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Decision

Matter of: Ohio KePRO, Inc.

File: B-417836; B-417836.2

Date: November 18, 2019

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Lucy G. Mac Gabhann, Esq., and Douglas W. Kornreich, Esq., Department of Health and Human Services, for the agency.

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DIGEST

1. Protest challenging agency's cost realism evaluation is sustained where the agency failed to reasonably evaluate the protester's proposed direct labor rates, and assess the realism of the offeror's proposed level of effort.
 2. Protest challenging agency's technical evaluation is sustained where the agency failed to reasonably evaluate the awardee's proposed level of effort.
 3. Protest challenging agency's evaluation of experience is sustained where the agency failed to adequately document the basis for its conclusion that the awardee's proposal demonstrated the required experience.
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DECISION

Ohio KePRO, Inc. (KEPRO), of Harrisburg, Pennsylvania, protests the issuance of a task order to Livanta, LLC, of Annapolis Junction, Maryland, under task order request for proposals (TORP) No. 190361, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for beneficiary oversight and claim review services. KEPRO challenges the agency's cost realism analysis, technical evaluation, and source selection decision.

We sustain the protest.

BACKGROUND

On March 28, 2019, the agency issued the solicitation, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5, to contractors holding CMS's Beneficiary and Family Centered Care - Quality Improvement Organization (BFCC-QIO) indefinite-delivery, indefinite-quantity (IDIQ) contracts. Agency Report (AR), Tab 3m, TORP; Contracting Officer Statement (COS) at 3.¹ The solicitation sought proposals to provide beneficiary oversight and expert services for Medicare claim reviews nationwide. AR, Tab 3m, TORP, attach. 1, Statement of Work (SOW) at 1, 12.²

Under the SOW, the contractor "shall furnish all the necessary services, qualified personnel, material, equipment, and workspace facilities, not otherwise provided by the agency, as needed to perform the requirements of this T[ask] O[rder]." Id. at 3. According to the agency, the purpose of this task order is "to decrease the paid claims error rate and address medical review related coverage, coding and billing errors to improve healthcare services for Medicare beneficiaries and protect the Medicare Trust Fund." COS at 1.

The solicitation contemplated the award of a cost-plus-fixed-fee task order for a 5-year period. TORP, attach. 7, Terms and Conditions, at 1-2. The solicitation stated that award would be made on a best-value tradeoff basis considering cost and the following non-cost factors, in descending order of importance: technical approach and understanding, key and other recommended personnel and staffing plan, experience, and Section 508 compliance.³ TORP, attach. 6, Proposal Preparation Instructions, at 12. In rating the non-cost factors, the solicitation provided that the agency would assign adjectival ratings. TORP, attach. 6, Proposal Preparation Instructions, at 12.

Under the solicitation, offerors were required to submit proposals consisting of the following three volumes: technical; business; and business ethics, conflict of interest and compliance. TORP, attach. 6, Proposal Preparation Instructions, at 1. With respect

¹ Our citations to the TORP are to the final, conformed version of the solicitation provided by the agency. Agency Report (AR), Tab 3m, TORP.

² As stated in the SOW, the agency required expert services for reviews such as, but not limited to, short stay reviews (SSRs) and higher weighted diagnosis-related group (HWDRG) reviews. AR, Tab 3m, TORP, attach. 1, SOW at 3. Under the task order, the awardee will conduct SSRs on a sample of Medicare claims for appropriateness of inpatient admission. Id. at 16. In addition, the task order awardee will review hospital requests for HWDRG payments when the hospital determines that the diagnosis-related group originally assigned by the hospital was not sufficient based on the clinical circumstances. Id. at 23.

³ Section 508 of the Rehabilitation Act of 1973, as amended, generally requires that agencies' electronic and information technology be accessible to people with disabilities. See 29 U.S.C. § 794d.

to experience, an offeror's technical proposal was instructed to include detailed information on a minimum of three projects of similar size, scope, and complexity to the TORP's requirements. Id. at 6.

As relevant to this protest, under the technical approach and understanding factor, the agency would evaluate "the extent to which the Offeror's [. . .] anticipated level of effort for all positions aligns with SOW requirements and the Contractor's proposed approach." TORP, attach. 6, Proposal Preparation Instructions, at 12. Also relevant to this protest, in evaluating cost realism, the solicitation stated:

In accordance with FAR 15.404-1(d), CMS will conduct a cost realism analysis which includes determining 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.

