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Decision

Matter of: Lockheed Martin Integrated Systems, Inc.

File: B-410189.5; B-410189.6

Date: September 27, 2016

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Ryan A. Black, Esq., and Steven W. Feldman, Esq., Department of the Army, Corps of Engineers, for the agency.

Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is denied where the agency's evaluation reasonably considered an upcoming corporate restructuring involving the protester, and excluded the protester's proposal from eligibility for award when the agency concluded that it could not determine the realism of the protester's costs and identified other risks associated with the anticipated transaction.

DECISION

Lockheed Martin Integrated Systems, Inc. (LMIS), of Bethesda, Maryland, protests the Department of the Army, U.S. Army Corps of Engineers' (Corps) issuance of a task order to Science Applications International Corporation (SAIC), of McLean, Virginia, under request for proposals (RFP) No. W912DY-13-R-0004 to acquire high performance computing modernization program integrated technical services. LMIS asserts that the agency unreasonably excluded its proposal from award consideration due to an unquantifiable cost and other risks associated with the protester's planned spin-off of its information systems business segment, and that the agency disparately treated the offerors with respect to the evaluated impact of the transaction on their proposals.

We deny the protest.

BACKGROUND

On December 5, 2013, the agency issued the RFP, which was limited to offerors holding a General Services Administration Alliant Governmentwide Acquisition Contract. The RFP contemplated the issuance of a fixed-price, cost reimbursable, and cost-plus-incentive-fee task order for various information technology (IT) services. RFP §§ A2, A3. The period of performance was one base year with four 1-year options. Id. § A4. The task order would be issued to the firm whose proposal represented the best value to the government, considering the following four factors: technical capability, past performance, small business participation, and price. Id. § M.2. With respect to price, the RFP advised offerors that the government would evaluate all aspects of the price proposal for fairness, reasonableness, and realism, and would determine whether the proposed prices were realistic for the work to be performed, reflected a clear understanding of the requirements, and were consistent with the methods of performance described in the offeror's proposal. Id. § M.3.4. Further, the agency would evaluate costs using probable costs computed by the government. Id. The RFP advised that the agency may reject an offer that reflects a serious lack of cost/price realism. ld. The estimated value of the task order was \$600 million. As relevant to this protest, base labor was included in cost-plus-incentive-fee contract line items. Id. at 173.

The agency received several proposals, including those from LMIS and SAIC. SAIC, as discussed below, proposed to subcontract a portion of the requirement to Leidos. LMIS would be using its Information Systems & Global Solutions (IS&GS) line of business as the performing organization. Agency Report (AR), Tab 1, Vol. II, Cost Proposal, at 119. On July 28, 2014, the agency issued the task order to SAIC; that award was protested, and the agency took corrective action. See Analytical Servs., Inc.; Raytheon Co., B-410189, B-410189.2, Aug. 29, 2014 (unpublished decision). As part of its corrective action, the agency stated it would conduct discussions with the offerors, evaluate revised proposals, and make a new selection decision. Id.

On December 11, the agency held discussions with the offerors. Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 1.² On January 20, 2015, the agency received second final proposal revisions. <u>Id.</u> at 2. On July 20,

¹ Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award indefinite-delivery/indefinite-quantity contracts valued in excess of \$10 million. 10 U.S.C. § 2304c(e).

² After the discussions, Analytical Services and Raytheon filed pre-award protests challenging SAIC's eligibility to compete for this procurement. We dismissed those protests as failing to state a valid basis of protest. <u>See Raytheon Co.; Analytical Servs.</u>, Inc., B-410189.3, B-410189.4, Apr. 23, 2015 (unpublished decision).

Lockheed Martin (LM) issued a press release stating that it had entered into a definitive agreement with Sikorsky Aircraft to acquire that firm; the press release also announced that Lockheed Martin "would conduct a strategic review of alternatives for its government IT and technical services business." AR, Tab 3.2, LM Announcement, July 20, 2015, at 1. On September 23, the agency again conducted discussions with offerors and requested final proposal revisions. COS/MOL at 2. On October 8, the agency amended the solicitation and on November 3, after concluding discussions, the agency received the third final proposal revisions from the offerors. Id.

