

## Decision

**Matter of:** Crowley Government Services, Inc.; Petro Star, Inc.

**File:** B-419347; B-419347.2; B-419347.3

**Date:** January 25, 2021

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### DIGEST

Protests challenging agency's evaluation of price proposals and award of contracts are sustained where record shows agency's evaluation was not in accordance with the terms of the solicitation.

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### DECISION

Crowley Government Services, Inc., of Jacksonville, Florida, and Petro Star, Inc., of Anchorage, Alaska, protest the award of various contracts under request for proposals (RFP) No. SPE605-20-R-0222, issued by the Defense Logistics Agency to acquire various petroleum products. Both protesters argue that the agency miscalculated prices in connection with the awarded contracts.

We sustain the protests.

### BACKGROUND

The RFP contemplates the award of multiple fixed-price requirements type contracts on a lowest-price technically acceptable (LPTA) basis to provide petroleum products to Department of Defense and federal civilian agencies in Alaska during a 5-year ordering period. The RFP included 164 contract line item numbers (CLINs) and firms were advised that awards would be made individually on a CLIN-by-CLIN basis. RFP at 123.

These protests involve just a single issue relating to the interpretation of the RFP's price evaluation provisions.

Because of the volatility of prices for the solicited products, the RFP includes an economic price adjustment (EPA) clause that contemplates price adjustments on what amounts to a continuous basis throughout the contracts' period of performance. Specifically, the RFP advises that the resulting contracts will include an EPA clause providing for the daily adjustment of prices to be paid under the contracts (prices are to be adjusted daily Monday through Friday, and prices paid on Saturday and Sunday will be based on prices established on the preceding Friday). RFP at 2. These price adjustments are keyed to "escalation publications" or indexes identified in the RFP. *Id.*; RFP attach. B, Government Preferred Base Reference Indexes.

The escalation publications identified in the RFP are referred to as the government's "preferred base reference indexes." RFP, attach. B, Government Preferred Base Reference Indexes. (Throughout the discussion below, we refer to these preferred base reference indexes as the "government-preferred escalator(s).") For each CLIN being solicited, there is a corresponding government-preferred escalator identified, along with a "base reference price," which is the published price for a given product on the identified index as of January 17, 2020. As originally issued, the RFP required offerors to establish their proposed pricing using the government-preferred escalators and base reference prices included in the RFP. For example, CLIN 0001, for the provision of automotive gasoline, identified the government-preferred escalator as "ODFBNKU9," and identified a base reference price of \$2.375000 per gallon.<sup>1</sup>

After issuing the original RFP, the agency issued a series of amendments. Of relevance to the protests is amendment No. 0004, which provided an alternative approach for the way offerors could price their proposals. Specifically, offerors were advised that they could choose not to use the government-preferred escalators, and could instead use an escalator/index of their own choosing. These are referred to in the RFP and throughout the record as "uncommon escalators." RFP, amend. No. 0004, at 10.

In the event an offeror elected to use an "uncommon escalator," it was required to submit something known as a "posting history worksheet." RFP, attach. C, Posting History Worksheet. Basically, firms were required to provide detailed information about the pricing history of the selected uncommon escalator, including pricing data for the preceding year. *Id.* at 2. Firms also were required to use the price set by the uncommon escalator as of January 17, 2020 as the "base reference price" (that is, a price from the same date used to establish the base reference prices identified in the government-preferred escalators). Firms also were required to provide pricing history for the selected uncommon escalator for the preceding 12-month period. *Id.* at 2-3.

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<sup>1</sup> The government-preferred base reference indexes were expressed as abbreviations. For example, "ODFBNKU9" refers to an index known as the oil price information service Fairbanks conventional clear unleaded fuel index. RFP, amend No. 4, at 9.

In those instances where an offeror proposed to use an uncommon escalator, the RFP provided that the agency would perform a calculation using information provided in the posting history worksheet to establish an evaluated price for the offered product (we discuss the calculation of the evaluated prices in detail below).

In response to the RFP, the agency received a large number of proposals. The agency included all of the proposals in the competitive range, engaged in discussions with all of the offerors, and thereafter solicited, obtained and evaluated final proposal revisions. The agency made award decisions based on that evaluation in late August, 2020. Thereafter, the agency performed a reevaluation of proposals based on a different calculation of the offerors' prices, and changed some of its award decisions. Both protesters object to the agency's reevaluation of prices and revised selection of awardees for a number of CLINs because they maintain that the agency's price calculations were not permitted under the terms of the RFP.

## DISCUSSION

Both protesters take issue with the method the agency used to calculate prices in those instances where one or more offerors for an individual CLIN proposed to use an uncommon escalator. The facts here are not in dispute. As noted above, the RFP provided for the calculation of an evaluated price where an uncommon escalator was proposed. The record shows that the agency used this method to calculate evaluated prices for all offerors--that is, those firms proposing an uncommon escalator, as well as those firms proposing to use the government-preferred escalator--for each CLIN where one or more offerors proposed an uncommon escalator. We agree with the protesters that this was improper under the terms of the RFP. We discuss our conclusion below.

