



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: OGSystems, LLC

File: B-417026; B-417026.2; B-417026.3; B-417026.4

Date: January 22, 2019

Cameron Hamrick, Esq., C. Peter Dungan, Esq., Jason A. Blindauer, Esq., and Christopher S. Denny, Esq., Miles & Stockbridge P.C., for the protester.

Peter B. Ford, Esq., Julia Di Vito, Esq., Timothy F. Valley, Esq., and Meghan F. Leemon, Esq., Piliero Mazza PLLC, for Higgins, Hermansen, Banikas, LLC, the intervenor.

Kenneth W. Sachs, Esq., National Geospatial-Intelligence Agency, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of the awardee's technical proposal is sustained where the agency did not adequately document its basis for concluding that the risks assigned to the awardee's proposal were resolved and where the record does not support other aspects of the evaluation.
 2. Protest alleging that the awardee's proposal took exception to the requirement to propose a fixed price is denied where the assumptions set forth in the awardee's price proposal do not improperly condition its commitment to perform at a fixed price.
 3. Protest that the awardee engaged in an improper bait and switch scheme is denied where the record does not show that the awardee misrepresented its intention to provide personnel identified in its proposal.
 4. Protest challenging agency's the tradeoff decision is sustained where the agency did not adequately explain why it concluded that the awardee's lower-rated proposal would be able to provide the same level of benefits as the protester's higher-rated proposal.
-

DECISION

OGSystems, LLC (OGS), of Chantilly, Virginia, protests the issuance of a task order to Higgins, Hermansen, Banikas, LLC (HHB), of Springfield, Virginia, by the National Geospatial-Intelligence Agency (NGA), under fair opportunity proposal request (FOPR)

No. HM0476-18-D-0004, to support the agency's Security and Installation Office (SIO). The protester argues that the agency unreasonably evaluated the awardee's technical proposal, the awardee took exception to the requirement to propose a fixed price, the awardee engaged in an improper bait and switch scheme regarding its proposed personnel, and the award decision was unreasonable.

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

BACKGROUND

NGA issued the solicitation on July 6, 2018, to firms holding one of the agency's multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts, known as MOJAVE. Agency Report (AR), Tab A.1, FOPR Cover Letter, at 1; Tab A3.b, FOPR Amend. 1¹, at 1. The awardee will be required to provide support for day-to-day operations at NGA's East Campus in Springfield, Virginia; the awardee will also provide engineering and base operations support, strategic facilities planning, space management, project approval, project management, architectural and interior design, space data accountability, computer-aided facility management, and furniture implementation and management. AR, Tab A.4.b, Revised Performance Work Statement (PWS)², at 4-6. The solicitation anticipated the issuance of a fixed-price task order with a base period of 1 year and four 1-year options. FOPR at 5-6; PWS at 6. OGS is the incumbent for "much of the work" covered by the FOPR. Protest at 1; see Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 9.

The FOPR advised offerors³ that proposals would be evaluated on the basis of two factors: technical and price. FOPR at 8. The technical evaluation factor had three equally-weighted subfactors, which aligned to the three primary areas of support to be provided to the SIO: (1) east operations division support, (2) space and interiors division support, and (3) property division support. Id. For each subfactor, the agency advised that proposals must address the following areas for evaluation:

The Offeror shall propos[e] a detailed approach for accomplishing the scope of work as described in [the PWS sections relevant to each subfactor]. The Offeror shall describe the team organization, labor categories, and overall approach (Offerors may include past/current experience related to the PWS) to supporting [the relevant PWS section].

¹ All citations to the solicitation are to FOPR amendment 1.

² All citations to the PWS are to the amended version issued on September 18, 2018.

³ Although firms that compete for task orders under IDIQ contracts are generally referred to as "vendors," the record here uses the term "offerors." For the sake of consistency, we refer to the firms that competed for the award as offerors.

The Offeror shall use the attached Staffing Plan matrix template which will be used by the Government as part of the evaluation.

Id. For purposes of award, the technical factor was “significantly more important” than price. Id. at 1.

NGA received proposals from two offerors, OGS and HHB, by the initial closing date of August 6. AR, Tab J.1, Fair Opportunity Decision Document (FODD), at 1. As discussed below, the agency evaluated the offerors’ proposals and conducted interchanges⁴ with the offerors. Id. Based on the offerors’ first final proposal revisions (FPRs), the agency concluded that the PWS required amendment. Id. at 1-2. The agency issued the revised PWS to the offerors and requested second FPRs. Id. at 2. The agency’s evaluation of the offerors’ second FPRs was as follows:⁵

	OGS	HHB
TECHNICAL FACTOR	MAJOR BENEFIT	MINOR BENEFIT
Subfactor 1.1 East Operations Divisions Support		
Corporate Experience	Major Benefit	Minor Benefit
Team Organization	Major Benefit	Meets the Standard
Labor Categories	Major Benefit	Major Benefit
Overall Approach	Major Benefit	Minor Benefit
Subfactor 1.2 Space and Interior Division Support		
Corporate Experience	Major Benefit	Meets the Standard
Team Organization	Major Benefit	Minor Benefit
Labor Categories	Major Benefit	Major Benefit
Overall Approach	Major Benefit	Minor Benefit
Subfactor 1.3 Property Division Support		
Corporate Experience	Major Benefit	Meets the Standard
Team Organization	Major Benefit	Meets the Standard
Labor Categories	Major Benefit	Minor Benefit
Overall Approach	Major Benefit	Meets the Standard
PRICE	\$43,149,204	\$34,405,860

⁴ The agency referred to exchanges with offerors for the purpose of soliciting proposal revisions as “interchanges.” See FOPR at 7.