On January 26, 2016, LM issued a second press release entitled "Lockheed Martin to Separate and Combine IT and Technical Services Business with Leidos" in a transaction expected to close in the third or fourth quarter of 2016. AR, Tab 2, LMIS Press Release, Jan. 26, 2016, at 1-2. The press release announced that LMIS had "entered into a definitive agreement to separate and combine its realigned [IS&GS] business segment with Leidos Holdings, Inc." Id. at 1. The press release further stated that "[t]he new business will be positioned for growth while unlocking value for [LM] stockholders." Id. (internal quotations omitted). LMIS' proposal had made no mention of any planned corporate divestiture of its IS&GS business segment.

Following the text of the press release was a provision titled "Cautionary Statement Regarding Forward Looking Statements." AR, Tab 2, LMIS Press Release, Jan. 26, 2016, at 2. That statement explained that there were many uncertainties that could affect LM's and Leidos Holdings' operations, markets, products, services, prices and other factors, which are discussed in filings with the Securities and Exchange Commission (SEC). Id. Further, the statement explained that although there was an agreement between LM "to separate a substantial portion of its government information technology infrastructure services business and its technical services business. . . and combine this business with Leidos. . . [m]any factors could cause actual results to differ materially from these forward-looking statements with respect to the Transaction." Id. The cautionary statement further explained that material differences in results, as compared with those anticipated in the forward-looking statements, could include business disruption, operational problems, financial loss, legal liability to third parties, and similar risks, any of which could have a material adverse effect on LM's or Leidos' consolidated financial condition, results of operations or liquidity. Id.

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³ The transaction closed August 16, 2016. <u>See</u> Email from Agency to GAO, Attach., Press Release: "Leidos Announces Closing of the Merger with Lockheed Martin's IS&GS Business and Election of Three New Directors."

On March 18, the source selection evaluation board (SSEB) completed its evaluation of the proposals. On March 30, the SSEB submitted its final report, which contained the following evaluation of LMIS and SAIC:

Evaluation Factor	LMIS	SAIC
Technical Capability/		
Proposal Risk	Outstanding/Low	Outstanding/Low
Performance Confidence	Substantial Confidence	Satisfactory Confidence
Small Business Participation	Outstanding	Outstanding
Contractor Proposed Price	\$552,474,015	\$568,326,997
Probable Cost	\$567,719,507	\$564,338,100

AR, Tab 7, SSEB Report, March 30, 2016, at 18. The SSEB addressed the possible cost implications of the "definitive agreement" entered into between LM and Leidos, referencing the press release, and concluded that, for LMIS, the transaction "creates an environment of risk for cost and the overall employee compensation plan. Lockheed Martin IS&GS 'procures [DELETED]% of LM's IT, resulting in market expertise and volume discounts available to the [Corps'] procurement team (LMIS proposal, Section 1.2.1, pg. II-117)." Id. at 16. In the SSEB's view, the transaction, "may affect [LM] and Leidos Holdings Inc.'s operations, markets, products, services, prices, and other factors' in ways that are yet unknown, including Lockheed Martin direct labor rates and indirect rates proposed (LM to Separate Combine IT and Technical Services Businesses with Leidos, www.lockheedmartin.com, Jan. 26, 2016)." ld. The SSEB concluded that the "impact on proposed rates is unknown, since the rates are based on present company history and budget information. Lockheed Martin IS&GS is responsible for 100% of the proposed effort, and 89% (~\$481M) of the proposed cost. Impact on incumbent employee total compensation is unknown." ld.

With respect to the impact of the transaction on SAIC's proposal, the SSEB noted that the transaction "'may affect Leidos Holdings Inc.'s operations, markets, products, services, prices, and other factors' in ways that are yet unknown, including Leidos' direct labor rates and indirect rates proposed (Leidos to Combine with Lockheed Martin Information (IS&GS), investors.leidos.com, Jan. 26, 2016)." AR, Tab 7, SSEB Report, March 30, 2016, at 17. The SSEB concluded that the "impact on proposed rates is unknown, since the rates are based on present company history and budget information. This subcontractor is approximately 6.3% of proposed cost or 19% of the prime proposed effort." Id.

