U.S. GOVERNMENT ACCOUNTABILITY OFFICE
**441 G St. N.W.**
**Washington, DC 20548**
**Comptroller General**
**of the United States**



# Decision

**Matter of:** ORBIS Sibro, Inc.

**File:** B-421626.5; B-421626.7; B-421626.8

**Date:** December 12, 2023

Jerome S. Gabig Jr., Esq., Government Procurement Lawyer, LLC, for the protester.
Andrew P. Hallowell, Esq., Pargament & Hallowell, PLLC, for Sayres and Associates, LLC, the intervenor.
Alex Sheppard, Esq., and Robert Orozco, Esq., Department of the Navy, for the agency.
April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Initial protest is dismissed where the protester failed to timely file comments on the agency report.

2. Supplemental protest challenging the agency's cost realism evaluation of the protester's proposal is denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement law and regulation.

## DECISION

ORBIS Sibro, Inc., of Charleston, South Carolina, protests the issuance of a task order to Sayres and Associates, LLC, of Washington, D.C., under task order request for proposals (RFP) No. N0016422R3005 issued by the Department of the Navy, Naval Sea Systems Command, for professional support services. The protester primarily challenges the agency's cost realism evaluation of its proposal.

We dismiss the protest in part and deny the protest in part.

BACKGROUND

The agency issued the solicitation on January 21, 2022, to holders of the Navy's SeaPort Next-Generation multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contracts. The procurement was conducted pursuant to Federal Acquisition Regulation (FAR) subpart 16.5 procedures. The RFP sought a contractor to support the agency's

Program Executive Office for Ships and, specifically, its offices known as PMS 325, Auxiliary and Special Mission Shipbuilding Program Office; and PMS 300, U.S. Navy and Foreign Military Sales Boats and Craft Program Office. Agency Report (AR), Tab 1, RFP at 9.[1] The RFP explained that these offices are involved in various acquisition programs and that their mission is to "deliver integrated ship, boat, and craft products and services to U.S. and international maritime forces around the world." *Id.* The contractor would be responsible for various professional support services in the areas of: program management; engineering support; logistics management and integrated support; on-site support for detail design, construction, and post-delivery; and design site support. *Id.*

The RFP contemplated the issuance of a single, cost-plus-fixed-fee task order to be performed over a base year period and four option years. *Id.* at 2, 116. The RFP stated that award would be made on a best-value tradeoff basis based on three factors, listed in descending order of importance: technical and management, past performance, and total evaluated price. *Id.* at 117-119. The RFP provided that the non-cost/price factors, when combined, were significantly more important than cost/price. *Id.* at 118.

For cost/price, the RFP provided that the agency would calculate a total evaluated price and conduct a cost realism analysis. Per the RFP, the agency "intend[ed] to use cost estimates supported by relevant cost realism substantiating data, including, but not limited to: 1) historical substantiating data (e.g., recently-paid payroll screenshots and prior-years' actual indirect rates); 2) Forward Rate Pricing Agreements (FPRAs), Forward Rate Pricing Recommendations (FPRRs); 3) and contractual rate caps." *Id.* at 124. Further with respect to the cost realism analysis, the RFP provided the following:

> The Government will perform an analysis of the cost realism and completeness of the cost data and the traceability of the proposed cost to the Offeror's approach under the non-cost factors, including the proposed amount and allocation of labor-hours and labor mix. Pertinent cost information, including but not limited to DCAA [Defense Contract Audit Agency] and/or DCMA [Defense Contract Management Agency] recommended rates for such costs as direct labor, overhead, G&A [general and administrative], etc., as necessary and appropriate, will be used to arrive at the Government's determination of the probable cost to be incurred in the performance of this contract. If proposed costs are considered to be unrealistic, including unrealistic labor and/or indirect rates, the Offeror's proposed costs will be adjusted upward where appropriate.

[1] The agency amended the RFP once. References to the RFP are to the final conformed solicitation provided by the agency. All citations are to the Adobe PDF page numbers of the documents referenced in this decision.

