

B- 413321.2 (Comp.Gen.), B- 413321.3, 2017 WL 930352

COMPTROLLER GENERAL

Matter of: Mark Dunning Industries, Inc.

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March 2, 2017

**DECISION**

\*1 Mark Dunning Industries, Inc. (MDI) protests the award of a contract to CoSTAR Services, Inc. under request for proposals (RFP) No. N69450-15-R-2106, issued by Department of the Navy, Naval Facilities Engineering Command Southeast, for regional base operations support services. The protester challenges the evaluation of CoSTAR's proposal and the selection of CoSTAR for award.

We dismiss the protest.

The agency initially made award to MDI under this solicitation, which contemplated the award of a fixed-price indefinite-delivery, indefinite-quantity contract for a base year and four option years, to the offeror with the lowest-priced, technically acceptable proposal. Protest at 2, 5. CoSTAR subsequently filed a protest with our Office, which was dismissed following notification by the agency that it would take corrective action by reevaluating the protester's proposal, conducting discussions with the protester and the awardee if deemed necessary, and issuing a new or revised source selection decision as appropriate. *CoSTAR Serv., Inc.*, B-413321, July 14, 2016 (unpublished decision).

Following the completion of the agency's corrective action, which included discussions with both MDI and CoSTAR, as well as the submission of final proposal revisions (FPRs), the agency selected CoSTAR for award, finding that CoSTAR submitted the lowest-priced, technically acceptable proposal. MDI filed a small business size challenge of CoSTAR with the agency on January 20, 2017, the resolution of which is still pending, and MDI filed a protest with our Office on January 23. As a result of the pending size challenge, MDI has not yet been provided a debriefing. As set forth below, MDI's protest fails to state a valid basis of protest and is largely speculative.

In its protest, MDI complains that that agency did not properly evaluate CoSTAR's FPR and should not have selected CoSTAR for award. Specifically, MDI argues that CoSTAR should have received a lower rating; CoSTAR offered an unreasonably low price; CoSTAR used an improper bait and switch scheme; and CoSTAR's proposal failed to demonstrate compliance with the RFP's limitation on subcontracting. In a supplemental protest filed with our office on February 17, MDI further alleges that the agency should terminate the award to CoSTAR because CoSTAR's proposal contained misrepresentations regarding the individuals that would fill key personnel roles identified in the RFP. We find that each of the protest grounds raised by the protester is speculative and does not form a valid basis for protest.

MDI first argues that the agency did not properly evaluate CoSTAR's FPR following corrective action. In this regard, the protester focuses on deficiencies identified in CoSTAR's initial proposal, which had been found unacceptable by the agency during its initial round of evaluations.<sup>1</sup> Protest at 8. According to the protester, there were deficiencies identified in CoSTAR's proposal that could not “be addressed or fixed through the stroke of a pen in a re-written proposal.” *Id.*

\*2 Our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §21.1(c)(4) and (f). These requirements contemplate

that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Pacific Photocopy & Research Servs.*, B-278698, B-278698.3, Mar. 4, 1998, 98-1 CPD ¶69 at 4. Here, the protester merely speculates as to the contents of CoSTAR's FPR, having no actual knowledge as to its contents. Further, MDI's arguments discount the possibility that, as CoSTAR argued in its earlier protest to our Office, the agency's evaluation of CoSTAR's initial proposal could have been flawed. Accordingly, we dismiss the protester's arguments because they are speculative and insufficient to form a valid basis for protest.

MDI next challenges the agency's selection of CoSTAR arguing that CoSTAR proposed an unreasonably low price. Protest at 10. This argument is also speculative. As discussed above, MDI has not yet been provided with a debriefing, and, as a result, MDI has not been given information about CoSTAR's final proposed price. Furthermore, a protester's claim that a bidder or offeror submitted an unreasonably low price--or even that the price is below the cost of performance--is not a valid basis for protest. A bidder or offeror, in its business judgment, may decide to submit a price that is extremely low. *Brewer-Taylor Assocs.*, B-277845, Oct. 30, 1997, 97-2 CPD ¶124 at 4. An agency decision that the contractor can perform the contract at the offered price is an affirmative determination of responsibility, which we will not review except for protests that allege that definitive responsibility criteria in the solicitation were not met, and protests 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). Since the protest did not provide such a showing, we have no basis to review the protest.<sup>2</sup>

MDI's arguments that the agency should have rejected CoSTAR's proposal because CoSTAR used an improper bait and switch scheme and failed to demonstrate compliance with the solicitation's limitation on subcontracting are also dismissed because they are speculative. These arguments are based largely on statements contained in an affidavit signed by the Vice President and Chief Operating Officer of MDI.