⁴ These findings were adopted from the Price/Cost Evaluation Report. AR, Tab 7.1, Price/Cost Evaluation Report, Mar. 29, 2016, at 11-14.

During its review of the SSEB report, the source selection advisory council (SSAC) commissioned the cost board to conduct a "stand-alone" analysis to attempt to quantify the impact of the LM-Leidos transaction. AR, Tab 8.1, Analysis of LM-Leidos Transaction Impacts, Apr. 19, 2016. That analysis compared LMIS' labor rates to those of Leidos', in order to calculate the percentage change in the probable cost of moving from LMIS' rates to Leidos' rates. Id. at 2. The analysis also considered the change in the two firms' indirect rates. Id. This analysis concluded as follows:

CLOSING. The scenario that the team has provided in this analysis is one of an infinite number of scenarios that can be performed. Based on this analysis, the government could expect to incur additional costs in amounts potentially exceeding \$7.275M through the LM-Leidos transaction. The government may also expect contractor employee retention and compensation impacts as a result of the indirect wrap rate caps proposed by LMIS.⁵

ld. at 5.

On April 27, the SSAC finalized its report, which discussed the LM-Leidos transaction and how the agency should address the issue. Specifically, the SSAC concluded that it could not ignore the press release and pending transaction and did not believe it was necessary to re-open discussions with all offerors in the competitive range since SAIC's proposal was awardable. AR, Tab 8, SSAC Report, Apr. 27, 2016, at 3.

In considering the impacts of the transaction, the SSAC determined that the LM-Leidos transaction "introduced significant cost uncertainty" into the LMIS proposal. AR, Tab 8, SSAC Report, Apr. 27, 2016, at 4. The SSAC concluded that the government may incur additional costs "in amounts potentially exceeding \$7M due to the LM-Leidos transaction." Id. As a result of the indirect wrap rate caps proposed by LMIS, the SSAC estimated that the government "may also expect contractor compensation impacts, which, if realized, may potentially impact

⁵ Federal Acquisition Regulation (FAR) § 2.101 states that an indirect cost rate is the percentage or dollar factor that expresses the ratio of indirect expenses incurred in a given period to direct labor cost, manufacturing cost, or another appropriate base for the same period. FAR § 2.101. The agency explains that a wrap rate is generally considered a fully burdened labor rate before profit. COS/MOL at 19. LMIS proposed a cap on its indirect wrap rates, not its indirect costs or indirect cost rates. As a result, the Corps explains here that although there might be a ceiling on the indirect wrap rate, there was no proposed ceiling for indirect rates on all other costs, and a cap on the wrap rate could impact the amount of money reimbursed by the government that is available for employee salaries.

employee retention on the LMIS proposal; for LMIS' proposed indirect wrap rate caps could potentially cause financial hardships on Leidos and result in decreased fringe benefits for employees in years following the implementation of the caps." <u>Id.</u>

With respect to the impact of the transaction on SAIC's proposal, the SSAC noted that Leidos, as a subcontractor to SAIC, "is only responsible for 6.3% of SAIC's proposed cost; assuming Leidos' costs are impacted by a liberal 5%, this would result in an overall cost difference of 0.315% (0.063*0.05) to SAIC's proposed cost." AR, Tab 8, SSAC Report, Apr. 27, 2016, at 4. The SSAC concluded that the transaction between LM and Leidos "does not materially impact the proposed cost of SAIC's proposal. Therefore, no cost adjustment to SAIC is warranted." Id. The SSAC arrived at the following summary conclusions:

[The United States Government (USG)] considered the impact to the SAIC proposal [of the LM-Leidos transaction] to be minimal to none. However, in regard to the LMIS proposal, these analyses show unquantifiable cost risks. It is unknown, and unknowable, what impacts the new LM-Leidos corporate structure will have on future performance, whether past performance is still a predictor of future performance of offerors, and how small business will be utilized. Therefore, there are potential risks associated with the delivery of the technical capabilities proposed. Based on the above, LMIS's proposal should therefore not be considered for award.

