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Decision

Matter of: Trident Technologies, LLC; Test Engineering Strategic Technologies, LLC

File: B-412020.16; B-412020.18; B-412020.19

Date: January 31, 2018

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DIGEST

Protests challenging the agency's cost realism analysis are denied, where the record shows that the agency's analysis complied with the terms of the solicitation.

DECISION

Trident Technologies, LLC, of Huntsville, Alabama, and Test Engineering Strategic Technologies, LLC (TEST), of Sierra Vista, Arizona, protest the award of a contract to TNT Premier Partnership (TNT), of El Paso, Texas, under request for proposals (RFP) No. W9124Q-15-R-0011, issued by the Department of the Army for test engineering and analytical services. The protesters challenge the Army's cost realism analysis.

We deny the protests.

BACKGROUND

The RFP, which was issued on February 9, 2015, as a set-aside for participants in the Small Business Administration's 8(a) business development program, provided for the award of a cost-plus-fixed-fee contract for test engineering and analytical services to

support the White Sands Missile Range, New Mexico. Agency Report (AR),¹ Tab 3, RFP, at 40, 57; Tab 6, RFP amend. 3, Performance Work Statement (PWS), at 20. The period of performance consisted of a base year and four option years. See RFP at 2-9.

The RFP stated that award would be made on a lowest-priced, technically-acceptable basis. Id. at 72. The non-cost evaluation factors were technical expertise; management, leadership and organization; quality control and continuous process improvement; and past performance. Id. at 73.

The RFP advised that proposed costs would be evaluated for realism, probable cost, balance, and reasonableness. Id. at 78. Offerors were required to complete a cost model provided with the solicitation. Id. at 65. The cost model included, among other things, various labor categories for which offerors were to propose labor rates for exempt and non-exempt employees.² RFP, attach. 4, Cost Model. The RFP, in Technical Exhibit 5, also provided historical staffing levels for the labor categories, as well as the General Schedule (GS) equivalent grade of incumbent staff.³ RFP at 67; RFP amend. 3, at 121-122.

For non-exempt employees, the RFP required offerors to ensure that the non-exempt labor rates meet or exceed the applicable area wage determination minimum rates, but also advised that “to retain highly qualified Non-exempt employees in this geographic location, they will likely need to pay higher than the minimum required hourly rates.” RFP at 67. The RFP also advised that non-exempt employees currently performing the requirement are paid, on average, higher basic wage rates than the wage determination minimums. Id. The RFP stated that the GS grade/step indicators provided in Technical Exhibit 5 constituted “minimums below which offerors must clearly justify how lower proposed hourly direct labor rates and fringe benefits will not compromise mission requirements, employee recruitment/retention, or call into question the offeror’s understanding of the requirements of the PWS.” Id. Technical Exhibit 5 included the Department of Labor occupation codes for the non-exempt positions. Id.

The cost model included a separate spreadsheet for overtime. The RFP stated that the cost model included “plug” numbers to calculate overtime, applying a 3 percent rate for management and administrative support occupation titles, and 10 percent for technical

¹ Trident’s and TEST’s protests were developed separately, and then later joined in the drafting of this decision. Our citations are to the agency report provided in response to Trident’s protest, except where otherwise indicated.

² The RFP states that the terms “exempt” and “non-exempt” refer to applicability of the Fair Labor Standards Act and the Service Contract Act requirements as reflected in the applicable area wage determination. RFP at 67.

³ The General Schedule is a job classification and pay system used by the federal government for civilian federal employees. <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule> (last visited Jan. 25, 2018).

support occupation titles. Id. at 70. The RFP advised offerors to “remember the implication and requirements of Federal Acquisition Regulation (FAR) [provision] 52.237-10: Identification of Uncompensated Overtime.”⁴ Id.

The Army received proposals from seven offerors, including Trident, TEST, and TNT. AR, Tab 21, Source Selection Decision Document, at 1. The agency evaluated proposals and on August 20, 2015, made award to Trident. Contracting Officer’s Statement (COS) at 3. After two rounds of protests filed with our Office, in May 2016 the Army issued evaluation notices to offerors in the competitive range. Id. at 4.

