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Decision

Matter of: ORBIS Sibro, Inc.

File: B-415714; B-415714.2

Date: February 26, 2018

Jerome S. Gabig, Esq., Christopher L. Lockwood, Esq., Richard J.R. Raleigh Jr., Esq., and Kimberly K. Rucker, Esq., Wilmer & Lee, P.A., for the protester.

Edward J. Kingberg, Esq., R. Brent Blackburn, Esq., and Mark R. Malek, Esq., Widerman Malek, for the intervenor.

James C. Brent, Esq. and Robert M. Jusko, Esq., Department of the Navy, for the agency.

Charmaine A. Stevenson, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the cost realism analysis of the protester's proposal is sustained where the agency unreasonably included an upward cost adjustment in the protester's total evaluated price.

DECISION

ORBIS Sibro, Inc. (ORBIS), of Mount Pleasant, South Carolina, protests the issuance of a task order to Craig Technologies, Inc., of Cape Canaveral, Florida, by the Department of the Navy, Naval Sea Logistics Center under request for proposals (RFP) No. N00024-15-R-3243 for information technology, cybersecurity, configuration, logistics, and technical data support services. The protester contends that the Navy's cost realism analysis was unreasonable and resulted in a flawed best-value tradeoff decision.

We sustain the protest in part and deny it in part.

BACKGROUND

The RFP was issued on May 24, 2016, to holders of the Navy's Seaport-e multiple award indefinite-delivery, indefinite-quantity (IDIQ) contracts, and contemplated a

cost-plus-incentive-fee task order with a 1-year base period and four 1-year option periods.¹ Agency Report (AR), Tab 5, RFP, at 51, 117. The RFP included three evaluation factors: technical capability; past performance; and evaluated cost/price. Id. at 150. The technical capability factor included three subfactors, listed in descending order of importance: staffing plan and management approach; key personnel; and corporate technical experience in providing similar services. Id. The technical capability factor was more important than the past performance factor and, when combined, the two factors were significantly more important than evaluated cost/price. Id.

The RFP established the Navy's desired minimum labor qualifications for personnel and included Bureau of Labor Statistics (BLS) data "for general reference purposes. . . [to provide] the government's best approximation of the BLS-defined Standard Occupational Classification (SOC) and approximate annual wage for each Labor Category." RFP at 33-36. The RFP stated that the Navy would perform a cost realism analysis and would calculate an evaluated cost that reflected the Navy's estimate of the offeror's most probable cost. Id. at 155. As relevant to the protest, regarding the preparation of cost/price proposals, the RFP included multiple attachments and instructed offerors as follows:

The Cost/Price proposal shall be a separate volume comprised of the Cost/Price Narrative, Attachment 1 Cost Plus Incentive Fee Table, Attachments 5-9 Base and Option Year Cost Summaries and all supporting documentation. Offerors must propose to provide all items and include costs for all [contract line item numbers (CLINs)] in Section B. Offerors that do not include costs for all CLINs may be considered non-responsive and ineligible for award. Should there be any discrepancies between the cost submitted in Section B and the Excel files for Attachments 1 or 5-9, the Offeror's Section B cost will take precedence.

Id. at 131 (RFP § 2.6.3.2). The contracting officer explains that the purpose for establishing this precedence was "because any resulting award would be issued using the prices entered by the successful Offeror in Section B of their Seaport-e proposal." AR, Tab 14, Contracting Officer's Statement (COS), at 3.

Five offerors submitted proposals by the closing date, including ORBIS and Craig. AR, Tab 12, Business Clearance Memorandum, at 10. During the evaluation, the Navy found that the costs proposed by ORBIS in section B of its proposal (costs by CLINs) and its cost summaries (burdened direct labor rates for each labor category for each year of performance) were not the same. Id. at 167-169. ORBIS' section B costs were \$35,327,697, but the sum of its cost summaries was \$34,089,015, a difference of \$1,238,682. Id. at 168-169; COS at 4.

¹ The RFP was amended four times. Citations to the RFP are to the conformed copy.

In its cost realism analysis of ORBIS' proposal, the Navy made upward cost adjustments totaling \$6,225,377, which included as a separate item an upward adjustment of \$1,238,682 to account for the variance between the proposed cost in section B and the cost summaries. COS at 5; see also AR, Tab 12, Business Clearance Memorandum, at 169. The Navy's final evaluation results of the Craig Technologies and ORBIS proposals were as follows:

	Craig Technologies	ORBIS
TECHNICAL CAPABILITY	ACCEPTABLE	ACCEPTABLE
Staffing Plan and Management Approach	Acceptable	Acceptable
Key Personnel	Good	Good
Corporate Technical Experience in Providing Similar Services	Acceptable	Good
PAST PERFORMANCE	SATISFACTORY CONFIDENCE	SATISFACTORY CONFIDENCE
EVALUATED COST/PRICE	\$39,941,876	\$40,314,393

AR, Tab12, Business Clearance Memorandum, at 19.

