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Decision

Matter of: AMEC Programs, Inc; Bechtel National, Inc.

File: B-408708; B-408708.2

Date: December 4, 2013

Michael A. Branca, Esq., Lori Ann Lange, Esq., and Nick R. Hoogstraten, Esq., Peckar & Abramson, PC, for AMEC Programs, Inc.; and Marcia G. Madsen, Esq., David F. Dowd, Esq., Luke Levasseur, Esq., Polly A. Myers, Esq., and Michelle E. Litteken, Esq., Mayer Brown LLP, for Bechtel National, Inc., the protesters.
Steven J. Weber, Esq., Walter A. I. Wilson, Esq., Daniel J. Donohue, Esq., Claude P. Goddard, Esq., and R. Clay Hagedorn, Esq., Polsinelli PC, for Kellogg Brown & Root Services, Inc., the intervenor.
H. Jay Aldridge, Esq., Department of the Army, Corps of Engineers, for the agency.
Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging an agency's determination that the awardee's low fixed price was realistic are denied, where the agency found that the awardee's low price reflected the firm's technical approach (that differed from that of the other offerors and the government's estimate).

DECISION

Bechtel National, Inc., of Reston, Virginia, and AMEC Programs, Inc., of Alpharetta, Georgia, protest the award of a contract to Kellogg, Brown & Root Services, Inc. (KBR), of Arlington, Virginia, under request for proposals (RFP) No. W912GB-13-R-0003, issued by the Department of the Army, Corps of Engineers, for the construction of an Aegis Ashore Missile Defense System complex at Deveselu Air Base, Romania. Bechtel and AMEC challenge the agency's technical and price evaluations.

We deny the protests.

BACKGROUND

The RFP provided for the award of a fixed-price contract for the construction of an Aegis Ashore Missile Defense System complex at Deveselu Air Base capable of supporting the deployment of a land-based Aegis Weapon System. The Aegis Weapon System is a sea-based combat system deployed by the Department of the Navy.[1] The Aegis Ashore system adapts the sea-based system for use as a land-based ballistic missile defense system.[2]

The RFP stated the procurement would be two-phased: a prequalification phase and a source selection phase. In the first phase, the Corps would evaluate proposals under two factors: security requirements and staffing considerations. RFP amend. 10, at 624-27. Offerors were informed that only the five "most qualified offerors" would be invited to compete the second phase. Id. at 622.

With regard to the source selection phase, offerors were informed that award would be made on a best-value basis, considering the following evaluation factors, listed in descending order of importance: past performance, experience, management plan, schedule, small business participation, and price. The non-price factors were stated to be, when combined, significantly more important than price. Id. at 623.

Offerors were cautioned that unreasonably high or low proposed prices could result in eliminating a proposal from the competition based on an assessment that the offeror did not understand the requirement or had prepared an unreasonable proposal.[3] See id. at 623, 638-39. In this regard, the RFP provided that the agency would consider whether an offeror's low price reflected a "buy-in" and whether the price reflected proposed performance. Id. at 639. The RFP informed offerors that the agency's "overarching evaluation approach for all factors" would be to consider the adequacy of the offeror's response to the RFP's requirements and the feasibility of the proposed approach. Id. at 624.

In the first phase, the Corps received proposals from eight offerors, which were evaluated by the agency's prequalification technical review board. Five offerors,

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[1] This information was drawn from the following Navy website: www.navy.mil/navydata/fact_display.asp?cid=2100&tid=200&ct=2.

[2] See www.mda.mil/system/aegis_ashore.html.

[3] Although the RFP did not specifically state that the agency would assess the "realism" of offerors' prices, the parties all understood that a price realism analysis would be conducted. In any event, such an analysis is required where a solicitation provides for the evaluation of price to determine an offeror's comprehension of the requirements, and states that a proposal can be rejected for offering low prices. See Optex Sys., Inc., B-408591, Oct. 30, 2013, 2013, 2013 CPD ¶ 244 at 4.

including AMEC, Bechtel, and KBR, were invited to submit proposals under the second phase of the procurement. Contracting Officer's (CO's) Statement at 6.

The second-phase proposals were evaluated by the agency's source selection evaluation board (SSEB), which consisted of a technical evaluation board (TEB) and price evaluation board (PEB). The TEB found that the initial proposals of all five offerors were technically unacceptable, and recommended that the agency conduct discussions. See id. at 22; Agency Report (AR), Tab 22, Competitive Range Determination, at 769-70.[4] The PEB found significant variance in the offerors' pricing under various contract line items (CLINs) and with respect to the independent government estimate (IGE).[5] AR, Tab 20, PEB Price Evaluation, at 2,750.