<u>Id.</u> Following a trade-off analysis, the SSAC recommended the task order be issued to SAIC. Id. at 11-12.

On April 28, the agency issued a price negotiation memorandum (PNM), which determined SAIC's proposal to be realistic, however, "due to the uncertainty surrounding the cost impacts of LMIS's pending transaction with Leidos Holdings, Inc., the Contracting Officer is unable to determine the realism of LMIS's proposal." PNM, Apr. 28, 2016, at 30. The source selection authority (SSA) reviewed the findings, noting that the SSAC recommended award to SAIC. AR, Tab 9, Source Selection Decision Document (SSDD), May 3, 2106, at 4. The SSA observed that the most probable cost calculation had been made prior to the press release announcing the corporate restructuring; in the SSA's view, there was no way to predict what the actual costs to LMIS may be in the future. Id. at 5. Based on the SSAC's review of the restructuring and its recommendation, the SSA determined that "LMIS" proposal should not be considered for award given the uncertainties introduced by LM's announcement that they have entered into an agreement to separate its' [IS&GS] division and combine it with Leidos Holdings, Inc." ld. at 8. The SSA's tradeoff analysis concluded that the task order should be issued to SAIC as the firm whose proposal represented the best value to the government. Id. at 15. On June 13, the agency issued the task order to SAIC and notified LMIS of the award. This protest followed.

DISCUSSION

LMIS asserts that the agency improperly excluded its proposal from award consideration when the Corps misinterpreted our decisions on corporate restructuring and also "reached unreasonable, unfounded conclusions about the impact of the Lockheed Martin-Leidos transaction based on the January 26, 2016 press release." Comments at 20-24. The agency argues that it reasonably relied on the press release when considering the effects of the impending corporate restructuring on LMIS' proposal and that it was not aware of the definitive plans for the LM-Leidos transaction until after the close of discussions.

In reviewing protests challenging an agency's evaluation of proposals in a task order competition that, as here, uses negotiated procurement techniques, our Office does not reevaluate proposals, but examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Technology Concepts & Design, Inc., B-403949.2, B-403949.3, Mar. 25, 2011, 2011 CPD ¶ 78 at 8. It is a fundamental principal of federal procurement law that an agency's evaluation of proposals must reflect a reasonable assessment of each offeror's ability to successfully perform the contract requirements, and that the evaluation and the agency's source selection decision must be adequately documented. Savvee Consulting, Inc., B-408416, B-408416.2, Sept. 18, 2013, 2013 CPD ¶ 231 at 7-8. In evaluating proposals to perform cost reimbursement contracts, the agency's assessment must, further, include a cost realism analysis to determine what the government should realistically expect to pay for each offeror's proposed effort. KPMG LLP, B-406409 et al., May 21, 2012, 2012 CPD ¶ 175 at 12-13. Where an offeror's proposal represents that it will perform the contract in a manner materially different from the offeror's actual intent, an award based on such proposal cannot stand, because both the offeror's representations, and the agency's reliance on such, have an adverse impact on the integrity of the procurement process. Wyle Labs., Inc., B-408112.2, Dec. 27, 2014, 2013 CPD ¶ 16 at 8; see Greenleaf Constr. Co., Inc., B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19 at 8-10; AdapTech Gen. Scientific, LLC, B-293867, June 4, 2004, 2004 CPD ¶ 126 at 5.

Lockheed Martin's Press Release

LMIS first asserts that the agency improperly considered the January 2016 press release in its evaluation. Specifically, LMIS argues that the agency misinterpreted our decision in Wyle Labs., Inc., and that the protester was prejudiced by that misinterpretation. Comments at 22-24, citing Wyle Labs., Inc., supra. The protester contrasts our decision in Wyle Labs., Inc., <a href="in in which we sustained an allegation that the agency unreasonably failed to consider the effect of a corporate restructuring on the awardee's proposal, with our decision in VSE Corp.; The Univ. of Hawaii-Costs, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202, where we denied an

allegation that the agency unreasonably failed to consider a corporate restructuring. LMIS asserts that the "factor that led GAO to reach different conclusions" in these two protests was "whether the offeror had told the agency that the reorganization would affect its proposal." Comments at 23. We disagree.