On September 22, 2017, the contracting officer, who also served as the source selection authority, awarded the task order to Craig Technologies. COS at 1. After receiving a written debriefing, ORBIS filed an agency-level protest challenging the Navy's cost realism analysis. On November 1, the Navy denied ORBIS' agency-level protest, and this protest followed.²

DISCUSSION

In its protest, ORBIS alleges that the Navy's cost realism analysis was unreasonable, and challenges virtually all of the upward cost adjustments made by the Navy. For the reasons discussed below, we find that the agency's upward adjustment of \$1,238,682 to account for the variance between ORBIS' proposed cost in section B and the cost summaries was unreasonable, and sustain the protest on this basis. We deny the remaining protest grounds.³

² The awarded value of the task order at issue exceeds \$25 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts. 10 U.S.C. § 2304c(e)(1)(B).

³ In a supplemental protest, ORBIS further challenged a downward cost adjustment made to its proposed fee in the cost realism analysis. Supp. Protest at 2-6. However, the Navy disclosed the fee adjustment in the written debriefing provided to ORBIS on September 27. AR, Tab 3.3, Debriefing, at 3 ("The evaluated incentive fee was approximately \$[DELETED] less than the proposed target incentive fee."). We dismiss this allegation as untimely because ORBIS failed to raise it in its agency-level protest, (continued...)

Upward Adjustment For Proposal Variance

ORBIS argues that the Navy's upward adjustment of \$1,238,682, which accounts for the variance in its proposal between section B and the cost summaries, was arbitrary and double-counts costs already included in the upward cost adjustments to its labor costs. See Protest at 9-12. The Navy responds that the RFP explicitly advised offerors that a discrepancy between an offeror's section B and its cost summaries "would result in the Agency using the Section B proposed price for evaluation purposes." Memorandum of Law (MOL) at 20, 25. The Navy argues that it properly calculated the cost adjustments using ORBIS' cost summaries and added the adjustments to ORBIS' section B cost to determine ORBIS' evaluated cost/price. Id. at 18-20, 25-27.

When an agency evaluates a proposal for the award of a cost-reimbursement contract or order, an offeror's proposed costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation (FAR) §§ 15.305(a)(1), 15.404-1(d); Exelis Sys. Corp., B-407673 et al., Jan. 22, 2013, 2013 CPD ¶ 54 at 7 (considering FAR part 15 cost realism standards in a FAR part 16 task order procurement); CGI Fed. Inc., B-403570 et al., Nov. 5, 2010, 2011 CPD ¶ 32 at 5 n.1. Consequently, an 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. FAR § 15.404-1(d)(1); DynCorp Int'l LLC, B-411465, B-411465.2, Aug. 4, 2015, 2015 CPD ¶ 228 at 8. While an agency's cost realism analysis need not achieve scientific certainty, the methodology employed 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 at the time of its evaluation. Tantus Techs., Inc., B-411608, B-411608.3, Sept. 14, 2015, 2015 CPD ¶ 299 at 10. Our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. TriCenturion, Inc.; Safeguard Servs., LLC, B-406032 et al., Jan. 25, 2012, 2012 CPD ¶ 52 at 6.

The RFP stated that the Navy would perform a cost realism analysis and would calculate an evaluated cost that reflected the Navy's estimate of the offeror's most probable cost. RFP at 155. As noted, the RFP included multiple attachments to be completed by offerors, and instructed offerors to include a separate cost/price narrative along with attachments 5-9, which contained the cost summaries, and all supporting documents. Id. at 131. Offerors were also required to include costs for all CLINs in section B and if there were "any discrepancies between the cost submitted in Section B and the Excel files for Attachments 1 or 5-9, the Offeror's Section B cost [would] take precedence." Id.

(...continued)

and did not raise the issue until after the agency report was filed. See 4 C.F.R. § 21.2(a)(3).

Our review of the record shows that the Navy performed its cost realism analysis of the ORBIS proposal as follows:

ORBIS' proposed Section B total cost is \$1,238,682 higher than its total cost as calculated from its Attachments 5 through 9, Cost Summaries (\$34,089,015). . . . However, since the solicitation Section B cost breakouts do not provide the granularity required for cost evaluation, the evaluated cost adjustments were developed from the ORBIS' Attachments 5 through 9, Cost Summaries, including where marked differences were identified between the total cost identified in Section B and the Attachments 5 through 9, Cost Summaries.

