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# Decision

**Matter of:** ARES Technical Services Corporation

**File:** B-415081.5

**Date:** November 4, 2019

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## DIGEST

Protest challenging agency's evaluation of proposals, and arguing that awardee's proposal should have been rejected for failing to comply with proposal preparation instructions, is denied where record shows that agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations, and there was no basis for the agency to reject the awardee's proposal.

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## DECISION

ARES Technical Services Corporation, of Greenbelt, Maryland, protests the award of a contract to Millennium Engineering and Integration Company (MEI) of Arlington, Virginia, under request for proposals (RFP) No. NNG16547352R, issued by the National Aeronautics and Space Administration (NASA) for safety and mission assurance services to be performed at the agency's Goddard Space Flight Center.<sup>1</sup> ARES argues that the agency miscalculated proposals, engaged in unequal discussions, and made an unreasonable source selection decision.

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<sup>1</sup> The contract to be awarded under the current solicitation is called the safety and mission assurance services contract, which is a follow-on to a previous contract for these same services; throughout the record, the protested contract is referred to by the parties as the SMAS II contract.

We deny the protest.

## BACKGROUND

### Procedural History

This is ARES's fourth challenge to the agency's award of the subject contract. In July 2017, the agency originally awarded the subject contract to MEI. After learning of the agency's selection decision, ARES filed a protest in our Office. In addition to challenging the agency's evaluation of proposals, the adequacy of discussions, and the agency's source selection decision, ARES argued that MEI had an improper organizational conflict of interest (OCI) that should have precluded an award to MEI.

In response to that protest, NASA advised our Office that it would take corrective action by conducting an assessment of potential OCIs, and also would review ARES's remaining protest allegations relating to the evaluation of proposals, the conduct of discussions and the agency's source selection decision. Based on the agency's proposed corrective action, we dismissed ARES's protest as academic. ARES Technical Services Corporation, B-415081, Aug. 30, 2017 (unpublished decision).

After performing the corrective action detailed above, the agency again selected MEI for award of the contract. ARES filed a second protest with our Office in January 2018, again challenging MEI's eligibility for award based on an alleged OCI, and also challenging the agency's evaluation of proposals and source selection decision.

In response to ARES's second protest, we issued a decision sustaining in part, denying in part, and dismissing in part ARES's protest. ARES Technical Services Corporation, B-415081.2, B-415081.3, May 8, 2018, 2018 CPD ¶ 153. We dismissed ARES's allegation concerning an alleged OCI on the part of MEI because, in addition to obtaining OCI mitigation plans from both MEI and ARES and performing a detailed investigation into the matter and concluding that award to MEI would be unobjectionable, NASA also executed a waiver of any possible residual OCI that might have been present. Id. at 3-5. We sustained an allegation raised by ARES in connection with the agency's evaluation of technical proposals, specifically finding that the agency's evaluation of technical proposals failed to contemporaneously document how MEI's OCI mitigation strategy might affect its management approach. Id. at 5-7. We also sustained an allegation relating to the agency's evaluation of cost proposals, finding that the agency's realism evaluation did not reflect the apparent approach on the part of MEI for capturing incumbent employees.<sup>2</sup> Id. at 8-10. We recommended that the agency reevaluate proposals in a manner consistent with our decision. Id. at 10.

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<sup>2</sup> ARES also argued that the agency improperly had engaged in what it described as "unilateral discussions" with MEI in connection with NASA's receipt of materials relating  
(continued...)

After receiving our second decision, NASA invited the offerors to make limited revisions to their management and cost proposals (we discuss these actions in more detail below). After receiving and evaluating the revised proposals, NASA once again selected MEI for award and ARES protested the agency's selection decision. ARES argued that the agency had allowed MEI to make proposal revisions not contemplated by NASA's corrective action; that the agency miscalculated the revised proposals submitted; that MEI had what ARES characterized as a new OCI; and that the agency's selection decision was unreasonable under the circumstances.

In response to ARES's third protest, NASA again advised our Office that it would reevaluate proposals and make a new source selection decision, and also would consider all of ARES's remaining protest allegations. We dismissed ARES's third protest as academic. ARES Technical Services Corporation, B-415081.4, Feb. 7, 2019 (unpublished decision).

Thereafter, the agency reevaluated proposals. NASA again selected MEI for award of the contract, and ARES filed the current protest. ARES again argues that MEI improperly was permitted to revise its proposal in a manner not contemplated by the limitations placed on proposal changes during the agency's corrective action; and that the agency miscalculated proposals and made an unreasonable selection decision.

