



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Supreme Foodservice GmbH

File: B-405400.1; B-405400.2

Date: October 31, 2011

Thomas P. Humphrey, Esq., Puja Satiani, Esq., Jonathan M. Baker, Esq., James G. Peyster, Esq., and Sarah B. Gleich, Esq., Crowell & Moring LLP, for the protester. Jeremiah Kline, Esq., and Michael D. Delaney, Esq., Defense Logistics Agency, for the agency.

Matthew T. Crosby, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that estimates in solicitation based on current troop levels do not accurately reflect agency's needs due to presidential announcement of troop withdrawals is denied where agency determines that due to absence of official notification and guidance regarding announced troop withdrawal and possibility that troops may be replaced with individuals to be serviced under contemplated contract, agency's basis for solicitation estimates is reasonable.
2. Protest that solicitation calling for fixed prices for delivery of products to be ordered on indefinite-delivery/indefinite-quantity basis to locations in war zone subjects contractor to undue risk is denied where record reflects that solicitation includes adequate information for offerors to factor risk into pricing, [DELETED] proposals have been submitted, protester represents that it understands risk and has submitted proposal responding to solicitation, and agency has articulated reasonable bases for shifting risk to contractor.
3. Protest that agency unreasonably failed to provide for price realism evaluation in solicitation is denied where solicitation contemplates award of fixed-price contract and assessment of performance risk in connection with technical evaluation.
4. Protest that agency unreasonably failed to include definitive responsibility criterion for financial capability in solicitation is denied where record reflects that agency intends to make pre-award responsibility determination based on information both independently obtained by agency and submitted by offerors.

DECISION

Supreme Foodservice GmbH, of Ziegelbrücke, Switzerland, protests the terms of request for proposals (RFP) No. SPM300-11-R-0063, issued by the Defense Logistics Agency (DLA), Troop Support, for the supply and distribution of subsistence products to locations throughout Afghanistan. Supreme asserts that various terms of the solicitation impose undue risk on the contractor and that it does not include terms necessary for a reasonable evaluation of offerors' proposals.

We deny the protest.

The solicitation, which was issued on April 26, 2011 and amended nine times, calls for a full-line food distributor to act as the prime contractor responsible for the supply and delivery of semi-perishable and perishable items to the military and other federally-funded customers at more than 200 locations throughout Afghanistan.¹ RFP at 72-73. The solicitation contemplates the award of a single indefinite-delivery/indefinite-quantity (ID/IQ) fixed-price contract, with economic price adjustment, for a term of 66 months. Id. Award is to be made to the offeror whose proposal is determined to be most advantageous to the government based on price and the following five technical evaluation factors: experience/past performance; distribution system/quality assurance; private convoy security capability; operational support; and socioeconomic considerations. Id. at 168-69; RFP amend. 0007 at 2. The distribution system/quality assurance factor includes the following five subfactors: warehouse location/capacity and resource availability; airlift capacity; quality control, assurance, and warehouse procedures; product protection/food defense; and surge and sustainment capability. RFP at 169. The solicitation defines the ratings that will be used in the technical evaluation process. Id. at 171. Each definition indicates that risk of unsuccessful performance will be assessed.² Id.

Under the contemplated contract, the successful offeror will be paid a "contract unit price" for products delivered to the agency's government customers in Afghanistan. Id. at 33. The contract unit price consists of two components: the product price and the distribution price. Id. The product price essentially is the price that the contractor pays for a given product.³ See id. at 97; Agency Report (AR) at 20. The

¹ The contractor is known as the "subsistence prime vendor." RFP at 77.

² For example, a technical rating of outstanding is defined to mean, among other things, that the "[r]isk of unsuccessful performance is very low," whereas a technical rating of marginal is defined to mean, among other things, that the "[r]isk of unsuccessful performance is high." RFP at 171.

