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Decision

Matter of: Staples Contract & Commercial, Inc.

File: B-409528.34; B-409528.37

Date: December 3, 2014

David Gallacher, Esq., Jonathan S. Aronie, Esq., Keith R. Szeliga, Esq., Emily Theriault, Esq., and Katie A. Calogero, Esq., Sheppard Mullin Richter & Hampton, LLP, for the protester.

John G. Horan, Esq., John W. Sorrenti, Esq., and Katherine M. John, Esq., McKenna Long & Aldridge LLP, for Office Depot, Inc., the intervenor.

Christopher Murphy, Esq., and Kristen Nowadly, Esq., General Services Administration, for the agency.

Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency unreasonably found the awardee's proposal technically acceptable is denied where the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria. To the extent certain solicitation specifications were unclear or ambiguous, the protester failed to timely challenge patent ambiguities before the due date for receipt of proposals.
 2. Protest challenging the evaluation of the awardee's proposed pricing as unbalanced is denied where the solicitation set forth an estimated quantity for the items to be ordered under the anticipated indefinite-delivery, indefinite-quantity contract, and thus did not create the possibility for unbalanced pricing.
 3. Protest that the agency unreasonably provided an opportunity for the awardee to revise its proposal to address non-compliant items in its proposed list of products is denied where the protester was provided a similar opportunity.
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DECISION

Staples Contract & Commercial, Inc., of Edgewood, New Jersey, protests the award of a contract to Office Depot, Inc., by the General Services Administration (GSA) under request for proposals (RFP) No. GSQ02-14-R-SA0001, contract line item number (CLIN) No. 4, for a full range of office items that will be available for order

by participating agencies. Staples argues that the agency unreasonably found that Office Depot's proposal was acceptable under the solicitation's technical and past performance requirements. The protester also contends that the agency failed to reasonably evaluate whether the awardee proposed balanced pricing, and improperly permitted the protester to revise its proposal to replace non-compliant items.

We deny the protest.

BACKGROUND

GSA issued the solicitation on January 31, 2014. The RFP sought proposals for the award of multiple indefinite-delivery, indefinite-quantity (ID/IQ) contracts for GSA's Office Supplies Third Generation (OS3) program, which will be available for use by the entire federal government. RFP, Statement of Work (SOW), at 3.¹ The solicitation anticipated the award of approximately 24 contracts with fixed-unit-prices (with economic price adjustments), for a base period of 1 year, with four 1-year options. RFP at 2.²

The RFP anticipated separate awards under each of four CLINs. This protest concerns CLIN No. 4. The requirements for this CLIN were as follows:

CLIN Four (0004) (GSA On-the-Go): Contractors may propose a full catalog of general office supplies as specified in CLIN 0001 with added capability within the 10 largest U.S. Metropolitan Areas by population for same day delivery, secure desktop, expedited and/or brick/mortar store presence for onsite immediate delivery all within no more than 4 hours of order receipt.

RFP, SOW, at 5.

For this CLIN, the solicitation anticipated award of at least one ID/IQ contract to an "other than small business." Id. at 38. Award was to be made to the offeror that submitted the lowest-priced, technically acceptable offer. Id. at 3.

The RFP provided that technical proposals would be evaluated on a "go/no-go" basis. RFP, SOW, at 36. The evaluation process consisted of three steps: (1) a proposal compliance review, (2) evaluation of offerors' technical proposals, and (3) the price evaluation. Id. at 42.

¹ Citations to the RFP and SOW are to conformed copies provided by the agency.

² The agency advised that the estimated spending over the 5-year term of the contracts will be \$1.25 billion. Agency Report (AR) at 1.

