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Decision

Matter of: NJVC, LLC
File: B-410035; B-410035.2
Date: October 15, 2014

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Howard Phifer, Esq., National Geospatial-Intelligence Agency, for the agency.
Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging various aspects of the agency's evaluation of proposals and best-value tradeoff decision is denied where the record shows that the evaluation and trade-off decision were reasonable and consistent with the solicitation's terms.

DECISION

NJVC, LLC, of Chantilly, Virginia, protests the award of a contract to L-3 National Security Solutions, Inc., of Reston, Virginia, by the National Geospatial-Intelligence Agency (NGA) under request for proposals (RFP) No. HM0176-13-R-0001 for information technology enterprise managed services (ITEMS) transport services (TS). NJVC challenges various aspects of the agency's evaluation of proposals.

We deny the protest.

BACKGROUND

The RFP, issued on September 11, 2013, sought proposals to provide various services in support of the agency's ITEMS-TS program. RFP, Cover Letter. The RFP contemplated award of a contract consisting of one base year and four option years, with each year containing various fixed-price and cost-reimbursement contract line item numbers (CLINs). *Id.* at 2-21. Award was to be made on a best-value basis, with a tradeoff between price/cost and the following non-price factors:

technical, management, past performance, and security. Id. at 137-139. Each non-cost/price factor, except past performance, contained various subfactors, with weighting for each factor and subfactor. Technical was to be moderately more important than management, and management was to be significantly more important than past performance. Both technical and management, when combined, were to be significantly more important than past performance, which itself was to be slightly more important than security. Id. at 139. The non-price factors, when combined, were to be significantly more important than cost/price. Id.

Each non-cost/price factor was to be assigned an “appropriate rating” supported by a written narrative evaluation reflecting relative strengths, weaknesses or deficiencies. Id. The factor and sub-factor ratings were to reflect the degree to which the proposed approach meets the minimum performance or capability requirements, and was to provide a qualitative assessment of the proposal’s approach and understanding of the requirements through an assessment of its strengths, weaknesses, deficiencies, and risks. Id. Under the technical factor, the agency was to evaluate the extent to which the offeror understands the technical requirements, the quality of its proposal, and the offeror’s ability to fulfill the requirements in the performance work statement (PWS). Id. The technical factor included three sub-factors: operations and sustainment (O&S), projects, and engineering. Id. at 140.

Under the RFP, cost/price was to be considered separately from the non-cost/price factors and was not to be scored, but used in the agency’s overall best value decision. The cost-type CLINs were to be analyzed for completeness, reasonableness, and realism,¹ along with the development of a most probable cost (MPC) as anticipated by FAR § 15.404-1(d). Id. at 142. The fixed-price CLINs were to be evaluated for completeness and reasonableness. Id. The total evaluated cost/price was to be derived by adding the government-provided, not-to-exceed amount for CLINs X006; the MPC derived from the cost-type CLINs; and the offeror’s proposed prices for the fixed-price CLINs. Id.

The agency received four proposals, including those from NJVC and L-3. Agency Report (AR), exh. 21, Source Selection Decision (SSD), at 1. The agency’s initial evaluation resulted in the inclusion of all four proposals in the competitive range. Id. at 2. Written and face-to-face discussions were conducted with each offeror, and final proposal revisions (FPR) were requested and submitted. Id. The relevant results from the final evaluation were as follows:

¹ Reasonableness was defined as the cost and price analysis techniques described in Federal Acquisition Regulation (FAR) § 15.404-1(c)(2) that are used to determine whether the offered cost/price is fair and reasonable. Id. Realism was defined as “[c]ost realism analysis will be performed on [cost plus fixed fee] and Cost CLINs only in accordance with the criteria” included in FAR § 15.404-1(d). Id.

	L-3	NJVC
Overall Technical	Good	Acceptable
O&S	Good	Acceptable
Projects	Acceptable	Acceptable
Engineering	Good	Acceptable
Overall Management	Good	Good
Program Management	Good	Good
Small Business Participation	Good	Good
Past Performance	Satisfactory	Substantial
Security	Low	Low
Evaluated Cost/Price	\$217,865,554	\$241,315,968

Id. at 3, 9; exh. 20, Source Selection Authority (SSA) Award Brief, at 89-94.²

The SSD discussed the relative merits of each proposal under the various factors, and ultimately ranked each based on an integrated cost/price tradeoff. The SSA ranked L-3 first and NJVC as the third highest-rated offeror. AR, exh. 21, SSD, at 3. The SSA found that L-3 submitted the strongest technical proposal, and was a close second for the strongest management proposal. Id. at 10. He noted that L-3's technical proposal reflected a thorough understanding of the current operational environment, with emphasis on technology optimization and innovation. Id. The SSA concluded that NJVC's proposal "did not offer sufficient strengths consistent with their substantially higher costs to prudently justify spending more on them in terms of best value to the Government and warrant further consideration in the final trade-off." Id. The final best-value tradeoff consisted primarily of a comparison between L-3 and another offeror who was ranked higher than NJVC, with the SSA concluding that L-3 offered the best value. Id. at 10-11.