³ In relevant part, the solicitation defines product price as "the most recent DLA Troop Support Manufacturer's Price Agreement (MLA) price or the most recent manufacturer, grower or private label holder commercial price per unit to the

(continued...)

distribution price is a fixed price for all aspects of performance other than the product price and the cost of surface transportation of product from the contractor's continental United States (CONUS) facility(s) to the contractor's outside-CONUS (OCONUS) facility(s)⁴ using the United States Defense Transportation System (DTS).⁵ RFP at 98-99. For example, the distribution price includes components of performance such as the transportation of product by air (including emergency airlifts), transportation of product from the contractor's OCONUS facility(s) to the delivery points in Afghanistan, private convoy security, security of the contractor's OCONUS distribution facility(s), and the contractor's customer service representative program.⁶ Id. at 77-79, 85-86.

The solicitation establishes three pricing "tiers" that coincide with three phases of contract performance. Id. at 73. First-tier pricing is applicable to the first thirty months of performance; second tier pricing is applicable to the subsequent eighteen months of performance; third tier pricing is applicable to the final eighteen months of performance. Id. For each tier, offerors are to submit a product price for over 700 products. Id. at 163-64, attachs. 1, 3. Also for each tier, offerors are to submit a distribution price for 16 different product categories. Id. at 100-01, 163, 165.

(...continued)

Contractor, exclusive of standard freight." RFP at 97. The product price is subject to a monthly economic price adjustment based on changes in the price that the contractor pays for a product. See id. at 35-37; AR at 4.

⁴ The solicitation includes numerous references to the contractor's "OCONUS distribution facility(s)." Based on the context of the procurement and the record, we infer that such facility(s) generally would be located in Afghanistan. See RFP at 88 (discussing transportation of product to "the contractor's OCONUS distribution facility(s) in Afghanistan"), 156 (requiring "distribution network capacity in Afghanistan"); Protest at 38 (asserting the need for distribution facilities "in Afghanistan"). Consistent with the general parlance of the solicitation, however, throughout this decision we refer to such facility(s) simply as the contractor's "OCONUS distribution facility(s)."

⁵ The government directly funds the surface transportation of product via DTS from the contractor's CONUS facility(s) to the contractor's OCONUS facility(s). See RFP at 90.

⁶ The transportation of product to the contractor's OCONUS distribution facility(s) is known as "inbound transportation," and the transportation of product from the contractor's OCONUS distribution facility(s) to the delivery points throughout Afghanistan is known as "outbound transportation." See RFP at 79. Title to product transfers from the contractor to the government at the final DLA delivery point in Afghanistan. Id. at 113.

Within pricing schedules that are to be completed by offerors, the solicitation includes estimates of the volume of product to be delivered to each DLA customer location on a weekly basis. RFP attaches 1, 3. The estimates were derived from historical ordering data. Id. The solicitation also includes an estimated sales dollar value of \$10 billion and a total maximum sales dollar value of \$30 billion. RFP at 73, 96.

The solicitation provides that when products originating in the United States are to be transported by surface to the contractor's OCONUS distribution facility(s), the products must be transported via DTS by commercial carriers holding Universal Services Contracts (USC) awarded by the United States Transportation Command. Id. at 88. Such transportation is to be directly arranged for and funded by the government. Id. at 90. The terms and conditions of the USC govern liability for loss or damage of product during transportation. Id. at 89. The solicitation advises that the government is not responsible for such loss or damage or for detention charges. Id. at 89, 91. The solicitation also advises that in some instances, the USC carrier will have limited or no liability under the terms of the USC. Id. at 89.

To mitigate losses related to the transportation of product via DTS by USC carriers, the solicitation encourages offerors to obtain maritime insurance, to consider the terms and conditions of the USC,⁷ and to establish "a good working relationship" with the USC carriers. Id. at 91. In connection with the latter, the solicitation requires the contractor to enter into an agreement with the USC carriers in order to both establish a working relationship and to develop a claims process. Id. at 90. According to the solicitation, the agreement must:

address issues such as claims processing and dispute resolution for losses and damage to contractor cargo by the USC carrier(s) and for the resolution of claims by the USC carrier(s) against the contractor for detention of carrier containers, port storage for detained containers, and maintenance provided by a carrier for detained refrigerated containers.

Id. at 90.