In <u>VSE Corp.</u>; The Univ. of Hawaii-Costs, the information available to the agency was a press release that "was nothing more than an announcement of [the awardee's] board of directors stating its intentions to plan to examine the possibility of future action by [the awardee]." <u>VSE Corp.</u>; The Univ. of Hawaii-Costs, supra, at 7. We found that such an indefinite plan "did not trigger any obligation by [the awardee] to report or the agency to consider" the possible corporate restructuring, and we found nothing unreasonable in the agency's decision not to consider the transaction. <u>Id.</u> In contrast, in <u>Wyle Labs.</u>, Inc., the awardee had made "various statements regarding the pending corporate separation," but "the record contain[ed] no documentation indicating that the agency considered any data reflecting the impact of the pending corporate restructuring." <u>Wyle Labs.</u>, supra, at 4. We found the agency's evaluation unreasonable where the agency ignored the possible impact of a transaction that was imminent and essentially certain. <u>Nat'l Aeronautics and Space Admin.</u>—Recon., B-408112.3, May 14, 2014, 2014 CPD ¶ 155 at 3, citing <u>Wyle Labs.</u>, Inc., supra, at 3-4.

The protester's reading of those two decisions--that the determinative fact was that one proposal contained details of the possible restructuring and one did not--is in error and, if adopted, would deprive agencies of the necessary discretion to consider information outside the four corners of a proposal. Interfor US, Inc., B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7 (noting that an agency "is not bound by the 'four corners' of an offeror's proposal, and may properly use information known by its own evaluators, as with any other references, to aid in the evaluation of proposals"); See also Northrop Grumman Sys. Corp., B-406411, B-406411.2, May 25, 2012, 2012 CPD ¶ 164 at 11; Park Tower Mgmt., Ltd., B-295589, B-295589.2, Mar. 22, 2005, 2005 CPD ¶ 77 at 6. Moreover, under the protester's interpretation of our decisions, an offeror could shield an impending corporate transaction from consideration by an agency merely by omitting the mention of a possible transaction from the offeror's proposal.

Therefore, an agency should analyze the effect of a possible corporate restructuring on an offeror's proposal when the transaction at issue is "imminent and essentially certain." Nat'l Aeronautics and Space Admin.--Recon., supra. Indices of whether a transaction is imminent and essentially certain include whether the timing and manner of the spin-off contemplated were within the control of the offeror, and whether the offeror had disclosed detailed plans to the SEC, including an anticipated time frame for closing the transaction. See id.

Here, LM issued a press release on January 26, 2016, stating that LM had "entered into a definitive agreement to separate and combine its realigned [IS&GS] business

segment with Leidos Holdings, Inc." AR, Tab 2, LMIS Press Release, Jan. 26, 2016, at 1. LM exercised considerable control over the timing and manner of the transaction, and, as the press release and accompanying documents made clear, had detailed transaction plans that it had shared with the SEC, including an expected quarter in which the transaction would close. <u>Id.</u> On this record, the agency could reasonably conclude that the transaction at issue, the transfer of LM's IS&GS business segment to Leidos, was imminent and essentially certain, and the agency reasonably considered the second press release when evaluating the possible impact of the transaction on LMIS' proposal.

The Nature of the LM-Leidos Transaction

LMIS also argues that once the agency decided to consider the press release and transaction, it was required to proceed in a manner that was reasonable and consistent with the RFP. Comments at 24. LMIS contends that the agency reached unreasonable, unfounded conclusions about the impact of the LM-Leidos transaction based on the January 2016 press release because nothing in the press release reasonably called into question LMIS' proposal or the ability of the IS&GS business to perform consistent with that proposal. Id. at 25. Rather, LMIS asserts that the agency mistakenly believed that the IS&GS business would be merged into Leidos, when, in fact, it would be a subsidiary of Leidos. Id. at 25-26. LMIS further argues that had the agency reviewed the SEC filings, it would have found that although the IS&GS business is transferring to another company, "its assets are not being divided or diminished in any material way." Id. at 26.