After receiving revised proposals, the Army selected another offeror for award. Id. The award was protested and in response to the Army’s notice of corrective action, we dismissed the protests. Id.; see, e.g., Trident Technologies, LLC, B-412020.12, Nov. 23, 2016 (unpublished decision); TEST Engineering Strategic Technologies, LLC, B-412020.15, Nov. 23, 2016 (unpublished decision).

In June 2017, the Army reopened discussions and amended RFP Technical Exhibit 5 to include a GS salary table that reflected 2017 GS labor rates. COS at 5; AR, Tab 8, Trident June 2017 Discussion Letter, at 3. Offerors were instructed to use the 2017 GS salary table as a baseline for final proposal revisions. AR, Tab 8, June 2017 Discussion Letter, at 3. The resulting final proposed costs and the most probable costs were as follows:

	Final Proposed Cost	Adjustment	Most Probable Cost
TNT	\$71,702,260	+ \$4,216,822	\$75,919,083
TEST	\$73,579,481	+ \$4,806,941	\$78,386,423
Trident	\$75,174,798	+ \$3,261,487	\$78,436,285

AR, Tab 21, Source Selection Decision Document, at 4.

⁴ The FAR provision states that whenever there is uncompensated overtime, the adjusted hourly rate (including uncompensated overtime), rather than the hourly rate, shall be applied to all proposed hours, whether regular or overtime hours. FAR § 52.237-10(b)(1). The adjusted hourly rate (including uncompensated overtime) is the rate that results from multiplying the hourly rate for a 40-hour work week by 40, and then dividing by the total proposed hours per week (which includes uncompensated overtime hours) over and above the standard 40-hour work week. Id. § 52.237-10(a). The provision also states that proposals that include unrealistically low labor rates, or that do not otherwise demonstrate cost realism, will be considered in a risk assessment and evaluated for award in accordance with that assessment. Id. § 52.237-10(d).

Trident's Proposal

As relevant here, the Army informed Trident that some of its labor rates for non-exempt employees were unrealistically low in comparison to GS equivalent rates. AR, Tab 10, Trident Response to Discussions, May 19, 2017, at 5-6. The Army stated that Trident failed to adhere to the terms of the RFP, which advised offerors that GS grade/step indicators constituted minimums and that offerors were required to clearly justify how lower proposed hourly direct labor rates would not compromise employee retention. Id. at 5. The Army instructed Trident that,

when responding to this [evaluation notice], an explanation of how rates were derived will not be sufficient. The Offeror must specifically indicate how paying rates that the Government sees as unrealistic will not jeopardize the quality and stability of the workforce. If the Government finds that your response is inadequate, unrealistically low rates shall be adjusted.

Id. at 6 (emphasis omitted).

In Trident's response to the evaluation notice, the firm accepted the Army's instruction to adjust some of the labor rates. Id. However, in defense of its lower non-exempt labor rates in the option years, Trident explained that in the event an employee leaves, it expected to fill the position either by promoting from within or hiring outside personnel at wage determination wage rates, which would result in a reduced average hourly rate. Id. at 10-11. Trident also stated that it based its calculations for the lower labor rates on an attrition model, which itself was based on its experience with similar contracts and wage survey averages and included the model in its proposal. Id. at 10.

After reviewing Trident's response to the evaluation notices, the Army adjusted Trident's proposed costs upward by almost \$3.3 million. AR, Tab 19, 2nd Addendum to Cost Evaluation Report, at 41. The adjustment was the result of the Army's disagreement with Trident's proposed labor rate for its meteorological specialist, annual decreases in labor rates based on Trident's attrition model, proposed wage determination minimum rates for non-exempt surge employees, and escalation rate. Id. at 53, 57. The bulk of the increase resulted from adjustments due to Trident's proposed annual decreases in labor rates in the option years. Memorandum of Law (MOL) at 19. In this regard, the evaluators stated that Trident provided no data-driven information, such as old payroll information, to support its claim that new employee recruitment and employee retention was achieved at lower labor rates in other contracts. AR, Tab 19, 2nd Addendum to Cost Evaluation Report, at 53.