After product has arrived at the contractor's OCONUS distribution facility(s), the contractor is responsible for delivering the product by ground, fixed-wing aircraft, or rotary aircraft to final delivery points throughout Afghanistan. Id. at 79, 92. The contractor also is responsible for, among other things, providing all necessary trucking assets, private convoy security, material handling equipment, and labor necessary to transport product from the OCONUS distribution facility(s) to the final

⁷ The solicitation includes an Internet address for viewing the current USC. RFP at 90.

delivery points. RFP at 75, 85. The solicitation states that “it is estimated” that the contractor will be required to maintain a minimum 60 day supply of product at its OCONUS distribution facility(s), id. at 75, but that the contractor must “have the ability to meet surges of 200% of normal [product] demand levels,” id. at 141.

The solicitation stipulates that due to factors such as border closures, contingencies in the area of responsibility, military exercises, and unforeseen changes in troop personnel, the contractor on some occasions will be required to transport product to its OCONUS distribution facility(s) by executing emergency airlifts. Id. at 78-79. The solicitation provides that an estimated 0.5 percent of the total sales volume will require emergency airlift.⁸ Id.

On August 17, 2010, the president of Afghanistan signed Presidential Decree 62, which ordered the dissolution of national and international private security firms operating in Afghanistan. AR, Tab 14, Presidential Decree 62, at 7. The decree provides that the Afghanistan Ministry of Interior is to assume responsibility for security of, among other things, “logistic shipping of international forces.” Id. On March 15, 2011, the Afghanistan Ministry of Interior announced that in connection with implementation of the presidential decree, the Afghan Public Protection Force will be organized as a state-owned security service provider. AR, Tab 15, Bridging Strategy for Implementation of Presidential Decree 62, at 1, 3. The March 15 announcement states that after a one-year bridging period, the Afghan Public Protection Force, together with the Afghanistan Ministry of Defense, will assume responsibility for, among other things, convoy security. Id. at 11.

Because of uncertainty regarding the transition from private convoy security to Afghan Public Protection Force convoy security, the solicitation requires offerors to submit two sets of pricing: one set of pricing is to include private convoy security; the other set of pricing is to exclude private convoy security. RFP at 2, 164-65; AR at 29. After issuance of the solicitation, the agency received offeror questions regarding the potential for increased costs related to Afghan Public Protection Force services. RFP amend. 0002, at 22-24. In response to the questions, the agency restated the requirement that offerors submit pricing both with and without private convoy security. Id. The agency also advised that the government will not be responsible for payment for Afghan Public Protection Force services, id. at 23, but that the contractor will be entitled to submit “a request for equitable adjustment that results from any change in the contract resulting from increased costs,” id. at 25.

On June 22, 2011, the President of the United States announced that “we will be able to remove 10,000 of our troops from Afghanistan by the end of this year, and we will

⁸ The solicitation also provides that the contractor is responsible for “routine” airlifts to the contractor’s OCONUS distribution facility; for example, airlifts of fresh fruit and vegetables to the contractor’s OCONUS distribution facility(s). RFP at 92.

bring home a total of 33,000 troops by next summer.” Remarks by the President on the Way Forward in Afghanistan, <http://www.whitehouse.gov/the-press-office/2011/06/22/remarks-president-way-forward-afghanistan> (last visited Oct. 27, 2011). On July 8, the agency advised offerors that notwithstanding the President’s announcement, the agency “has not received an exact timeline or official details with respect to the proposed drawdown.” RFP amend. 0006, at 5. The agency further advised as follows:

The current estimated quantities, sales volume, and dollar value are based on the most up to date and available contract data reflecting approximately 130,000 personnel. DLA Troop Support will not amend or revise its estimated sales volume or estimated dollar value unless, and until, it receives official notice and guidance regarding changes in U.S. troop levels in Afghanistan.

Id.

Supreme is the incumbent subsistence prime vendor contractor. AR at 2. As such, Supreme, since 2005, has performed essentially the same requirement that is the subject of the solicitation. See Protest at 2, 17-18, 21, 23, 27, 33, 35, 38. In the event that the contemplated contract is awarded to a firm other than Supreme, the solicitation provides that a 180-day transition phase will occur. RFP at 133.