⁵ For the overall ratings and each element of the evaluation subfactors, the agency assigned one of the following ratings: significant benefit, major benefit, minor benefit, meets the standard, minor risk, major risk, or significant risk. AR, Tab J.1, FODD at 3-4.

Id. at 4-9.

The source selection authority (SSA) stated that she made an “independent and integrated assessment and comparison” of the technical evaluation team’s (TET’s) evaluations of each offeror’s proposal. Id. at 1. Based on these evaluations, the SSA concluded that “HHB’s proposal provides the best overall value to the Government, technical and price factors considered.” Id. at 10. The SSA acknowledged that OGS’s proposal offered “higher rated benefits [which] mostly resulted from their NGA specific expertise and experience working within NGA. . . .” Id. The SSA nonetheless concluded that “[t]he added value OGS systems would provide the Government in the early stages of the contract based on their experience is not worth the \$8,743,343.93 (20%) price premium over HHBs’ price.” Id.

NGA selected HHB’s proposal for award on September 28, and notified OGS of the award on the same day. The agency provided a debriefing to the protester, which closed on October 11. This protest followed.⁶

DISCUSSION

OGS raises the following four primary arguments: (1) the agency failed to adequately document and unreasonably evaluated the awardee’s technical proposal, (2) the awardee’s proposal took exception to material solicitation requirements, (3) the awardee engaged in an improper bait and switch scheme regarding its proposed personnel, and (4) the award decision was unreasonable. For the reasons discussed below, we sustain the first and fourth arguments, and deny the remaining arguments.⁷

In reviewing protests challenging an agency’s evaluation of proposals in a task order competition, our Office does not reevaluate proposals, but examines the record to determine whether the agency’s judgment was reasonable and in accordance with the

⁶ 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 awarded under the authority of Title 10 of the U.S. Code. 10 U.S.C. § 2304c(e)(1)(B).

⁷ OGS also raises other collateral arguments. Although we do not address every issue, we have reviewed them all and find no basis to sustain the protest apart from those issues specifically addressed herein. In addition, OGS’s initial protest argued that the agency should have identified additional benefits in its technical proposal and assigned it higher ratings. Protest at 17-28. Although NGA responded to these issues in the agency report, OGS did not address them in its comments on the agency report. See COS/MOL at 17-24. We therefore consider these issues abandoned and dismiss them. Bid Protest Regulations, 4 C.F.R. § 21.3(i)(3) (“GAO will dismiss any protest allegation or argument where the agency’s report responds to the allegation or argument, but the protester’s comments fail to address that response.”).

stated evaluation criteria and applicable procurement laws and regulations. Trandes Corp., B-411742 et al., Oct. 13, 2015, 2015 CPD ¶ 317 at 6. A vendor's disagreement with the agency's judgment, without more, is insufficient to establish that the agency acted unreasonably. STG, Inc., B-405101.3 et al., Jan. 12, 2012, 2012 CPD ¶ 48 at 7. While we will not substitute our judgment for that of the agency, we will question the agency's conclusions where they are inconsistent with the solicitation criteria and applicable procurement statutes and regulations, undocumented, or not reasonably based. MicroTechnologies, LLC, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 4-5.

In reviewing an agency's evaluation, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties' arguments and explanations concerning the contemporaneous record. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 10. 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 the reasonableness of evaluation decisions--provided those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16. Where an agency offers an explanation of its evaluation during the heat of litigation that is not borne out by the contemporaneous record, however, we generally give little weight to the later explanation. Al Raha Grp. for Tech. Servs., Inc.; Logistics Mgmt. Int'l, Inc., B-411015.2, B-411015.3, Apr. 22, 2015, 2015 CPD ¶ 134 at 10.

Evaluation of HHB's Technical Proposal

OGS argues that neither the contemporaneous record nor NGA's response to the protest explains the agency's basis for finding that the awardee's second FPR resolved numerous risks assigned to its initial proposal. The protester also challenges the reasonableness of two specific aspects of the agency's evaluation of the awardee's proposal. For the reasons discussed below, we agree with the protester.

Inadequate Documentation of FPR Evaluation

NGA assigned HHB's initial technical proposal the following risks: for subfactor 1.1, East operations divisions support, the agency identified two major risks; for subfactor 1.2, space and interior division support, the agency identified two major risks and a minor risk; and for subfactor 1.3, property division support, the agency identified two major risks and one significant risk. AR, Tab H.1, HHB Initial Technical Evaluation, at 1-5. On September 7, the agency conducted oral interchanges with the protester and intervenor and requested first FPRs. COS/MOL at 9. On September 12, HHB submitted revised technical and price proposals; OGS submitted a revised price proposal. After the evaluation of the revised proposals, the agency concluded that the PWS required revision based on the following concerns regarding HHB's understanding of the scope of the work:

One Offeror, HHB, included assumptions in their Basis of Estimate (BOE) which NGA found to be erroneous due to NGA's inadequate description of the tasks involved to accomplish the work. NGA determined that a non-incumbent Offeror would not have knowledge of specific information needed to base their assumptions on to build their BOE. Therefore, NGA revised the PWS to more clearly define the tasks that encompass the requirements in order to ensure a fair competition.

AR, Tab J.1, FODD, at 1-2.