*Id.* Ultimately, the RFP warned that "the burden of proof for cost credibility and realism rests with the Offeror; therefore, Offerors are cautioned to ensure that its proposed costs are easily traceable to the workforce proposed in the Staffing Plan and are supported by cost realism substantiating data." *Id.*

On or before the February 25, 2022, closing date for receipt of proposals, the agency received proposals from five offerors, including ORBIS and Sayres. The agency selected Sayres for award, and ORBIS filed its first round of protests with our Office, challenging various aspects of the agency's evaluation and award decision. The agency proposed to take corrective action, to include further evaluating the proposals and making a new award decision, and we dismissed the protest as academic. *ORBIS Sibro, Inc.*, B-421626, B-421626.3, May 8, 2023 (unpublished decision).

The agency conducted a reevaluation and again selected Sayres for award. The agency's decision included the following evaluation results:

| | **ORBIS** | **Sayres** |
|---|---|---|
| **Technical and Management** | Acceptable | Good |
| Technical Capabilities and Approach | Acceptable | Outstanding |
| Management Approach | Acceptable | Acceptable |
| Personnel Requirements | Acceptable | Acceptable |
| **Past Performance** | Satisfactory Confidence | Satisfactory Confidence |
| **Total Evaluated Price** | $271,382,029 | $282,938,493 |

AR, Tab 4, Best-Value Determination at 9.

Of relevance here, the cost evaluation team (CET) evaluated ORBIS's proposal for cost realism, considering the protester's total proposed price of $[REDACTED] and upwardly adjusted ORBIS's cost to a total evaluated price of $271,382,029, *i.e.*, a difference of approximately $[REDACTED] million or [REDACTED] percent. AR, Tab 3, Cost Realism Report at 68. The CET noted concerns that ORBIS did not provide sufficient information to substantiate its rates and had inconsistencies in its proposal; stating that, among other things, in order "to substantiate ORBIS'[s] proposed indirect rates, the CET performed an independent analysis of ORBIS'[s] historical rate information" and upwardly adjusted various rates "to align with the applicable historical average rates." *Id.* at 80-82.

The source selection authority (SSA) considered the evaluation results and concluded that the proposal from Sayres represented the best overall value to the agency. In comparing the proposals from ORBIS and Sayres, the SSA noted that ORBIS's proposed price "was upwardly adjusted by over [REDACTED] [percent] due to proposed indirect rates that lacked support by relevant, reliable data to demonstrate the realism of the proposed rates" and agreed with the CET's adjustment. AR, Tab 4, Best-Value Determination at 29. The SSA further determined that Sayres's "technical advantages are worth its additional price as compared to the less capable proposals," including the one submitted by ORBIS. *Id.* at 30.

On August 22, 2023, the agency notified ORBIS of its award decision. After a debriefing, this protest followed.[2]

## DISCUSSION

ORBIS primarily challenges the cost realism evaluation of its proposal. While we do not specifically address all of the protester's arguments, we have fully considered them all and find no basis to sustain the protest.

### Failure to File Timely Comments

As a preliminary matter, we dismiss ORBIS's initial protest--which challenges various aspects of the agency's evaluation and award decision--because the protester failed to file its comments on the agency report by the due date established by our Office, as required by our Bid Protest Regulations.

The filing deadlines in our regulations are prescribed under the authority of the Competition in Contracting Act of 1984; their purpose is to enable us to comply with the statute's mandate that we resolve protests expeditiously. *See* 31 U.S.C. § 3554(a); *Keymiaee Aero-Tech, Inc.*, B-274803.2, Dec. 20, 1996, 97-1 CPD ¶ 153. To avoid delay in the resolution of protests, section 21.3(i) of our regulations provides that a protester's failure to file comments within 10 calendar days of when the agency report was filed "shall" result in dismissal of the protest except where GAO has granted an extension or has established a shorter period. 4 C.F.R. § 21.3(i). Our regulations provide that a document is filed on a particular day when it is received by 5:30 p.m. Eastern Time[3] on that day. 4 C.F.R. § 21.0(g).

Here, the agency filed its agency report on Friday, October 6, and as such, the deadline for comments was 5:30 p.m. on Monday, October 16. ORBIS filed its comments at 11:07 p.m. on October 16. Thus, the protester did not file its comments by the deadline. ORBIS acknowledges that it "inadvertently miscounted the days" and requests that an "extension be granted retroactively." Protester's Supp. Comments at 2.