Prior to the time set in the solicitation for receipt of proposals, Supreme submitted a proposal, which the agency accepted. Protest at 4. In total, the agency received [DELETED] complete proposals in response to the solicitation. AR at 13. Also prior to the time set for receipt of proposals, Supreme filed a protest with our Office. The protest asserted, among other things, that the solicitation improperly failed to include an evaluation criterion regarding an offeror’s approach and ability to provide private convoy security. Protest at 34-36. In response to this protest claim, the agency took corrective action consisting of amending the solicitation to include the above-referenced private convoy security technical evaluation factor.⁹ See RFP amend. 0007. Accordingly, our Office dismissed this ground of protest. Following issuance of the amendment, however, Supreme filed another protest with our Office asserting that the solicitation as amended precludes a reasonable evaluation of an offeror’s approach and ability to provide private convoy security. Supp. Protest at 6-8.

⁹ Among other things, the amended solicitation requires offerors to “provide a comprehensive plan that describes the measures their company will take to successfully deliver product to customers when conditions on the ground are at [four different] threat level[s] of terrorist attack.” RFP amend. 0009 at 2.

DISCUSSION

Supreme asserts that various terms of the solicitation impose undue risk on the contractor and that it does not include terms necessary for a reasonable evaluation of offerors' proposals. We have reviewed all of Supreme's protest allegations and, as discussed below, find that they furnish no basis on which to sustain the protest.

Solicitation Estimates

Supreme asserts that the solicitation inaccurately reflects the government's requirements because following issuance of the solicitation, the President of the United States announced that 33,000 troops will be brought home by the summer of 2012, yet the agency did not subsequently revise the solicitation to include reduced estimates. Protest at 36-37; Comments at 44-48. Supreme contends that the government's requirements have changed, and, therefore, the agency should re-structure the solicitation to require different pricing for different quantities or to provide for price adjustments based on changes in the level of troops deployed in Afghanistan. Comments at 46-47.

The agency responds that the solicitation was amended to advise offerors that the agency was aware of the President's announcement, but that the estimates included in the solicitation would not be revised unless and until the agency received official notice and guidance regarding the announced troop withdrawal.¹⁰ AR at 11, 14 (referencing RFP amend. 0006 at 5). The agency asserts that official notice of the withdrawal—with accompanying details—is needed because, among other reasons, if troops are withdrawn, they may be replaced by contractors or Department of State employees who will be serviced under the contract. AR at 14-15; Agency Response to GAO Interrogatories at 18.

Where, as here, the government cannot predetermine, above a specified minimum, the precise quantity of supplies that will be required during the contract period, and where it is inadvisable for the government to commit itself for more than a minimum quantity, it may use an ID/IQ contract. Federal Acquisition Regulation (FAR) § 16.504(b). An ID/IQ contract shall require the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services and, if ordered, the contractor to furnish any additional quantities, not to exceed a stated maximum. *Id.* § 16.504(a)(1). Estimated maximum quantities should be based on "market research, trends in recent contracts for similar supplies or services, survey of potential users, or any other rational basis." *Id.* These estimates need not be precise; rather, such estimates are unobjectionable so long as they were established

¹⁰ The agency represents that as of the date of its report, it has not received such guidance. AR at 11 n.18.

in good faith or based on the best information available, and are reasonably accurate representations of the agency's anticipated needs. Bristol-Myers Squibb Co., B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 7; Aalco Forwarding, Inc., et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 6.

The record here reflects that the estimates included in the solicitation are based on detailed historical data regarding the product demand experienced under the predecessor contract. RFP attaches. 1, 3; AR at 11. In the absence of official notification or details regarding implementation of the announced troop withdrawal, we decline to find, as Supreme urges, that the agency must substitute the general information provided in the President's announcement for the detailed historical information that the agency used in developing its estimates. The agency has determined that the estimates in the solicitation continue to reflect its current projected needs, and the agency has advanced a reasonable basis for deciding to wait for official notification and guidance regarding the announced troop withdrawal before amending the solicitation. This protest claim is denied.¹¹

Allocation of Risk

Supreme asserts that the solicitation imposes unreasonable risk on offerors due to the following uncertainties: the degree to which emergency airlifts will be required; the magnitude of contractor-borne costs associated with the use of USC carriers; the degree to which the use of aircraft rather than trucks will be required in connection with outbound transportation; the degree to which private convoy security will be required; the magnitude of contractor-borne costs associated with the transition from private convoy security to Afghan Public Protection Force security; and the magnitude of taxes imposed on the contractor by the government of Afghanistan. Protest at 16-29; Comments at 15-35.