TORP, attach. 6, Proposal Preparation Instructions, at 15.

Livanta and KEPRO submitted timely proposals in response to the solicitation. AR, Tab 10b, Source Selection Decision (SSD), at 4. After conducting discussions with the two offerors, the agency evaluated the proposals of Livanta and KEPRO as follows:

	Livanta	KEPRO
Technical Approach and Understanding	Very Good	Satisfactory
Key Personnel and Other Recommended Personnel	Very Good	Satisfactory
Experience	Very Good	Very Good
Section 508 Compliance	Adequate	Adequate
Final Proposed Cost	\$73,039,672	\$99,993,698
Recommended/Evaluated Cost	\$73,039,672	\$99,993,698

AR, Tab 10b, SSD, at 6, 8; Tab 9d, Contract Specialist (CS) Cost Analysis, at 1.

The contracting officer, acting as the source selection authority, conducted an integrated assessment of the proposals and concluded that Livanta's proposal offered the best value to the agency. AR, Tab 10b, SSD, at 15. In this regard, the contracting officer found that there was no need to make a trade-off decision as Livanta offered the lowest evaluated cost and was the highest technically rated offeror. AR, Tab 10b, SSD,

at 15. The agency issued the task order to Livanta on July 30, 2019. On August 9, after receiving a debriefing, KEPRO filed this protest with our Office.⁴

DISCUSSION

KEPRO challenges multiple aspects of the agency's evaluation and source selection decision. The protester primarily alleges that the agency's cost realism evaluation was flawed. In addition, KEPRO asserts that the agency improperly evaluated Livanta's technical proposal under both the technical approach and understanding, and the experience factors.

As stated above, the task order competition here was conducted pursuant to FAR subpart 16.5. COS at 3. In reviewing protests of an award in a task order competition, we do not reevaluate proposals, but examine the record to determine whether the evaluation and source selection decision are reasonable and consistent with the solicitation's evaluation criteria and applicable procurement laws and regulations. Smartronix, Inc.; ManTech Advanced Systems International, Inc., B-411970 et al., Nov. 25, 2015, 2015 CPD ¶ 373 at 5. For the reasons discussed below, we sustain the protest.⁵

Cost Realism

KEPRO argues that the agency's cost realism analysis was flawed for two primary reasons. First, the protester contends the agency failed to reasonably evaluate the realism of Livanta's direct labor rates. Second, the protester asserts that the agency failed to consider the realism of Livanta's cost proposal as it related to Livanta's proposed level of effort. As a result, KEPRO claims that the agency's cost realism

⁴ The awarded value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under civilian agency multiple-award, indefinite-delivery, indefinite-quantity contracts. 41 U.S.C. § 4106(f)(1)(B).

⁵ Although we do not address every issue raised by the protester, we have reviewed each issue and find that with the exception of those discussed in this decision, none provides a basis to sustain the protest. For example, KEPRO argues that Livanta's proposal should be deemed technically unacceptable because an individual Livanta proposed as one of its key personnel is no longer available. Protester's Comments & Supp. Protest at 41-42. In this regard, KEPRO asserts that, based upon publicly available information, Livanta's proposed Corporate Medical Director is unavailable for performance under the task order. Id. In response, the intervenor submitted a declaration from the individual in question, in which she states that she remains committed to perform work as Livanta's Corporate Medical Director. Intervenor's Supp. Comments, Decl. of Corporate Medical Director (Sept. 24, 2019). Thus, we find no basis to sustain this protest ground.

evaluation did not accurately assess the likely cost the government would have to pay under the task order.

Our Office has explained that when an agency evaluates a proposal for the award of a cost-reimbursement contract or task order, an offeror's costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR § 15.305(a)(1); Target Media Mid Atl., Inc., B-412468.6, Dec. 6, 2016, 2016 CPD ¶ 358 at 4 (applying FAR part 15 cost realism standards in a FAR subpart 16.5 task order procurement). As a consequence, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract costs are likely to be under the offeror's unique technical approach, assuming economy and efficiency. FAR §§ 15.305(a)(1), 15.404-1(d)(1),(2); Magellan Health Servs., B-298912, Jan. 5, 2007, 2007 CPD ¶ 81 at 13. In this regard, a proper cost realism evaluation prevents an offeror from improperly "having it both ways"--that is, from receiving a technical evaluation rating based on its proposed performance but failing to propose costs that reasonably reflect that performance. Target Media Mid Atl., Inc., *supra*, at 5 citing Magellan Health Servs., *supra*, at 16-17.