As noted above, LMIS' press release announced an agreement to "separate and combine" LM's IS&GS business segment with Leidos, so that "[t]he combination of [Lockheed Martin's] proven IT and technical services businesses with Leidos will create a new leader in the government IT sector. . . . The new business will be positioned for growth while unlocking value for [Lockheed Martin] stockholders." AR, Tab 2, LMIS Press Release, Jan. 26, 2016, at 1 (internal quotations omitted). It is well settled that offerors are responsible for submitting a well-written proposal with adequately-detailed information that allows for a meaningful review by the procuring agency. iGov, et al., B-408128.24 et al., Oct. 31, 2014, 2014 CPD ¶ 329 at 31. In our view, the agency, having read and evaluated the protester's proposal, which contained no mention of a possible spin-off of the IS&GS business segment, and having received and reviewed the press release, was under no obligation to read the accompanying SEC filings. Further, based on the language in the press

⁶ With respect to the SEC filings, the S-4 Registration Statement uses the term "merger" throughout to explain the transaction, but states in one part that Leidos is registering "the offer and sale of its shares of its common stock . . . which will be issued in the <u>merger</u> (the '<u>Merger</u>')" and a new subsidiary will continue as the surviving company and a wholly-owned subsidiary of Leidos. AR, Tab 3, Leidos (continued...)

release, we see nothing unreasonable about the agency's determination that the IS&GS business would no longer be part of the offeror, but would be part of Leidos, creating a new corporate entity different from the firm that submitted the final proposal.⁷

Realism Analysis

As noted above, the RFP contemplated the issuance of a fixed-price, cost reimbursable, and cost-plus-incentive-fee task order, and base labor was included in cost-plus-incentive-fee contract line items. RFP §§ A2, A3; <u>id.</u> at 173. Further, the RFP advised offerors that the government would evaluate realism and may reject an offer that reflects a serious lack of cost/price realism. <u>Id.</u> at M.3.4. The agency concluded that the transaction between LM and Leidos resulted in unquantifiable cost risks for LMIS. AR, Tab 8, SSAC Report, Apr. 27, 2016, at 4.

The protester argues that the agency was able to quantify the potential cost impact of the transaction on its proposal, and that the agency's eventual conclusion that it was unable to assess the realism of LMIS' proposed cost was therefore unreasonable. See Comments at 2 (noting that "the Cost/Price Team (commissioned by the SSAC) was able to quantify the potential cost impact of the transaction"). For support, LMIS relies on an agency report, which concluded that "one of an infinite number of scenarios that can be performed" demonstrated that "the government could expect to incur additional costs in amounts potentially exceeding \$7.275M through the LM-Leidos transaction." AR, Tab 8.1, Analysis of LM-Leidos Transaction Impacts, Apr. 19, 2016, at 5. That report analyzed the effect on cost of possible changes to direct and indirect rates. Id. at 1-2.

While the Corps' analysis here did create a possible range of the impact of the transaction on LMIS' proposed cost, that analysis does not support the protester's assertion that the agency had quantified the cost impact of the transaction or that the cost impact was quantifiable. The SSEB addressed the possible cost implications of the agreement entered into between LM and Leidos and concluded that, for LMIS, the transaction creates an environment of risk for cost and the overall employee compensation plan since LM IS&GS procures [DELETED]% of LM's IT,

SEC Form S-4 Registration Statement, at 3. Since the filing itself uses the term "merger," and explains that part of LM is moving to Leidos, it is not clear that even if the agency had considered these documents it would have reached a different conclusion as to the nature of the transaction.

^{(...}continued)

⁷ Leidos described the completed transaction as the "combination" of or "merger" of Leidos with Lockheed Martin's IS&GS business segment. <u>See</u> Email from Agency to GAO, Attach., Press Release: "Leidos Announces Closing of the Merger with Lockheed Martin's IS&GS Business and Election of Three New Directors."

resulting in market expertise and volume discounts available to the procurement team. AR, Tab 7, SSEB Report, March 30, 2016, at 16. In the SSEB's view, the transaction could affect LM and Leidos Holdings Inc.'s operations, markets, products, services, prices, and other factors in ways that are yet unknown, including LM's direct labor rates and indirect rates proposed. Id. The SSEB concluded that the "impact on proposed rates is unknown, since the rates are based on present company history and budget information. Lockheed Martin IS&GS is responsible for 100% of the proposed effort, and 89% (~\$481M) of the proposed cost. Impact on incumbent employee total compensation is unknown." Id.