DISCUSSION

NJVC protests various aspects of the procurement, including the evaluation of the firm's proposal under the technical and management factors, and the evaluation of L-3's proposal under the technical, past performance and cost/price factors. The protester also argues that the agency did not conduct meaningful discussions and failed to conduct a reasonable best-value tradeoff. We have considered all of the

² The technical and management factors were to be assigned ratings of outstanding, good, acceptable, marginal, or unacceptable; the security factor was to be evaluated on a scale of low, medium or high; and past performance was to be evaluated as either substantial confidence, satisfactory confidence, limited confidence, no confidence or unknown confidence. AR, exh. 5, Source Selection Plan (SSP), at 22-26.

protest grounds raised by NJVC and conclude that none provide a basis to sustain the protest. We discuss the most significant issues below.

NJVC's Evaluation

NJVC argues that the agency unreasonably evaluated its proposal under the non-cost/price factors. For example, the protester asserts that it should have received higher ratings under both the technical and management factors based on the quantity and quality of the strengths assigned its proposal; NGA failed to recognize and properly credit the benefits and unique capabilities of its technical proposal; and the agency unreasonably assigned the proposal a major weakness for the resources it proposed to satisfy the projects CLIN.

In reviewing a protest challenging an agency's evaluation, our Office will neither reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. Analytical Innovative Solutions, LLC, B-408727, Nov. 6, 2013, 2013 CPD ¶ 263 at 3. Rather, we will review the record only to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. Id. Our review of the record affords us no basis to question the agency's judgment here.

As to NJVC's challenges to the assignment of overall ratings for the technical and management factors, the evaluation of proposals and assignment of adjectival ratings should generally not be based upon a simple count of strengths and weaknesses, but on a qualitative assessment of the proposals consistent with the evaluation scheme. Epsilon Sys. Solutions, Inc., B-409720, B-409720.2, July 21, 2014, 2014 CPD ¶ 230 at 6. Where the evaluation and source selection decision reasonably consider the underlying basis for the ratings, the protester's disagreement over the actual numerical, adjectival, or color ratings is essentially inconsequential in that it does not affect the reasonableness of the judgments made in the source selection decision. Id. Further, we will not sustain a protest where the agency's evaluation is reasonable, and the protester's challenges amount to disagreement with the agency's considered technical judgments regarding the specific elements of an offeror's proposal. BNL, Inc., B-409450, B-409450.3, May 1, 2014, 2014 CPD ¶ 138 at 5.

Preliminarily, we note that the quantitative and qualitative strengths assigned to L-3's proposal reasonably support the firm's superior technical rating as compared to the other offerors, including NJVC. In other words, even if we were to simply "count strengths" the record reasonably supports L-3 receiving a higher rating than NJVC under the technical factor. Looking beyond the ratings, to the underlying bases for the assigned strengths and weaknesses, we conclude that the agency has rationally supported its award decision. Nothing raised by NJVC leads us to conclude otherwise.

For example, NJVC contends that the agency failed to reasonably evaluate the alleged strengths of the firm's offered solution of using [DELETED]. Yet, the record shows that the SSA considered NJVC's [DELETED] solution and recognized that the firm asserted it would lead to labor cost savings. AR, exh. 21, SSD, at 4. In a comparison, however, he noted that L-3's technical proposal had more merit, with clearly defined and substantiated processes and efficiencies. Id. Since the record shows that the SSA clearly considered the merits of NJVC's technical proposal, we are in no position to substitute our judgment for the agency's.

NJVC also argues that the agency irrationally assigned it a major weakness for not substantiating its proposed low resource levels, which the protester asserts was a benefit derived from its use of the [DELETED] solution. Protest at 14-17. NJVC argues that the NGA, in effect, double-penalized the firm, and in the protester's view, the evaluation "confirms that NGA either completely ignored, missed or failed to understand the [DELETED] solution centrally featured in NJVC's Technical proposal." Id. at 14.