TEST's Proposal

During discussions, the Army advised TEST that it failed to capture the majority of the prescribed overtime costs because the firm had not inserted the burden rate into its cost submission, that some of TEST's proposed labor rates for both exempt and non-exempt positions were unrealistically low, and that TEST's proposed 1.5 percent escalation rate

was significantly below the 2 percent average increase in salaries over the past three years. AR (TEST), Tab 10, TEST Response to Discussions, at 4, 6-8, 11. As relevant here, TEST disagreed with the Army's conclusions with respect to uncompensated overtime and its proposed escalation rate. Id. at 5, 12. TEST stated that all exempt employees are compensated on a salaried basis regardless of the amount of time worked and that all overtime hours were captured in accordance with solicitation requirements at the salaried rate as defined by TEST's total time accounting policy. Id. at 5. TEST also stated that it accumulates, reports, and bills hours worked in accordance with its Defense Contract Audit Agency-approved total time accounting system. Id.

After reviewing TEST's responses to the discussion items, the Army increased TEST's most probable cost by \$4,806,941. AR, Tab 19, 2nd Addendum to Cost Evaluation Report, at 14. The majority of the increase, \$4,554,056, resulted from the Army's adjustment for uncompensated overtime. Id. In this regard, the Army noted that, although TEST's rate calculation was correct, a salaried employee's "true" rate of pay per hour decreases with every hour of uncompensated overtime. Id. at 11. As a result, although TEST is proposing GS labor rates, the impact of uncompensated overtime decreases the "true" labor rate, which results in unrealistic rates and performance risk to the government. Id. Accordingly, the Army applied TEST's labor rates for exempt positions to the overtime hours to obtain a "true" labor rate. Id. at 12.

TNT's Proposal

In discussions, the Army informed TNT that some of its labor rates were unrealistically low for some exempt positions, and that a subcontractor's indirect rates were inconsistent with the cost narrative. AR, Tab 15, TNT Response to Discussions, at 1, 3. After reviewing TNT's response to the discussion items and TNT's final revised proposal, the Army upwardly adjusted TNT's most probable cost by \$4,216,822. AR, Tab 19, 2nd Addendum to Cost Evaluation Report, at 26. The majority of the increase, \$3,604,378, resulted from TNT failing to capture the correct overtime hours for two categories in an option year and from TNT using its subcontractor's handling rate instead of its own handling rate. Id. at 26-27.

The source selection evaluation board submitted its report to the source selection authority and recommended TNT for contract award as the lowest-priced, technically acceptable offeror. AR, Tab 20, Source Selection Evaluation Board Report, at 6-7. The source selection authority concurred with the board's recommendation and selected TNT for award. AR, Tab 21, Source Selection Decision Document, at 4.

After receiving their debriefings, Trident and TEST protested to our Office.

DISCUSSION

Trident and TEST challenge the Army's cost realism analysis of their cost proposals, arguing that the Army's upward adjustments to their cost proposals were unreasonable.

Trident also challenges the evaluation of TNT's cost proposal. We have considered all of the protesters' arguments and find that none provide a basis for sustaining the protests. We discuss a selection of their arguments below.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Wyle Labs., Inc., B-407784, Feb. 19, 2013, 2013 CPD ¶ 63 at 8; American Tech. Servs., Inc., B-407168, B-407168.2, Nov. 21, 2012, 2012 CPD ¶ 344 at 5; FAR § 15.404-1(d). Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. 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 Cascade Gen., Inc., B-283872, Jan. 18, 2000, 2000 CPD ¶ 14 at 8. Further, an agency's cost realism analysis need not achieve scientific certainty; rather, the methodology employed must be reasonably adequate and provide some measure of confidence that the proposed costs are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation. See SGT, Inc., B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7. We review an agency's judgment in this area to see that the agency's cost realism evaluation was reasonably based and not arbitrary. Hanford Evtl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8.

Trident's Proposed Costs

Trident argues that the Army unreasonably upwardly adjusted its most probable cost with respect to labor rates for non-exempt personnel in the option years. In this regard, Trident contends that the Army failed to accept approximately 100 pages of data supporting the attrition model upon which the lower labor rates were based. Trident Protest at 12. Trident states that it provided the Army with calculations based on the actual attrition rates of its subcontractor to support the attrition model applied in its proposal. Trident Comments & Supp. Protest at 5. Trident also argues that the Army failed to conduct meaningful discussions with respect to Trident's attrition model. Id. at 4.

The Army explains that Trident proposed to decrease the labor rates for all non-exempt positions every year based on its attrition model. MOL at 17. The Army states that it considered the information Trident provided but did not find it sufficient to support the lower labor rates. Id. at 17-18. The Army explains that even though Trident's model appears to be based on past experience and mathematical calculations, attracting and retaining employees at the lower labor rates would become increasingly difficult in light of the limited population near White Sands. Id. at 18. The Army states that because it would bear the risk of not having enough qualified personnel available, it reasonably adjusted Trident's most probable cost by \$3,128,426. Id. at 19.

Based on the record before us, we conclude that the Army's adjustment of Trident's proposed costs was reasonable. The RFP advised offerors that non-exempt employees working on the current contract were being paid, on average, higher wage rates than the minimum rates listed in the relevant Department of Labor wage determination for the area. RFP at 67. The RFP also advised offerors of the need to pay higher than the minimum required hourly rates in order to retain highly qualified non-exempt employees. Id. During discussions, the Army informed Trident that its proposed labor rates were unrealistically low and reminded Trident that local wage determinations are rate surveys for the area surrounding White Sands and do not reflect the pay rates required to maintain and attract quality personnel. AR, Tab 8, Trident June 2017 Discussion Letter, at 1-2. Nonetheless, in its response to discussions, Trident informed the Army that, although its labor rates for the base year would be at the current rates, it expected that as a result of attrition it would be able to hire new staff or promote from within at the wage determination rate. AR, Tab 10, Trident Response to Discussions, May 19, 2017, at 10-11. The Army concluded that Trident provided no data-driven information to support its claim that it can hire replacement personnel at the normal wage determination rate instead of the higher rate paid to current personnel and on this basis upwardly adjusted Trident's most probable cost. AR, Tab 19, 2nd Addendum to Cost Evaluation Report, at 53. Trident has provided no basis for us to conclude that the Army erred in increasing Trident's labor rates in the option years.⁵

Trident also argues that the Army failed to raise its concerns with Trident's attrition model during discussions, but instead focused on labor rates for specific labor categories. Trident Comments & Supp. Protest at 4. The Army states that it informed Trident that its labor rates were unrealistically low and would be adjusted upward, and that Trident should have logically concluded that Trident's lowered labor rates in the option years were also considered unrealistically low. Supp. COS at 1.

Agencies have broad discretion to determine the content and extent of discussions, and we limit our review of the agency's judgments in this area to a determination of whether they are reasonable. Space Systems/Loral LLC, B-413131, Aug. 22, 2016, 2016 CPD ¶ 242 at 10. When an agency engages in discussions with an offeror, the discussions

⁵ Trident also argues that the Army unreasonably failed to accept its explanation concerning its proposed labor rate for the meteorological specialist position. Trident Protest at 11. We need not address this protest ground because, even if Trident were correct, Trident's most probable cost would still be higher than TNT's. In this regard, even if we accepted Trident's argument that the Army unreasonably adjusted its labor rate for the meteorological specialist position, which we do not, Trident's most probable cost would be lowered by only \$141,414, see MOL at 16, and therefore would not overcome the \$2.5 million difference in Trident's and TNT's most probable costs. See Technology Advancement Grp., Inc., B-406982 et al., Oct. 12, 2012, 2012 CPD ¶ 306 at 6 n.10 (where award is made on a lowest-price, technically acceptable basis, the protester is not prejudiced where, even if the protester's price was adjusted by the protested amount, its total price would remain higher than the awardee's).

must be meaningful, that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision in a manner to materially enhance the offeror's potential for receiving the award. FAR § 15.306(d); Lockheed Martin Corp., B-411365.2, Aug., 26, 2015, 2015 CPD ¶ 294 at 10. The requirement that discussions be meaningful, however, does not obligate an agency to spoon-feed an offeror or to discuss every area where the proposal could be improved. FAR § 15.306(d)(3); Insignia-Spectrum, LLC, B-406963.2, Sept. 19, 2012, 2012 CPD ¶ 304 at 5. The degree of specificity required in conducting discussions is not constant and is primarily a matter for the procuring agency to determine. Kathpal Techs., Inc., B-291637.2, Apr. 10, 2003, 2003 CPD ¶ 69 at 3.

Here, the record indicates that the Army reasonably led Trident into the area into which it was concerned. The Army advised Trident that its proposed labor rates for non-exempt personnel were unrealistic and that the agency would upwardly adjust the labor rates by over \$7.8 million. AR, Tab 10, Trident Response to Discussions, May 19, 2017, at 5-6. In view of the amount by which the Army proposed to raise Trident's non-exempt labor rates, Trident should reasonably have recognized that the agency's concern comprised more than the base year. Moreover, Trident's understanding of the Army's concern about its labor rates for non-exempt personnel in the option years is demonstrated by its explanation of how its attrition model permitted it to lower the labor rates in the option years. See id. at 10-11. Accordingly, we deny this protest ground.⁶

TEST's Proposed Costs

TEST contends that the Army unreasonably upwardly adjusted its proposed costs by over \$4.5 million for uncompensated overtime for exempt employees. TEST Protest at 5. TEST argues that the agency should have accepted its total time accounting policy and procedures for uncompensated overtime for exempt employees, in which the employees are compensated on a salaried basis regardless of hours worked. Id.

The Army states that its adjustment of uncompensated overtime rates was reasonable and consistent with the solicitation and the FAR. MOL (TEST) at 16. The Army explains that the RFP advised offerors that cost proposals would be evaluated to determine the extent to which the proposal complies with FAR provision 52.237-10, Identification of Uncompensated Overtime, which states that proposals that include unrealistic labor rates, or that do not otherwise demonstrate cost realism, will be considered in a risk assessment and evaluated for award in accordance with that assessment. Id. at 16-17. The Army explains that it was required by FAR § 37.115-2 to apply an hourly rate adjusted for uncompensated overtime to TEST's proposed rates and evaluate whether the use of uncompensated overtime resulted in unrealistically low

⁶ Although Trident maintains that the Army objected to its proposed attrition rate, Trident Comments & Supp. Protest at 3-4, the record shows that the Army objected to the labor rates Trident proposed, notwithstanding attrition. See AR, Tab 19, 2nd Addendum to Cost Evaluation Report, at 53.

labor rates and/or performance risk. Id. at 18-19. The Army further explains that it did not object to TEST's use of the total time accounting system but nonetheless had concerns about the realism of the adjusted hourly rates--the "true" hourly rates. Id. at 19. The Army states that uncompensated overtime in effect lowers the hourly rates for every exempt employee to below GS rates and creates performance risk. Id. Therefore, the Army adjusted TEST's labor rates for exempt employees to account for the effect of overtime. Id. at 20.

We find no basis to sustain TEST's protest. As noted above, the RFP incorporated by reference FAR provision 52.237-10, Identification of Uncompensated Overtime. The FAR provision directs that whenever there is uncompensated overtime, the adjusted hourly rate (which includes uncompensated overtime), rather than the hourly rate, shall be applied to all proposed hours, whether regular or overtime hours. FAR § 52.237-10(b)(1). The provision also states that proposals that include unrealistically low labor rates, or that otherwise do not demonstrate cost realism, will be considered in a risk assessment. FAR § 52.237-10(d). Thus, the agency complied with the terms of the solicitation in calculating a labor rate that included the impact of overtime on the hourly rate and assessing the risk of the adjusted labor rate on performance. In this regard, FAR § 37.115-2 requires contracting officers to ensure that the use of uncompensated overtime in contracts to acquire services on the basis of the number of hours provided will not degrade the level of technical expertise required to meet the government's requirements, and to apply an hourly rate adjusted for uncompensated overtime to all proposed hours. FAR § 37.115-2(c) and (d). Therefore, we find the Army's upward adjustment of \$4,554,056 to TEST's most probable cost to be reasonable. TEST's disagreement with the agency's judgment, without more, does not provide a basis to sustain the protest. See Oasis Sys., LLC; Quantech Servs., Inc., B-408227.10 et al., Apr. 28, 2016, 2016 CPD ¶ 124 at 13.

TNT's Proposed Costs

Trident also argues that the Army misevaluated TNT's 401(k) plan. Trident Comments & Supp. Protest at 9. Trident maintains that the Army failed to recognize inconsistencies in TNT's proposal, which Trident alleges decreased TNT's 401(k) contribution from [DELETED] percent to [DELETED] percent of payroll on one page, but proposed a [DELETED] percent contribution on another page of the proposal. Id.

The Army states that Trident's arguments are not supported by the record. The Army explains that TNT's cost proposal stated that under its 401(k) plan it would match "up to [DELETED] percent for all employees" – a statement that does not promise an exact contribution, but rather, a maximum, based on how much the employee contributed. Supp. MOL at 3. The Army further explains that the cost proposal later stated that based upon prior experience, TNT can reasonably expect to contribute [DELETED] percent to employees' 401(k) plans and used the [DELETED] percent figure in its calculations. Id.

The record supports the agency's position. TNT's proposal states that its 401(k) retirement plan provides matching up to [DELETED] percent for all employees. AR, Tab 16, TNT Final Cost Narrative, at 24. Later in TNT's proposal, TNT estimated its 401(k) contributions as [DELETED] percent of payroll, based on its experience. Id. at 26. Therefore, based on the record, we find no basis to sustain this protest ground.

Finally, Trident argues that the Army failed to consider whether TNT's labor mix demonstrated a clear understanding of the work to be performed. Trident Comments & Supp. Protest at 13. More specifically, Trident contends that TNT failed to properly allocate labor hours between exempt and non-exempt labor categories in accordance with the PWS. Id. at 16. In this regard, Trident identifies four tasks that it contends require non-exempt personnel to perform, based on the descriptions in the PWS, and for which TNT proposed exempt personnel. Id. at 14-16.

The Army states that TNT's classification of labor categories as exempt or non-exempt was in line with the agency's suggested staffing plan in Technical Exhibit 5, which provided the Department of Labor occupation code for non-exempt positions. Supp. MOL at 5. The Army also explains that the solicitation advised offerors under the management, leadership, and organization evaluation factor that deviations from the government-suggested staffing plan would be evaluated based on the methodology and rationale proposed. Id. at 6, citing RFP at 75. The agency states that it evaluated TNT's plan and found that it conformed to the suggested staffing plan, and thus was reasonable. Id. at 7.

We find no basis to sustain this protest ground. The RFP advised offerors that Technical Exhibit 5 provided the Department of Labor occupation codes for non-exempt positions. RFP at 67. Thus, offerors could reasonably rely on the agency's determination of which positions were non-exempt positions. Moreover, concerns with regard to establishing proper wage rate determinations or the application of the statutory requirements should be raised with the Wage and Hour Division in the Department of Labor, the agency that is statutorily charged with the implementation of the Act. See 41 U.S.C. § 6707(a); 40 U.S.C. § 276a; SAGE Sys. Techs., LLC, B-310155, Nov. 29, 2007, 2007 CPD ¶ 219 at 3. In this regard, the determination of prevailing wages and fringe benefits, and the issuance of appropriate wage determinations under the Service Contract Act, 41 U.S.C. §§ 6701-6707, are matters for the Department of Labor. SAGE Sys. Techs., LLC, supra. Thus, our Office will not consider this protest ground as this is a matter for consideration by the Department of Labor.

The protests are denied.

Thomas H. Armstrong
General Counsel