#### The RFP and Most Recent Evaluation Results

The RFP contemplates award, on a best-value tradeoff basis, of a single cost-plus-award-fee type indefinite-delivery, indefinite-quantity contract for a 5-year ordering period.<sup>3</sup> Firms were advised that the agency would evaluate proposals considering cost and two non-cost evaluation factors, mission suitability and past performance, which were deemed, both individually and collectively, more important than cost. In addition, mission suitability was deemed more important than past performance. RFP at BATES 0096.<sup>4</sup> The RFP further advised offerors that, within the mission suitability factor, there were two subfactors, technical approach and management approach, with management approach deemed more important than technical approach (management approach was

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to MEI's OCI mitigation strategy. We denied that aspect of ARES's protest. ARES Technical Services Corporation, *supra*, at 7-8 n.10.

<sup>3</sup> The RFP provides for a 30-day phase-in period during which the successful offeror will perform on a fixed-price basis. All other task or delivery orders issued under the contract will be performed on a cost-reimbursement basis.

<sup>4</sup> The agency assigned BATES numbers to the record. All citations in this decision are to those numbers.

worth up to 550 points while technical approach was worth up to 450 points).<sup>5</sup> Id. at BATES 0096-0100. The RFP provided that the agency would evaluate cost for realism and reasonableness.<sup>6</sup> Id. at BATES 0100.

As discussed above, the agency permitted offerors to submit limited proposal revisions in connection with its corrective action taken in response to our decision in ARES's second protest. After receipt of the revised proposals, the agency twice performed a reevaluation and assigned scores and ratings to the proposals, and also performed a cost realism evaluation to arrive at a most probable cost for each offeror. The agency's latest evaluation results were as follows:

	<b>ARES</b>	<b>MEI</b>
<b>Mission Suitability</b>	745	778
<b>Technical Approach</b>	360	409
<b>Management Approach</b>	385	369
<b>Past Performance</b>	Very High	Very High
<b>Proposed Cost</b>	\$104,111,747	\$105,676,183
<b>Probable Cost</b>	\$106,670,908	\$114,631,172

Agency Report (AR) exh. 12, Presentation to the Source Selection Authority, at BATES 1838, 1863, 1900, 1921. Based on these evaluation results, the agency once again selected MEI for award of the contract. After learning of the agency's latest selection decision and requesting and receiving a debriefing, ARES filed the instant protest.

## DISCUSSION

ARES argues that NASA treated the offerors unequally by allowing MEI to revise its cost proposal in a manner that was inconsistent with the instructions the agency provided to the offerors during corrective action, which only permitted the firms to make limited revisions to their proposals. NASA disagrees, and argues that MEI's proposal revisions were clearly within the scope of the instructions provided to the offerors.

The record shows that the agency provided both firms the same instructions, first in discussion letters sent to the firms, and thereafter in an amendment to the RFP. The following language, in pertinent part, was provided to both offerors:

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<sup>5</sup> Offerors' past performance would be assigned adjectival ratings of very high level of confidence, high level of confidence, moderate level of confidence, low level of confidence, very low level of confidence, or neutral. RFP at BATES 0102-0103.

<sup>6</sup> The RFP included a government pricing model (GPM). RFP Encl. 4. The GPM specified all of the contemplated labor categories and number of hours for each labor category that the agency anticipates will be used during contract performance. Offerors were required to submit their proposed cost using the GPM. In effect, therefore, all firms proposed to perform using the same labor categories and hours.

Offerors shall provide updated cost information (including data and supporting narrative) in order to make its proposal current. . . . Updated information will be limited to those areas of cost that are required for increased clarity and those areas impacted by time, including direct labor rates (based on escalation) and indirect rates. Fee may be adjusted if desired. . . . Other updates that are not based on the clarity or currency of the proposal are not allowed (e.g. approach to providing labor, approach to subcontracting, etc.). The fixed-price phase-in shall not be updated.

AR, exh. 3, RFP amend. No. 0006, at BATES 398; see also AR, exh. 4, Discussion Letter to ARES, Aug. 2, 2019, at BATES 0485 (providing the identical language to ARES during discussions); AR, exh. 5, Discussion Letter to MEI, Aug. 2, 2019, at BATES 0619-0620 (same).

ARES argues that MEI's revisions to its cost proposal were inconsistent with these instructions. In particular, ARES argues that MEI proposed a fundamental change to its business strategy for providing labor to perform the requirement. ARES appears to rely, in part, on a finding in our prior decision that NASA unreasonably adjusted MEI's proposed labor rates downward during its cost realism evaluation to match rates being paid to incumbent personnel. In discussing the fact that certain of MEI's proposed rates were higher than the actual rates compensation rates paid to incumbent employees, we stated as follows:

We therefore conclude that MEI intended, as a matter of its business strategy, to offer rates of compensation that it thought would be adequate to attract the incumbent workforce, rather than simply to match the incumbent direct rates, as the agency's evaluation concluded."

ARES Technical Services Corporation, *supra*, at 10.