### Calculation of Evaluated Prices

The RFP described a calculation to be performed in order to establish an evaluated price in those instances where a firm proposed to use an uncommon escalator. RFP at 125, Section M3.01, Evaluation of Offers Where Uncommon Escalators Are Used. As noted, in those instances where a firm proposed an uncommon escalator, the firm was required to include certain information in its proposal, including the base reference price on January 17, 2020, as well as historical information about prices reported or posted by the selected index for the preceding year. The RFP provided that the agency would calculate an evaluated price by: (1) subtracting the base reference price from the offeror's proposed price in order to establish what is referred to as the offeror's "margin" (that is, the net amount above (or below) the base reference price being proposed); (2) calculating the annual average price for the preceding year as reported or posted by the publication; and (3) adding the offeror's price "margin" to the 12-month average price to arrive at an evaluated price. In essence, these steps are set out below:

- (1) Proposed Price – Base Reference Price = Offeror Margin
- (2) Calculation of the 12-Month Average Price

### (3) Offeror Margin + 12-Month Average Price = Evaluated Price

The record shows that, in every instance where at least one offeror proposed an uncommon escalator to establish its price for a given CLIN, the agency performed the calculation on all of the offered prices for that CLIN. The agency made this calculation--regardless of whether the proposed price was based on the use of an uncommon escalator, or used the government-preferred escalator--to arrive at an "evaluated price" for that CLIN for every offeror.

#### The Protesters' Allegation

Both protesters argue that the agency erred in calculating an "evaluated price" for the offerors that based their prices on the government-preferred escalator. According to the protesters, the agency's actions violated the express terms of the solicitation. In support of their position, the protesters rely on a provision added by amendment No. 0004 that states as follows:

If a vendor does not choose to use the Government[']s Preferred Base Reference Indexes [government-preferred escalator] (see Attachment B), they may choose their own escalator/index (known as an uncommon escalator). Vendors who choose to use an uncommon escalator shall submit a Posting History Worksheet (Attachment C) for each uncommon escalator. *Vendors using an uncommon escalator will be evaluated in accordance with M3.01 Evaluation of Offers Where Uncommon Escalators Are Used (DLA ENERGY JAN 1998).*

RFP, amend. No. 0004, at 10 (emphasis supplied). Both protesters argue that, under the terms of the solicitation, only the proposed prices that relied on an uncommon escalator were to be subject to the calculation. Thus, the protesters contend that the agency's calculation of "evaluated prices" was improper in those instances where a vendor proposed using the government-preferred escalator. The protesters also argue that this flawed approach led the agency to make award under a number of CLINs to other than the LPTA offeror. In addition, the protesters argue that they relied on their understanding of the RFP in preparing their proposals, and made business judgments based on that understanding, regarding the use of the government-preferred escalators versus the use of uncommon escalators.

The agency, for its part, directs our attention to the solicitation provision that describes the calculation to be performed. That portion of the RFP states as follows:

FOR EVALUATION PURPOSES ONLY, an evaluation factor will be applied to the Final Proposal Revision (FPR) prices of those items in which uncommon escalators are proposed as a basis for economic price adjustments. The evaluation factor will establish a commonality among the different postings or publications offered in order to ensure that all offerors are evaluated on an equal basis.

RFP at 125. According to the agency, because this provision states that the calculation will be performed for “those items” where an uncommon escalator has been proposed, the RFP contemplated that, for those CLINs, all proposed prices (*i.e.*, those based on the government-preferred escalator and those based on the uncommon escalator) would be subject to the calculation. In explaining the rationale for its actions, the agency states that it performed the calculation on all prices submitted for a CLIN where an uncommon escalator had been proposed by one of the offerors in order to arrive at what it describes as an “apples-to-apples” comparison of prices.

We agree with the protesters that the RFP did not advise offerors that the agency would use this calculation in those instances where an offeror proposed its prices using the government-preferred escalator. In this connection, where a dispute exists concerning the meaning of a solicitation, we read the solicitation as a whole, and in a manner that gives effect to all of its provisions. *The Lioce Group*, B-416896, Jan. 7, 2019, 2019 CPD ¶ 52 at 4. To be reasonable, an interpretation of a solicitation must be consistent with such a reading. *Id.* Here, we conclude that the agency’s interpretation of the RFP is unreasonable.

First and foremost, the plain meaning of the language relied on by the protesters was limited to offerors that adopted the alternative pricing approach: “Vendors using an uncommon escalator will be evaluated in accordance with M3.01 Evaluation of Offers Where Uncommon Escalators Are Used.” The language does not suggest the agency would also use this approach to evaluate proposals from offerors that did not elect to base their prices on an uncommon escalator.

Second, the solicitation provision relied on by the agency includes a second clause that makes it clear that only prices based on an uncommon escalator would be subject to the calculation. The second clause provides as follows:

The offeror’s margin (plus or minus) will be established as the difference between the FPR [final proposal revision] price and the Final Revised reference price. *The margin will then be added to the 12-month average of the posting or publication being proposed to determine the evaluated price.*

RFP at 125 (emphasis supplied). This second provision further specifies a unique analysis of adding the “margin” to the 12-month average only those instances where a posting or publication was “being proposed.” In other words, the calculation was only to be performed in those instances where a posting or publication--that is, an uncommon escalator--is being proposed by the offeror.