A "stand-alone" analysis attempted to quantify the impact of the LM-Leidos transaction. AR, Tab 8.1, Analysis of LM-Leidos Transaction Impacts, Apr. 19, 2016, at 2. However, this analysis concluded the government could expect to incur additional costs in amounts potentially exceeding \$7.275 million, and the government may also expect contractor employee retention and compensation impacts as a result of the indirect wrap rate caps proposed by LMIS. Id. at 5. In considering the impacts of the transaction, the SSAC determined that the LM-Leidos transaction "introduced significant cost uncertainty" into the LMIS proposal. AR, Tab 8, SSAC Report, Apr. 27, 2016, at 4. Further, the agency's PNM concluded that "due to the uncertainty surrounding the cost impacts of LMIS's pending transaction with Leidos Holdings, Inc., the Contracting Officer is unable to determine the realism of LMIS's proposal." PNM, Apr. 28, 2016, at 30. The Cost/Price Evaluation Report recognized certain conditions or constraints "which are not presently quantifiable," which might ultimately impact actual costs incurred. AR, Tab 7.1, Price/Cost Evaluation Report, at 11 (emphasis added).

On this record, we see no merit to the protester's argument that the agency was able to quantify the impact of the transaction on LMIS' proposed cost. More important, the agency's extensive contemporaneous analysis supports the reasonableness of the Corps' conclusion that it could not determine the realism of the protester's costs.

Disparate Treatment

LMIS also asserts that the agency engaged in disparate treatment of the protester and the awardee when evaluating the impact of the LM-Leidos transaction on the offerors' proposals. Comments at 43. The protester asserts that the agency

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⁸ As discussed above, the press release contained a "Cautionary Statement Regarding Forward Looking Statement," which explained that there were many uncertainties that could affect LM's and Leidos Holdings' operations. AR, Tab 2, LMIS Press Release, Jan. 26, 2016, at 2.

⁹ We view a protester as an interested party where the basis for protest is that the protester and the awardee were treated disparately, even where we agree that the (continued...)

"unreasonably concluded that the planned transaction created 'unquantifiable cost risks' for Lockheed Martin's proposal but would not 'materially impact' SAIC's proposal." <u>Id.</u> at 44. The protester bases its claim on the following: Leidos would provide approximately 20 percent of SAIC's direct labor ¹⁰; Leidos issued a press release with language virtually identical to the language in LMIS' press release concerning operations and cost; Leidos, too, "capped" its costs with SAIC since its subcontract was for time and materials; and the SSEB determined that the transaction presented unquantified cost impacts for both offerors' proposals. ¹¹ Comments at 44.

With respect to LMIS, the Corps concluded that the cost risk was not quantifiable but that the government could expect to incur additional amounts "potentially exceeding \$7.275M," and with respect to SAIC's proposal, the agency concluded that the transaction "does not materially impact the cost to SAIC." AR, Tab 8.1, Analysis of LM-Leidos Transaction Impacts, Apr. 19, 2016, at 5. In this case, the agency considered the obvious difference in magnitude of the impact on LMIS' proposal and SAIC's proposal. LMIS' entire IS&GS business segment was being spun-off to Leidos, whereas Leidos was a subcontractor to SAIC, the prime offeror. The agency reasonably determined that the evaluation of LMIS' proposal would be more heavily impacted by the transaction than would SAIC's. It therefore does not constitute disparate treatment for the agency to conclude that the impact of the transaction on LMIS' proposal rendered the protester's costs unquantifiable, while the impact on SAIC's costs was deemed not material.