ARES argues that, in revising its proposal, MEI lowered its proposed labor rates, and that this was fundamentally inconsistent with its earlier business strategy of paying rates that, in some instances, exceeded the rates being paid to incumbent employees in order to attract those employees. ARES therefore argues that the MEI proposal should have been rejected for not complying with the proposal revision instructions quoted above.

We have no basis to find that MEI's proposal revisions were inconsistent with the instructions provided to the offerors or, correspondingly, that the agency should have rejected the MEI proposal for this reason.

We find that ARES's argument relies on a faulty premise, namely, that the instructions necessarily precluded firms from lowering their direct labor rates. According to ARES, such a change would amount to a fundamental change in MEI's "business strategy." ARES relies on the instruction's reference to changes: "impacted by time, including direct labor rates (based on escalation) . . .," as well as the subsequent language: "Other updates that are not based on the clarity or currency of the proposal are not

allowed (e.g. approach to providing labor, approach to subcontracting, etc.).” AR, exh. 3, RFP amend. No. 0006, at BATES 398. In effect, ARES argues that only upward changes to an offeror’s proposed direct labor rates would be acceptable in light of these instructions. We disagree.

The instructions do not use the phrase “business strategy,” and our use of that phrase simply described MEI’s compensation package proposed as a means to attract incumbent employees. While we agree with ARES that the instructions precluded offerors from changing their approach to providing labor for the contract, nothing precluded offerors from proposing the same approach to providing labor, but demonstrating that the same approach could be achieved based on changes to an offeror’s compensation package that were occasioned by the passage of time.

The record here shows that MEI at all times proposed exactly the same approach to providing labor on the contract--attracting and hiring a high percentage of incumbent employees--but was able to provide more accurate information concerning the compensation necessary to attract those incumbent employees based on the passage of time. MEI’s proposal prior to the agency’s corrective action identified a target of hiring approximately [deleted] percent of the incumbent workforce, and described other contractual examples where MEI was able to hire up to [deleted] percent of the incumbent workforce. AR, B-415081.2, B-415081.3, exh. 17, MEI Mission Suitability Volume, at BATES 2423. As we noted in our prior decision, MEI described its previously-proposed compensation package as being designed to attract, motivate and retain key engineering talent, in other words, the incumbent workforce. Id. at BATES 2471.

In submitting its proposal revision during the agency’s corrective action, MEI described--word-for-word--exactly the same approach to providing labor for the contract, namely, hiring a high percentage of the incumbent workforce. MEI again proposed a target of hiring approximately [deleted] percent of the incumbent workforce; again described the other contractual examples where MEI was able to hire up to [deleted] percent of the incumbent workforce; and again made reference to its total compensation package designed to attract, motivate and retain key engineering talent. AR, exh. 8, MEI Mission Suitability Volume, at BATES 1263-1264, 1357.

The principal difference between MEI’s earlier proposal and its proposal submitted during corrective action was a different basis for determining the direct labor rates that it proposed. The record shows that, because MEI had been awarded the contract in 2017 and had begun negotiations with the incumbent workforce, it claimed that it was able to base its labor rates on actual rates the firm had negotiated with approximately [deleted] percent of the incumbent employees. MEI’s revised cost proposal provided as follows:

During the August 2017 Phase-In period, we negotiated contingent offer letters for a significant number of incumbent personnel. The contingent offer letters provide highly reliable cost data as they represent the actual costs to hire staff currently supporting the effort. In accordance with our

standard estimating practices, [deleted] and the candidate met the labor category requirements thus ensuring cost realism. We utilized actual salaries based on contingent offer letters for the vast preponderance of the proposed hours on the contract. Based on the proposed hours for CY1 [calendar year 1], actual negotiated salaries from contingent offer letters account for approximately [deleted]% of the proposed hours, consistent with our [deleted]% proposed incumbent capture approach.

AR, exh. 9, MEI Cost Proposal, at BATES 1415.

The record therefore shows that MEI used the exact same approach to providing labor on the contract throughout the various versions of its proposal--hiring a large percentage of the incumbent workforce. The principal difference between the firm's earlier proposal and its subsequent proposal was the availability of new data concerning the actual direct labor rates it would have to pay to hire the incumbent workforce.<sup>7</sup> That new data was available to MEI based on the passage of time and, consistent with the express terms of the proposal instructions, MEI provided: "Updated information . . . limited to those areas of cost that are . . . impacted by time" AR, exh. 3, RFP amend. No. 0006. In light of the foregoing discussion, we deny this aspect of ARES's protest.<sup>8</sup>

ARES also argues that the agency erred in evaluating the MEI proposal in light of changes it made to its technical proposal to conform its management approach with its proposed OCI mitigation strategy. As noted, we sustained ARES's earlier protest, in part, because the contemporaneous record did not reflect that the agency had considered changes that would be necessary to MEI's management approach to accommodate its OCI mitigation plan, which required different management strategies and data sharing limitations than had been contemplated under MEI's original management plan. According to ARES, the agency still has not considered the impact of MEI's OCI mitigation plan on its proposed management approach.