AR, Tab 12, Business Clearance Memorandum, at 168. Using ORBIS' cost summaries, the price evaluation board (PEB) evaluated the proposed direct rates for all labor categories, and where the PEB determined that a proposed direct labor rate was not substantiated by the data provided in ORBIS' proposal, the rate was "adjusted to the lowest rate within the BLS wage rate range in Table C-1 of the solicitation." Id. at 174-178. The PEB then computed adjustments to indirect labor costs, subcontractor costs, surge labor, and incentive fees that resulted from the adjustments made to ORBIS' direct labor rates, resulting in the following adjustments and evaluated cost/price for the ORBIS proposal:

Cost Element	Proposed	Evaluated	Adjustment
Prime Direct Labor	[DELETED]	[DELETED]	[DELETED]
Prime Indirect Labor	[DELETED]	[DELETED]	[DELETED]
Subcontractor Labor	[DELETED]	[DELETED]	[DELETED]
Prime Indirects on Subcontractor	[DELETED]	[DELETED]	[DELETED]
Incentive Fee	[DELETED]	[DELETED]	[DELETED]
Prime Surge Labor	[DELETED]	[DELETED]	[DELETED]
Labor and Fee	[DELETED]	[DELETED]	\$4,986,695
Proposal Section B Variance	-	\$1,238,682	\$1,238,682
Subtotal Labor and Fee	[DELETED]	[DELETED]	\$6,225,377
Other Direct Costs	[DELETED]	[DELETED]	\$0
Grand Total (attachments 5-9)	* \$34,089,016	\$40,314,393	\$6,225,377

*\$1 Difference in total due to rounding

Id. at 169. As indicated, the PEB separately added the variance between ORBIS' section B and cost summaries as an upward cost adjustment. Id.

When denying ORBIS' agency-level protest, the Navy concluded: "Using the methodology of adding the \$1,238,682 difference between ORBIS' Section B and Attachments 5-9 proposed prices to the PEB's adjustments to ORBIS' labor rates, to calculate the total evaluated cost/price of \$40,321,517, was reasonable and consistent with the solicitation requirements found in Section 2.6.3.2 of the solicitation." AR, Tab 4, Navy Response to ORBIS' Agency-Level Protest, at 10.

Contrary to the Navy's assertions, the RFP did not otherwise require the Navy to account for the variance between ORBIS' section B and its cost summaries in the assessment of the realism of ORBIS' cost/price proposal. Once the Navy adjusted ORBIS' direct labor rates to be realistic and computed the corresponding impact of these adjustments to the proposed indirect costs, subcontract costs, surge labor, and fee, there was no reason for the Navy to separately adjust ORBIS' proposed costs with the variance between ORBIS' section B and cost summaries. Simply put, since the Navy had already adjusted ORBIS' proposed costs, it was unreasonable for the Navy to include the variance as an additional and separate cost adjustment.

Competitive prejudice is an essential element of a viable protest, and we will sustain a protest only where the protester demonstrates that, but for the agency's improper actions, it would have had a substantial chance of receiving the award. Imagine One Tech. & Mgmt., Ltd., B-412860.4, B-412860.5, Dec. 9, 2016, 2016 CPD ¶ 360 at 12. The contracting officer considered the discriminators between the Craig Technologies and ORBIS technical proposals and concluded that the ORBIS "technical proposal did not warrant paying an evaluated cost premium of \$372,517 or 0.93% taking into consideration the additional risk associated with ORBIS' cost proposal." AR, Tab 12, Business Clearance Memorandum, at 236. Here, we think that, but for the error discussed above, the protester would have had a substantial chance for award. While we recognize that ORBIS' higher cost was not the only discriminator identified by the contracting officer when selecting Craig Technologies for award, the protester and awardee have equal overall technical ratings, and the correction of this error would result in ORBIS having an evaluated cost/price that is lower than that of the awardee. Under these circumstances, the contracting officer could conclude that the ORBIS proposal is the best value to the government. We therefore sustain the protest.

Other Cost Realism Adjustments

ORBIS also challenges the upward adjustments made to its direct labor rates, and argues that the agency failed to evaluate information included in its proposal that substantiates its lower proposed costs. Protest at 5-9. In particular, ORBIS challenges upward cost adjustments made for proposed personnel currently employed by ORBIS, and for whom current payroll information was included in its proposal to substantiate the proposed labor rates. Id.; see also Protester's Comments at 4-8. ORBIS further alleges that the agency's adjustments to ORBIS' cost proposal based on the use of BLS data, which it contends was included in the RFP for "general reference purposes" only, was an unstated evaluation criterion. Protest at 12-13; Comments at 9-12.