In its response to the protest, the agency further explains that "two areas in the PWS lacked sufficient detail regarding the tasks involved in performing the work," and therefore "[i]t was evident that HHB had made several assumptions where OGS--the incumbent having superior, detailed knowledge of the specific tasks associated with accomplishing the PWS--did not." COS/MOL at 9. Specifically, the agency "concluded that, as written, a non-incumbent could not have reasonably understood the need for furniture installers." Id. at 10. The agency states, however, that "[t]he revised PWS did include additional tasks; however, the revisions were all provided to clarify and expound on existing tasks, and did not add to the scope of the PWS." Id.

NGA issued the final revised version of the PWS on September 18 and requested second FPRs from offerors. AR, Tab G.3, Request to HHB for Second FPR, Sept. 18, 2018; Tab G.7, Request to OGS for Second FPR, Sept. 18, 2018. On September 24, HHB submitted revised technical and price proposals. AR, Tabs F.1-F.9, HHB 2d FPR. OGS advised that it would not submit any proposal revisions. AR, Tab C.3, Email from OGS to NGA, Sept. 21, 2018. The agency's evaluation of HHB's second FPR did not address any of the risks assigned to the awardee's initial proposal or how they were resolved. See AR, Tab H.3, Revised HHB Technical Evaluation, at 1-4.

NGA does not contend that the contemporaneous evaluation specifically explained how the agency concluded that the awardee's second FPR resolved the risks assigned to its initial proposal. See Supp. COS/MOL, Dec. 11, 2018, at 3-5. The agency nonetheless states that it considered all of the risks to have been addressed by the awardee's second FPR based on two considerations: (1) revisions to the awardee's proposal in the second FPR, and (2) the agency's revised understanding of the terms "risk" and "benefit," as used in the FOPR. See id. at 3.

With regard to the revisions in HHB's second FPR, the agency states that the awardee increased the number of hours and full-time equivalent personnel (FTEs). COS/MOL at 15-16. The agency's explanation of its evaluation of the awardee's second FPR relies primarily on the following statement by the TET lead, who states as follows:

As for HHB, the TET evaluated HHB's revised proposal and determined that the revised technical approach met all PWS requirements and was in accord with the historical staffing levels (39 FTEs) referenced in the PWS.

Therefore, the TET had confidence that HHB's final FPR proposed a sufficient level of effort and appropriate skill mix to successfully accomplish the full scope of work.

AR, Tab M.1, Decl. of TET Lead, Nov. 19, 2018, at 3-4.

With regard to the agency's changed understanding of the FOPR, the agency explains that, following the evaluation of the offerors' first FPRs, the agency revised its understanding of the terms "risk" and "benefit." COS/MOL at 12; Supp. COS/MOL, Dec. 11, 2018, at 2-3. The TET lead explains the agency's "broadened" view of risks and benefits, as follows:

[T]he TET broadened their view of benefits and risks when assessing the scope of the proposal. When the team made this modification to what would qualify for a higher rating under the evaluation factors, it applied this standard consistently to both proposals. As a result, both proposals' final rating improved to the rating assigned in post-Amendment 2 [evaluations].

AR, Tab M.1, Decl. of TET Lead, Nov. 19, 2018, at 4.

OGS argues that NGA's evaluation was not reasonable because the contemporaneous record does not address either the revisions to HHB's proposal or the agency's change in its understanding of the terms risk and benefit. The protester also argues that the agency's response to the protest does not reasonably explain the basis for resolving the risks assigned to the awardee's initial proposal. We agree.

To the extent the agency states that the resolution of the risks assigned to HHB's initial proposal was based on revisions to the awardee's proposal and the agency's revised understanding of the FOPR, the agency's general explanations in response to the protest do not provide any meaningful detail concerning these matters. In this regard, the agency does not explain which risks, or which aspects of the risks, were resolved by revisions to HHB's proposal and which were resolved based on the revised understanding of the FOPR. Additionally, the agency does not explain how its understanding of the FOPR changed or how that change affected the resolution of the risks assigned to HHB's proposal.⁸ Specially, the agency does not provide any basis for

⁸ As a related matter, OGS also argues that the agency improperly changed the definitions of the terms "benefit" and "risk" during its evaluation of proposals. The fact that an agency changes its interpretation of a term or definitions in a solicitation does not provide an independent basis to sustain the protest--provided the final interpretation is reasonable, consistent with terms of the solicitation, and adequately documented. See Trandes Corp., *supra*; MicroTechnologies, LLC, *supra*; Systems Plus, Inc., B-415559, B-415559.2, Jan. 12, 2018, 2018 CPD ¶ 27 at 5 (agencies not prohibited from revisiting or revising evaluations). Thus, while we agree with the protester that the agency did not reasonably document its basis for concluding that the awardee's second

(continued...)

understanding whether its broadened interpretation was reasonable, as the agency does not explain either its initial definition of a risk or its “broadened” view.

On this record, we agree with OGS that the contemporaneous record does not explain how the risks assigned to HHB’s initial proposal were resolved. We also agree that the agency’s response to the protest, including the declaration of the TET lead, does not specifically explain how the agency concluded how the risks were resolved. We therefore sustain this argument. See IBM Global Bus. Serv.--U.S. Fed., B-409029, B-409029.2, Jan. 27, 2014, 2014 CPD ¶ 43 at 4 (where an agency fails to adequately document its evaluation, our Office cannot determine whether the agency’s evaluation was reasonable).