The agency established a competitive range that included the proposals of all five offerors, and conducted technical and price discussions. With respect to price, the agency posed the following discussion question to all offerors:

> Please ensure that your Final Price Proposal reflects all adjustments made as part of your technical proposal changes. In addition, please provide a detailed price narrative for each contract line item (CLIN) which shall include the following: Area Cost Factor (ACF), Overhead ([job office overhead] and [home office overhead]), Profit, Mark-Ups, bonding, other cost drivers to include labor discussions of number of shift and days per week worked, labor restrictions impacting price (i.e. Romanian labor laws), long lead items to include any difficulty acquiring any materials and/or equipment over $500K. Please also include any additional cost drivers (i.e. diesel fuel cost, [International Traffic in Arms Regulations] requirements, risk, etc) which have impacted your pricing.

See, e.g., AR, Tab 17, KBR Discussion Letter, at 2,569. In addition, for each offeror, the agency identified CLIN pricing in their respective proposals that was above or below the IGE by either 50 percent or $2 million. For these items, the Corps asked the offerors to review their associated costs and address whether the proposed prices accurately reflected the scope of work required. See, e.g., id. As relevant here, the Corps also asked KBR to review and confirm the accuracy of its proposed [deleted] percent profit rate.[6] Id.

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[4] Our page citations to documents in the AR are to the Bates numbers provided by the Corps.

[5] The IGE for this procurement is $225 million. AR, Tab 34, IGE, at 3,327.

[6] Similarly, the Corps informed AMEC that one of its overhead rates appeared to be extremely high and asked for the firm's rationale. AR, Tab 9A, AMEC Discussion Letter, at 1,332.

Revised proposals were received and evaluated by the TEB and PEB. As relevant here, KBR explained that it had obtained fixed prices, bonding/insurance commitments, and acceptance of KBR's subcontract terms and conditions from all of its major subcontractors. AR, Tab 18B, KBR's Revised Price Proposal, at 2,654-655. KBR also stated that it had firm quotes from its subcontractors and vendors for over 97 percent of the contract's tasks and materials, which allowed it to eliminate the need to apply location-based price adjustments for most of the work.[7] Id. at 2,655. KBR thus represented that only 2.93 percent of its price proposal was based upon estimates and that its internal costs were based on known employee salaries, planned work week schedules, and known overhead elements. Id.

In response to each CLIN identified by the Corps as differing significantly from the IGE, KBR provided detailed narratives explaining its pricing. For example, with regard to the CLIN for a deckhouse support building, KBR explained that it would use Romanian-based contractors for the building and non-technical portions of the system work, which would result in significant labor savings.[8] Id. at 2,656. Noting its own and its subcontractors' experience of more than 10 years in Romania, KBR explained the impact of the Romanian labor code on such things as minimum wage and overtime rules; explained the basis for its per-hour labor cost calculations; and discussed its approach to incentivizing subcontractors by basing pay on work performed instead of hours worked. Id. at 2,656-657.

The PEB determined that KBR's proposed price was "consistently lower than the IGE and the other offerors for nearly every CLIN . . . due to a unique approach." AR, Tab 35, Declaration of Senior Price Analyst, at 3,332.[9] Specifically, the PEB

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[7] KBR also stated that, to provide the most economical and highest quality product, it had selected a Romanian general contractor, Danya Cebus, which KBR described as having significant experience in Romania and Europe. See AR, Tab 18B, KBR's Revised Price Proposal, at 2,655.

[8] In its discussion responses, KBR stated that its approach was to generally use Romanian subcontractors for all non-sensitive work and explained for each CLIN how it would divide the work between Romanian and U.S. workers, often indicating the percentage of work that would be performed by Romanian contractors. On average, KBR proposed that a very high percentage of the work would be performed by Romanian workers, in contrast to the IGE, which assumed that only 30 percent of the requirement would be done by Romanian workers.

[9] The senior price analyst was one of two members of the PEB and had worked on the Aegis Ashore system project since its inception. AR, Tab 35, Declaration of Senior Price Analyst, at 1.

found that KBR, based upon its subcontractor relationships, planned to use a significant amount of Romanian labor.[10] As recounted by the price analyst:

> In the end, the main differences between KBR's approach and the IGE and AMEC/Bechtel's approach was KBR's detailed explanation of the use of a large Romanian Subcontractor, the decision not to construct a Mancamp,[11] a [reliance] on Firm Fixed-Pricing and Markups vs. AMEC's cost database adjusted approach, unclear Firm Fixed Pricing and Markups vs. Bechtel's [deleted].

Id. at 3,333.

The PEB's conclusion that all offerors' proposed pricing was reasonable and realistic was presented to the agency's source selection advisory council (SSAC). The SSAC concluded, based upon the PEB's analysis, that KBR's pricing was realistic. AR, Tab 26, SSAC Report, at 2,971-972.

