



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: Repeat Consultants International, LLC--Advisory Opinion

File: B-421772.5

Date: May 9, 2024

David B. Robbins, Esq., Carla J. Weiss, Esq., Noah B. Bleicher, Esq., Nathan E. Castellano, Esq., Moshe B. Broder, Esq., and Ginsey V. Kramarczyk, Esq., Jenner & Block, LLP, for the protester.
Richard Aviles, Esq., Celia DePaolis, Esq., and Steven M. Sosko, Esq., Department of Defense, for the agency.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency misevaluated awardees' proposals would have been denied where the evaluation was reasonable and consistent with the solicitation criteria.
 2. Protest that agency made an unreasonable price realism assessment of awardees' proposals would have been denied where agency compared prices of acceptable offerors, determined that price differences were relatively small, and reasonably concluded the awardee's low prices were realistic.
 3. Protest that agency's affirmative determination of responsibility was unreasonable would have been denied where agency considered allegations of improper and illegal acts and obtained responses from the awardees, and reasonably determined that the responses were credible, consistent, and supported the responsibility determination.
-

OPINION

Repeat Consultants International, LLC, of McLean, Virginia, protested the award of one contract to Shanica Company for Logistics, Mine Action, Importation of Explosive Materials and General Trading LTD, of Erbil, Iraq, and a second contract to Hawax Corporation, of Erbil, Iraq, for delivery of fuels in Syria and Iraq, respectively. The contracts were awarded under request for proposals (RFP) No. SPE605-23-R-0209, issued by the Department of Defense, Defense Logistics Agency (DLA). Repeat, the incumbent contractor, argued that DLA should have evaluated the awardees' proposals as unacceptable because of alleged material misrepresentations. Repeat also argued

that DLA made an unreasonable price realism analysis, and erroneously found both awardees to be responsible.¹

Repeat filed its most recent protest challenging this procurement in our Office on January 23, 2024. On April 19, Repeat filed an action in the United States Court of Federal Claims that raised issues that were substantially similar to its protest in our Office. We dismissed Repeat's protest on April 23 because of the action pending at the court. 4 C.F.R. § 21.11(a). In an order dated April 26, the court requested an advisory opinion addressing Repeat's protest. 4 C.F.R. § 21.11(b). This advisory opinion is issued in response to the court's request and is presented in the same general format that our Office uses when deciding a protest. As explained below, the record before our Office did not provide a basis to sustain Repeat's protest.

BACKGROUND

The RFP, issued on April 27, 2023, as a commercial item procurement under the procedures of Federal Acquisition Regulation (FAR) part 12, sought proposals to provide specific types of fuel for locations in Syria and in Erbil, Iraq, under requirements contracts for fixed prices with economic price adjustment. Agency Report (AR), Tab 1, RFP at 7-13. The RFP set forth 17 contract line item numbers (CLINs); CLINs 1-13, for Syria, were to be proposed and awarded on an all or none basis. RFP at 2. CLINs 14-17, for Erbil, were being competed at the CLIN level and would be awarded individually. *Id.* The RFP contemplated that contracts would be awarded to the offeror that submitted the lowest-priced, technically acceptable proposal. RFP at 2.

The RFP established a set of initial gateway criteria that offerors had to satisfy,² after which proposals would be evaluated under three factors: technical capability, past performance, and price. RFP at 149. There were three subfactors under the technical capability factor: supply, transportation, and storage/distribution. RFP at 149-150. The technical capability factor and each of its subfactors were each to be rated as acceptable or unacceptable. For the past performance factor evaluation, the agency would evaluate three relevant current or past reference contracts as demonstrating acceptable or unacceptable performance. *Id.* at 150-151. The price factor required offerors to submit fixed prices for each product and destination, priced in U.S. dollars per U.S. gallon, which would be adjusted up or down on the basis of changes in a commercially available reference price for specific products. RFP at 14-18 (price adjustment clause and price references; AR, Tab 10, RFP amend. 4 at 2 (amending reference price). Additionally, the RFP specified that, when evaluating price, the

¹ Although DLA awarded one CLIN to Repeat, we refer to Shanica and Hawax as the awardees in this opinion.