Evaluation under Subfactors 1.2 and 1.3

Next, OGS challenges the evaluation of HHB’s proposal under technical evaluation subfactors 1.2, space and interior division support, and 1.3, property division support. With regard to NGA’s evaluation of HHB’s initial proposal for technical subfactor 1.2, the agency found that the awardee’s approach to performing the tasks in PWS section 5.3, support to space and interiors division, was “more than slightly below expectations and will likely result in major risk to the NGA customer/mission.” AR, Tab H.1, Initial HHB Technical Evaluation, at 3. The agency noted that the awardee’s proposal “included a very brief organization plan without specific details regarding the structure of how the team will be organized.” Id. The agency further stated that “[g]iven the large number of FTE support personnel and lack of details on how the team will be organized, the Government is unable to determine how the Offeror will specifically organize the team to effectively perform the tasks within PWS Section 5.3.” Id.

The agency’s evaluation of the awardee’s second FPR did not explain the basis for concluding that this major weakness had been resolved. Instead, the agency assigned a minor benefit rating to the proposal under the team organization element of subfactor 1.2 based on the following finding: “The Offeror proposed a detailed organization chart with specific PWS tasks aligned to specific labor categories, and a detailed skills matrix to successfully perform the PWS tasks. The Offeror’s deep understanding of how to structure PWS tasks to labor categories exceeds the Government’s expectation.” AR, Tab H.3, Final HHB Technical Evaluation, at 3.

In response to the protester’s argument that the agency failed to explain the basis for finding the major weakness resolved and that the agency lacked a reasonable basis for

(...continued)

FPR resolved the risks assigned to its initial proposal--due in part to the agency’s changed interpretation of the evaluation ratings identified in the solicitation--we find no basis to conclude that the agency was precluded from changing its interpretation of the general definitions set forth in the solicitation or revising its evaluation of HHB’s proposal.

assigning a minor benefit rating, the agency states that the awardee's proposal "included both a revised chart and further detail regarding how it would manage the various work requirements contained in PWS Section 5.3." Supp. COS/MOL, Dec. 11, 2018, at 10-11. As the protester notes, however, the awardee's revised organizational chart failed to address the PWS requirement to address furniture installation--which was a specific task added to the PWS based on the agency's concern that HHB did not understand the scope of the requirements. See COS/MOL at 9-10; AR, Tab F.3, HHB 2d FPR Technical Proposal, at 3.

The agency acknowledges that the awardee's revised organizational chart did not address furniture installation. See Supp. COS/MOL, Dec. 11, 2018, at 11. The agency contends, however, that other parts of the awardee's proposal addressed this requirement and were considered by the agency in its evaluation. Id. Specifically, the agency states that in a different part of the awardee's proposal, the staffing matrix, [DELETED] proposed personnel "were both shown to have furniture installation experience." Id. (citing AR, Tab F.4, HHB 2d FPR, Staffing Matrix).

The protester contends that the agency's explanation was not reasonable because the minor benefit assigned to the awardee's proposal specifically addressed its "detailed organization chart with specific PWS tasks aligned to specific labor categories," rather than information found elsewhere in the proposal. AR, Tab H.3, Final HHB Technical Evaluation, at 3. In any event, the protester notes that the awardee's staffing matrix does not detail the tasks that these [DELETED] individuals would perform. See AR, Tab F.4, HHB 2d FPR, Staffing Matrix. Thus, even if the [DELETED] individuals identified by the agency in its response to the protest have furniture installation experience, the agency does not explain why it found that the awardee proposed those individuals to perform those tasks, as opposed to other tasks associated with their stated experience.

With regard to NGA's evaluation of HHB's initial proposal for technical subfactor 1.3, property division support, the agency found that the awardee's approach to performing the tasks in PWS section 5.4, support to property division, was "more than slightly below expectations and will likely result in major risk to the NGA customer/mission." AR, Tab H.1, Initial HHB Technical Evaluation, at 4. The agency noted that the awardee's proposal did not propose an adequate number of hours for the assigned FTEs to perform the work required in PWS section 5.4. Id. The agency further stated that "[t]he Offeror does not provide any details on the proposed transition or explain how they will accomplish the full scope of all the tasks within PWS Section 5.4 in the first month of performance with only [DELETED] hours for [DELETED] of the FTEs and [DELETED] hours for the remaining [DELETED] FTEs." Id. at 5.

The agency's evaluation of the awardee's second FPR did not explain the basis for concluding that this major weakness had been resolved; instead, the evaluation stated: "The Offeror's approach meets the standard. The Offeror provided a sufficient overall approach to accomplishing the task in PWS Section 5.4." AR, Tab H.3, Revised HHB Technical Evaluation, at 4. In response to the protester's argument that the agency

failed to explain the basis for finding the major weakness resolved, the agency states that the awardee's second FPR increased the number of hours assigned to perform the PWS section 5.4 requirements. The agency states that this increase "spoke for itself" and therefore resolved the agency's concern:

In HHB's post-amendment 2 FPR, HHB resolved this concern by increasing the number of hours for the base year of performance for staff associated with PWS Section 5.4 to [DELETED] hours. Tab F.4, HHB 2d FPR Volume 2- Staffing Matrix. As such, the concern noted by the TET in HHB's initial [consensus evaluation report] was resolved through a revision of the post- Amendment 2 FPR Staffing Matrix, submitted with the final proposal. Viewing the issue with lack of hours as resolved, there was no need for a detailed explanation regarding how HHB would accomplish all tasks within PWS Section 5.4: the proposal, and the hours proposed, spoke for itself. Therefore, the TET reasonably determined that HHB's final proposal represented no risk, as opposed to the 'Major Risk' identified in the initial [evaluation].

Supp. COS/MOL, Dec. 11, 2018, at 9 (emphasis added).