The SSEB's and SSAC's evaluation reports were provided to the SSA, who also independently reviewed the final revised proposals.[12] The parties' revised proposals were evaluated as follows:

[10] The PEB also noted that KBR had broken down its labor buildup in far more detail than any other offeror. AR, Tab 35, Declaration of Senior Price Analyst, at 3,333.

[11] A "mancamp" is an optional onsite compound where workers could be housed during the construction activities, which offerors were permitted to build if they found that approach financially beneficial. See RFP amend. 8, at 378.

[12] During this review, the SSA increased KBR's rating under the management approach factor from good to outstanding. See AR, Tab 27A, Source Selection Decision, at 3,023.

	KBR	Bechtel	AMEC
Past Performance	Relevant/ Satisfactory	Relevant/ Satisfactory	Relevant/ Satisfactory
Experience	Good	Good	Acceptable
Management Plan	Outstanding	Acceptable	Acceptable
Schedule	Outstanding	Acceptable	Good
Small Business Participation	Outstanding	Outstanding	Acceptable
Price	**$134.2 million**	**$185 million**	**$179.5 million**

AR, Tab 27A, Source Selection Decision, at 3,067.

The SSA selected KBR's proposal for award as the offeror with the highest-rated and lowest-priced proposal. Id. In this regard, the SSA recognized that KBR's approach to performing the work was different from that of the IGE. In particular, the SSA noted KBR's proposed use of predominately local labor; its decision not to construct a mancamp; and its plan to use local concrete and asphalt sources instead of constructing an onsite concrete batch plant. The SSA concluded that KBR's explanations and narratives demonstrated its understanding of the requirement and provided a rationale for the differences in approach. The SSA also noted that KBR's past performance demonstrated successful completion of relevant projects with high customer satisfaction, as reflected by KBR's letters of recognition, multiple awards, and high ratings. Id. With respect to the protesters' proposals, the SSA noted that they were rated lower technically than KBR's proposal, although he found that some of their lower ratings under certain of the evaluation factors were not discriminators. The SSA concluded that there was no specific aspect or benefit in AMEC's or Bechtel's lower-rated proposals that would justify paying the respective $45 or $50 million price premium. Id. at 3,069.

KBR was awarded the contract and, following debriefings, Bechtel and AMEC filed these protests.

DISCUSSION

Price Realism

Bechtel and AMEC challenge the agency's price realism evaluation of KBR's proposal, arguing that KBR's price is too low to be realistic.[13] Each of the protesters makes numerous arguments challenging the depth of the agency's price realism evaluation. For example, AMEC complains that the Corps accepted KBR's reliance on lower-cost Romanian labor without adequately determining whether KBR's anticipated productivity complied with Romanian labor laws. See AMEC Comments at 11. Both protesters complain that the Corps did not adequately scrutinize KBR's approach to housing workers, where KBR did not propose, [deleted], to construct a mancamp. AMEC Comments at 8-9; Bechtel Comments at 8. Similarly, the protesters complain that the Corps accepted KBR's approach to procuring concrete from local providers, rather than proposing to construct its own on-site batch plant to produce concrete,[deleted]. AMEC Comments at 20; Bechtel Comments at 4-5.

We have considered all of AMEC's and Bechtel's numerous complaints concerning the adequacy of the agency's price realism evaluation of KBR's proposal, and find that none of the protesters' complaints provide a basis to conclude that the agency's evaluation was unreasonable.

Where a fixed-price contract is contemplated, a proposal's price realism is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor. OMV Med., Inc.; Saratoga Med. Ctr., Inc., B-281387 et al., Feb. 3, 1999, 99-1 CPD ¶ 52 at 5. However, an agency may, as here, provide for a price realism analysis in the solicitation for such purposes as measuring an offeror's understanding of the solicitation requirements, or to avoid the risk of poor performance from a contractor who is forced to provide services at little or no profit. See METAG Insaat Ticaret A.S., B-401844, Dec. 4, 2009, 2010 CPD ¶ 86 at 6. In reviewing protests challenging price realism evaluations, our focus is whether the agency acted reasonably and in a manner consistent with the terms of the solicitation. CC Distribs., Inc., B-406450, B-406450.2, May 25, 2012, 2012 CPD ¶ 177 at 7.

Here, the Corps recognized that KBR's price was much lower than the prices submitted by the other offerors and the agency's own IGE. See, e.g., AR Tab 20, PEB Review Comments, at 2,751. The Corps explored the bases of KBR's price during discussions, requesting that KBR provide a detailed price narrative for each CLIN in the RFP, including specific price elements, and, in addition, specifically

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[13] AMEC argues that, based on its own cost calculations, KBR's proposed price was approximately $17 million below cost, and thus constituted a buy-in.

identified every CLIN in KBR's initial proposal that was markedly above or below the IGE.