Supreme argues that the variables that control these uncertainties are beyond the contractor's control, and that changes in the variables could significantly increase the costs borne by the contractor. Protest at 2. Supreme characterizes the potential increased costs as "impossible to estimate" given the potential for further border closures, heightened insurgent activity or political unrest, customs delays, and fees

¹¹ Supreme also asserts that the solicitation's 0.5 percent estimate for sales volume requiring emergency airlifts is inaccurate. Comments at 16; Protester Response to GAO Interrogatories at 7-8; see also Protest at 17. In this regard, Supreme has provided information showing that approximately [DELETED] percent of the sales volume of the predecessor contract required emergency airlift. Protester Response to GAO Interrogatories at 7-8. Even if we were to conclude that Supreme's calculation reflects a more accurate estimate, we view the slight difference ([DELETED]) between the calculations to be an insufficient basis for sustaining the protest. See Head Inc., B-233066, Jan. 25, 1989 89-1 CPD ¶ 82 at 4.

imposed by the government of Afghanistan for Afghan Public Protection Force services, among other things. Protest at 2, 16-30. To illustrate the magnitude of the potential cost increases, Supreme provides projections of costs that the contractor would incur in the event of a 10 percent increase in the volume of outbound product that must be delivered by rotary aircraft or in the event of a 10 percent increase in deliveries requiring private convoy security. Id. at 26-28.

Supreme also provides costs that Supreme incurred under the predecessor contract for emergency airlifts and for USC carrier-related product losses and port detention fees. Id. at 17, 21. Supreme points out that these costs generally were covered by the government under the predecessor contract, but that under the protested solicitation, risk for increased costs in these areas has been shifted to the contractor.¹² Id. at 17-18, 23. Finally, Supreme expresses concern that other offerors (*i.e.*, non-incumbents) will not understand the risk, and therefore will not account for the risk in their proposals. Id. at 2.

In response to Supreme's claims, the agency acknowledges that the solicitation involves certain "unknowns," particularly "the uncertainties inherent in having a contract performed in a war zone and how long extensive military operations will continue in the region." AR at 22, 29. The agency, however, maintains that the solicitation includes adequate information—including detailed estimates based on historical data—for offerors to evaluate the costs and risks of performance and to factor those risks into their pricing using business judgment. Id. at 22, 25, 28. The agency also asserts that the contractor can mitigate its cost exposure by, for example, obtaining insurance, reviewing the USC terms, negotiating with the USC carriers, and avoiding private convoy security costs by electing to make outbound deliveries by aircraft. AR at 21, 24, 25; Agency Response to GAO Interrogatories at 3. Further, the agency provides reasons for its determination to shift risk to the contractor in certain areas. For example, the agency explains that the predecessor contract included different rates for different modes of outbound delivery because nearly 200 delivery locations were added after contract award. AR at 25. As another example, the agency explains that it seeks to avoid the burden of administering different rates for different modes of delivery and of processing USC-related claims. Id. at 24, 26, 28; Agency Response to GAO Interrogatories at 6-7.

As a general rule, the contracting agency must give offerors sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 13-14.

¹² For example, under the predecessor contract, the government paid emergency airlift costs based on agreed rates. Protest at 18. As further examples, the government paid different rates based on whether product was delivered by ground, rotary aircraft, or fixed-wing aircraft, and with or without private convoy security. Id. at 23, 27.

However, the contracting agency has the primary responsibility for determining its needs and the method of accommodating them, including the choice of the appropriate contracting format. Id. We will not question an agency's choice of procurement approach, absent clear evidence that its decision is arbitrary or unreasonable, or in violation of statute or regulation. Id.