\*3 Regarding the bait and switch allegation, the protester speculates that CoSTAR proposed the same subcontractor to perform pest control services in both its original and final proposal revisions, and further conjectures that CoSTAR failed to notify the agency that it intended to switch to a different subcontractor for contract performance. The protester does not have actual knowledge regarding the contents of either CoSTAR's initial proposal or FPR, such that it can only assert that CoSTAR proposed to use the same subcontractor in both its original and final proposals "on information and belief." Protest at 11. Speculating further, MDI contends that CoSTAR intended to use a different subcontractor than the one it proposed, but failed to notify the agency of the change. This assertion is based on nothing more than an unsubstantiated statement from MDI's vice president that MDI is "aware that CoSTAR terminated its relationship" with the subcontractor listed in its initial and final proposals. Protest, Exhibit E, Affidavit at 1. This challenge amounts to nothing more than speculation based on speculation, which is insufficient grounds for protest.

With regard to MDI's assertion that CoSTAR will not comply with the limitation on subcontracting established by the RFP, which provides that at least fifty percent of the cost of contract performance incurred for personnel be expended for employees of the prime contractor, the protester once again bases its arguments on speculation as to the contents of CoSTAR's final proposal. In this regard, the protester relies upon a statement from MDI's vice president that purports to speak to the content of CoSTAR's revised proposal, but provides no explanation as to how the protester would have knowledge of the contents of CoSTAR's final proposal and no additional information that would substantiate the vice president's statement. Protest, Exhibit E, Affidavit at 1.

Finally, MDI's supplemental protest, in which MDI argues that the agency should terminate the contract issued to CoSTAR because CoSTAR's proposal allegedly contained misrepresentations regarding the individuals that would fill key personnel roles identified in the RFP, is dismissed. Similar to arguments discussed above, it is speculative and it fails to state a valid legal basis.

MDI's supplemental argument relies upon internet job postings that, according to the protester, show that CoSTAR is "actively recruiting employees to fill the [k]ey [p]ersonnel positions required to be included as part of CoSTAR's plan for performing the [c]ontract." Supplemental Protest at 2. According to the protester, it follows that the Workforce Management Plan and Organizational Chart included in CoSTAR's proposal must have contained misrepresentations regarding the individuals who would be serving in key personnel positions. *Id.* This assertion is speculative, as MDI has no actual knowledge regarding the contents of CoSTAR's proposal.

\*4 Additionally, this argument is insufficient to form a basis of protest because the agency informed offerors, during questions and answers that were incorporated into the solicitation by amendment, that they need not name key personnel in proposal submissions. Rather, the agency explained, contractors "shall submit a [l]ist of [k]ey [p]ersonnel and [q]ualifications within 15 calendar days after award ..." Agency Request for Summary Dismissal, Exhibit G. As such, the protester's contention that CoSTAR's post-award recruitment efforts should be seen as evidence that CoSTAR misrepresented its proposed key personnel in its final proposal revision-when CoSTAR need not have named key personnel in its final proposal revision-does not provide a factually or legally sufficient basis for protest.

In sum, the protest grounds filed by MDI fail to state a valid legal basis in that they are largely based on speculation regarding the content of CoSTAR's final proposal revision and supported by unsubstantiated assertions from MDI's vice president.

The protest is dismissed.

Susan A. Poling  
General Counsel

#### Footnotes

- 1 MDI was an intervenor in the protest filed by CoSTAR following the agency's initial selection of MDI for award, and MDI's counsel was provided with a copy of CoSTAR's protest, which included challenges to deficiencies identified by the agency during its evaluation of CoSTAR's proposal. The protester's arguments are apparently based upon information about the evaluation of CoSTAR's initial proposal included in CoSTAR's protest to our Office.
- 2 Further, we note that MDI's argument relies upon a provision in the solicitation indicating that the agency will evaluate prices to determine whether they are "fair and reasonable." Protest at 10. The purpose of a price reasonableness evaluation in a fixed-price environment, however, is to determine whether prices are too high, as opposed to too low. *Sterling Servs., Inc.*, B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶26 at 3. In contrast, arguments that an agency did not perform an appropriate analysis to determine whether prices are too low concern price realism. *SDV Solutions, Inc.*, B-402309 Feb. 1, 2010, 2010 CPD ¶48 at 4. A price realism evaluation is not required where, as here, the solicitation provides for the award of a fixed-price contract, absent a specific requirement for price realism. Here, the protester has not argued that the solicitation required the agency to perform a price realism analysis, and the protester's argument does not provide a valid basis for protest.

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