An agency is not required to conduct an in-depth cost analysis, or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. See FAR § 15.404-1(d)(1); Smartronix, Inc.; ManTech Adv. Sys. Int'l, Inc., B-411970 *et al.*, Dec. 9, 2016, 2016 CPD ¶ 362 at 6. Thus, our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based. TriCenturion, Inc.; SafeGuard Servs., LLC, B-406032 *et al.*, Jan. 25, 2012, 2012 CPD ¶ 52 at 6.

Direct Labor Rates

KEPRO contends the agency failed to meaningfully evaluate whether Livanta's proposed direct labor rates were realistic. Protester's Comments & Supp. Protest at 8-11. First, the protester challenges the agency's methodology which only examined the direct rates for nine of the 25 labor categories proposed by Livanta, arguing that such a sampling was unreasonably limited. Second, the protester argues that the contemporaneous record demonstrates that the agency's cost evaluation was limited to whether direct labor rates were reasonable (*i.e.*, too high), and did not assess whether the proposed labor rates were realistic (*i.e.*, too low).⁶ *Id.* at 10.

⁶ The contemporaneous record of the agency's cost evaluation of Livanta's proposal is comprised of three separate cost analyses, performed by three separate individuals. Memorandum of Law at 2. First, the contract specialist (CS) performed an analysis of Livanta's proposed costs, and as relevant here, focused on proposed labor costs, including direct labor rates. AR, Tab 9a, CS Cost Analysis. Second, a financial management specialist (FMS) conducted a cost analysis, determining whether Livanta's proposed costs were allowable, allocable, and reasonable. AR, Tab 9a, FMS Cost

In response, the agency first contends that its methodology was reasonable because five of the labor categories it examined represented 86% of Livanta's total proposed labor hours, and the other four represented the highest proposed hourly rates. Supp. Memorandum of Law at 11-12 citing AR, Tab 9a, CS Cost Analysis at 1-2. The agency further maintains that its evaluation of these labor categories included a cost realism assessment of Livanta's direct labor rates. Supp. Memorandum of Law at 11-12. Where, as here, a contract involves the provision of a large amount of labor, agencies are required to consider the realism of an offeror's proposed labor rates. See Prism Maritime, LLC., B-409267.2; B-409267.3, Apr. 7, 2014, 2014 CPD ¶ 124 at 11-13 (protest sustained where record showed that agency failed to consider awardee's low proposed direct labor rates in its cost realism evaluation). Unless an agency evaluates the realism of the offerors' proposed direct labor rates, the agency has no basis to determine whether or not those rates are realistic to attract and retain the types of personnel to be hired. Id. at 12.

As an initial matter, we find the agency's decision to evaluate a sample of Livanta's direct labor rates to be reasonable. As discussed above, an agency's cost realism analysis need not consider every element of an offeror's cost proposal, nor must the analysis achieve scientific certainty regarding the realism of an offeror's proposed costs. Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Our Office has found that even though there is no requirement that an agency evaluate the realism of each and every direct labor rate proposed by an offeror, the agency's methodology must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. AdvanceMed Corporation; TrustSolutions, LLC, B-404910.4 et al., Jan. 17, 2012, 2012 CPD ¶ 25 at 15-16 (finding agency's use of a sampling method to evaluate the realism of the offerors' proposed labor costs provided a sufficient basis to conclude that they were realistic). Here, we find that the agency's plan to examine the direct labor rates for nine labor categories, if implemented properly, would include a sufficiently large amount of the awardee's proposed direct labor costs, as to permit the agency to conclude that they were representative of the likely costs that Livanta would incur in terms of direct labor. Therefore, we see no basis to question the reasonableness of the agency's chosen methodology itself.

However, while we deny KEPRO's protest regarding the methodology for evaluating the realism of labor rates, based upon our review of the record and consideration of the agency's arguments in response to the protest, we find that the agency unreasonably evaluated Livanta's direct labor rates.

In order for us to review an agency's evaluation judgment, an agency must have adequate documentation to support its judgment. Technology Concepts & Design, Inc., B-403949.2; B-403949.3, Mar. 25, 2011, 2011 CPD ¶ 78 at 8-9. Where an agency fails

Analysis. Third, the technical evaluation panel (TEP) Chair purported to examine the adequacy of Livanta's proposed labor hours. Tab 9b, TEP Chair Cost Analysis.

to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for the source selection decision. See Systems Research & Applications Corp.; Booz Allen Hamilton, Inc., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28 at 12.