As noted above, and as the protester was advised by the acknowledgment of protest that our Office sent when the protest was filed, our rules provide that the protest shall be dismissed where comments are not submitted on time. Our regulations do not provide exceptions to the requirement to file comments on time. *California Envtl. Eng'g*,

---

[2] The task order at issue is valued in excess of $25 million and was placed under an IDIQ contract established by the Navy. Accordingly, our Office has jurisdiction to consider ORBIS's protest. 10 U.S.C. § 3406(f)(1)(B).

[3] All times referenced in this decision are shown in Eastern Time.

B-274807, B-274807.2, Jan. 3, 1997, 97-1 CPD ¶ 99 at 5-6; *see also Monbo Grp. Int'l--Recon.*, B-420387.2, May 17, 2022, 2022 CPD ¶ 118 at 2-4 (denying request for reconsideration of a protest that was dismissed where comments were not filed by due date). Thus, the initial protest is dismissed.[4]

Cost Realism

Notwithstanding that we dismiss ORBIS's initial protest, the protester also timely filed a supplemental protest that we now consider below. In its supplemental protest, ORBIS raises various arguments about the agency's cost realism evaluation of its proposal. Generally, ORBIS argues that the agency's use of historical indirect rates to assess cost realism was unreasonable and "did not comply with the FAR definition of cost realism." Supp. Protest at 6, 9. ORBIS further asserts that "the essence of the protest is that the Navy did not follow the evaluation criteria because the CET did not truly examine the substantiation in ORBIS's cost narrative when evaluating for cost realism." Protester's Supp. Comments at 11.

More specifically, ORBIS argues that the agency conducted an unreasonable cost realism assessment when the agency failed to use an alternative cost realism method the protester utilized in its proposal. In this regard, ORBIS asserts that the RFP provided a "not all-inclusive" list of methods to evaluate cost realism and therefore, "other methods of establishing cost realism were permitted under [the RFP]." Supp. Protest at 3, *citing* RFP at 124. In this context, the protester contends that, "[i]n refusing to allow ORBIS to propose a cost realism method other than the four expressly addressed in the solicitation, the Navy failed to follow the evaluation criteria." Supp. Protest at 6.

ORBIS relies on the assertion in its proposal that, "[i]f the three-year average of indirect rates is used[,] that will unfairly penalize a growing and maturing business that does not reflect forward facing business structure." *Id.* at 4, *citing* AR, Tab 8, ORBIS Cost Narrative at 12. ORBIS asserts that its proposal sufficiently explained an alternative method tailored to "changes in ORBIS['s] business structure and allocation of costs in the last 3 years as well as anticipated additions to the overhead pools and bases with corresponding reductions in the other indirect costs as a result of executing this contract." Supp. Protest at 4, *citing* AR, Tab 8, ORBIS Cost Narrative at 12-13. In other

[4] ORBIS requests, in the alternative, that our Office not dismiss what it claims is a pending request for a recommendation for reimbursement of protest costs based on the agency's corrective action. Our Office advised the protester that its request should have been filed as a new protest under the circumstances presented here and consistent with our regulations. Electronic Protest Docketing System (EPDS or Dkt.) Dkts. 2 and 3, Sept. 6, 2023. Indeed, ORBIS filed a new protest. As such, there is no pending request for a recommendation for reimbursement of protest costs for us to consider. *See*, *e.g.*, *AeroSage, LLC--Recon.*, B-417247.4, July 9, 2019, 2019 CPD ¶ 251 (filing challenging a new award decision was improperly filed where it was filed in a reconsideration proceeding and not filed as a new protest on EPDS).

words, in the protester's view, the method "chosen by ORBIS best reflected the purpose of cost realism," and the agency's upward cost adjustments that resulted in a $53 million difference between its total proposed price and its total evaluated price were unreasonable and prejudicial. Supp. Protest at 3.