As relevant to CLIN No. 4, the SOW stated that proposals would be evaluated on a go/no-go basis with regard to the following 15 technical subfactors: (1) status as an AbilityOne-certified contractor, (2) ability to meet all environmental reporting and green product requirements, (3) ability to provide 100-percent core item products, (4) ability to provide real-time order status to GSA Advantage!, (5) ability to provide point-of-sale discounts for all ID/IQ contract orders, (6) ability to provide agency defined reports at no additional cost, (7) ability to provide desktop delivery and secure desktop delivery, (8) ability to deliver anywhere in the continental United States within 3 to 4 business days, (9) ability to provide expedited or same-day delivery for immediate purchases within 4 hours of receiving the order and/or brick mortar presence serving government offices within the top 10 U.S. metropolitan areas by population, (10) ability to deliver to Alaska, Hawaii, Puerto Rico, and international locations, (11) ability to provide “Fill or Kill” status, (12) ability to provide Level III transaction data at the line-item level, (13) ability to provide quarterly subcontracting reports, (14) satisfactory past performance, and (15) provision of a subcontracting plan, if applicable. Id. at 36-37. The solicitation also stated that only proposals that were found to be technically acceptable for all of the subfactors would proceed to the price evaluation stage. Id. at 36.

With regard to the list of core item products, offerors were required to propose a “market basket” of 803 items listed in RFP attachment 1. RFP, SOW, at 11, 35. The solicitation stated that the agency would perform a “random sample verification,” based on the model numbers of the market basket items, to ensure that the proposed products met the product descriptions and other requirements, such as environmental requirements, Trade Agreement Act (TAA) requirements, and the essentially the same (ETS) requirements of the AbilityOne program. RFP, SOW, at 43. Offerors were instructed to submit prices for core market basket items, as well as non-market basket items. RFP, SOW, at 35. The solicitation stated that the agency reserved the right to request “multiple rounds of revised pricing,” and further advised that “the price evaluation phase may include a reverse auction.” Id.

Our Office received numerous protests from firms prior to the closing date of March 24, each of which argued that GSA’s procurement approach for the OS3 program had not adequately considered the effect of consolidation on small businesses. American Toner & Ink et al., B-409528.7 et al., June 9, 2014, 2014 CPD ¶ 161 at 5. Our Office denied the protests, finding that GSA reasonably considered the potential impact of its procurement approach on small businesses, and also reasonably concluded that the consolidation would result in substantial benefits to the government. Id. at 10.

GSA evaluated each proposal on a go/no-go basis, based on the technical subfactors included for each CLIN. The agency found Staples’ and Office Depot’s proposals for CLIN No. 4 to be responsive and technically acceptable, and both offerors participated in three rounds of a reverse auction. GSA awarded the

contract to Office Depot, based on its lowest-evaluated price of \$153,840,703. This protest to our Office followed.

DISCUSSION

Staples argues that GSA should have rejected Office Depot's proposal as technically unacceptable because, the protester contends, the awardee's proposal listed core items in its market basket that did not satisfy various solicitation requirements, and because the awardee's proposal did not demonstrate acceptable past performance. The protester also contends that the agency failed to evaluate whether the awardee's proposed prices were unbalanced, and improperly permitted the awardee to revise its proposal to replace noncompliant market basket items. For the reasons discussed below, we find no basis to sustain the protest.³

In considering protests challenging an agency's evaluation of proposals, our Office will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the stated evaluation factors and applicable procurement laws and regulations. A protester's mere disagreement with the agency's judgment is not sufficient to establish that an agency acted unreasonably. Herman Constr. Group, Inc., B-408018.2, B-408018.3, May 31, 2013, 2013 CPD ¶ 139 at 3; Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6.

³ Although this decision does not address every argument raised by Staples, we have considered each argument and find that none provides a basis to sustain the protest. For example, the protester argues that GSA's decision to end the reverse auction process after round three was arbitrary because the auctions showed "consistent reductions in price," and that additional rounds could have resulted in a lower price to the government. Protester's Comments (Oct. 6, 2014) at 19. The agency notes that the solicitation reserved the right to request multiple rounds of price revisions, including reverse auctions; the solicitation, however, did not guarantee a minimum number of rounds for reverse auctions. See RFP, SOW, at 35. Given the discretionary language set forth in the solicitation, we conclude that the protester's disagreement with the agency's judgment as to the number of reverse auction rounds to conduct does not provide a basis to sustain the protest. See Metcalf Constr. Co., Inc., B-289100, Jan. 14, 2002, 2002 CPD ¶ 31 at 5 (the decision whether to reopen discussions and request a new round of revised proposals is largely within the discretion of the contracting officer). In addition, if the protester disagreed with the agency's announced reverse auction methodology, it was required to protest this apparent solicitation impropriety before the receipt of proposals. Bid Protest Regulations 4 C.F.R. § 21.1(a)(1) (2014).