While we consider the entire record in resolving a protest, including statements and arguments in response to a protest, in determining whether an agency's selection decision is supportable, under certain circumstances, our Office will accord lesser weight to post-hoc arguments or analyses due to concerns that judgments made "in the heat of an adversarial process" may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process. Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15. Post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details will generally be considered in our review of evaluations and award determinations, so long as those explanations are credible and consistent with the contemporaneous record. ITT Fed. Servs. Int'l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 6. Thus, we give little weight to post-hoc statements that are inconsistent with or not supported by the contemporaneous record. See Caddell Constr. Co., Inc., B-411005.1, B-411005.2, Apr. 20, 2015, 2015 CPD ¶ 132 at 11.

Here, there is nothing in the contemporaneous evaluation record to show that the agency evaluated the realism of Livanta's proposed direct labor rates. As relevant here, the agency cites a cost analysis conducted by the CS to argue that the agency reasonably performed a cost realism analysis. Memorandum of Law citing AR, Tab 9a, CS Cost Analysis. While the cost analysis begins by referencing the solicitation's requirement that the agency conduct a cost realism analysis, the subsequent analysis does not evidence an evaluation of whether Livanta's proposed labor rates were too low. Rather, as the protester contends, the agency's analysis only focuses on the reasonableness of Livanta's direct labor rates. See e.g., AR, Tab 9a, CS Cost Analysis, at 1 ("Based upon the results of the sampling, the proposed direct labor rates are determined to be reasonable as they all fall within the average range established."). Thus, the contemporaneous record does not demonstrate that the agency performed a realism assessment of Livanta's direct labor rates.

In response to the protest, the agency puts forth several arguments, none of which are persuasive. For example, the agency provides a declaration from the contracting officer, which states that even though the contemporaneous record made findings in terms of "reasonableness," the agency actually performed a cost realism analysis by comparing the proposed labor rates to rates found on salary.com. Supp. COS at 2. In this regard, the contracting officer contends that the agency considered any proposed direct labor rates to be unrealistic if they were more than 20% below the relevant rates obtained from salary.com. Id. This argument, however, is not supported by the record.

As discussed above, the CS's cost analysis examined the proposed direct labor rates for nine of Livanta's proposed labor categories. AR, Tab 9a, CS Cost Analysis, at 1-2. Notably, the direct labor rates proposed by Livanta for 4 out of the 9 labor categories were at least 20% lower than comparable rates on salary.com.⁷ Id. at 2. However, the contemporaneous record is devoid of any recognition--let alone any discussion--of the cost realism concerns presented by these low proposed rates. First, the agency did not make any upward cost realism adjustments to the rates that fell outside of the 20% range. Second, the record lacks any explanation of whether these proposed rates were realistic in terms of being able to attract and retain the types of personnel to be hired.

In response to the protest, the contracting officer also asserts that he relied on a cost analysis performed by the FMS in determining that Livanta's proposed direct labor rates were realistic. Supp. COS at 2 citing AR, Tab 9a, FMS Cost Analysis. However, this statement is not supported by the record. First, expressly stating that a cost realism analysis would be performed separately by a different agency employee, the FMS's analysis purports to only determine whether the offeror's proposed costs are allowable, allocable, and reasonable. AR, Tab 9a, FMS Cost Analysis, at 1. Second, the FMS analyzed Livanta's direct labor rates for a different sampling of labor categories than the CS examined. Id. at 2. Third, the FMS compared this sampling of labor rates against rates from the salary.com website for a different geographic location than the CS used. Id. To the extent the contracting officer claims to have relied on the judgment of the underlying cost evaluations in concluding that Livanta's business proposal required no cost adjustments, the record does not establish that the underlying judgments were reasonable, sufficiently documented, or that the contracting officer otherwise evaluated the realism of Livanta's direct labor rates. See COS at 4, 6; Supp. COS at 1-2; AR, Tab 10b, SSD, at 8-10.⁸

Because the record includes no analysis or findings regarding the realism of Livanta's direct labor rates and because we cannot find support for the agency's post-protest rationalizations in the contemporaneous record, we conclude that the agency failed to meaningfully consider the realism of Livanta's proposed direct labor rates. TriCenturion, Inc.; SafeGuard Servs., LLC, B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52 at 13 (sustaining protest because the record was inadequate to conclude that the agency's cost realism analysis was reasonable). We therefore sustain this aspect of KEPRO's protest.