The protester argues that the agency's claimed basis for finding the major weakness resolved is inconsistent with the solicitation requirements, which expressly required offerors to "propose a detailed approach for accomplishing the scope of work as described in the PWS Section 5.4," including "team organization, labor categories, and overall approach." FOPR at 8. In contrast to these requirements, as noted above, the agency's evaluation of HHB's initial proposal found that it "[did] not provide any details on the proposed transition or explain how [HHB] will accomplish the full scope of all the tasks . . ." at the level of staffing proposed. AR, Tab H.1, Initial HHB Technical Evaluation, at 5. We agree with the protester that the agency's explanation--that the awardee's increased staffing was sufficient to address the agency's concern for this subfactor and that detailed explanations were not required--is not consistent with the FOPR's evaluation criteria, and effectively abandoned the stated requirement to provide a detailed approach to performing the work.

On this record, we agree with the protester that the agency does not provide a reasonable explanation for concluding that the major risk assigned in connection with technical evaluation subfactor 1.3, property division support, was resolved, or reasonably explain why the agency assigned the awardee's proposal a minor benefit rating under subfactor 1.2, space and interior division support. In sum, we conclude that the agency's evaluation of the awardee's technical proposal was neither adequately documented nor reasonable. We therefore sustain the protest.

HHB's Exception to Fixed-Price Requirement

Next, OGS argues that HHB's proposal improperly took exception to the FOPR's requirement to propose a fixed price. For the reasons discussed below, we find no basis to sustain the protest.

A proposal that takes exception to a solicitation's material terms and conditions is unacceptable and may not form the basis for an award. Solers, Inc., B-404032.3, B-404032.4, Apr. 6, 2011, 2011 CPD ¶ 83 at 4. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. Concurrent Techs. Corp., B-415513, B-415513.2, Jan. 18, 2018, 2018 CPD ¶ 59 at 11. The requirement to propose fixed prices is a material term or condition of a solicitation requiring such pricing. Marine Pollution Control Corp., B-270172, Feb. 13, 1996, 96-1 CPD ¶ 73 at 2-3. Where a solicitation requests proposals on a fixed-price basis, a price offer that is conditional and not firm cannot be considered for award. Id.; SunEdison, LLC, B-298583, B-298583.2, Oct. 30, 2006, 2006 CPD ¶ 168 at 5. For example, conditioning a fixed price on future negotiations constitutes an exception to the requirement to propose a fixed price. Solers, Inc., supra, at 6-7. Additionally, our Office has found that an ambiguity in a proposal as to whether an offeror will comply with a solicitation requirement to propose a fixed price renders the proposal unacceptable. Id. at 7 n.6; Rel-Tek Sys. & Design, Inc., B-280463.3, Nov. 25, 1998, 99-1 CPD ¶ 2 at 3.

Here, OGS contends that HHB's proposal contained pricing assumptions which reflect improper conditions or qualifications on the awardee's proposed price. Specifically, the protester notes that each version of the awardee's proposal contained the following assumptions:

Pricing Assump[t]ions

- 1 FIRM FIXED PRICE CONTRACT to be Awarded for services rendered per PWS.
- 2 Pricing template and BOEs provide basis for [fixed-price] proposal, however invoices and payment are not based on hours delivered
- 3 Invoices will be submitted monthly by the contractor within 15 days of the end of each month.
- 4 Staffing reports and Quality Assurance Performance Measurements will also be submitted with invoices.
- 5 Invoices, if full staffing is in place ([DELETED]% of planned staff) will be for the monthly portion of the annual price of the contracts. For example if Base Year is \$12 [million], the month[ly] invoices will be for \$1 [million] due to the services and fixed fee proposals[]

6 If full staffing is not in place, invoices will be adjusted accordingly to reflect the % of staffing, by labor category and FTE.

Because the contract and the [task order] do[] not reflect payment options, the above assumptions are [a] negotiations baseline to be worked out between the HHB Systems and the Government at award.

AR, Tab D.20, HHB Initial Pricing Template, Pricing Assumptions; Tab E.6, HHB 1st FPR Pricing Template, Pricing Assumptions; Tab F.7, HHB 2d FPR Pricing Template, Pricing Assumptions (emphasis added).

OGS argues that the proposal language characterizing the assumptions as a “negotiations baseline” to be resolved after award between the awardee and the agency demonstrates that HHB took exception to the requirement to propose a fixed price. In this regard, the protester contends that the awardee “proposed a price that it considered subject to renegotiation and that was dependent on unknown events.” Protester’s Comments & 3d Supp. Protest, Nov. 29, 2018, at 20-21.

NGA argues that the pricing assumptions were “merely a suggestion that HHB’s invoices may vary month-to-month until the [fixed-price] amount is reached.” Supp. COS/MOL at 13. In this regard, the agency notes that assumption No. 6 “is the only assumption that could result in a change in invoicing amounts,” but argues that it does not affect the overall price ceiling established by the proposal. Id. Instead, the agency explains that the proposal states that “if full staffing is not in place—a common possibility for any contract involving services—then invoices will be reduced.” Id. at 14.

We agree with agency that HHB’s pricing assumptions are reasonably understood to anticipate invoicing based on even monthly payments of a fixed-price, but will be subject to decrement in the event the awardee does not provide full staffing. See AR, Tab D.20, HHB Initial Pricing Template, Pricing Assumptions; Tab E.6, HHB 1st FPR Pricing Template, Pricing Assumptions; Tab F.7, HHB 2d FPR Pricing Template, Pricing Assumptions. The provision regarding a “negotiations baseline to be worked out” after award is therefore reasonably understood to relate to the context of the six enumerated assumptions, i.e., the monthly payments and potential for a decrement of a given monthly invoice. See id. We further agree with the agency that nothing in the assumptions takes exception to the requirement to propose a fixed price, nor do the assumptions condition performance at a fixed price on terms inconsistent with the terms of the solicitation. Cf. Solers, Inc., supra at 6-7 (sustaining protest where proposal took exception to the requirement to propose a fixed price by conditioning its price on the agency’s provision of additional government resources). We therefore find no basis to sustain the protest in connection with HHB’s pricing assumptions.⁹

⁹ OGS also argues that HHB’s price assumptions raise the possibility that the awardee will not provide full staffing. Protester’s Comments and 3d Supp. Protest, Nov. 29,

(continued...)

HHB's Bait and Switch

Next, OGS argues that HHB's proposal contained material misrepresentations regarding the availability of its proposed personnel. The protester contends that the awardee proposed individuals that it did not intend to provide during performance of the task order, and that the agency relied upon these misrepresentations in its evaluation of the proposal. For the reasons discussed below, we find no basis to sustain the protest.

The issue of whether personnel identified in an offeror's proposal, in fact, perform under the subsequently-awarded contract is generally a matter of contract administration that our Office does not review. See 4 C.F.R. § 21.5(a); Patricio Enters. Inc., B-412738, B-412738.2, May 26, 2016, 2016 CPD ¶ 145 at 4-5. As our Office has explained, it is neither unusual nor inherently improper for an awardee to recruit and hire personnel previously employed by an incumbent contractor. Invertix Corp., B-411329.2, July 8, 2015, 2015 CPD ¶ 197 at 6. Nonetheless, our Office will consider allegations that an offeror proposed personnel that it did not intend to provide or did not have a reasonable basis to expect to provide during contract performance, in order to obtain a more favorable evaluation, as such a material misrepresentation has an adverse effect on the integrity of the competitive procurement system. Ryan Assocs., Inc., B-274194 et al., Nov. 26, 1996, 97-1 CPD ¶ 2 at 6.

Our decisions frequently refer to such circumstances as a "bait and switch." Id. In order to establish an impermissible "bait and switch," a protester must show: (1) that the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance, (2) that the misrepresentation was relied on by the agency, and (3) that the agency's reliance on the misrepresentation had a material effect on the evaluation results. Patricio Enters., supra, at 4; CACI Techs., Inc., B-408858, B-408858.2, Dec. 5,

(...continued)

2018, at 22. In this regard, the assumptions provide for an adjustment to an invoice "[i]f full staffing is not in place." AR, Tab D.20, HHB Initial Pricing Template, Pricing Assumptions; Tab E.6, HHB 1st FPR Pricing Template, Pricing Assumptions; Tab F.7, HHB 2d FPR Pricing Template, Pricing Assumptions. The protester argues, therefore, that the agency should have assigned risk or found the awardee's proposal unacceptable based on this provision. Nothing in the pricing assumptions, however, takes exception to the awardee's obligation to meet the FOPR requirements, nor do the assumptions state that the awardee will not be able to perform the task order as proposed. Instead, the assumptions address the manner in which billing would be conducted in the event the awardee fails to provide its proposed level of staffing. See id. Any failure by the awardee to perform the contract would be a matter of contract administration that our Office does not review as part of our bid protest function. See 4 C.F.R. § 21.5(a). We therefore find no basis to sustain the protest based on this argument.

2013, 2013 CPD ¶ 283 at 5; ACS Gov't Servs., Inc., B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 3, 10.

Here, the protester submitted declarations from three OGS employees, each of whom works on the contract performed by the protester for NGA (that is characterized by the parties as the incumbent contract). Decl. of OGS Employee 1, Oct. 24, 2018, at 1; Decl. of OGS Employee 2, Oct. 25, 2018, at 1-2; Decl. of OGS Employee 3, Oct. 25, 2018, at 1-2.¹⁰ Each declaration states that the OGS employee was contacted by a recruiter for Jacobs Engineering Group, which was proposed as a subcontractor to HHB. Id. In addition, the second and third declaration state that the employees were contacted by a representative of The Boeing Corporation, which was also proposed as a subcontractor to HHB. Decl. of OGS Employee 2, Oct. 25, 2018, at 1-2; Decl. of OGS Employee 3, Oct. 25, 2018, at 1-2.

The declarations state that the three OGS employees understood, based on conversations with or messages left by the recruiter for Jacobs and representative from Boeing, that HHB and its subcontractors were seeking to hire incumbent staff. Decl. of OGS Employee 1, Oct. 24, 2018, at 1; Decl. of OGS Employee 2, Oct. 25, 2018, at 1; Decl. of OGS Employee 3, Oct. 25, 2018, at 1. One declaration states Jacobs “[w]as looking to hire the existing personnel that were already onsite, meaning the incumbents from the team headed by OGS working on the current contract . . . , versus what HHB and Jacobs had proposed. . . .” Decl. of OGS Employee 1, Oct. 24, 2018, at 1.

NGA advises that, in essence, it has no basis to confirm or dispute the factual allegations in the declarations submitted by the protester. See COS/MOL at 35. The agency and intervenor argue, however, that the alleged facts--even if true--do not meet the standard for finding an impermissible bait and switch scheme. We agree.

As discussed above, a protester must demonstrate that the awardee either knowingly or negligently represented that it would rely on specific personnel that it did not have a reasonable basis to expect to furnish during contract performance. Patricio Enters., supra, at 4; CACI Techs., Inc., supra at 5. OGS’s declarations concern alleged statements by a recruiter for Jacobs and a representative of Boeing, and represent that these two individuals stated a desire to hire the protester’s incumbent staff to perform on the awarded task order. These declarations, however, do not address, or claim to address, the knowledge or intentions of HHB in connection with the preparation of its proposal.¹¹

¹⁰ The declarations are listed in the order provided as an attachment to OGS’s second supplemental protest.

¹¹ HHB also argues that the declarations should not be given weight because they constitute “double hearsay,” in that they are statements by OGS employees about statements by a Jacobs recruiter and Boeing representative, for the purpose of establishing HHB’s intent in preparing its proposal. Intervenor’s Comments, Nov. 29, 2018, at 23. Because we find that the declarations on their faces do not set forth facts

(continued...)

There is no allegation that HHB knew or should have known that personnel identified in its proposal were not available or that the awardee did not intend to provide these individuals during performance of the task order. Instead, at most, these declarations show the intent, sometime after award, to recruit incumbent personnel to work on the task order. For these reasons, we conclude that the protester's allegations fail to demonstrate that the awardee engaged in an improper bait and switch scheme. See Dorado Servs., Inc., B-408075, June 14, 2013, 2013 CPD ¶ 161 at 9-10 (solicitation of incumbent personnel, alone, does not demonstrate that the awardee intended to replace its proposed personnel). We therefore find no basis to sustain this argument.

Tradeoff and Award Decision

Next, OGS argues that NGA's award decision was flawed because it was based on the unreasonable evaluation of HHB's technical proposal, and because the tradeoff decision did not reasonably explain the basis for selecting HHB's lower-rated, lower-priced proposal. For the reasons discussed below, we agree with the protester.

Generally, in a negotiated procurement--including task order competitions under IDIQ contracts--an agency may properly select a lower-rated, lower-priced quotation where it reasonably concludes that the price premium involved in selecting a higher-rated quotation is not justified in light of the acceptable level of technical competence available at a lower price. NOVA Corp., B-408046, B-408046.2, June 4, 2013, 2013 CPD ¶ 127 at 5-6. While an agency has broad discretion in making a tradeoff between price and non-price factors, an award decision in favor of a lower-rated, lower-priced proposal must acknowledge and document any significant advantages of the higher-priced, higher-rated quotation, and explain why they are not worth the price premium. Id. A protester's disagreement with the agency's determination, without more, does not establish that the evaluation or source selection was unreasonable. Id.

As discussed above, we conclude that NGA's evaluation of HHB's second FPR was neither reasonable nor adequately documented. Because we cannot find that the agency's evaluation was reasonable, we necessarily conclude that the award decision based on that evaluation was not reasonable. See AT&T Gov't Solutions, Inc., B-413012, B-413012.2, July 28, 2016, 2016 CPD ¶ 237 at 28 (protest sustained where unreasonable evaluation of proposals rendered the award decision unreasonable). We therefore sustain the protest.

Next, we agree with OGS that the award decision does not reasonably explain why the agency selected HHB's lower-technically rated, lower-priced proposal for award. The solicitation advised offerors that the technical evaluation factor was "significantly more

(...continued)

to support a bait and switch scheme, we need not resolve the appropriate weight to be accorded to them.

important” than price. FOPR at 7. HHB’s proposed price was \$34.4 million and OGS’s proposed price was \$43.1 million. AR, Tab J.1, FODD, at 9. NGA assigned HHB’s technical proposal an overall minor benefit rating, based on five meets the standard ratings, five minor benefit ratings, and two major benefit ratings. Id. at 4-6. The agency assigned OGS’s technical proposal an overall major benefit rating, based on 12 major benefit ratings. Id. at 6-9. The SSA recognized that OGS’s proposal offered higher-rated benefits, as compared to HHB’s proposal. Id. at 10. For these reasons, the agency’s selection decision was obligated to explain why OGS’s higher-rated proposal was not worth a price premium as compared to HHB’s lower-rated proposal. See DynCorp Int’l, LLC, B-412451, B-412451.2, Feb 16, 2016, 2016 CPD ¶ 75 at 22; Protection Strategies, Inc., B-414648.2, B-414648.3, Nov. 20, 2017, 2017 CPD ¶ 365 at 13.

In the tradeoff analysis, the SSA found that “[b]oth OGSystems and HHB have major benefits in areas that will have an enduring benefit to the Government over the life of the contract.” AR, Tab J.1, FODD, at 10. The SSA also stated that the superior benefits of OGS’s technical proposal “mostly resulted from their NGA specific expertise and experience working within NGA, however, HHB has the foundational knowledge to be successful and will overcome a learning curve in the early stages of the contract.” Id. The SSA therefore concluded that “[t]he added value OGSystems would provide the Government in the early stages of the contract based on their experience is not worth the \$8,743,343.93 (20%) price premium over HHBs’ price.” Id.

OGS argues that the award decision does not explain why the benefits in its proposal are limited to “the early stages of the contract,” and are therefore not worth a price premium. In this regard, the agency’s evaluation of the protester’s proposal cites major benefits in each evaluation subfactor such as the offeror’s experience; its organizational chart, “reach back” partners and staffing surge capabilities; its detailed and extensive approach for successfully executing PWS tasks; and its understanding of the PWS and the agency’s requirements. Id. at 7-10. We agree with the protester that the award decision, however, does not explain why these benefits will not be provided over the life of the contract. Moreover, the protester notes that the discounting of the benefits of OGS’s proposal as being limited to the early stages of performance is inconsistent with the FODD’s statement that OGS and HHB’s proposal offer major benefits “that will have an enduring benefit to the Government over the life of the contract.” Id. at 10.