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<sup>7</sup> The record also shows that, in performing its cost realism evaluation, NASA was not entirely confident that the contingent hire letters relied on by MEI were representative of all employees in any particular labor category. Consequently, where MEI based a direct labor rate on contingent hire letters, the agency performed an upward adjustment to MEI's proposed direct labor rates, raising them to the rates being paid to incumbent employees. This resulted in an upward probable cost adjustment of \$[deleted] for MEI's direct labor. AR, exh 11, Cost Evaluation Report, at BATES 1798-1799.

<sup>8</sup> In a related argument, ARES argues that the agency engaged in unequal discussions with the two offerors by permitting MEI, but not ARES, an opportunity to lower its direct labor rates. However, ARES has not explained how the offerors could have been afforded unequal discussions given the fact that both firms were provided identical instructions regarding permissible revisions to their proposals.

We have no basis to object to the agency's evaluation for the reasons advanced by ARES. In reviewing protests that challenge an agency's evaluation of proposals, our Office does not independently evaluate proposals; rather, we review the agency's evaluation to ensure that it is reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. L-3 Communications, L-3 Link Simulations and Training, B-410644.2, Jan. 20, 2016, 2016 CPD ¶ 44 at 3-4. We have no basis to object to the agency's evaluation here.

The record shows that offerors were instructed to make limited updates to their respective management approaches to reflect consistency between their management approaches and their OCI mitigation plans. The RFP instructions provided as follows: "Offerors shall update and clarify [their] Mission Suitability Management Approach subfactor, as needed, to provide a consistent and comprehensive approach that addresses the management aspects associated with the proposed OCI Plan. AR, exh. 3, RFP amend. No. 0006, at BATES 0398.

In keeping with this instruction, the record shows that both offerors submitted OCI mitigation plans and made revisions to their respective proposals in light of those plans. The record also shows that the agency considered the firms' OCI mitigation plans and the possible impact of those plans on all aspects of their proposals, including mission suitability (and the two mission suitability subfactors, technical approach and management approach), cost and past performance. AR, exh. 12, Presentation to the Source Selection Authority, at BATES 1924-1938. In evaluating the MEI proposal, the agency specifically found that MEI's proposed OCI mitigation plan would not impact or conflict with its management approach.<sup>9</sup> Specifically, the agency found as follows:

In reviewing the OCI plan, the SEB [source evaluation board] determined that it did not impact or conflict with the management approach. The proposed organizational structure, lines of communication, and roles and responsibilities for Project Management and Subcontract Management did not contradict the OCI avoidance and mitigation approaches.

Id. at 1935. In summarizing its findings with respect to the evaluation of the MEI OCI mitigation plan and determining that it was acceptable and did not adversely impact any aspect of its proposal, the SEB concluded as follows:

Because MEI is currently a subcontractor on the OMES II [omnibus multidisciplinary engineering services II] contract and a subcontractor on [deleted], its objectivity may be impaired if MEI were required, under SMAS II, to assess the products or services it provides on [deleted] and OMES II. In response to this potential OCI for itself, MEI proposes to

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<sup>9</sup> The record shows that NASA reached a similar conclusion with respect to the ARES OCI mitigation plan. AR, exh. 12, Presentation to the Source Selection Authority, at BATES 1930.

divest itself from [deleted] and OMES II if it receives the SMAS II award. To the extent SMAS II required review of previously provided services or products, MEI will assign the work to a non-conflicted subcontractor which would then report directly to the Government. In instances where MEI subcontractors could be potentially conflicted with their work on other contracts, the OCI Plan leverages reassignment of work to non-conflicted and firewalled team members. In conclusion, the SEB determined that the MEI OCI submission was Acceptable.

Id. at 1937.

The record therefore shows that the agency did, in fact, give consideration to the impact that the offerors' proposed OCI mitigation plans would have on every aspect of their proposals, including any possible impact on their proposed management approaches.

In the final analysis, ARES would have us conclude that, in the absence of a material, adverse finding on the part of the agency concerning the impact of MEI's OCI mitigation plan on its management approach, the agency necessarily failed to evaluate this aspect of MEI's proposal. However, there is no reason for our Office to object to the agency's evaluation. As demonstrated above, the record shows that the agency gave consideration to the impact of both offerors' OCI mitigation plans on every aspect of their proposals, and concluded that there would be no adverse impact based on those OCI mitigation plans. We therefore deny this aspect of ARES's protest.

The protest is denied.

Thomas H. Armstrong  
General Counsel