Level of Effort

Next, KEPRO alleges that Livanta proposed significantly lower costs than KEPRO, and that the agency failed to account for this difference in the agency's cost realism

⁷ Salary.com is a commercial service that tracks salary data for various labor positions throughout U.S. labor markets. See www.salary.com (last visited Nov. 4, 2019).

⁸ While the SSD generally states that "[a]fter analysis, cost realism adjustment[s] were not made on either proposal[,]" the document does not substantively discuss or mention the realism of the offerors' proposed direct labor costs. AR, Tab 10b, SSD, at 8.

analysis. Protester's Comments & Supp. Protest at 6-8. Specifically, the protester contends that the record contains no analysis of Livanta's proposed level of effort for non-review work, and therefore, no analysis of whether Livanta's proposed costs related to these requirements were realistic. Id.

In response to the protest, the agency provides multiple arguments contending that its review of offerors' level of effort was reasonable. For example, the agency asserts that Livanta's overall level of effort was reasonable for its proposed technical approach. COS at 9. Additionally, the agency argues that its cost evaluation, which considered level of effort, sufficiently assessed whether Livanta's proposed level of effort was realistic. Supp. Memorandum of Law at 10-11.

For the reasons discussed below, we conclude that neither the contemporaneous evaluation, nor the agency's post-protest explanations adequately establish that the agency reasonably evaluated the realism of Livanta's level of effort for the non-review work.

The solicitation required offerors to submit business proposals, describing the basis for their proposed costs. TORP, attach. 6, Proposal Preparation Instructions, at 1, 8. The solicitation instructed offerors to organize and submit their proposed costs for each of 21 specific activities. Of particular importance to this protest, four of the activities involved review work, and the remaining 17 activities involved non-review work--e.g., transition costs, training medical staff, and various types of claim intake. TORP, attach. 8, Business Proposal Format, at 4-6.

With respect to the agency's evaluation of the business proposals, the solicitation provided that the agency would conduct a cost realism analysis including a determination as to whether the estimated proposed cost elements were realistic for the work to be performed. TORP, attach. 6, Proposal Preparation Instructions, at 15. Both Livanta and KEPRO submitted business proposals that purported to reflect their respective technical approaches and proposed levels of effort. AR, Tab 4b, Livanta Business Proposal; AR, Tab 6d, KEPRO Revised Business Proposal. The agency's cost evaluation resulted in no adjustments to either Livanta's or KEPRO's proposed estimated costs. AR, Tab 10b, SSD, at 8.

The protester claims that the agency erred by accepting Livanta's unrealistically low proposed costs. Protester's Comments & Supp. Protest at 6-8. In this regard, KEPRO contends that Livanta's proposed costs are too low due to Livanta's proposed level of effort for the non-review work required under the solicitation. Protester's Comments & Supp. Protest at 6-8. In support of its allegation, KEPRO asserts that the impact of the difference in the proposed level of effort for non-review work between its proposal and

Livanta's was significant, calculated at an estimated cost of \$[DELETED].⁹ Protester's Comments on Supp. AR, Decl. of Cost Expert, at 5.

Here, the record reflects no meaningful consideration of whether Livanta's proposed costs for the non-review work were realistic. To the contrary, the agency's evaluation of Livanta's proposed level of effort--and hence Livanta's proposed costs--was limited to its proposed level of effort for claim reviews. First, the record indicates that the technical evaluators concluded in a summary manner that Livanta's staffing approach and level of effort were sufficient. AR, Tab 8b, Final Technical Evaluation (Livanta), at 31, 33. Upon examination of the agency's technical evaluation, the only substantive discussion of whether Livanta proposed sufficient manpower focuses on Livanta's proposed level of effort for claim reviews. *Id.* at 33 ("An explanation on how the Offeror arrived at the FTE [full-time equivalent] calculations was also provided. [Livanta] uses efficiencies to propose fewer hours per claim review than projected by the government.").