The mere presence of risk in a solicitation does not make the solicitation inappropriate or improper. TN-KY Contractors, B-291997.2, May 5, 2003, 2003 CPD ¶ 91 at 3. It is within the administrative discretion of an agency to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency, and an offeror should account for this in formulating its proposal. JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5; TN-KY Contractors, supra. There is no requirement that a competition be based on specifications drafted in such detail as to eliminate all risk or remove every uncertainty from the mind of every prospective offeror. Abba Int'l, Inc. et al., B-311225.4, Feb. 2, 2009, 2009 CPD ¶ 28 at 7; AirTrak Travel et al., supra, at 14. Risk is inherent in most type of contracts, particularly fixed-price contracts, and firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. JRS Mgmt., supra; AirTrak Travel et al., supra.

The solicitation here is not inconsistent with the applicable standard. Although the solicitation imposes risk on the contractor by requiring the submission of fixed prices for the delivery of product in a war zone, the record reflects that Supreme has adequate information to factor that risk into its pricing using business judgment. For example, throughout this proceeding, Supreme has provided the costs it incurred in many of the performance areas that it complains involve undue risk. Protest at 17, 21; Comments at 13-14, 17, 33. With respect to other areas, Supreme has provided the costs that it would expect to incur if certain contingencies arise. Protest at 26-28; Comments at 14. Also, compellingly, Supreme has represented as follows: "Supreme, as the incumbent for the last six years, understands the risks involved in performance and has priced its proposal accordingly." Protest at 33. We fail to see how the solicitation can be said to impose an unacceptable level of risk on Supreme when Supreme both "understands" the risks and was able to factor the risks into a proposal that it submitted to the agency. See S.P.I.R.I.T. Specialist Unlimited, Inc., B-237114.2, Mar. 8, 1990, 90-1 CPD 257 ¶ at 3.

Further, the agency has articulated reasonable bases--described above--for shifting risk to the contractor, and has represented that it is willing to compensate the contractor for assuming the risk of performing a contract in a war zone. See AR at 24-26, 28; Agency Response to GAO Interrogatories at 4, 6-7. An agency's acceptance of the risk of higher pricing based on an expectation of reduced administrative burden is not improper. See Braswell Servs. Group, Inc., B-278521, Feb. 9, 1998, 98-1 CPD ¶ 49 at 5 n.6.

Supreme also argues that the solicitation's allocation of risk prevents full and open competition, as required by the Competition in Contracting Act (CICA). Comments at 2, 6, 14; see also Protest at 14. In this regard, Supreme asserts that “[o]ther offerors will not understand the risks, and therefore, will fail to even attempt to account for them in the proposals.” Protest at 2; see also id. at 14; Comments at 4-6.

CICA generally requires contracting agencies to obtain full and open competition through the use of competitive procedures, absent an exception specified in CICA or other express statutory authority. 10 U.S.C. § 2304(a)(1)(A) (2010). “Full and open competition” is obtained when “all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.” Id. § 2302(3)(D). Here, the record reflects that Supreme itself submitted a proposal and that the agency received a total of [DELETED] complete proposals. AR, Tab 12, Bid Abstract. Supreme thus has failed to show that the terms of the solicitation prevented a responsible source from submitting a proposal in contravention of CICA.¹³ See Day Zimmermann Hawthorne Corp., B-287121, Mar. 30, 2001, 2001 CPD ¶ 60 at 6; S.P.I.R.I.T. Specialist Unlimited, Inc., supra, at 3.

Supreme's position that the solicitation imposes undue risk on offerors relies heavily on our decisions in BMAR & Assocs., Inc., B-281664, Mar. 18, 1999, 99-1 CPD ¶ 62 and Four Star Maint. Corp., B-240413, Nov. 2, 1990, 91-1 CPD ¶ 70. In both of those decisions, we sustained protests on the basis that the fixed-priced solicitations at issue subjected the contractor to unreasonable risk because they required lump sum pricing with no limitation on the amount of work to be performed. The circumstances in BMAR and Four Star, however, are distinguishable from the circumstances here in several key respects. First, unlike the situation here, there was no indication in BMAR and Four Star that the protester and other offerors had submitted offers responding to the solicitation. Second, unlike the solicitations in BMAR and Four Star, the solicitation here does not call for lump sum pricing without limitation on the amount of work; rather, the solicitation calls for offerors to submit