Technical Acceptability Evaluation

Staples first argues that at least 12 items in Office Depot's market basket of 803 items failed to meet various technical go/no-go factors. Protest at 5-8; Supp. Protest at 3-9. Specifically, Staples contends that the awardee's market basket contained eight paper products, one battery, and three toner products that did not comply with the RFP. For the reasons discussed below, we find no basis to sustain the protest.

As discussed above, the RFP required offerors to demonstrate their "ability to provide 100 percent core-items list products." RFP, SOW, at 37. The solicitation stated that the agency would evaluate the ability to provide the core items as follows:

For all CLINs, the following requirements shall apply, and all submissions are required as part of the evaluation process:

* * * * *

2. Demonstrated ability to provide 100 percent full core-items list products. GSA will perform random sample verification, based on the model numbers, to ensure the products proposed meet the descriptions and environmental attributes, are TAA and ETS requirement compliant, and may be cross-referenced. Proposals should also include Non-Market Basket items which are available products proposed in their commercial catalog price list compliant with the exclusions aforementioned. The remaining may be composed of ancillary office supplies incidentals.

RFP, SOW, at 43.

With regard to the eight paper products cited by the protester, the solicitation required, as discussed above, that an offeror demonstrate its ability to meet all environmental reporting and green product requirements. RFP, SOW, at 36-37. The solicitation required compliance with a number of regulatory requirements, including the Comprehensive Procurement Guidelines (CPG), issued by the Environmental Protection Agency. RFP, SOW, at 15-16. For paper, the solicitation provided that all agencies are "required to use 30 percent postconsumer copier paper." RFP, SOW, at 12, 16. Staples contends that Office Depot included eight items in its market basket that did not contain any recycled content. Protest at 7; Protester's Comments (Oct. 6, 2014) at 3.

With regard to the battery cited by the protester, the approved products list included an item with sample part No. EVEL91BP4, bid manufacturer part No. E91BP4, and which was described as a 4-pack of AA lithium ion batteries. RFP

attach. 1, List_ApprovedMarketBasket. The protester notes that Office Depot proposed an Energizer alkaline battery, bid manufacturer part No. E91BP-4, in response to a market basket item description that specifically called for a lithium battery. Protest at 8; Protester's Comments (Oct. 6, 2014) at 8. In its evaluation of Staples' proposal, GSA noted that the awardee's proposed price was lower than expected. AR, exh. III, Confirmation of Intended Pricing Proposal for Office Depot. The protester contends that although the agency reviewed the battery in question during the price evaluation, it failed to check that it met the purchase description as required by the solicitation.

GSA argues, and we agree, that the protester was on notice that the agency considered the paper products and the alkaline battery to meet the solicitation requirements. As part of the solicitation, the agency provided offerors with a list, "Reviewed and Approved OS3 Market Basket Part Number Combinations," that contained 6,385 items. RFP attach. 1, List_ApprovedMarketBasket. RFP amendment 9 advised offerors that the agency had revised the approved items list, and that "[t]he 'Final Reviewed & Approved OS3 Market Basket_07112014' reflects the latest version of the approved items list." RFP amend. 9. GSA argues that the protester knew or should have known that the agency viewed these items as "approved," and that because the awardee's market basket proposed items on this list, the agency reasonably found its proposal acceptable.

Staples argues that the approved products list was not intended to convey that the agency viewed all of the items as meeting the applicable regulatory or compliance requirements set forth in the solicitation. In this regard, the protester notes that, during exchanges, the agency identified instances where offerors did not meet the requirement to propose 100 percent of the required market basket items. Supp. AR, attach. D, Agency Letter to Staples (June 13, 2014), at 1. In this letter, the agency advised that "[a]s this is a preliminary review, offerors should not misinterpret the provided 'approved' list as a final part number compliance determination by GSA." Id.

As GSA notes, however, the agency subsequently issued RFP amendment 9, which included the "Final Reviewed & Approved" list. Although offerors were not permitted to submit proposal revisions in response to RFP amendment 9, the protester did not challenge the lack of an opportunity to do so, nor did the protester challenge the acceptability of any of the items on the "Final Reviewed & Approved" list.

We therefore find that, based on the issuance of RFP amendment 9 and the "Final Reviewed & Approved" list, the protester knew or should have known that the agency would view products on this list as acceptable. Because there was no new closing time for submission of proposals, the protester was required to challenge the terms of RFP amendment 9, including the "Final Reviewed & Approved" list, within 10 days of the issuance of that amendment. See U.S. Bank, B-404169.3, Feb. 15, 2011, 2011 CPD ¶ 43 at n.2; Armorworks Enters., LLC, B-400394,

B-400394.2, Sept. 23, 2008, 2008 CPD ¶ 176 at 7; 4 C.F.R. § 21.1(a)(2). Similarly, we also find that, to the extent the protester argues that the awardee should not have been found technically acceptable because it proposed an alkaline battery that met the part number specified in the approved products list, but was inconsistent with the description for that item, this conflict was patent. As a result, at this juncture, the argument is untimely. See id.

In any event, we also find that GSA's evaluation was reasonable because it was consistent with the terms of the solicitation, which provided for a "random sampling" of offerors' market baskets. GSA states that, in accordance with the solicitation, it used a random sampling verification process, whereby it randomly selected items from each offeror's market basket to verify that the items met the solicitation's requirements. Supp. AR at 4-5; see RFP, SOW, at 43. GSA states that it performed automated and manual verifications of a random sample of items in offerors' market baskets, and found that, following exchanges, both Office Depot and Staples proposed the core items from the final approved products list that conformed with the approximately 50 items selected for verification. Supp. AR at 4-5; Supp. CO Statement at 2; see Supp. AR, attach. C, Office Depot Summary of Proposal.

To the extent the agency's evaluation failed to identify the eight paper products or battery that the protester contends were noncompliant, such an evaluation was a possibility raised by the terms of the solicitation. That is, offerors were on notice that the agency would conduct a "random sample" evaluation "based on the model numbers" of the market basket items, rather than a line-by-line analysis of each of the 803 core items required in an offeror's market basket. See RFP, SOW, at 43. Staples' argument, that the solicitation should have included an evaluation scheme which required the agency to evaluate each individual market basket item for acceptability, is untimely because it challenges an alleged impropriety in the solicitation that should have been protested before the initial closing time for submission of proposals. Our Bid Protest Regulations specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1).

Staples also argues that Office Depot proposed three toner items that do not comply with the Trade Agreements Act (TAA), as required by the solicitation. Protest at 6. The protester contends that, notwithstanding the issuance of an approved products list, and notwithstanding the random sampling evaluation scheme set forth in the solicitation, the agency was on notice that these three toner items were not acceptable. This argument is also untimely.

On February 13, Xerox, the manufacturer of the toner items, sent an email to GSA informing them that certain products, including three that were proposed in Office Depot's market basket, were not made in a TAA-compliant country. Protest,

attach. A, Email from Xerox to GSA (Feb. 13, 2014). This email was sent to GSA 13 days after the solicitation was released, and “was later forwarded to Staples’ personnel preparing Staples’ proposal.” Protest at 6. Although the protester does not state when its personnel received the email, Staples states that it was received by personnel who were “preparing” the protester’s proposal, and also states that, based on this correspondence, Staples “expected” that GSA would exclude these products from the final evaluation. Id.

It is clear from the record that Staples knew of the basis for its argument concerning the TAA compliance of the toner items prior to July 11, when the agency issued RFP amendment 9 and the “Final Reviewed & Approved” products list. See id. To the extent that Staples objected to the inclusion of these items on the final approved list that was provided to offerors, this was an impropriety that had to be filed within 10 days of the issuance the amendment. See U.S. Bank, supra; Armorworks Enters., LLC, supra; 4 C.F.R. § 21.1(a)(2).