The record shows that the agency informed NJVC that it had been assigned a significant weakness for providing no justification for low project management and systems engineering labor hours for one of the fixed-price CLINs. AR, exh. 10.b, NJVC Items for Discussion (IFD), at 3. In its response, NJVC explained that the hours "were derived from [DELETED], taking into account actual hours and complexity levels of [DELETED]." AR, exh. 11.a, NJVC IFD Response, at 13. While the agency elected to upgrade the significant weakness to only a major weakness,³ it also found that NJVC's proposal still provided little evidence of a feasible approach to demonstrate its ability to successfully execute the scenarios using the low resource levels proposed. AR, exh. 12.b, NJVC FPR Technical Consensus Report, at 6-7.

NJVC points to seven sections of its proposal which purport to show how it emphasized the value, benefit and cost savings offered through the [DELETED] solution. Protester's Comments at 11-14. However, our review of NJVC's proposal, including the cited sections, does not provide a basis to find the NGA's evaluation unreasonable. See generally, AR, exh. 8.c, NJVC FPR, Vol. 3, Technical Proposal. For instance, NJVC's response to the agency's discussion topic, stated above, does not make any clear link between the low resource levels and the firm's [DELETED] solution. Likewise, our review of the remainder of NJVC's proposal provides us no basis to question the agency's conclusion that that the firm provided little support for the feasibility of its approach.

³ Weaknesses were assigned using a scale of minor weakness, major weakness, and significant weakness, with significant weakness being the most egregious weakness. AR, exh. 5, SSP, at 19.

Discussions

NJVC next argues that the agency conducted misleading discussions. NJVC first argues that it was improperly misled through the agency's silence about its concerns related to low resource levels under the projects subfactor during subsequent rounds of discussions. Id. at 18. In support of its contention, the protester proffers that, subsequent to NGA raising the significant weakness, discussed above, and NJVC's written response, the agency conducted oral and written discussions, but did not raise any further concerns about this specific significant weakness. In addition, at the conclusion of the oral discussions, NJVC asserts that the contracting officer expressly stated that "all issues had been identified." Id. at 16. However, as we have held, where an agency has advised an offeror of its concern, there is no requirement that it raise the issue again in subsequent rounds of discussions, even where the issue continues to be a concern to the agency. Weibel Equip., Inc., B-406888, B-406888.2, Sep. 21, 2012, 2012 CPD ¶ 279 at 5-8. The record shows that the NGA raised its concern with NJVC and was not required to raise the issue anew during subsequent discussions.

NJVC next argues that the agency only raised concerns about the firm's low project management and systems engineering hours, but the final major weakness involved a broader concern regarding the firm's overall proposed low resources for the project scenarios. Protester's Comments at 14-20. Thus the protester contends that it was prejudicially deprived of the opportunity to address the agency's true concern. We find no basis to sustain the protest on this issue.

While the scope of the weakness apparently expanded from the agency's discussion topic to encompass the offeror's overall approach, the focus of the weakness remained on project management and systems engineering. Further, even if we were to agree that the IFD did not convey the breadth of the agency's concern, we nonetheless find that the protester was not prejudiced. Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 4 (prejudice is an element of every viable protest). The record shows that in evaluating NJVC's proposal under the projects subfactor, the SSA discusses the strengths of the firm's proposal and does not mention this weakness. AR, ex. 21, SSD, at 5. We believe it is reasonable to infer from the SSA's silence as to this major weakness, and his focus on the strengths of NJVC's proposal under the relevant subfactor, that the SSA did not accord the matter much, if any, weight in his source selection decision. Moreover, even if the weakness were removed, the protester has not shown that its competitive position would have improved.

Cost/Price Evaluation

NJVC argues that the agency failed to reasonably evaluate L-3's cost-plus-fixed-fee (CPFF) CLINs for realism, and failed to reasonably evaluate the risk of performance associated with L-3's overall cost/price proposal. Protest at 20. In this regard, NJVC asserts that L-3's total evaluated price is unrealistically low. Id. We address each argument in turn.

NJVC alleges two errors in the cost realism evaluation. First, NJVC argues that the technical evaluation panel's (TEP) evaluation of L-3's basis of estimate (BOE) for one of the CPFF CLINs was conclusory and incomplete. Comments at 36. Second, NJVC argues that the management evaluation panel (MEP) did not find L-3's labor mix to be entirely realistic, but the agency never translated this criticism into a weakness for L-3's cost/price factor. Id. We conclude that both allegations are without merit.