¹³ The agency's report does not discuss its evaluation of the proposals received, or whether such evaluation has occurred. Supreme suggests that the proposals may not reflect a reasonable assessment of the risks attendant to performance, and, therefore, in Supreme's view, the receipt of proposals is irrelevant to the issue of whether meaningful full and open competition was achieved. Protester Letter to GAO, Aug. 24, 2011; Comments at 14. We do not view the absence in the record of proposal evaluation findings as an indication that meaningful competition was not achieved. See Day Zimmermann Hawthorne Corp., supra; S.P.I.R.I.T. Specialist Unlimited, Inc., supra; Canon U.S.A., Inc., B-232262, Nov. 30, 1988, 88-2 CPD ¶ 538 at 6. Further, while Supreme may be of the view that other offerors could not have prepared proposals reflecting a reasonable assessment of the risks of performance, development of such an allegation at this stage of the procurement--i.e., before award--would be premature.

a separate distribution price for 16 categories of products to be ordered on an ID/IQ basis with a stated maximum order limitation. Third, unlike here, the solicitations in BMAR and Four Star were issued in connection with a public/private competition under Office of Management and Budget (OMB) Circular A-76. In the unique context of such a competition, the lump sum pricing arrangement put private offerors at a competitive disadvantage in relation to the public sector competitor. The solicitation here was not issued in connection with OMB Circular A-76, and, therefore, no such competitive disadvantage is present.¹⁴

In sum, the record here shows that when presented with the information contained in this solicitation, contractors such as Supreme, the incumbent, can reasonably project the costs involved and are willing to accept a fixed price representing assumptions of the risks involved. Accordingly, Supreme's protest that the solicitation subjects the contractor to undue risk is denied.¹⁵

Price Realism

Next, Supreme argues that given the risk, complexity, and magnitude of the contemplated contract, the agency unreasonably failed to provide for an evaluation of price realism within the solicitation. Protest at 31-33. Supreme contends that because of this, the agency will be unable to reject or downgrade a low-price proposal that reflects a performance risk or a lack of understanding of the requirement. Id. The agency responds that it will assess performance risk in the course of its technical evaluation, as reflected in the solicitation's technical evaluation rating definitions. AR at 12, 17 (referencing RFP at 171).

¹⁴ In addition to BMAR and Four Star, Supreme relies on two other decisions in which our office sustained protests involving allegations that fixed-price solicitations subjected offerors to undue risk. Neither of those decisions is applicable here. In Fabrics Plus, Inc., B-218546, July 12, 1985, 85-2 CPD ¶ 46, our Office concluded that the protested solicitation's terms resulted in an unacceptable level of uncertainty and risk because five of the seven proposals submitted were rejected as nonresponsive, indicating that competition had been inhibited. In Sletager, Inc., B-244710, Nov. 13, 1991, 91-2 CPD ¶ 452, our Office concluded that the absence of a required clause in a solicitation presented in an unacceptable level of uncertainty and risk because the protester did not submit a bid as a result of the absence of the clause in question. Thus, unlike here, in both Fabrics Plus and Sletager, the record indicated that the terms of the solicitations at issue had inhibited full and open competition.

¹⁵ Supreme's arguments regarding the undue risk that the solicitation allegedly imposes are numerous and pertain to uncertainties beyond those specifically discussed in this decision. E.g., Protest at 30. We have considered all of Supreme's arguments, and conclude that none provides a basis on which to sustain the protest.

Price realism ordinarily is not considered in the evaluation of fixed-price contracts because such contracts place the risk of loss on the contractor. Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 19. Although an agency may choose to provide for a price realism analysis in connection with a solicitation for a fixed-price contract, there is no requirement to do so. United Concordia Cos., Inc., B-404740, Apr. 27, 2011, 2011 CPD ¶ 97 at 15; CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207 at 4.

