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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Raytheon Technical Services Company LLC

File: B-406136; B-406136.2

Date: February 15, 2012

Joseph P. Hornyak, Esq., Alexander B. Ginsberg, Esq., and Kelly Krystyniak, Esq., Holland & Knight LLP, for the protester.

Paul F. Khoury, Esq., Nicole J. Owren-Wiest, Esq., and Tracye Winfrey Howard, Esq., Wiley Rein LLP, for Cubic Worldwide Technical Services, Inc., the intervenor. Amanda M. Willis, Esq., Col. Mark S. Teskey, Esq., and Douglas Chicka, Esq., Department of the Air Force, for the agency.

Paula J. Haurilesko, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's determination that the awardee's fixed price was realistic is denied, where the agency compared the awardee's low price to the government's cost estimate and concluded that the awardee's pricing assumptions were realistic and consistent with the firm's technical approach.

DECISION

Raytheon Technical Services Company LLC, of Dulles, Virginia, protests the award of a contract to Cubic Worldwide Technical Services, Inc., of San Diego, California, under request for proposals (RFP) No. FA5613-11-R-0012, issued by the Department of the Air Force for flight simulator training services. Raytheon challenges the agency's price realism evaluation of the awardee's proposal.

We deny the protest.

BACKGROUND

The RFP, issued under the commercial item acquisition procedures of Federal Acquisition Regulation (FAR) Part 12, provided for award of a fixed-price contract to provide academic and flight simulator training at Aviano Air Base, Italy; Royal Air Force Lakenheath, United Kingdom; and Spangdahlem Air Base, Germany, for a

base period (including a 2-month phase-in) and four option years.¹ Contracting Officer's (CO) Statement at 2-3; RFP at 3-4. The stated objective of the training is to maximize the Air Force's operational effectiveness and combat capability while preserving its limited personnel, aircraft and resources. See Agency Report (AR), Tab 5b, Revised Performance Work Statement (PWS), at 1.

Offerors were informed that award would be made to the lowest-priced, technically acceptable offeror with acceptable past performance. RFP at 20. The RFP provided that the agency would first rank proposals by price; the lowest-priced proposal would then be evaluated for technical acceptability and for acceptable past performance. If the lowest-priced proposal was determined to be unacceptable, the next lowest priced proposal would be evaluated. Id. at 22. Offerors were also informed that the agency would evaluate the acceptability of technical proposals by reviewing the offeror's management plan. Id. at 21. The RFP provided that the management plan should, at a minimum, identify all personnel, duties, responsibilities, and qualifications, and address relevant sections of the PWS. Id. at 71.

The RFP also provided that proposals could be rejected on the basis of unrealistically high, low, or unbalanced prices. Id. at 21. Offerors were not required, however, to submit detailed cost data, although they were advised that the agency may later require offerors to submit additional information "to the extent necessary for the CO to determine the reasonableness of the price." Id. at 70.

The PWS required that the contractor provide a contract program manager, a contract site manager, and a security officer at each location, as well as course instructors. See AR, Tab 5b, Revised PWS, at 14, 15. The PWS also provided a workload estimate for academic and simulator training at each location. See id., append. 1, Work Load Estimate. A specific estimate of staffing was not provided in the RFP, and the agency declined to provide such information. Instead, offerors were informed that the contract was performance based and therefore it was the contractor's responsibility to determine the workforce necessary to perform the contract. AR, Tab 6, Questions/Answers Nos. 48, 49. The Air Force also informed offerors that it could not provide salary or wage information for the incumbent workforce, nor information on the number of dependent children associated with the incumbent workforce. Id., Questions/Answers Nos. 17, 62. Offerors also were informed that their fixed-price line items must include the cost of any tuition paid for contractors' children to attend the Department of Defense Dependent Schools

¹ The RFP also provided for cost reimbursement line items for training and travel. The RFP provided pre-established not-to-exceed amounts that offerors would use in their proposals for these line items.

(DoDDS) at the three locations, as well as relocation costs for new hires, and other costs. Id., Questions/Answers Nos. 31, 44.