As the RFP contemplated the award of CPFF CLINs, the agency was required to, and did, perform cost realism analyses on these CLINs. Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal. FAR § 15.404-1(d)(1). Agencies are required to perform such an analysis when awarding cost-reimbursement contracts to determine the probable cost of performance for each offeror. FAR § 15.404-1(d)(2).

The record shows that, in conducting its realism analysis of L-3's cost-reimbursement CLINs, the agency considered labor mix, hours and rates, and devised an MPC for each cost-type CLIN. See generally AR, exh. 16.a, L-3 Cost Evaluation Panel Report. The analysis included a review of L-3's BOE, where the TEP evaluated the firm's proposed overall labor hours and labor category/skill level mix for each area of the PWS covered by the CLINs. Id., TEP BOE Assessment. NJVC gives us no reason to question the agency's analysis. Importantly, NJVC has made no effort to show that L-3's labor mix, hours, and rates were unrealistic for the technical solution proposed by L-3, which is the very essence of a cost realism analysis. See CACI Tech., Inc., B-409147, B-409147.2, Jan. 27, 2014, 2014 CPD ¶ 44 at 4. In fact, NJVC makes no argument at all with respect to L-3's technical solution, let alone the realistic cost of performing that solution.

NJVC's second argument, that the agency failed to translate the MEP's "criticism" of L-3's labor mix under one of the CPFF CLINs into a weakness under the cost/price factor, is equally without merit. First, the RFP only states that the non-cost/price factors would receive ratings and written narratives based on an assessment of strengths weaknesses, deficiencies, and risks of the proposal. RFP at 139. Cost and price were not to be scored, but were to be considered in the overall best value decision. Id. at 142. Thus, under the stated evaluation scheme, the agency could

not have assigned a weakness to L-3 under the cost/price factor. More importantly, the record clearly shows that the MEP had concern about L-3's labor mix under one of the CPFF CLINs. AR, exh. 16.a, L-3 Cost Evaluation Panel (CEP) Report, MEP BOE. In response to the MEP's concerns, the CEP adopted the MEP's recommended labor mix and downwardly adjusted L-3's MPC by \$58,108. AR, exh.16.a, L-3 CEP Report, at 13. In sum, NJVC has pointed us to no errors in the agency's cost realism evaluation.

NJVC next argues that the agency unreasonably failed to consider the risk posed by L-3's low cost/price proposal overall. Protest at 20-24. NJVC asserts that L-3's low cost/price suggests L-3 does not adequately understand the RFP's requirements and that there is no evidence NGA evaluated whether L-3 could perform at that cost/price. Protester's Comments at 36. NGA responds that most of the price difference between NJVC and L-3 was in the fixed-price CLINs, and that NJVC's arguments concern a price realism analysis not required by the solicitation. Legal Memorandum at 12. NJVC objects that it is not arguing that NGA failed to perform a realism analysis on the fixed-price CLINs, but that NGA "failed to reasonably evaluate the impact of L-3's low cost/price on the risk of performance associated with its Technical and Management proposals." Protester's Comments at 37. We agree with the agency.

Where a solicitation contemplates the award of a fixed-price contract, an agency may provide in the solicitation for the use of a price realism analysis for the purpose of measuring an offeror's understanding of the requirements. IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 at 10-11. Price realism involves many of the same considerations as cost realism, except with an analysis of price, instead of elements of cost. See id. (analogizing price realism to cost realism analysis stated in the FAR). Price realism, however, may also be used by the agency to evaluate whether an offeror can realistically perform its technical solution at the fixed price proposed in order to assess the risk inherent in an offeror's proposed approach. DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 8-9; Triad Int'l Maint. Corp., B-408374, Sep. 5, 2013, 2013 CPD ¶ 208 at 8. This is so because, unlike a cost realism analysis where a probable cost of performance is determined, no adjustment to price is permitted in a fixed-price contract. See id. Analyzing whether an offeror's fixed price is so low that it reflects a lack of understanding of solicitation requirements is the crux of a price realism evaluation. Science Applications Int'l Corp., B-407105, B-407105.2, Nov. 1, 2012, 2012 CPD ¶ 310 at 10. Likewise, consideration of whether an offeror's fixed price is so low that it creates a risk that the firm cannot perform its proposed technical solution at the price offered is also a price realism analysis. See IBM Corp., supra, at 10-11. NJVC's arguments to the contrary notwithstanding, its allegation that the agency failed to consider L-3's low price as part of its technical analysis is an allegation that the agency failed to conduct a price realism analysis.