Potential Performance Risks Introduced by Transaction

In its evaluation, the agency also identified risks of performance relating to the LM-Leidos transaction. For example, LMIS proposed indirect wrap rate caps, and the agency concluded that those caps could potentially cause financial hardships on Leidos and result in decreased fringe benefits for employees, potentially reducing employee retention. AR, Tab 8.1, Analysis of LM-Leidos Transaction Impacts, Apr. 19, 2016, at 5. Also, the agency questioned the accuracy of its prior past performance evaluation, given the possible impact the

protester's offer was reasonably excluded from the competition. See Aquila Fitness Consulting Sys., Ltd., B-286488, Jan. 17, 2001, 2001 CPD ¶ 4 at 4.

^{(...}continued)

¹⁰ Comments at 44, <u>citing</u> AR, Tab 6, Leidos Cost/Price Proposal, Attach. 13D. While the subcontract represented approximately 20 percent of SAIC's direct labor, it was only approximately 6.3 percent of proposed costs. AR, Tab 7, SSEB Report, Mar. 30, 2016, at 17.

¹¹ Comments at 44, <u>citing</u> AR, Tab 7.1, Price/Cost Evaluation Report.

new Leidos corporate structure would have on contract performance. <u>See AR</u>, Tab 8, SSAC Report, April 27, 2016, at 4.

The protester asserts that the agency identified possible contract performance issues only after the agency erroneously concluded that LMIS' IS&GS business segment would be "merged" into Leidos. Comments at 29. Because the IS&GS business segment will survive as a separate entity, LMIS argues, it will maintain its own rates, and the experience and qualifications of IS&GS will continue to be committed to performing the task order. <u>Id.</u>

The record in this protest is clear that the ownership of the entire business segment committed by the protester to the performance of the contract has shifted from one firm to another. See Email from Agency to GAO, Attach., Press Release: "Leidos Announces Closing of the Merger with Lockheed Martin's IS&GS Business and Election of Three New Directors." Our Office has stated before that the substitution of a new prime contractor, in place of the original offeror, may well have a material effect on the technical approach employed during contract performance. Wyle Labs., Inc., supra, at 9. Here, the protester stated that the strength of its proposal was backed by the entirety of LM. See AR, Tab 1, LMIS Cost/Price Proposal, Vol. II, at 119. In light of the divestiture by LM of its IS&GS business segment, we see nothing unreasonable in the agency's conclusion that the transaction created some element of risk regarding the protester's actual performance.

Discussions

LMIS also challenged the agency's conduct of discussions as inadequate. The protester asserts that a press release issued on July 20, 2015, put the agency on notice of the impending transaction prior to the third request for final proposals, and that therefore the agency was required to address in discussions the Corps' concerns regarding the possible impact of the transaction on the evaluation of the protester's proposal. Comments at 40.

The first press release stated that LM entered into a definitive agreement with Sikorsky Aircraft and would conduct a strategic review of alternatives for its government IT and technical services business. AR, Tab 3.2, LM Announcement dated July 20, 2015, at 1. We disagree with the protester that this earlier press release provided sufficient notice of the likelihood of the transaction. The record reflects that LM issued its press release announcing the combination of its IS&GS business with Leidos on January 26, 2016. AR, Tab 2, LMIS Press Release, Jan. 26, 2016. The agency had already closed discussions on November 3, 2015. Because LMIS' proposal failed to mention anything about the transaction, the agency was not obligated to reopen discussions with the protester. See FP-FAA Seattle, LLC, B-411544, B-411544.2, Aug. 26, 2015, 2015 CPD ¶ 274 at 7 (agency is not required to re-open discussions to address new information).

Finally, the protester raises several protest allegations unrelated to the issue of the corporate restructuring and the acceptability of proposals discussed above. Because we find that the agency reasonably excluded the protester's proposal from eligibility for award, and we also find that there is no basis on which to sustain the allegation that the agency should have evaluated the awardee's proposal as ineligible, the protester is not an interested party to bring its other protest allegations. Because the Army reasonably determined that LMIS' proposal was ineligible for award, LMIS is not an interested party to protest that the agency improperly evaluated proposals with respect to factors unrelated to acceptability; LMIS would not be in line for award even if we agreed with its position. See Allenhurst Indus., Inc., B-256836, B-256836.2, July 8, 1994, 94-2 CPD ¶ 14.

We deny the protest.

Susan A. Poling General Counsel