Past Performance Evaluation

Next, Staples argues that Office Depot’s proposal failed to meet the solicitation’s requirements with respect to past performance.⁴ Specifically, the protester argues that the protester did not follow the solicitation’s instructions for submission of performance references. We find no basis to sustain the protest.

The solicitation instructed offerors to provide completed past performance questionnaires for review in connection with the solicitation’s past performance go/no-go criteria. RFP, SOW, at 41. In this regard, the past performance questionnaires provided the following instructions:

2. List Performance Data on your five (5) most recently completed Federal Government contracts (not to exceed three years since completion) for like or similar items required by this solicitation indicating highest Office Supplies sales. If you do not have 5 Federal Government contracts, then list state, local or commercial contracts, in that order, to complete this report.

AR, exh. VII, Doc. 5, Past Performance Questionnaires.

⁴ Staples withdrew its initial protest grounds challenging the agency’s failure to consider public information about Office Depot’s past performance, and Office Depot’s corporate reorganization. Protest at 8; Protester’s Comments (Oct. 6, 2014) at 2 n.2.

Staples contends that, rather than submitting five federal government contract references as instructed, Office Depot submitted references from seven customers, only two of which involved federal government contracts: the Federal Aviation Administration (FAA) and the Internal Revenue Service (IRS). Protester's Comments (Oct. 6, 2014) at 10, citing AR, exh. IV, Office Depot Past Performance Questionnaires. The protester notes that in a different part of the awardee's proposal, required under RFP attach. 3, Office Depot listed five federal agencies with whom the awardee had done business, and which represented the highest percentage of overall sales to the federal government: the U.S. Postal Service, the Department of the Navy/U.S. Marine Corps, the Department of the Treasury, and the Department of Homeland Security. Id., citing AR, exh. II, Office Depot Technical Proposal, Vital Statistics, at 4. Staples contends that these data show that the Office Depot had more than five federal government contracts, and that because the awardee provided performance questionnaires for only two federal agencies, that Office Depot failed to comply with the solicitation instructions and should have been found unacceptable under the past performance evaluation subfactor.

In its role as an intervenor, Office Depot responded to Staples' arguments concerning the past performance section of Office Depot's proposal. Office Depot notes, regarding the list of federal contracts in its proposal, that RFP attachment 3 required offerors to provide "vital statistics." One of these questions on this attachment stated, "Please list the Government agencies you currently supply and the percentage of current revenues each agency represents." RFP attach. 3 at 2. Office Depot explains that the five contracts that it cited were held or performed by Office Max, which was recently acquired by Office Depot. Intervenor's Supp. Comments (Oct. 20, 2014) at 12. In contrast, the two contracts listed in Office Depot's past performance questionnaires were those that it performed. Id. Office Depot further explains that the Office Depot part of the reorganized firm, and not the Office Max part, will be responsible for performance of the contract. Id. For this reason, Office Depot states that the protester's citation to the Office Depot's response in the vital statistics questionnaire does not demonstrate that it failed to provide accurate data in the past performance section of its proposal. In light of the above explanation, we find that Office Depot did not fail to follow the solicitation's instructions for past performance, and that the agency's evaluation of Office Depot's past performance was reasonable.

Improper Exchanges with the Awardee

Next, Staples argues that GSA conducted exchanges that improperly allowed Office Depot to materially revise its proposal after the due date for proposals. Protester Supp. Comments (Oct. 20, 2014) at 13. Staples argues that any communications between a firm and an agency that results in that firm changing its proposal constitutes discussions, and that if GSA held discussions with Office Depot then it was required to hold discussions with the other offerors and, at the conclusion, request revised proposals. Protester Supp. Comments (Oct. 20, 2014) at 14.

GSA responds that Staples was similarly allowed to address the agency's concerns with its technical approach after the due date for proposals. Supp. AR at 7. The agency states that it allowed all CLIN No. 4 offerors to "clarify their initial submissions" to address, for example, noncompliant items in their market baskets and incomplete subcontracting plans. Id. at 8. Therefore, the agency argues that its actions in this regard did not prejudice the protester.