Because below-cost prices are not inherently improper when offerors are competing for award of a fixed-price contract, companies must be given reasonable notice that their business decision to submit a low-priced proposal will be viewed negatively by the government in assessing a company's understanding or the risk associated with its proposal. Triad Int'l Maint. Corp., *supra*, at 11. In other words, offerors must be reasonably informed that a price realism analysis will occur, and, in circumstances where price realism is not explicitly called for in the RFP, offerors must be reasonably informed that negative consequences may result. *See, e.g., Dyncorp Int'l LLC*, *supra*, at 9 (where an agency seeks to reject an unrealistically low-priced proposal, the solicitation must state that proposals can be rejected for offering low prices). Thus, the relevant inquiry is whether the solicitation notified offerors that a price realism analysis would be conducted; we conclude that it did not.

The record shows that cost and price were to be considered separately from the non-cost/price factors in the best-value tradeoff analysis. RFP at 142. While the cost-reimbursement CLINs were to be evaluated for completeness, reasonableness and realism, the RFP limits the realism analysis to those CLINs, and specifies that the fixed-price CLINs were only to be evaluated for completeness and reasonableness. Thus, the solicitation reasonably informed offerors that the fixed-price CLINs would not be evaluated for price realism.

In arguing that the agency was required to evaluate price realism, NJVC points to the solicitation's statement that proposals "will be evaluated to determine the extent that the offeror understands the Government's technical requirements. . . ." Protest at 25; RFP at 139. NJVC also points to language in the source selection plan for the proposition that the agency was required to consider the risk of unsuccessful performance associated with the offeror's approach.⁴ AR, exh. 5, SSP, at 22. NJVC concludes that "L-3's unfeasibly low labor rates should have been assessed as a Significant Weakness since it 'appreciably increases the risk of unsuccessful contract performance.'" Protester's Comments at 38. We disagree.

There is nothing in the technical or management factors that would inform offerors that price would be considered in assessing a firm's technical understanding or performance risk. RFP at 139-140. The RFP is clear that price information was not to be included in technical proposals for the FPAF CLINs, and thus would not be evaluated by the technical evaluators. We conclude that absent a clear indication in the RFP that price would be considered in assessing technical understanding or

⁴ Challenges that an agency deviated from its source selection plan do not provide a valid basis of protest, SWR, Inc.--Protest and Costs, B-294266.2, *et al.*, Apr. 22, 2005, 2005 CPD ¶ 94 at 5; it is the terms of the solicitation provided to the offerors that govern the evaluation.

performance risk under the technical and management factors, the agency was neither required to nor permitted to consider an offeror's price under these factors.⁵

Best-Value Tradeoff

Finally, NJVC raises various arguments attacking the agency's best-value determination, most of which are based on the alleged evaluation errors discussed above. As we have resolved these allegations, and find them to be without merit, we have no basis to conclude that the best-value tradeoff decision was unreasonable. However, we address here one remaining issue raised by NJVC with respect to the best-value determination not previously addressed.

NJVC argues that NGA deviated from the evaluation criteria in that the agency "heavily focused on L-3's perceived superior level of innovation as a discriminator in the SSDD," a consideration not stated in the evaluation scheme. Protester's Comments at 26-28. As we have held, where a solicitation indicates the relative weights of evaluation factors, the agency is not limited to determining whether a proposal is merely technically acceptable; rather, proposals may be evaluated to distinguish their relative quality by considering the degree to which they exceed the minimum requirements or will better satisfy the agency's needs. ViroMed Laboratories, Inc., B-310747.4, Jan. 22, 2009, 2009 CPD ¶ 32 at 4. With specific regard to the consideration of "innovations and/or creative approaches" to distinguish the relative quality of proposals, an agency can properly consider both the extent to which proposals exceed the RFP requirements and the extent to which offerors used innovative measures to respond to those requirements. Id.; IAP World Servs, Inc., B-297084, Nov. 1, 2005, 2005 CPD ¶ 199. We conclude that NGA's consideration of the innovation of L-3's technical proposal was reasonably contemplated by the stated evaluation criteria, and not based on unstated evaluation criteria, as the protester alleges.

The protest is denied.

Susan A. Poling
General Counsel

⁵ We note for the record that NJVC devotes much of its pleadings to challenging the realism of L-3's allegedly low labor rates under one of the fixed-price CLINs. Protest at 20-25; Protester's Comments at 36-38; exh. 2 (NJVC's Expert Report). However, as the CLIN in question was fixed-price, the agency was not required to consider the realism of L-3's labor rates here. NJVC also raises a challenge to the realism of L-3's labor hours under these CLINs, which was properly considered under the technical factor. We have considered NJVC's allegations and find no basis to find the agency's evaluation unreasonable.