates. RFP amend. 2, at 0278, 0317. Accordingly, we conclude that the RFP did not require offerors to provide documentation for their prices and in this regard the agency applied an unstated evaluation criterion.

Nevertheless, we conclude that the protester is not prejudiced by the agency's error. Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. Northrop Grumman Sys. Corp., B-412278.7, B-412278.8, Oct. 4, 2017, 2017 CPD ¶ 312 at 18. WHS argues that CRJV has not shown prejudice because "price was the least important evaluation factor" and the SSA's decision "focused on the benefits associated with Markon's highest-rated proposal when compared to the risks posed by CRJV's lower technically rated proposal," a conclusion which the protester did not challenge. 2nd Supp. MOL at 2. In addressing the impact of any errors in the agency's evaluation of price reasonableness, CRJV argues that, notwithstanding the weight placed on price, price "cannot be ignored especially when there is such a substantial difference between Markon's price and CRJV's price." CRJV Supp. Comments at 11.

Here, the application of an unstated evaluation criterion in the price reasonableness determination does not raise questions about the agency's ultimate award decision, given the awardee's significantly higher-rated technical proposal and the SSA's well-documented tradeoff rationale.⁹ The record shows that the SSA, in making his tradeoff between the two offerors, concluded that Markon's proposal contained many strengths compared to the weaknesses, significant weaknesses, and risks of CRJV's proposal. AR, Tab 10, Source Selection Decision Memorandum, at 66. In addition, the SSA

⁹ The RFP stated that technical and past performance, when combined, were significantly more important than price. RFP amend. 2, at 0258. CRJV and Markon received the same adjectival rating under the past performance factor, thus technical became the determinative factor in the SSA's tradeoff determination. AR, Tab 10, Source Selection Decision Memorandum, at 65.

considered the risks associated with CRJV's unbalanced pricing, and reasonably concluded that those risks exposed the government to risks not found in Markon's proposal and outweighed CRJV's overall lower total price. Id. On this record, we find no basis to conclude that the agency's application of an unstated evaluation factor in its price analysis would give CRJV a substantial chance of receiving award. See McKean Def. Grp., LLC, B-415254.2, Dec. 19, 2017, 2017 CPD ¶ 389 at 11.

The protest is denied.

Thomas H. Armstrong
General Counsel