The Navy responds that it was reasonable to upwardly adjust ORBIS' labor rates, even for personnel for whom payroll information was provided, where the proposal failed to demonstrate that the personnel were currently performing in the same labor category that ORBIS proposed the personnel to perform under the task order. MOL at 11-16. The Navy states that when it determined that a proposed labor rate was unrealistically low, it upwardly adjusted the rate to the lowest rate reflected in the BLS data for that labor category because it represented the minimum rate the Navy could realistically expect to pay. Id. at 16-17. The agency argues that it was reasonable to use the BLS data to calculate the cost adjustments to ORBIS' proposal, and that ORBIS itself used the BLS data to propose labor rates for labor categories for the proposed personnel was to-be-determined (TBD). Id. at 16.

Here, the RFP included the provision at FAR § 52.222-46, Evaluation of Compensation for Professional Employees, which specifically advised offerors that "lowered compensation for essentially the same professional work may indicate lack of sound management judgment and lack of understanding of the requirement." RFP at 118. The RFP further advised offerors:

If proposed costs are considered to be unrealistic, the Offeror's proposed costs will be adjusted upward to reflect more realistic costs. Offerors are cautioned that to the extent proposed costs appear unrealistic[,] the Government may infer either a lack of understanding of the requirements, increased risk of performance, or lack of credibility on the part of the Offeror. The burden of proof for cost credibility rests with the Offeror.

Id. at 154. Further, the RFP included BLS data "for general reference purposes. . . [to provide] the government's best approximation of the BLS-defined Standard Occupational Classification (SOC) and approximate annual wage for each Labor Category." Id. at 33-36.

In its analysis of ORBIS' proposal, the Navy identified multiple labor categories for which there was a significant disparity between ORBIS' proposed labor rates and the minimum rate in the BLS data, for which "ORBIS did not provide sufficient information to demonstrate that the position associated with the payroll data provided was for the same labor category identified in the solicitation." AR, Tab 4, Navy Response to ORBIS' Agency-Level Protest, at 4-6. For example, for the labor category of Application Software Developer - Mid, ORBIS proposed a current employee at an hourly rate of \$[DELETED], and for the same position where the proposed personnel was "TBD," ORBIS proposed a rate of \$[DELETED]. AR, Tab 6.2, ORBIS Base Year Cost Summary, at 1. The BLS hourly rate range for that labor category was \$43.59 to \$53.28. AR, Tab 12, Business Clearance Memorandum, at 174. Although ORBIS provided payroll data that indicated its current employee was being paid at an hourly rate of \$[DELETED], nothing in the ORBIS proposal explained why it is realistic that ORBIS could pay such disparate salaries to personnel performing the same labor category. See AR, Tab 6.8, ORBIS Direct Rate Backup. Further, ORBIS failed to provide information showing that the current employee was actually performing in the

proposed labor category at that rate. Accordingly, the Navy adjusted the rates to \$43.59 for this labor category. AR, Tab 4, Navy Response to ORBIS' Agency-Level Protest, at 4.

We find that the Navy's cost adjustments to ORBIS' labor costs were proper. The record shows that although ORBIS provided payroll data to substantiate labor rates currently being paid to employees proposed to perform the task order, the protester failed to establish in its proposal the realism of its proposed labor rates. See AR, Tab 6.8, ORBIS Direct Rate Backup. We also find no merit to ORBIS argument that it was unreasonable for the Navy to use the BLS data to adjust its rates, since the RFP stated that the data reflected the government's best approximation of the annual wage for each labor category, and since the record shows that ORBIS used the BLS data when it did not propose a current employee or provide a commitment letter from a prospective hire to perform a particular labor category at a lower salary. RFP at 52; see also Protest at 5 ("ORBIS used the BLS rates to substantiate the rates proposed for all 'TBD' personnel."). Accordingly, these protest grounds are denied.

CONCLUSION AND RECOMMENDATION

In sum, we sustain ORBIS' protest because the Navy's inclusion of the variance between ORBIS' section B and cost summaries as an upward cost adjustment in its cost realism analysis was not reasonable. We recommend that the Navy reevaluate ORBIS' proposed costs consistent with the discussion above, and make a new selection decision. We also recommend that ORBIS be reimbursed its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). The protester's certified claims for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained in part, and denied in part.

Thomas H. Armstrong
General Counsel