The solicitation here contemplates the award of a fixed-price contract. Consequently, the agency had the discretion not to include price realism as an evaluation criterion. We do not view the agency's election not to include a price realism evaluation criterion as an abuse of discretion or as unreasonable, particularly given that the agency intends to assess performance risk in connection with its technical evaluation. Further, we are unpersuaded by Supreme's argument that the agency's evaluation of technical risk unreasonably fails to account for the risk of performance failure associated with a "low ball" offer. See Comments at 39-44. Supreme's position ignores a fundamental precept of a fixed-price contracting, specifically, that the contractor--and not the government--assumes the risk if its approach results in higher costs than anticipated.

Definitive Responsibility Criterion

Supreme also asserts that the agency unreasonably failed to include a definitive responsibility criterion for financial capability in the solicitation. Protest at 38-39. Based on the amount of working capital and investment in infrastructure that was necessary for Supreme to perform the predecessor contract, Supreme argues that a definitive responsibility criterion is needed to establish whether an offeror has the financial capacity to perform the contract.¹⁶ Id. at 38.

The agency responds that it intends to make an affirmative determination of responsibility with respect to the financial capacity of the potential awardee by considering both information independently obtained by the agency and information submitted by the offerors. AR at 18. With respect to the latter, the agency states that it will consider information submitted in connection with the distribution system/quality assurance subfactors, which are: warehouse location/capacity and resource availability; airlift capacity; quality control, assurance, and warehouse procedures; product protection/food defense; and surge and sustainment capability. Agency Response to GAO Interrogatories at 19-20 (referencing RFP at 153-54).

Contracts may be awarded only to responsible prospective contractors. FAR § 9.103(a). In making a responsibility determination, the contracting officer must

¹⁶ Supreme estimates that working capital of [DELETED], not including investments, would be necessary to meet the solicitation's surge requirement. Protest at 38.

determine, among other things, that the contractor has “adequate financial resources to perform the contract, or the ability to obtain them.” Id. § 9.104-1(a). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer must find the firm nonresponsible. Id. § 9.103(b). A definitive responsibility criterion is a specific and objective standard, qualitative or quantitative, that is established by a contracting agency in a solicitation to measure an offeror’s ability to perform a contract. An agency may include definitive responsibility criteria in a solicitation so long as the criteria used reflect the agency’s legitimate needs. Software City, B-217542, Apr. 26, 1985, 85-1 CPD ¶ 475 at 2.

Because the agency intends to independently obtain information regarding offerors’ financial resources, and because of the reasonable potential that information submitted by offerors in connection with the distribution system/quality assurance subfactors will provide indicia of their financial resources, we find the agency’s decision not to include a definitive responsibility criterion for financial capability in the solicitation to be unobjectionable. Additionally, this aspect of Supreme’s protest essentially is an allegation that the solicitation should be more restrictive of competition. The role of our Office in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to protect any interest a protester may have in more restrictive specifications. Virginia Elec. & Power Co; Baltimore Gas & Elec. Co., B-285209, B-285209.2, Aug. 2, 2000, 2000 CPD ¶ 134 at 7-8. This basis of protest is denied.

Private Convoy Security Evaluation

Finally, Supreme alleges that the solicitation requires offerors to submit neither a timeline for implementing their private convoy security approach nor a plan for transition from private convoy security to Afghan Public Protection Force security. Supp. Protest at 7. Without such timelines or plans, Supreme argues, the agency cannot meaningfully assess an offeror’s capability to successfully implement private convoy security or to transition from private convoy security to Afghan Public Protection Force security. Id. at 7-8.

We observe that the solicitation: requires offerors to “provide a comprehensive plan that describes the measures their company will take to successfully deliver product to customers when conditions on the ground are at [four different] threat level[s] of terrorist attack,” RFP amend. 0009 at 2; provides for a 180-day transition phase in the event that the Supreme is not the awardee, RFP at 133; and provides for extensive, post-award contractor submissions related to private convoy security, id. amend. 0002 at 5-6. In light of the forgoing, Supreme’s allegation provides no basis on which to sustain a protest.

The protest is denied.

Lynn H. Gibson
General Counsel