Second, the record confirms that the agency's cost evaluation also failed to evaluate the realism of Livanta's proposed costs for non-review work. In response to the protest, the agency claims that the cost analysis performed by the TEP Chair analyzed the adequacy of Livanta's proposed labor hours. Memorandum of Law at 2 citing AR, Tab 9b, TEP Chair Cost Analysis. The TEP Chair's cost analysis concludes that Livanta's level of effort is reasonable. AR, Tab 9b, TEP Chair Cost Analysis, at 3, 6. However, similar to the agency's technical evaluation, the TEP Chair's evaluation of Livanta's level of effort was limited to claim review work as there is no substantive discussion of Livanta's non-review work. *Id.* Further, neither of the statements from the TEP Chair explain how Livanta's non-review work was considered when finding Livanta's level of effort to be reasonable. AR, Tab 2, TEP Chair Statement; AR, Tab 14, Supp. TEP Chair Statement.

The agency also argues that by evaluating the direct labor rates of labor categories the agency properly assessed the realism of Livanta's proposed costs for non-review work as Livanta proposed these labor categories to perform both review and non-review work. Supp. Memorandum of Law at 11. The agency's contention, however, conflates the agency's requirement to assess direct labor rates (as discussed above) for realism, and the agency's separate requirement to ensure that an offeror's proposed level of effort is realistic based upon its technical approach. In other words, the realism of the direct labor rates proposed for certain labor categories does not bear on the realism of the offerors proposed level of effort for the work to be performed under the solicitation--the latter of which being driven by the number of hours proposed. As a result, the

⁹ KEPRO's consultant calculated this difference by quantifying what Livanta's proposed costs would be if it had proposed the same level of effort as KEPRO for the non-review work at the rates proposed by Livanta. Protester's Comments on Supp. AR, Decl. of Cost Expert, at 5. Neither the agency nor the intervenor object to the accuracy of the protester's calculations.

record lacks any evidence that the agency evaluated the proposed costs related to Livanta's non-review work.

In short, the record is devoid of any substantive discussion of how or why Livanta's proposed hours for the non-review work represented the likely effort required for those activities. Thus, we find that neither the contemporaneous record nor any of the agency's post-protest explanations provide a basis for our Office to find that CMS reasonably evaluated the realism of Livanta's proposed costs for non-review work.¹⁰ Accordingly, this protest ground is sustained.

Related to KEPRO's cost realism challenge, the protester also contends that Livanta's proposal should have been excluded or significantly downgraded for its unrealistic staffing approach, especially with respect to the non-review requirements. Protester's Comments & Supp. Protest at 14. In this regard, KEPRO argues that the agency's technical evaluation failed to properly evaluate Livanta's proposal under the technical approach and understanding factor, which required the agency to evaluate "the extent to which the Offeror's proposed [. . .] staffing, [. . .] and the anticipated level of effort for all positions aligns with SOW requirements and the Contractor's proposed approach." TORP, attach. 6, Proposal Preparation Instructions, at 12. As discussed above, the agency's technical evaluation did not assess Livanta's proposed level of effort for non-review work. AR, Tab 8b, Final Technical Evaluation (Livanta), at 31, 33. Thus, we also sustain KEPRO's challenge to the agency's evaluation of Livanta's proposal under the technical approach and understanding factor.

Deviation from the Baseline

KEPRO next contends that the agency unreasonably accepted Livanta's deviation from the solicitation's baseline level of effort for claim reviews. Protester's Comments &

¹⁰ In addition, KEPRO argues that the evaluators apparently failed to recognize several anomalies regarding the FTE calculations in Livanta's proposal. Protester's Comments & Supp. Protest at 32-33; Protester's Supp. Comments at 17-18. In response, the agency appears to acknowledge discrepancies between Livanta's cost and technical proposals, and contends that Livanta's technical proposal may have slightly understated the necessary FTE amounts, but the business proposal shows that the proposed FTEs are in line with the historical level of effort that Livanta proposed. Supp. MOL at 19. As a general rule, an agency's technical evaluation and cost realism evaluation in the context of a cost reimbursement contract must be consistent with one another and withstand logical scrutiny. ITT Systems Corp., B-405865, B-405865.2, Jan. 6, 2012, 2012 CPD ¶ 44. Because the record is unclear as to whether the agency considered these contradictions in either its cost or technical evaluation, the agency may wish to examine this issue, and document its findings, as appropriate, when implementing the corrective action recommended below.

Supp. Protest at 11-12. In response, the agency contends that Livanta reasonably explained the basis for its deviation from the solicitation's baseline, and therefore the agency properly accepted it. Memorandum of Law at 5.