As noted above, the RFP provided a non-exhaustive list of methods to substantiate proposed rates and evaluate cost realism, including, but not limited to: "1) historical substantiating data (e.g., recently-paid payroll screenshots and prior-years' actual indirect rates); 2) Forward Rate Pricing Agreements (FPRAs), Forward Rate Pricing Recommendations (FPRRs); 3) and contractual rate caps." RFP at 124. The RFP warned that "the burden of proof for cost credibility and realism rests with the Offeror; therefore, Offerors are cautioned to ensure that its proposed costs are easily traceable to the workforce proposed in the Staffing Plan and are supported by cost realism substantiating data." *Id.*

The record shows that the CET evaluated ORBIS's proposal for cost realism, considering the protester's total proposed price of $[REDACTED], and upwardly adjusted the protester's proposed costs resulting in a total evaluated price of $271,382,029, *i.e.,* a difference of approximately $[REDACTED] million or [REDACTED] percent. AR, Tab 3, Cost Realism Report at 68. The CET noted concerns that ORBIS did not provide sufficient information to substantiate its rates and had inconsistencies in its proposal; stating that, among other things, in order "to substantiate ORBIS'[s] proposed indirect rates, the CET performed an independent analysis of ORBIS'[s] historical rate information; this involved calculating an average rate based on the last three years, two years for fringe, of historical rates." *Id.* at 80.

Specifically, the CET noted ORBIS's historical average rates were higher than its current proposed rates for fringe, company site overhead, client site overhead, G&A, and material handling. The CET further noted that, "[w]hile ORBIS provided information concerning the make-up of the expenses and labor base for each proposed indirect rate, it did not provide adequate rationale explaining the cost drivers that resulted in the lower than average proposed rates per [the RFP]." *Id.* The CET's specific concerns included the following:

> ORBIS does not provide adequate information to substantiate how their consolidation of Field Site Overhead and Company Site Overhead resulted in the large reduction of overhead rates. Notably, this consolidation took place in FY19 [fiscal year]; however, their Company Site Overhead historical rates for 2020 and 2021 were both higher than in 2019, the year in which the consolidation occurred.
>
> [ . . . ]
>
> ORBIS provided projections for out years in their indirect rate history excel document. The CET reviewed that excel document but it did not provide any further information/explanation to substantiate their proposed rates.

> Within the excel document, ORBIS provided their budgeted rates with a hypothetical impact if ORBIS received the award.

*Id.* at 80-81. The CET then summarized the following:

> The Government found ORBIS'[s] documentation and narrative failed to adequately substantiate their proposed rates or budgeted rates because there was no way to directly verify ORBIS'[s] calculations for the hypothetical impact of award. ORBIS also uses their budgeted rate when applying this impact to calculate their proposed rate. The Government does not consider this realistic due to the historical differences between ORBIS'[s] budgeted [versus] actuals as provided in their proposal. The historical rates do not support any reduction in rates due to ORBIS'[s] 40 percent reduction in facilities.
>
> [ . . . ]
>
> Moreover, the narrative is not consistent with the upward fluctuations in historical rates, specifically in FY20 and FY21. The CET reached out to the DCMA [point of contact] listed in ORBIS'[s] proposal; however, they did not provide any documentation to support ORBIS'[s] proposed indirect rates.
>
> Therefore, the CET upwardly adjusted [ ] ORBIS'[s] fringe, company site overhead, client site overhead, G&A, and subcontract material rates to align with the applicable historical average rates.

*Id.* at 81-82. The CET's evaluation also included adjusting: ORBIS's proposed surge labor cost (not including fee) "exclusively to account for upward adjustments made to ORBIS'[s] indirect rates as describe[d] above and to subcontractors"; other direct costs related to G&A and material handling; and some of a subcontractor's proposed rates. *See id.* at 82-88.

In other words, as the agency summarizes: "Based on all the available substantiating data, the Navy determined that ORBIS's lower than historical average indirect rates were not adequately supported. Therefore, in the absence of an FPRA, FPRR, indirect rate caps, or adequate relevant cost realism substantiating data, the Navy used relevant higher costs reflected in the historical indirect rate data[,] consistent with the instructions stated in [the RFP]." Supp. Memorandum of Law (MOL) at 6 (citations omitted), *citing* RFP at 124.