² These gateway criteria required offerors to be fully registered in the Joint Contingency Contracting System (which allows vendors to be considered for federal contracts performed in Africa and the Middle East), and to demonstrate and provide evidence of their ability to gain access into Erbil Air Base and the Syrian border. RFP at 148.

government will also look at price realism “to determine if a low price reflects the contractor’s ability to understand the inherent risk in the requirement.” RFP at 151.

Among other things, the RFP cautioned offerors of legal prohibitions against the delivery of fuel obtained from Iran, and that the inclusion of Iranian fuel in any blended products was strictly forbidden. RFP at 1, 14. Additionally, the RFP advised that submission of an offer would “constitute a certification” that the offeror, or any person owned or controlled by the offeror, does not engage in any activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act. *Id.*

The RFP also required offerors to include a detailed description and a map or chart of the offeror’s supply chain, from vendor source to final delivery, and to submit an additional document titled “Fuel Source Data Sheet Attachment 3” that listed details about the offeror’s fuel sources including the country of origin, refinery name, mode of transportation, and transit countries for each fuel product. RFP at 145; AR, Tab 19, Shanica Final Proposal Part 2 at 6 (completed Fuel Source Data Sheet).

DLA received proposals from Shanica, Hawax, the protester, and three other firms. In evaluating the proposals, DLA found that those of the protester and the two awardees passed the gateway criteria, were technically acceptable, and demonstrated acceptable past performance. Tab 24, Initial Source Selection Decision Document (SSDD) at 17-18, 20-21, 23. Shanica submitted the lowest price for CLINs 1-13, at \$82,446,804.60; Repeat submitted the lowest price for CLIN 14 at \$7,171,507.44; and Hawax submitted the lowest prices for each of CLINs 15-17, with a combined total price for all three CLINs of \$103,978,710.65. *Id.* at 25-30. Awards were made accordingly.

On November 26, after Repeat was notified of the awards, the firm filed a protest with our Office raising multiple arguments, including that the awardees made material misrepresentations concerning their technical acceptability, their prices were unrealistic, and that neither firm was responsible. Our Office dismissed that protest as academic when DLA indicated that it would take corrective action to consider the protester’s allegations, reevaluate aspects of the proposals, and make a new source selection decision. *Repeat Consultants Int’l, LLC, B-421772.3, Dec. 1, 2023* (unpublished).

During the corrective action, DLA investigated the protester’s allegations and again assessed the awardees’ proposals as acceptable, their prices as realistic, and determined that both were responsible. The source selection authority (SSA) again selected the same awardees. AR, Tab 41, SSDD Addendum at 1. After receiving a debriefing, Repeat filed a protest with our Office. As stated above, on April 19, Repeat filed an action with the court that raised issues that were substantially similar to its protest in our Office. We dismissed Repeat’s protest on April 23 because of the action pending at the court. As also stated above, the court subsequently requested our views on Repeat’s protest, which we discuss below.

DISCUSSION

Repeat contended that the awardees' proposals should have been rejected as technically unacceptable, as unrealistically priced, and that the agency improperly considered both awardees to be responsible contractors.³ We considered each contention in turn and found that none provided a basis to sustain the protest.

Technical Evaluation

Repeat challenged DLA's technical evaluation of the awardees' proposals on the basis that both firms allegedly misrepresented the source of their fuel and failed to demonstrate the ability to perform their respective contracts. With respect to the fuel source, Repeat contended that the awardees would obtain fuel from Iran, in violation of law and the terms of the RFP. With respect to performance, Repeat contended that the awardees misrepresented their ability to transport the fuel; that is, upon award of the contracts, both have allegedly sought to employ the incumbent's employees. Protest at 16. Repeat argued that corruption is prevalent in the region of Syria and Erbil, Iraq, and therefore DLA cannot rely on the awardees' proposals or the firms' own representations to refute Repeat's allegations. Comments at 4. The protester contended that DLA improperly awarded the contracts despite evidence of these alleged flaws. Protest at 16.