The solicitation provided an anticipated number of claim reviews by type, as well as an estimated level of effort per review for offerors to use as a baseline in their proposals. TORP, attach. 3, Claim Volume Estimates. The solicitation also advised that “[a]ny deviations from the estimate provided by CMS, should be explained as part of the assumptions included in the cover letter and must be properly justified within the business proposal narrative.” TORP, attach. 6, Proposal Preparation Instructions, at 7. Livanta, in developing its level of effort for medical reviews, utilized its recent experience performing similar reviews for CMS as a basis to propose fewer hours per review than estimated by the agency in the solicitation. AR, Tab 4c, Livanta Revised Technical Proposal, at 3; AR, Tab 4b, Livanta Business Proposal at 3, 10. Upon review of Livanta's proposals, both the technical and cost evaluation accepted Livanta's deviation from the baseline as sufficiently justified. AR, Tab 8b, Final Technical Evaluation (Livanta), at 31, 33; AR, Tab 9b, TEP Chair Cost Analysis, at 3, 6. In its protest, KEPRO challenges these findings, arguing that it was unreasonable for the agency to accept Livanta's level of effort, which was based on work involving a narrower scope than that contemplated by the TORP. Protester's Supp. Comments at 16.

In response to the protest, the agency acknowledged what it described as “significant differences” between the claim review Livanta recently performed, and the claim reviews contemplated by the solicitation. AR, Tab 2, TEP Chair Statement, at 3-4. For instance, Livanta's previous claim review responsibilities did not include analysis of HWDRG data or education of providers based on such an analysis. *Id.* at 3. The agency maintains, however, that notwithstanding the differences in scope between the two efforts, it reasonably accepted Livanta's proposed level of effort, which was based upon historical data. *Id.* at 4. On this point, the agency asserts that it also used historical data, after projecting escalation for the new statement of work, to create the solicitation's baseline. Supp. Memorandum of Law at 14-15 citing AR, Tab 14, Supp. TEP Chair Statement at 3.

Here, the record before us does not provide us with enough information to determine that the agency reasonably determined that, notwithstanding the differences in scope, Livanta's proposed deviation from the baseline for reviews was reasonable. Indeed, the agency makes conclusions without providing analysis to indicate how it reached these conclusions in the face of its recognized differences between the two scopes of work.

Further, we find no logical connection between the agency's argument that it used historical data to create its baseline number of claim reviews and Livanta's justification for proposing fewer hours per review than established in the solicitation. In sum, the agency has not provided a basis for its acceptance of Livanta's deviation from the solicitation's baseline. Accordingly, we sustain the protest. See Technology Concepts & Design, Inc., supra at 9.

Experience

Finally, KEPRO challenges the agency's evaluation under the experience factor. In this regard, the protester asserts that Livanta lacked the necessary experience to be found acceptable under the solicitation. Offerors were instructed to submit detailed information on a minimum of three projects in process or completed within the past five years. TORP, attach. 6, Proposal Preparation Instructions, at 6. The solicitation also stated that "[p]rojects shall be determined to be relevant based on the Offeror submissions, which must demonstrate how the projects are similar in size, scope and complexity." TORP, attach. 6, Proposal Preparation Instructions, at 14.

Here, with respect to experience, Livanta's proposal referenced its experience on two task orders in which it performed claim review services. AR, Tab 4c, Livanta Revised Technical Proposal, at 47-50. In this regard, Livanta referenced its work performing two different types of reviews (*i.e.*, SSR and HWDRG) for each of the two task orders, resulting in a total of four projects. *Id.* Also, in the technical approach and understanding section of its proposal, Livanta generally referenced its performance being a Medicare comprehensive error rate testing (CERT) contractor. AR, Tab 4c, Livanta Revised Technical Proposal, at 7.

First, KEPRO contends that Livanta failed to comply with the solicitation's requirements by identifying work performed on two task orders as four separate "projects" as part of its experience proposal. Protester's Comments & Supp. Protest at 15-18. In this regard, KEPRO argues that because Livanta failed to meet this solicitation requirement, Livanta's proposal should have been deemed technically unacceptable. *Id.* at 15. Second, the protester states that even if Livanta complied with the solicitation by identifying four projects, the agency erred by finding the projects to be similar in size, scope, and complexity. *Id.* at 19. Third, KEPRO also alleges that the agency improperly found Livanta's work as a CERT contractor to be relevant because it only represents a narrow aspect of the instant procurement. Protester's Supp. Comments at 31.