The record shows that KBR responded with a revised proposal that described with some specificity the bases for its proposed price and in addition addressed each CLIN. See AR, Tab 18B, KBR's Revised Price Proposal, at 2,654-667. With respect to its proposed use of Romanian labor, KBR explained its use of Danya Cebus, a Romanian general contractor that had significant experience with the local labor market and with Romanian labor laws. Id. at 2,655. With respect to its decision not to construct a mancamp to house laborers, KBR explained in its revised technical proposal that it intended to rely upon hotels and apartments to house laborers and would only construct a "work camp" to provide administrative offices, dining, toilets, and to support a limited number of security guards and mechanics. See AR, Tab 18A, Revised Technical Proposal, at 2,584, 2,598. KBR also addressed its planned procurement of concrete from local batch plants, explaining that it had contacted local suppliers concerning the anticipated volume of concrete and explaining its intention to monitor the local production to ensure quality control. See id. at 2,585-586.

The Corps determined that KBR's lower price reflected the firm's technical approach, which was different from that proposed by AMEC and Bechtel and that relied upon in the IGE. For example, the agency recognized that KBR's significant proposed use of Romanian labor reduced the firm's anticipated labor costs.[14] AR, Tab 25B, Final PEP Report, at 2,939. The agency also recognized that the KBR's planned use of local labor affected other associated costs, such as not constructing and operating a mancamp (housing for workers) as [deleted] assumed by the IGE. Id. The Corps also accepted KBR's lower overhead and profit rate, recognizing that KBR made a business decision to reduce these rates. The agency concluded from the information provided by KBR in its proposal and in response to discussions that KBR's price was not unrealistically low, and did not reflect a lack of understanding of the requirements. AR at 15. With respect to risk, while the TEB identified some risks in KBR's technical proposal, the SSA concluded that there was a very low level of risk associated with KBR's proposal. AR, Tab 27, Source Selection Decision, at 3,023.

The crux of the protesters' objections to the agency's price realism evaluation is their view that the agency did not request sufficient information or engage in a sufficiently probing analysis during discussions to enable a meaningful evaluation. The depth of an agency's price realism evaluation, however, is a matter within the

[14] Although Bechtel states that it too proposed the [deleted] and thus KBR's price must reflect a buy-in, the record shows that Bechtel's potential cost savings attributable to the proposal of [deleted] were offset by Bechtel's much higher overhead and profit rates. AR, Tab 25B, Final PEB Report, at 2,953-954.

sound exercise of the agency's discretion. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 4-5. Although the protesters continue to complain that the agency did not verify the feasibility of a number of aspects of KBR's anticipated costs, there is no obligation in a price realism analysis to verify each and every element of an offeror's costs.[15] Indeed, nothing about an obligation to review prices for realism bars an offeror from proposing--or an agency from reasonably deciding to accept--a below-cost offer. Optex Sys., Inc., supra, at 5-6.

In short, the record supports the reasonableness of the agency's price realism evaluation. Although the protesters may believe that the magnitude of the price difference demonstrated that KBR's price was too low to be acceptable, or too low to reflect an adequate understanding of the work, this disagreement with the agency's judgment does not show that the agency's decision was unreasonable.

Technical Evaluation

The protesters also challenge various aspects of the agency's technical evaluation. AMEC argues that its proposal should have received higher ratings under the management plan, schedule, and small business participation factors.[16] Bechtel argues that KBR's proposal should not have been rated outstanding under the management plan factor. Neither protester argues, however, that as a result of their arguments their own proposal should have been found technically superior to KBR's.

Given KBR's substantial price advantage and the SSA's conclusion that neither protester offered any technical advantages that would warrant paying such a significant price premium, the record does not show a reasonable possibility of

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[15] We disagree with Bechtel's apparent belief that because the RFP provided for considering feasibility of approach, this meant that the agency was in effect required to perform a cost (as opposed to price) realism evaluation. In any event, the agency's evaluation, as described above, determined both that KBR's approach was acceptable, and that its price, which reflected that approach, was realistic.

[16] AMEC also argued that the Corps evaluated the firms' proposals disparately. We reviewed each of AMEC's arguments in this regard, and find that none provides a basis to sustain AMEC's protest. As one example, AMEC argues that KBR was given credit in the evaluation for providing corporate support offices within the same time zones as the sites in the U.S. and Romania where the work would be performed, but AMEC had not received credit for its similar proposal. The record shows, however, that AMEC's proposal failed to provide the level of clarity and detail required by the RFP, whereas KBR did include such information in its proposal. Supp. CO's Statement, at 3.

prejudice even were we to accept the protesters' technical evaluation challenges. See CAE USA Inc., B-405659 et al., Dec. 2, 2011, 2012 CPD ¶ 40 at 8.

The protests are denied.

Susan A. Poling
General Counsel