In response, DLA argued that Repeat's allegations were undermined by the record. Regarding the allegation about the awardees' compliance with the prohibitions against the delivery of fuel obtained from Iran, the agency contended that Repeat's challenge stemmed from the protester's speculation about the companies' affiliation with a company (**[DELETED]**) that allegedly delivers fuel from Iranian sources. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 28. The agency argued that Repeat's allegation of connections between the awardees and the alleged affiliate was, at best, tenuous, and that Repeat expressed nothing more than its opinion that there is a risk the awardees will deliver Iranian fuel. *Id.* More importantly, however, the agency emphasized that both awardees responded to the agency's requirements by identifying their fuel sources and providing letters of commitment, all of which satisfactorily demonstrated that the awardees did not propose to deliver fuel products from Iran. *Id.* at 27-28 (citing AR, Tab 19, Shanica Final Proposal Part 2 at 62-68; AR, Tab 21, Hawax Final Proposal Part 2 at 88-93).

With respect to the contention that the awardees misrepresented their ability to perform their contracts, DLA contended that the protester lacked a sufficient factual basis for its

³ In its protest, Repeat also argued that the procurement was tainted by Procurement Integrity Act violations and that Hawax was ineligible for award because, among other things, it allegedly was not registered in the System for Award Management at the time of proposal submission. Protest at 8-14. The agency addressed these arguments in the agency report after which, in its comments, Repeat stated that it was no longer pursuing them. Comments at 1 n.2.

allegations, and that the record disproved this basis of protest. The agency contended that this aspect of the protest was based solely on an alleged phone call from a person who supposedly identified himself as an executive with one of the awardees and asked about prices to acquire the protester's trucks to perform this contract. Most significantly, the agency argued that both firms met the RFP requirements to provide detailed information about their respective plans to transport products to the delivery locations, identified all transportation modes to be used in performance, and submitted transportation asset letters of commitment as the RFP required. COS/MOL at 26. The agency argued that the evaluation reasonably concluded that both firms' proposals were acceptable. *Id.* at 28.

Where a protester argues that the agency's technical evaluation was flawed, our Office does not reevaluate proposals; rather, we review the record to determine if the evaluation documented in the record was reasonable and consistent with the solicitation's evaluation scheme and applicable law and regulation. Our review recognizes that the evaluation of technical proposals is primarily the responsibility of the contracting agency, because it is responsible for defining its needs and identifying the best method of accommodating them. *HCR Constr., Inc.; Southern Aire Contracting, Inc.*, B-418070.4, B-418070.5, May 8, 2020, 2020 CPD ¶ 166 at 4. An agency may reasonably base its evaluation on information provided by the offeror in its proposal and may ordinarily rely on the offeror's description of its proposed approach as accurate. *Id.* at 5. However, where an offeror's proposal includes a misrepresentation that materially influences the evaluation of the proposal, the circumstances generally constitute a basis to reject the proposal or, if already awarded, terminate the contract. A protester alleging such a material misrepresentation bears the burden to show that the information at issue is false. *Vizada Inc.*, B-405251 *et al.*, Oct. 5, 2011, 2011 CPD ¶ 235 at 9.

The record here provided no basis to question DLA's evaluation of the awardees' technical approaches as acceptable. The RFP required offerors to provide details about their fuel sources and transportation plans. Both firms did so, and neither proposal supported Repeat's allegation that the firm would obtain fuel from Iran. Moreover, the protester's contention that one or both of the awardees were affiliated with a firm that has previously delivered fuel from Iran did not demonstrate that the awardees also planned to do so in contravention of their contracts and proposals, or that DLA's evaluation of either proposal here was inadequate. Additionally, both firms' proposals addressed their respective plans to obtain necessary resources to perform, including trucks and drivers. AR, Tab 19, Shanica Final Proposal Part 2 at 44; AR, Tab 21, Hawax Final Proposal Part 2 at 115-119. Repeat's reliance on a phone call allegedly from an executive of Hawax asking about purchasing fuel trucks to perform the contract, even assuming it is accurate, did not serve as sufficient evidence that either awardee misrepresented its ability to perform with the trucks and other resources in its proposal.⁴

⁴ Although there are also obvious differences, there is some similarity to circumstances where an offeror may propose to perform a contract with specific personnel but then seeks to hire incumbent personnel for those positions. We have found that such efforts, (continued...)