As stated above, an agency's evaluation must be sufficiently documented to allow our Office to review the merits of a protest, and we will sustain a protest where there is not adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its evaluation. See Technology Concepts & Design, Inc., supra; Systems Research & Applications Corp.; Booz Allen Hamilton, Inc., supra.

In this case, we need not decide whether the agency reasonably found the work Livanta performed on two task orders counted as four separate projects because we are unable to conclude on the record before us that the agency's evaluation of Livanta's proposal under the experience factor was reasonable. That is, we find that nothing in the contemporaneous record sufficiently explained the relevance of the size, scope and complexity of Livanta's proposed projects as compared to the work to be performed under the TORP. TORP, attach. 6, Proposal Preparation Instructions, at 14.

First, while the agency's evaluation generally states that Livanta has experience performing SSR and HWDRG reviews that are similar to the reviews sought under the solicitation, there is no indication that the evaluators meaningfully considered the size of Livanta's previous projects as required by the solicitation. AR, Tab 8b, Final Technical Evaluation (Livanta), at 35. For example, as KEPRO points out, Livanta claims that the project value for its SSRs on the two task orders amounted to approximately \$[DELETED] and \$[DELETED], respectively. AR, Tab 4c, Livanta Revised Technical Proposal, at 49-50. The agency's analysis failed to provide any discussion of how these projects compared to the size of the \$73M in costs that Livanta proposed for total work contemplated by the solicitation.

Further, the agency's evaluation does not discuss the project references' scope and complexity relative to the TORP's work. Livanta's project references only involve some of the reviews contemplated by the TORP. AR, Tab 4c, Livanta Revised Technical Proposal, at 47-50. Livanta's experience arose from task orders that were limited to certain areas of the country in contrast to the nationwide scope of the instant task order. Id. Notwithstanding these differences, the contemporaneous record lacks a discussion of the similarities in scope and complexity between Livanta's project references and the TORP's requirements.

With respect to Livanta's experience as a CERT contractor, the agency's contemporaneous evaluation briefly identifies this experience, but does not explain why it qualifies as relevant experience. AR, Tab 8b, Final Technical Evaluation (Livanta), at 35. Then, in response to the protest, the agency provides a post-protest statement explaining that Livanta's CERT experience is relevant to the TORP's requirement related to improper payment reduction strategy. AR, Tab 2, TEP Chair Statement, at 8. However, this additional statement fails to fill in the gaps in the record as it does not adequately discuss the project's relevance in terms of size, scope, and complexity. Accordingly, we have no basis to conclude that the agency's evaluation of the CERT project was reasonable.

Based on the lack of documentation and analysis in the record, including the agency's post-protest submissions, we are unable to determine that the agency reasonably considered size, scope, and complexity in concluding that Livanta met the solicitation's experience requirements. See AR, Tab 2, TEP Chair Statement, at 7-9 (repeating the conclusion that Livanta's projects are relevant without any substantive explanation of how they are similar in size, scope, and complexity). Accordingly, we sustain this protest ground.

Competitive Prejudice

Prejudice is an essential element of every viable protest; we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving an award. Octo Consulting Grp., Inc., B-413116.53, B-413116.55, May 9, 2017, 2017 CPD ¶ 139 at 10. When

performing this analysis, GAO will resolve doubts regarding prejudice in favor of the protester; a reasonable possibility of prejudice is sufficient to sustain a protest. Alutiq-Banner Joint Venture, B-412952 et al., July 15, 2016, 2016 CPD ¶ 205 at 11.

Here, we have found errors in the agency's evaluation of Livanta's proposal under the cost, technical approach and understanding, and experience factors. Also, as relevant here, KEPRO asserts that had the agency reasonably evaluated the realism of Livanta's direct labor rates, and Livanta's proposed level of effort for the non-review work, the agency would have determined Livanta's total evaluated cost to be higher than KEPRO's. Protester's Supp. Comments at 8-9, 12-13. For these reasons, we conclude that KEPRO has met its burden of showing a reasonable possibility of prejudice.

RECOMMENDATION

We recommend that the agency reevaluate the realism of the offerors' proposed costs and technical proposals in a manner consistent with the discussion above, and make a new source selection decision. If, on the basis of that reevaluation, the agency determines that a proposal from a firm other than Livanta represents the best value to the government, we recommend that the agency terminate the task order issued to Livanta for the convenience of the government, and issue a task order to the selected concern, if otherwise proper. Finally, we recommend that the agency reimburse KEPRO the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel