



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: PAE Government Services, Inc.

File: B-407818

Date: March 5, 2013

Robert Nichols, Esq., Susan B. Cassidy, Esq., Anuj Vohra, Esq., Jade C. Totman, Esq., Daniel E. Matro, Esq., Saurabh Anand, Esq., and Michael T. Wagner, Esq., Covington & Burling, LLP, for the protester.
Richard, J. Vacura, Esq., Tina D. Reynolds, Esq., and K. Alyse Latour, Esq., Morrison & Foerster LLP, for DynCorp International LLC, an intervenor.
Kathleen D. Martin, Esq., Department of State, for the agency.
Katherine I. Riback, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency was not required to conduct cost realism or price realism analyses where the solicitation provided for the award of a fixed-price contract, and did not otherwise state that the agency would conduct such analyses.

DECISION

PAE Government Services, Inc., of Arlington, Virginia, protests the award of a task order contract issued by the Department of State (DOS) under task order request for proposals (TORP) No. SAQMMA12F1885 to DynCorp International LLC, of Falls Church, Virginia, for Criminal Justice Program Support (CPJS) in Haiti. PAE argues that the agency failed to reasonably evaluate offerors' prices and failed to take into account adverse past performance information concerning DynCorp.

We deny the protest.

BACKGROUND

The TORP was issued on March 31, 2012, and contemplated the award of a "hybrid fixed price, labor hour and cost reimbursement contract" with one base year and

three option years.¹ TORP §§ 1.3 and 1.8. The competition was limited to firms that hold one of the multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts for CPJS awarded by DOS in 2011.

The solicitation provided that DOS would make award “on a low price technically acceptable basis.” TORP § 1.3. Technical acceptability would be assessed based on an evaluation of an offeror’s plan to support the requirements in the statement of work, and the offeror’s past performance. TORP § 5.4. With regard to past performance, offerors were to provide information regarding “no more than three (3) previous contracts/orders of similar size and complexity that show experience in similar tasks and deployment circumstances,” including contact information for each referenced task order/contract. TORP §§ 4.2.6, 4.2.7. The TORP stated that the agency would evaluate each offeror’s past performance on the following basis:

Past performance will be evaluated based on the references provided by the Offeror, as well as contractor performance databases, internet references, former DoS contract/task order performance reports, firsthand knowledge of Government personnel and any other sources available.

TORP § 5.4.1. The agency provided that “submissions for [past performance] shall be recent within the past 36 months of proposal submission.” TORP, Amend. 1, Questions and Answers (Q&A) No. 130. The solicitation provided that an unacceptable past performance evaluation “[would] render the entire proposal unacceptable.” TORP § 5.4.1.

The TORP contained a pricing spreadsheet released in Amendment No. 001 which set out five master contract line item numbers (CLINS). The TORP provided that “[t]he proposed total price for all CLIN[s] in Section 1 for the base year and all option years will be used for determination of the reasonableness of total price.” TORP § 5.5.

DOS received nine proposals in response to the TORP. The agency established a competitive range and conducted discussions with the remaining offerors, including PAE and DynCorp, and received final proposal revisions. The agency found that all offerors in the competitive range were technically acceptable. The contracting officer (CO) then conducted a price reasonableness evaluation and determined that the price proposals of all competitive range offerors were reasonable. The agency’s evaluation of the offerors’ proposals was as follows:

¹ The TORP and agency report referred to the award as both a task order and a contract. For purposes of consistency, we refer to the award as a contract.

	DYNCORP	OFFEROR 3	PAE
Technical Approach and Past Performance	Acceptable	Acceptable	Acceptable
Price	\$49,126,625	\$49,398,785	\$49,865,072

Agency Report (AR), Tab 7, Selection Decision, at 5. The agency made award to DynCorp, as the lowest-priced, technically-acceptable offeror. This protest to our Office followed.

DISCUSSION

PAE argues DOS improperly awarded the contract to DynCorp because the agency's evaluation of price proposals failed to include cost and price realism analysis. As discussed below, we conclude that the TORP, when read as a whole clearly established that the offerors were to propose fixed CLIN prices or fixed unit prices and that the agency would conduct only a price reasonableness evaluation. See TORP § 5.5; TORP, Pricing Template. PAE also challenges the award to DynCorp on the grounds that the awardee's price is unbalanced, and that the agency failed to consider significant negative past performance by DynCorp.

Because, as explained below, we find that the record reflects that the agency's evaluation of price was reasonable and consistent with the terms of the TORP, PAE is not an interested party to challenge the award to DynCorp on the other grounds. In this regard, PAE is the third-lowest priced offeror, and the protester does not challenge the evaluation of the second-lowest priced offeror with regard to unbalanced pricing or past performance. A protester is not an interested party where it would not be in line for a contract award even if its protest were sustained, since it lacks the direct economic interest required by our Regulations to maintain a protest. Bid Protest Regulations, 4 C.F.R. §§ 21.0(a), 21.1(a) (2012); Indtai Inc., B-298432.3, Jan. 17, 2007, 2007 CPD ¶ 13 at 4-5.

Price Evaluation

PAE argues that the TORP required DOS to conduct both price realism and cost realism analyses of the offerors' proposals, but the agency failed to conduct these analyses. The agency acknowledges that it did not conduct these analyses, but argues that neither analysis was required because the TORP anticipated award of a fixed-price contract, and did not state that the agency would conduct a price realism analysis. We agree with the agency.

First, as discussed above, the TORP stated that an offeror's price would be evaluated based on the total for all CLINs for the base and option years, and that "[t]his task order will be awarded to the low price, technically acceptable offeror." TORP § 5.5. TORP, attach. 2, at 1. Notwithstanding this language, PAE argues that certain sub-CLINs were cost-reimbursable, which required the agency to evaluate the realism of offerors' proposed costs.

When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. Federal Acquisition Regulation (FAR) §§ 15.305(a)(1); 15.404-1(d); Palmetto GBA, LLC, B-298962, B-298962.2, Jan. 16, 2007, 2007 CPD ¶ 25 at 7. Consequently, the agency must perform a cost realism analysis to determine the extent to which an offeror's proposed costs are realistic for the work to be performed. FAR § 15.404-1(d)(1). Cost realism is not required 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 Maint., Inc., B-244366.2, Mar. 7, 1994, 94-1 CPD ¶ 177 at 10.

As relevant to PAE's argument, CLIN X002 concerned labor costs. The instructions for CLIN X002 stated: "Per TORP 1.8²; cost reimbursable with fixed unit pricing." TORP, attach. 2, at 1. The TORP explained that offerors were required to submit fixed unit prices for labor under various sub-CLINS, such as American citizen labor, third country national labor, and local national labor.³ Id. The TORP specified a number of hours for each of these categories, meaning that each offeror was required only to propose a fixed rate for these elements.⁴

PAE argues that the following three labor sub-CLINS were cost-reimbursable and required the agency to conduct a cost realism analysis: X002MA, danger pay differential; X002NA, post hardship differential; and X002OA, Defense Base Act (DBA) insurance. TORP, attach. 2, at 1.

CLINs X002MA and X002NA stated that pricing for these premium pay elements would be "% of [American citizen] wages." Id. PAE argues that, under the terms of the CPJS ID/IQ contract, offerors were permitted to propose danger pay and post

² The section listed the number of required full-time equivalent personnel. TORP § 1.8.

³ Additionally, the TORP identified numerous CLINs that were cost reimbursable, but for which no costs were to be proposed for purposes of the competition. TORP, attach. 2, at 1.

⁴ PAE does not argue that these sub-CLINs were cost-reimbursable.

hardship pay as a percentage of the DOS rates paid to its own employees for these elements. Protester's Response to Request for Dismissal (Dec. 10, 2012) at 11. The protester contends that because offerors could propose to pay these rates based on a percentage of the DOS rates, and because the DOS rates could change, the rates paid by the contractor were not fixed--thus requiring the agency to conduct a price realism evaluation.

The CPJS ID/IQ contract, however, stated that offerors could be paid for danger pay and post hardship pay, provided such pay was part of the contractor's established compensation plan and the rates for such pay did not exceed the allowable DOS rates. Protest, exh. C, PAE CPJS ID/IQ Contract, at 7-8. The contract did not state, as the protester implies, that contractors were to be reimbursed at a variable rate pegged to the DOS rates. Moreover, as DOS notes, the TORP did not state that offerors were to propose variable rates that would fluctuate based on DOS published rates; instead, the solicitation instructed offerors to propose danger and post hardship pay based on a rates that were a percentage of the pay for an American citizen. TORP, attach. 2, at 1. These percentages were fixed and, thus, were part of the fixed rates required under CLIN X002.

With regard to DBA insurance, the TORP stated that this element was "Reimbursable/no fee," TORP, attach. 2, at 1. PAE argues that the agency was therefore required to evaluate the realism of offerors' proposed costs for this sub-CLIN. DOS states, however, that DBA insurance is a standard cost for all offerors, at a rate that is set under the terms of CPJS ID/IQ contract and DOS policy. CO Statement (Dec. 19, 2012) ¶ 13. For this reason, the agency argues, DBA insurance is a fixed element of offerors' prices, rather than a reimbursable element unique to each offeror. While PAE stresses that the TORP used the term "reimbursable," the protester does not expressly dispute the agency's statement that there is a uniform DBA insurance rate for all offerors.

On this record, we conclude that offerors were required to propose fixed prices based on fixed unit or labor prices. Because the solicitation did not require offerors to propose cost-reimbursable elements for purposes of the competition, the agency was not required to conduct a cost realism analysis.⁵ See Systems, Studies & Simulation, Inc., B-295579, Mar. 28, 2005, 2005 CPD ¶ 78 at 6.

⁵ To the extent that PAE argues that use of the term "cost reimbursable" for DBA insurance sub-CLIN X002OA required the agency to conduct a cost realism analysis, the solicitation, at most, created a patent ambiguity. If the protester believed that the term "cost reimbursable" required offerors to propose costs--notwithstanding the requirement for fixed rates and the TORPs statement that award would be based on price--the protester was required to challenge this matter prior to the time for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

With regard to price realism, PAE contends that although the TORP did not specifically state that the agency would conduct a price realism analysis of an offeror's proposal, the solicitation effectively provided for one by instructing offerors to "[c]learly relat[e] cost/price to the statement of work sections," with price information "broken out . . . to the lowest detail practical." TORP § 4.3; Protest at 9-10. PAE notes that the TORP also stated that while offerors should attempt to lower their operating costs, they must also "assur[e] the Government that [they] can meet the requirement[s]" of the contract. TORP § 1.4.

While it is within an agency's discretion to provide for a price realism analysis in awarding a fixed-price contract to assess understanding or risk, see FAR § 15.404-1(d)(3), offerors competing for such an award must be given reasonable notice that a business decision to submit low pricing will be considered as reflecting on their understanding or the risk associated with their proposals. Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-6. Where there is no relevant evaluation criterion pertaining to price realism, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to perform successfully at its offered price. Flight Safety Servs. Corp., B-403831, B-403831.2, Dec. 9, 2010, 2010 CPD ¶ 294 at 5. Absent a solicitation provision for a fixed-priced contract requiring a price realism analysis, no such analysis is required or permitted. Cherry Road Techs.; Elec. Data Sys. Corp., B-296915 et al., Oct. 24, 2005, 2005 CPD ¶ 197 at 18; Emergint Techs. Inc., *supra*.

PAE argues that the circumstances here are similar to those discussed in our decision in Science Applications Int'l Corp., B-407105, B-407105.2, Nov. 1, 2012, 2012 CPD ¶ 310. In that decision, we found that although a solicitation did not expressly state that the agency would conduct a price realism analysis, the solicitation reasonably advised offerors that the agency intended to do so nonetheless. In Science Applications Int'l Corp. the solicitation stated that the agency would evaluate price proposals to determine whether proposed prices were "compatible with the scope of effort, are not unbalanced, and are neither excessive nor insufficient for the effort to be accomplished," and that "[t]his may be grounds for eliminating a proposal from competition on the basis that the offeror does not understand the requirement." *Id.* at 10. The protester contends that TORP here similarly advised offerors that the agency would conduct a price realism analysis because offerors were instructed to identify detailed information regarding the proposed prices and to "assur[e] the Government that [they] can meet the requirement[s]" of the contract. TORP § 1.4. We disagree.

While the TORP here expresses an expectation that the offerors will be able to crosswalk between price information and the statement of work, we note that the solicitation evaluation criteria did not state that the agency would specifically evaluate an offerors' understanding of the technical requirements based on its

proposed price, nor does solicitation provide for the elimination of a proposal based on a low price. Instead, the evaluation criteria stated that “[t]he proposed total price of all CLINs in Section 1 for the base year and all option years will be used for determination of the reasonableness of total price,” and that award would be made to the “low price, technically acceptable offeror.” TORP § 5.5. The TORP, when read as a whole clearly established that offerors were to propose fixed CLIN prices or fixed unit prices, and that the agency would evaluate offerors’ prices for reasonableness. See TORP § 5.5; TORP, attach. B, at 1. In sum, we find that the agency reasonably determined that the solicitation did not require a price realism analysis.

Unbalanced Pricing and Past Performance Evaluations

Next, PAE argues that DOS failed to evaluate whether DynCorp’s prices were unbalanced. PAE contends that DynCorp’s proposed price was front-loaded, in that its proposed price for the base year was higher than in each of the option years. PAE also argues that the agency’s evaluation of DynCorp’s past performance was unreasonable because the agency failed to consider DynCorp’s work on a DOS contract for Worldwide Protective Services⁶, where DOS gave DynCorp a rating of 1 out of 25 total possible points, and concluded that the “[c]ontinued use of DynCorp would represent an unjustifiable risk to the Government.” Protest, Tab G, Contractor Past Performance Evaluation at 5.

The record shows that PAE is not an interested party to challenge the award to DynCorp on either of these bases. A protester is not an interested party where it would not be in line for award if its protest were sustained. Avondale Tech. Servs., Inc., B-243330, July 18, 1991, 91-2 CPD ¶ 72 at 2. Here, PAE is the third-lowest priced offeror, and the protester does not challenge the evaluation of second-lowest priced offeror. As discussed above, we find no merit to the protester’s argument that the agency should have evaluated offerors’ prices for cost or price realism.⁷ For these reasons, we dismiss PAE’s arguments concerning unbalanced pricing and past performance.

The protest is denied.

Susan A. Poling
General Counsel

⁶ This requirement was for movement security services in Iraq and the provision of security forces. CO Statement (Jan. 18, 2013) ¶ 29.

⁷ PAE raises other collateral issues. We have reviewed all of the protester’s arguments and find that none provides a basis to sustain the protest.