In response to OGS’s argument NGA explains, in essence, that the benefits from the protester’s proposal stem from its incumbent status, and that the agency believed that the awardee would be able to achieve similar levels of performance after overcoming a “learning curve.” COS/MOL at 30-31. In this regard, the agency states that the SSA “perceived that HHB’s benefit to the government would increase as HHB’s staff gained experience working on the contract.” Id. at 31. In support of this view, the SSA submitted a declaration which provides what she characterizes as additional details regarding the basis for the tradeoff. Specifically, the SSA states in her declaration that, although the protester’s proposal had numerous evaluated benefits, she had “confidence” that the awardee would also provide the same level of benefits, as follows:

Examples of OGSystems' benefits noted in the FODD include their proposal to provide "an extensive step-by-step process for [DELETED] (FODD para. 4.3.1.4) and proposal to use a [DELETED] that exceeds PWS tasks (FODD para. 4.3.2.4). Further, OGSystems proposes to expand the use of the [DELETED] system of record for the accountability of all Agency Property, Plant, and Equipment (FODD para. 4.3.3.4). While these would be major benefits to NGA, HHB demonstrated knowledge of similar processes and procedures by way of their experience working in the federal government (FODD para. 4.2.1.1) which gave me assured confidence in their ability to rise to the same level of benefit within the early part of the contract at a much lower price.

AR, Tab M.2, Decl. of SSA, Nov. 19, 2018, at 2 (emphasis added).

The contemporaneous record and NGA's response to the protest show that the agency discounted the evaluated advantages identified in OGS's proposal based on the assumption that the awardee would be able to provide similar performance, at some point after "the early stages" of performance. See AR, Tab J.1, FODD, at 10. Implicit in this assumption is that the protester's proposal provides benefits which will not be of comparative value because the awardee will be able to improve its performance over time. The agency argues that this assumption was appropriate because it takes into account "the period in any contract transition where the incoming non-incumbent contractor needs to learn about specific processes and program-specific requirements." COS/MOL at 30. The agency's tradeoff decision, therefore, was based on this discounted value of the protester's technical proposal.

We agree with the protester that the award decision and the agency's response to the protest do not reasonably explain why the agency believed it was appropriate to discount the benefits in the awardee's proposal. As discussed above, the agency's contemporaneous evaluation identified specific advantages in the protester's proposal. Neither the contemporaneous award decision nor the SSA's declaration, however, explains why the SSA believed that the awardee's proposed approach would allow it to "rise to same level of benefit [as the protester's] within the early part of the contract." AR, Tab M.2, Decl. of SSA, Nov. 19, 2018, at 2. In this regard, the declaration does not cite any specific aspect of the awardee's proposal that would ensure the same level of benefit as compared to the protester's proposal, aside from general references to the awardee's "knowledge of similar processes," "experience working in the federal government," and a "sufficient" understanding of the requirements. Id. at 2-3. In the absence of any meaningful detail supporting this assertion in the record, we find no basis to conclude that the SSA's declaration is reasonable or demonstrates that the award was reasonable.

In sum, we find nothing in the record or the agency's response to the protest which reasonably explains why the agency concluded that the evaluated advantages in OGS's proposal were of limited value based on the agency's assumption that the awardee

would provide similar benefits during the course of performance. Where an agency states in a tradeoff decision that an evaluated benefit is less significant for a specific reason, and therefore does not merit a price premium, the agency must explain the basis for this rationale. See Protection Strategies, supra, at 15 (the discounting of evaluated strengths for the protester's proposal because they were based on incumbency advantage was not supported by the record or otherwise reasonable). We therefore conclude that neither the contemporaneous record nor the agency's response to the protest reasonably explains the basis for selection of HHB's proposal for award, and sustain the protest.¹²

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we conclude that NGA's evaluation of HHB's technical proposal was neither reasonable nor adequately documented, and that the agency's award decision was unreasonable because it relies on the flawed technical evaluation and failed to reasonably explain why the agency selected HHB's lower-rated, lower-priced proposal for award. We also conclude that OGS was prejudiced by the evaluation and award decision. Competitive prejudice is an essential element of a viable protest, and we will only sustain a protest where the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. DRS ICAS, LLC, B-401852.4, B-401852.5, Sept. 8, 2010, 2010 CPD ¶ 261 at 21. Here, a revised evaluation and tradeoff decision could result in an award to OGS.

We recommend that the agency conduct a new evaluation of HHB's technical proposal and adequately document the basis for the evaluation, and make and adequately document a new award decision. We also recommend that the agency reimburse the protester's reasonable costs associated with filing and pursuing its challenges to the evaluation of the awardee's technical proposal and the tradeoff decision, including attorneys' fees. 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing

¹² OGS also argues that there was insufficient time for the agency to evaluate the offerors second FPR and make a reasonable award decision. In support of its argument, the protester notes that the final evaluation was completed and award was made on September 28, 4 days after the submission of HHB's second FPR. See AR, Tab G.3, Request to HHB for Second FPR, Sept. 18, 2018; Tab J.1, FODD, at 11. Although agencies' evaluations and award decisions must be reasonable, the protester does not cite any procurement law or regulation which requires a minimum period of time to complete an evaluation or to make an award decision. Thus, although we conclude that the record here shows that the agency's evaluations and tradeoff decision do not support award to HHB, we find no basis to conclude that the award was unreasonable because it was made 4 days after the submission of the awardee's second FPR.

the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. Id. § 21.8(f).

The protest is sustained in part and denied in part.

Thomas H. Armstrong
General Counsel