In our view, Staples' argument about discussions overlooks the fact that this procurement anticipated award to the lowest-priced, technically acceptable offeror. Where proposals are to be rated acceptable/unacceptable, a proposal rated "acceptable" cannot be further improved. Therefore, we have recognized that in such situations, an agency properly may conduct discussions with only those offerors whose proposals are unacceptable. Presidio Networked Solutions, Inc. et al., B-408128.33 et al., Oct. 31, 2014, 2014 CPD ¶ __ at 8; see also Zodiac of North America, B-409084 et al., Jan. 17, 2014, 2014 CPD ¶ 79 at 4; Commercial Design Group, Inc., B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 at 3.

In any event, the record shows, and the protester does not dispute, that GSA allowed both Staples and Office Depot to substitute non-compliant items in their market baskets, and to address other items such as an incomplete subcontracting plan. Supp. AR at 7-8; see Protester's Supp. Comments (Oct. 20, 2014) at 10-11. Prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest. enerGies, Inc., B-408609.9, May 21, 2014, 2014 CPD ¶ 158 at 9-10.

Unbalanced Price Evaluation

Finally, Staples argues that GSA failed to reasonably evaluate whether Office Depot's proposed pricing was unbalanced.⁵ We find no merit to this argument.

As a general matter, unbalanced pricing may increase risk to the government and can result in payment of unreasonably high prices. FAR § 15.404-1(g); Semont Travel, Inc., B-291179, Nov. 20, 2002, 2002 CPD ¶ 200 at 3. Unbalanced pricing exists where, despite a proposal's low overall price, individual line item prices are either understated or overstated, as indicated by the application of cost or price analysis techniques. Id.

The record does not support Staples' assertion that Office Depot's prices are unbalanced. The solicitation included "Attachment 5-OS3 Proposal Sheet" which

⁵ The protester argues that Office Depot proposed unbalanced pricing by heavily weighting its offer with deep discounts on AbilityOne items, and not offering similar discounts on other non-AbilityOne commercial items. Protest at 11.

provided a detailed estimate of anticipated orders for each individual item. RFP attach. 1. The agency states that it based this projection on the previous year's sales data. Supp. AR at 10. As our Office has held, a key consideration in assessing price risk in the award of an ID/IQ contract is the accuracy of the government's quantity estimates; if the estimates are reasonably accurate, then evidence of mathematical unbalancing generally does not present a risk that the government will pay unreasonably high prices for contract performance. Cherokee Painting LLC, B-311020.3, Jan. 14, 2009, 2009 CPD ¶ 18 at 3. Where a solicitation for the award of an ID/IQ contract provides estimated quantities for individual items to be used in calculating a total price, and the estimated quantities used go unchallenged, there is no basis for our office to find a risk that the agency will pay unreasonably high prices, a necessary aspect of an unbalanced pricing argument. ABSG Consulting, Inc., B-404863.7, June 26, 2013, 2013 CPD ¶ 185 at 7. Here, because there was no challenge to the estimated quantities in the solicitation, there is no basis to conclude that the government faces risk based on unbalanced pricing on orders that may be different from the stated government estimates.⁶

The protest is denied.

Susan A. Poling
General Counsel

⁶ In any event, Staples' argument is untimely. Staples filed its protest on August 26, stating that it compared Office Depot's proposed prices to Office Depot's prices in published catalogs. Protest at 11. The protester argued that the awardee proposed "significant discounts on nearly 300 different AbilityOne products," but also argued that "[a]pproximately 129 of the items in Office Depot's core market basket are actually priced higher than Office Depot's prices currently posted on GSA Advantage!" Id. The protester, however, did not identify which items reflected the alleged unbalancing, and did not do so until it specifically cited 18 items in its supplemental protest--which was filed on October 6. Our Regulations do not envision a piecemeal presentation of evidence, information, or analysis. RC 27th Ave. Corp.--Recon., B-246727.2, May 20, 1992, 92-1 CPD ¶ 455 at 3; see 4 C.F.R. § 21.2(a)(2).