In the agency's view, "the Navy meaningfully considered ORBIS's narrative and proposed substantiating information for its major cost drivers, but determined it was not adequate," and "ORBIS did not meet its burden to establish cost credibility" per the RFP or "adequately substantiate" its preferred method for evaluating cost realism. Supp. MOL at 7. In this regard, the agency asserts that "the Navy reasonably relied on

ORBIS'[s] historical indirect rates when conducting its cost realism analysis, because ORBIS failed to adequately substantiate its lower than historical average proposed rates as required by the solicitation." *Id.*

When an agency evaluates proposals for award of a cost-reimbursement contract (or, as here, a task order), it 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 15.305(a)(1), 15.404-1(d); *National Gov't Servs., Inc.*, B-412142, Dec. 30, 2015, 2016 CPD ¶ 8 at 8. Nonetheless, an agency's realism analysis need not achieve scientific certainty; rather, the analysis must provide a reasonable measure of confidence that the costs proposed are realistic based on information reasonably available to the agency at the time of its evaluation. *SGT, Inc.*, B-294722.4, July 28, 2005, 2005 CPD ¶ 151 at 7. An agency is not required to conduct an in-depth cost analysis, *see* FAR 15.404-1(d)(1), or to verify each and every item in assessing cost realism; rather, the evaluation requires the exercise of informed judgment by the contracting agency. *AdvanceMed Corp.; TrustSolutions, LLC*, B-404910.4 *et al.*, Jan. 17, 2012, 2012 CPD ¶ 25 at 13. Agencies are given broad discretion to make cost realism evaluations. *Tridentis, LLC*, B-410202.2, B-410202.3, Feb. 24, 2015, 2015 CPD ¶ 99 at 7. Consequently, our review of an agency's cost realism evaluation is limited to determining whether the cost analysis is reasonably based and not arbitrary. *Id.*

On this record, we find no basis to question the agency's cost realism evaluation of ORBIS's proposal. As noted above, the RFP provided for a non-exhaustive list of methods to evaluate cost realism. RFP at 124. While this permitted the agency to consider other methods and is consistent with the broad discretion given to agencies to make cost realism evaluations, the protester's reliance on this language in the RFP is misplaced as it has not established that the RFP required the agency to use an alternative method chosen by the protester.

Consistent with the terms of the solicitation, the CET considered ORBIS's proposed costs; documented concerns that the proposal did not include adequate relevant substantiating data and contained various inconsistencies; and made upward adjustments where appropriate and as a result of the agency's subjective judgment. *See* AR, Tab 3, Cost Realism Report at 68-94. While the protester argues that "the CET did not truly examine the substantiation in ORBIS's cost narrative when evaluating for cost realism," Protester's Supp. Comments at 11, the record shows the CET reviewed and documented specific concerns with the proposal, such as inconsistencies between the narrative and the rates, and the inability to verify ORBIS's calculations for the "hypothetical impact" an award would have on rates, as noted above. AR, Tab 3, Cost Realism Report at 80-81. The protester's disagreement does not provide a basis to conclude that the agency's evaluation was unreasonable.

To the extent ORBIS complains generally that the RFP's provision to use "historical rates did not comply with the FAR definition of cost realism," Supp. Protest at 9, we find that the protester is raising an untimely challenge to the terms of the solicitation. 4 C.F.R. § 21.2(a)(1); *see*, *e.g.*, *ASRC Fed. Data Sols., LLC*, B-417655 *et al.*, Sept. 18, 2019, 2019 CPD ¶ 325 at 7 ("[i]t is well-settled that a party who has the opportunity to object to allegedly improper or patently ambiguous terms in a solicitation, but fails to do so prior to the time set for receipt of quotations, waives its ability to raise the same objection later"). We agree with the agency's assertion that "ORBIS knew or should have known that the Navy would rely on historical data as part of the cost realism evaluation unless provided other substantiating data with sufficient explanation of its relevance and reliability as early as January 21, 2022, when the Navy released the subject solicitation." Supp. MOL at 4.

In sum, ORBIS has not established that the evaluation was inconsistent with the terms of the solicitation and applicable procurement law and regulation. This protest ground is denied.

The protest is dismissed in part and denied in part.

Edda Emmanuelli Perez
General Counsel