Finally, notwithstanding Repeat's general allegations of an atmosphere of corruption, we did not find that the agency's reliance on the awardees' representations in their proposals was an improper basis to evaluate their acceptability. Accordingly, we would have denied Repeat's challenges to the technical evaluations.

Price Realism Evaluation

Next Repeat argued that DLA unreasonably found both awardees' prices were realistic. According to Repeat, both awardees' prices should have been found unrealistic because they allegedly do not reflect the cost of performance, including costs of handling the fuels as well as business costs such as local taxes. The protester alleged that the awardees offered prices so low as to pose a serious risk of nonperformance, which would result in DLA not receiving the fuel it orders because the awardees would be unable to perform at their prices. Protest at 21-23. Repeat contended that the market conditions in the region require DLA to do more to assess price realism than compare the prices in the three offerors' proposals. Comments at 10. Instead, Repeat argued that the agency should have focused on each firm's differential from the reference price, *id.* at 11, and further, should have inquired into each firm's costs, such as

costs associated with maintaining the fuel truck fleet; the costs associated with logistics and handling of fuel;[] the cost of fuel used by the trucks themselves[;] costs associated with storage includ[ing] the storage facilities themselves; . . . safety and environmental compliance; . . . financing the fuel inventory[;] . . . price fluctuation[] [risks]; . . . security for the fuel storage facilities; [and costs of] different types of fuel require additives to enhance performance, stability, or to comply with regulations[.]

Id. at 12.

The agency responded that the contracting officer's price realism analysis was reasonable, and nothing required the analysis to include the details as Repeat contended. The agency argued that comparing prices among acceptable offerors was a reasonable technique, and doing so produced comparisons that showed the awardees' prices were realistic. For the Syria requirement, the contracting officer compared Shanica's prices to Repeat's,⁵ and concluded that Shanica's total evaluated price of \$82,446,804.60 was \$1.8 million lower than Repeat's total evaluated price of \$84,245,352.60, over a 3-year period. The contracting officer determined that the difference was relatively small and raised no suggestion that Shanica had priced the

without more, are not sufficient to demonstrate that an awardee misrepresented its manner of performance by engaging in a bait-and-switch of personnel. *E.g., Target Media Mid Atl., Inc.*, B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358 at 8-9.

⁵ Only Shanica and Repeat submitted acceptable proposals and were considered for the Syria requirement.

requirement unrealistically. COS/MOL at 12 (citing AR, Tab 37, Price Realism Memorandum for Record at 2). For the Erbil requirement (CLINs 15-17), the contracting officer followed a similar analysis, comparing the prices of Hawax to those of both Shanica and Repeat. *Id.* The comparison again found the three firms' total evaluated prices were relatively close (ranging from \$5.2 million to \$6.5 million), which the contracting officer considered sufficient to show that Hawax had not priced the requirement unrealistically low. *Id.* (citing AR, Tab 37, Price Realism Memorandum for Record at 3).

Where a solicitation provides for the award of a fixed-price contract, an agency may use a price realism analysis to assess an offeror's understanding of the requirements and risks of unsuccessful performance. The nature and extent of that price realism analysis are within the agency's discretion and the agency is not required to analyze prices on a line-by-line basis or consider every aspect of the offerors' proposed pricing; rather, comparison of offeror prices may be used to assess price realism. Consequently, our Office's review of the analysis is limited to determining whether it was reasonable and consistent with the terms of the solicitation. *Airborne Tactical Advantage Co., LLC*, B-414929.2, B-414929.3, Sept. 28, 2018, 2018 CPD ¶ 342 at 20-21.