Third, the record shows that even the agency initially calculated prices in a manner consistent with the interpretation of the RFP advanced by the protesters. Specifically, the agency initially limited its calculation of an evaluated price to those instances where an offeror proposed an uncommon escalator. AR, exh. 25, Winning Offers Spreadsheet. Where a different offeror for the same CLIN proposed using the government-preferred escalator, the calculation was not performed. *Id.* Thereafter, the

agency performed a second evaluation of prices, this time performing the calculation on all proposed prices, regardless of whether an uncommon escalator had been proposed by any given offeror. AR, exh. 64, Price Reevaluation Worksheet.

The record includes affidavits from an agency economist, as well as the agency's price evaluator. AR, exh. 55, Declaration of the Agency's Economist; exh. 56, Declaration of the agency's Price Evaluator. Both of these declarations confirm that the agency performed two price evaluations, initially applying the calculation only to those prices where a firm proposed using an uncommon escalator, and thereafter applying the calculation to all prices, including those that used the government-preferred escalator.

We conclude that the agency' price evaluation and resulting selection decisions were inconsistent with the terms of the RFP. We therefore sustain this aspect of the protests.

### Calculation of the Margins

In addition to the argument discussed above, Crowley argues that the agency erred in calculating the evaluated prices in those instances where offerors used an uncommon escalator. According to Crowley, the agency was required to subtract the government-preferred base reference price from the offerors' proposed prices to arrive at the appropriate "margin" in those instances where a firm proposed a price based on an uncommon escalator. Crowley argues that the agency erred by instead subtracting the uncommon escalator base reference price from the offered price.

We find no merit to this argument. Crowley has not explained--and it is not apparent to us--how such a calculation would provide a useful guideline for the agency to compare prices. We understand that the agency's apparent objective in performing its calculations was to arrive at evaluated prices for all offerors that would be comparable, regardless of whether an offeror used the government-preferred escalator or an uncommon escalator. The agency's calculations accomplished accurate results, even though the agency was not permitted to make those calculations under the terms of the RFP.

The agency sought to establish what amounts to comparable "12-month average" prices for each offeror, for each CLIN. The agency isolated the difference between the offered price and the base reference price--that is, the margin--by subtracting the offered price from the applicable, escalator-specific base reference price.<sup>2</sup> The agency then added the margin to a 12-month average price that was calculated using historical data applicable to the specific escalator. Although the offerors were not on notice under the terms of the RFP that the agency would evaluate prices in this manner when they used

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<sup>2</sup> The agency used the base reference prices that were derived from the escalators themselves. In the case of a government-preferred escalator, the agency used the base reference price identified in the RFP. Similarly, in calculating the margins where an uncommon escalator was proposed, the agency subtracted the proposed price from the base reference price included in the proposal.

the government-preferred escalator, the calculations nonetheless present a logically consistent basis to calculate evaluated prices; all prices would be “12-month average” prices calculated using the appropriate base reference price and the appropriate 12-month average price.

Crowley’s proposed calculation does not withstand logical scrutiny. Following the protester’s logic, its calculations would provide accurate 12-month average prices when performed on a price that used the government-preferred escalator. However, when calculating a price where an uncommon escalator is used, subtracting the government-provided base reference price from the proposed price would not produce an accurate margin. Instead, it would produce a margin that bore no relation to the proposed uncommon base reference price. It follows that calculating a 12-month average price using Crowley’s proposed method would not produce an accurate result. We therefore deny this aspect of Crowley’s protest.<sup>3</sup>

## RECOMMENDATION

In light of the foregoing discussion, we sustain the protests. We recommend that the agency either reevaluate prices in a manner consistent with the terms of the RFP and the above discussion or, alternatively, that the agency amend the RFP to accurately reflect its intended method for evaluating prices, and provide the offerors with an opportunity to submit revised proposals. After making its choice in terms of how to proceed, we recommend that the agency reevaluate proposals and make awards in a manner consistent with the terms of the RFP as ultimately written, terminating for the convenience of the government any contracts improperly awarded, and making award to the firms in line for award, if otherwise proper. We also recommend that the agency reimburse the protesters the costs associated with filing and pursuing their respective protests, including reasonable attorneys’ fees. The protesters should submit their certified claims for such costs, detailing the time spent and the costs incurred, directly to the agency within 60 days of receiving this decision.

The protests are sustained.

Thomas H. Armstrong  
General Counsel

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<sup>3</sup> Petro Star also alleged that the agency improperly awarded CLINs 108, 109, 124, 136 and 198 for reasons unrelated to the discussion above. The agency agreed to take corrective action with respect to these CLINS, and Petro Star agreed that the agency’s proposed corrective action rendered these allegations academic. We therefore need not consider the merits of these allegations.