The RFP contained Defense FAR Supplement (DFARS) clause 252.222-7002, Compliance with Local Labor Laws (Overseas), which provides, in pertinent part, that “[t]he Contractor shall comply with all . . . [l]abor regulations including collective bargaining agreements, workers’ compensation, working conditions, fringe benefits, and labor standards or labor contractor matters.” See RFP at 56.

Proposals were received from five offerors, including Cubic and Raytheon. Cubic proposed \$18,900,712, the lowest-priced proposal, and Raytheon proposed [Deleted], the second lowest-priced proposal.² AR, Tab 13, Proposal Analysis Report & Price Competition Memorandum, at 8. The agency’s technical evaluation team (TET) evaluated the technical acceptability of Cubic’s proposal. Although the evaluators expressed concern about [Deleted], they concluded that Cubic’s proposal and staffing approach were technically acceptable. See AR, Tab 9b, TET Report, at 1.

The Air Force then evaluated the reasonableness and realism of Cubic’s proposed price. AR, Tab 13, Proposal Analysis Report & Price Competition Memorandum. Although not required by the RFP, Cubic provided other cost information in its proposal, including its estimated direct labor, indirect costs, and general & administrative (G&A) rates as well as its methodology for calculating other direct costs, such as DoDDS costs. See, e.g., AR, Tab 7, Cubic Price Proposal, at 4-28. In addition, Cubic informed the agency that its indirect rates had been provided in a forward pricing rate proposal to the government, but an audit had not yet been completed, and that the rates were applied in accordance with Cubic’s Cost Accounting Standard Disclosure Statement. Id. at 5.

The agency recognized that Cubic’s proposed price of \$18,900,712 was lower than the prices proposed by other offerors and lower than the government’s estimate of [Deleted]. In this regard, the agency noted that Cubic’s price was [Deleted] the government estimate ([Deleted]) and analyzed Cubic’s price to identify the reasons for this price differential. AR, Tab 13, Proposal Analysis Report & Price Competition Memorandum, at 8-9. The agency noted that Cubic’s proposed approach differed in several regards from that of the government estimate.

² One of the five proposals was incomplete and was rejected.

The agency found that Cubic proposed total staffing of [Deleted] personnel, where the government's estimate was based upon total staffing of [Deleted] personnel.³ This difference accounted for [Deleted] per year for five years), approximately half of the difference between Cubic's proposed price and the government's estimate.⁴ Id. at 9. The agency found that Cubic's lower proposed staff was based upon its [Deleted], which the TET had found acceptable. Id. at 10.

The Air Force also found that Cubic's estimated costs for DoDDS was about [Deleted] the government's estimate. Id. at 9. This reflected Cubic's and the agency's differing assumptions with regard to the number of children expected to attend DoDDS in Germany, Italy, and the United Kingdom. The Air Force assumed that [Deleted] children (presumably [Deleted]) would attend DoDDS, whereas Cubic assumed, based on its own experience, that [Deleted] children would attend DoDDS [Deleted]. See id. at 9; AR, Tab 7, Cubic Price Proposal, at 6. The agency accepted Cubic's pricing assumption in this regard, concluding that Cubic had reasonably accounted for DoDDS costs in its proposal. AR, Tab 13, Proposal Analysis Report & Price Competition Memorandum, at 10.

The agency also did market research with respect to labor rates and relocation costs to assess the realism of Cubic's estimated labor rates and relocations costs. See AR, Tab 11, Market Research; see also Tab 12, Pricing Research. Specifically, the Air Force reviewed on-line salary information for simulator instructors and other labor categories, as well as tuition rates for DoDDS, living quarters allowances, and Department of State cost of living allowances for the three locations. The Air Force concluded that Cubic had proposed [Deleted] hourly labor rates and that the firm's other estimated costs were accurate and current. AR, Tab 11, Market Research, at 1-3.

The Air Force concluded that Cubic's proposed price was realistic and reasonable. Award was made to Cubic, as the offeror with the lowest-priced, technically acceptable offer. This protest followed a debriefing.

DISCUSSION

Raytheon makes numerous arguments challenging the Air Force's price realism analysis and its determination that Cubic's proposed price was realistic. We have

³ The agency also noted that Cubic's estimated [Deleted] costs were lower than that estimated by the government. AR, Tab 13, Proposal Analysis Report & Price Competition Memorandum, at 9.