The agency assessment of price realism here was reasonable and consistent with the terms of the RFP. Notwithstanding Repeat's contention that the circumstances of performing these contracts in both Syria, and various locations in and near Erbil, Iraq makes them complex and costly, DLA was not required to conduct an extensive review of offerors' pricing or the costs behind them to assess whether the prices were realistic. Rather, it was within DLA's discretion to assess prices as it did, by comparing prices of acceptable offerors to historical prices, and then to the other competitors' prices and, upon finding that the differences were relatively small, deeming all offerors--including the lowest-priced--to be realistic. AR, Tab 24, SSDD at 28-29; AR, Tab 37, Price Realism Memorandum for Record at 2-5. With regard to historical prices, our review of the record showed that, in addition to comparing the offerors prices to one another as DLA emphasized, the contracting officer also compared the lowest offered prices to prices DLA had paid for one-time purchases of the same fuels in recent months. The comparison showed that the lowest price for mid-grade unleaded gasoline was 7 cents lower per gallon than the average historical price, for diesel fuel the lowest price was 38 cents lower than the historical average, and for aviation turbine fuel (also known as JP8) the lowest price was \$1.14 lower than the historical average. AR, Tab 24, SSDD at 29.

Altogether, the record showed that the contracting officer understood the magnitude of the differences in total evaluated price for both awardees and made a business judgment that those differences did not demonstrate that either Shanica or Hawax had submitted unrealistically low prices. Accordingly, we would have had no basis to sustain this ground of protest.

Affirmative Determinations of Responsibility

Finally, Repeat contended that DLA erroneously found the awardees to be responsible contractors. The protester argued that neither met the minimum standards of responsibility because Repeat submitted multiple notifications to DLA's contracting office raising what it characterized as "serious concerns relating to Shanica's (and therefore, by extension and affiliation, Hawax's) business integrity, including potential criminal violations in connection with this procurement." Protest at 24. The protester argued that DLA failed to make a reasonable inquiry into the facts, which it argued would have resulted in DLA concluding that neither Shanica nor Hawax was a responsible contractor, and therefore neither would be eligible to be awarded the contracts at issue. *Id.* The allegations were varied and ranged from alleged theft of lights from the protester's vehicles to allegedly transporting Iranian fuel as well as allegedly using corrupt methods to obtain local permits and discourage competitors.

DLA disputed the basis for the protester's challenge to the affirmative responsibility determinations. The agency countered that it investigated the protester's allegations, found that they were based on hearsay, tenuous inferences, and isolated or anecdotal issues that did not provide a basis to conclude that either competitor lacked responsibility. Altogether, the agency argued, the protester did not show a basis to overturn the affirmative responsibility determination for either awardee. COS/MOL at 31-32.

An affirmative responsibility determination is largely committed to the contracting officer's discretion. Our Office generally will not consider a protest challenging such a determination and will instead dismiss such allegations except under certain circumstances. The exceptions our Office will consider are protests that allege that definitive responsibility criteria in the solicitation were not met and those that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. Bid Protest Regulations, 4 C.F.R. § 21.5(c).

The record here did not meet our standard to question the contracting officer's responsibility determination. The record showed that the contracting officer considered Repeat's notifications, made a reasonable inquiry into them by querying the offerors about matters such as their affiliation, the proposed sources of their fuel, and their resources (drivers, trucks, storage facilities). The record also showed that the contracting officer concluded that the awardees' responses were credible and consistent, and that they contradicted the allegations, leaving Repeat's assertions unsubstantiated. *See generally* AR, Tab 38, Memorandum of Second Determination of Contractor Responsibility for Shanica at 2-8; AR, Tab 39, Memorandum of Second Determination of Contractor Responsibility for Hawax at 3-9. Accordingly, Repeat gave us no basis to question DLA's affirmative determination of responsibility of the awardees.

In sum, our review of the record in this case identified no basis to question DLA's evaluation or source selection decision for the reasons advanced by Repeat. Accordingly, if our Office were resolving the protest, we would deny or dismiss the issues raised for the reasons discussed above.

Edda Emmanuelli Perez
General Counsel