⁴ Elsewhere in its price analysis, the Air Force recognized that Cubic actually proposed [Deleted] individuals, or [Deleted] fewer staff than the government's estimate of [Deleted] individuals. See id. at 10.

considered all of Raytheon's arguments, although we specifically address only the protester's major arguments. As explained below, we do not find persuasive Raytheon's arguments challenging the depth of the agency's realism analysis. We also find that Raytheon has not shown that the agency's judgment concerning the realism of Cubic's pricing assumptions was unreasonable. In this regard, we have also found that some of the protester's arguments are based on erroneous assumptions concerning Cubic's proposal.⁵ In short, we find that the Air Force reasonably found that Cubic's price was realistic.

Cost realism, which measures the likely cost of performance, is a mandatory consideration for the award of cost-reimbursement contracts, because the government will generally bear the actual costs of performance. Cost realism is typically not a factor in the evaluation of proposals when a fixed-price contract is contemplated, because the government's liability is fixed and the contractor bears the risk of any cost escalation. J&J Maintenance, Inc., B-244366.2, Mar. 7, 1994, 94-1 CPD ¶ 177 at 10. However, since the government exposes itself to the risk of poor performance when a fixed-price contractor is forced to provide services at little or no profit, where a solicitation provides for the award of a fixed-price contract, or a fixed-price portion of a contract, an agency may provide in the RFP for the use of price realism analysis for the limited purpose of measuring an offeror's understanding of the requirements or to assess the risk inherent in an offeror's proposal. See AMEC Earth & Env'tl., Inc., B-404959.2, July 12, 2011, 2011 CPD ¶ 168 at 8.

Raytheon argues that the Air Force should have conducted "a meaningful comparison" between Cubic's total proposed compensation and the government cost estimate by conducting a line-by-line, in-depth analysis of Cubic's benefits package. See Protester Comments at 17. We disagree. The nature and extent of such a price realism analysis are matters within the agency's discretion. AMEC Earth & Env'tl., Inc., supra, at 8. Even under the more rigorous standard applied to cost realism analysis, agencies are not required to conduct an in-depth analysis or verify each and every item to a scientific certainty, but rather to perform a reasonable evaluation. L-3 Sys. Co., B-404671.2, B-404671.4, Apr. 8, 2011, 2011 CPD ¶ 93 at 10. Accordingly, our review of a price realism analysis is limited to determining whether it was reasonable and consistent with the terms of the

⁵ For example, Raytheon argues that Cubic's compensation for cost of living allowances is too low. Protester's Comments at 24-25. However, Raytheon bases its argument on the erroneous assumption that Cubic calculated cost of living allowances based on [Deleted] hours, whereas Cubic actually calculated its cost of living allowance based on [Deleted] hours. Raytheon also contends that Cubic failed to apply its [Deleted] percent fringe rate to its proposed [Deleted]. Id. at 27. However, Cubic's proposal indicates that the [Deleted] percent fringe rate applies only to its proposed [Deleted]. See AR, Tab 7, Cubic Price Proposal, at 5.

solicitation. Smith's Detection, Inc.; Am. Sci. & Eng'g, Inc., B-402168.4 et al., Feb. 9, 2011, 2011 CPD ¶ 39 at 17.

Here, as noted above, the RFP informed offerors that the agency could reject proposals that offered unrealistically low prices. RFP at 21. The RFP did not specify the level or type of price analysis that would be conducted, nor did the RFP require offerors to provide cost or pricing or other cost information. Because Cubic provided cost information to support its fixed price, the Air Force used this information in its price realism analysis. The record shows that the Air Force searched for differences, and the reasons for differences, between Cubic's proposed price and the government's estimate. For example, the agency found that roughly half of the price difference could be attributed to the differing approaches to staffing. Cubic's proposal [Deleted], which the agency found reasonable upon review. We find that the Air Force's price realism analysis was reasonable and consistent with the RFP.

Raytheon complains that Cubic's staffing plan was not realistic. Specifically, Raytheon notes that the government's estimate required [Deleted] full-time instructors and [Deleted] other individuals (to perform contract program management, on-site contract management, and security duties), or [Deleted] full-time staff, where Cubic's proposed price was based upon providing [Deleted] individuals. See Protester Comments at 14-15.

We do not agree with Raytheon's apparent belief that to be realistic an offeror's price had to be based upon providing [Deleted] individuals. Rather, as the offerors were repeatedly apprised, the amount of staffing necessary to perform the contract was dependent upon the offeror's own technical approach. See, e.g., AR, Tab 6, Questions/Answers Nos. 48, 49. Here, the Air Force found that Cubic's technical approach, which proposed less staffing than that of the government's estimate, was acceptable. That is, the agency accepted as reasonable Cubic's explanation as to how it could perform the contract work at its staffing estimate of [Deleted] individuals. See AR, Tab 13, Proposal Analysis Report & Price Competition Memorandum, at 10.

Raytheon has not challenged this technical acceptability determination. Given that Cubic's staffing is based upon its acceptable approach, we find that the agency reasonably accepted as realistic this aspect of Cubic's proposed price. In the context of a fixed-price contract, realism analysis is limited to measuring an offeror's understanding of the requirements or to assess the risk inherent in an offeror's proposal. See AMEC Earth & Env'tl., Inc., supra; see also FAR § 15.404-1(d)(1) (realism analysis based on "unique methods of performance and materials described in the offeror's technical proposal").

Raytheon also objects to Cubic's estimated DoDDS costs, which are based upon the awardee's assumption that [Deleted] children of contract employees would attend

DoDDS [Deleted]. Protester Comments at 21. Raytheon argues that this assumption is inconsistent with the Air Force's estimate that [Deleted] children would attend dependent schools in Italy, German, and the United Kingdom, and that Cubic will have difficulty retaining and recruiting staff if it refused to pay for DoDDS tuition for dependent children. The Air Force responds that in preparing its estimate it did not have any information pertaining to the number of children currently attending DoDDS under the incumbent contract. In accepting as realistic Cubic's estimate of how many dependent children would attend DoDDS, the agency reviewed Cubic's assumptions which were based on the firm's own experience under other contracts. Although Raytheon disagrees with Cubic's assumptions, and the agency's acceptance of these assumptions as realistic, Raytheon offers no data on which to base an alternative assumption.⁶ Raytheon's disagreement with the agency's judgment does not show that judgment to be unreasonable.

Raytheon also argues that Cubic's proposal indicates that the awardee will not comply with U.K. labor laws. Supp. Protest at 28. More specifically, Raytheon argues that the labor rates and benefits proposed by Cubic are too low and will violate the U.K.'s Transfer of Undertakings (Protection of Employment) Regulations of 2006, which provides that employee benefits cannot be diminished by a new employer. The Air Force responds that neither the agency nor the protester has information on the salaries and benefits that the incumbent provides for its employees in the United Kingdom with which to conduct such an analysis, and moreover, the solicitation did not provide for this level of analysis. Supp. AR at 9.

The protester's argument is without merit. The RFP did not indicate that proposals would be evaluated to determine compliance with local laws. Rather, the RFP included DFARS clause 252.222-7002 Compliance with Local Labor Laws (Overseas), which requires that "[t]he Contractor shall comply with all . . . [l]abor regulations including collective bargaining agreements, workers' compensation, working conditions, fringe benefits, and labor standards or labor contractor matters." We have held that general solicitation provisions mandating that "the contractor" comply with federal, state, and local laws do not require that an offeror demonstrate compliance prior to award. See, e.g., Freedom Scientific, Inc., B-401173.3, May 4, 2010, 2010 CPD ¶ 111 at 3 (compliance with FCC labeling requirements); Honolulu Marine, Inc., B-248380, Aug. 6, 1992, 92-2 CPD ¶ 87 at 5 (state licensing requirement). Rather compliance is a performance requirement that may be satisfied during contractor performance and does not affect the award decision (except, possibly, as a responsibility matter). Id. Moreover, whether Cubic complies with the provision is a matter of contract administration that we will not review. 4 C.F.R. § 21.5(a); Freedom Scientific, Inc., supra. Given that the solicitation did not

⁶ Raytheon does not identify what number of children attending DoDDS it used in calculating its proposed price.

provide for evaluating offerors' compliance with local laws, and Cubic's proposal did not take exception to this requirement, Raytheon's arguments provide no basis for us to question the agency's evaluation.

The protest is denied.

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General Counsel