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Decision

Matter of: APlus Technologies, Inc.

File: B-408551.3

Date: December 23, 2013

Craig A. Holman, Esq., Kara L. Daniels, Esq., and Steffen G. Jacobsen, Esq., Arnold & Porter LLP, for the protester.
Katherine S. Nucci, Esq., and Scott F. Lane, Esq., Thompson Coburn LLP, for Caduceus Healthcare, Inc., the intervenor.
Scott N. Flesch, Esq., and Maj. Joseph K. Venghaus, Department of the Army, for the agency.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly evaluated proposed compensation plans using an unreliable standard, and unequally rated the awardee's compensation plan as acceptable and the protester's plan as unacceptable, is denied where the record provides no basis to find the standard unreasonable, and where the record does not support the contention that the proposals were unequally evaluated.

DECISION

APlus Technologies, Inc., of Columbia, Maryland, protests the award of a contract to Caduceus Healthcare, Inc., of Atlanta, Georgia, by the Department of the Army, Army Medical Command, under request for proposals (RFP) No. W81K00-13-R-0019 for the services of certified registered nurse anesthetists (CRNA) at the San Antonio Military Medical Center (SAMMC), located at Fort Sam Houston, Texas, and nearby military medical facilities. APlus argues that the Army misevaluated its proposal and treated the proposals unequally.

We deny the protest.

BACKGROUND

The RFP, issued on April 17, 2013, as a commercial services solicitation set aside for the 8(a) program, contemplated the award of an indefinite-delivery/indefinite-

quantity commercial services contract. RFP at 1, 47 (Federal Acquisition Regulation (FAR) § 52.212-1), 54. The RFP requested proposals to supply the personal services of 11 CRNAs for a 3-month base period, and 35 CRNAs for up to two 1-year option periods. RFP at 3-6, 18; RFP, amend. 1, at 22.

The solicitation's performance work statement (PWS) explained that SAMMC is a level 1 trauma center, and most anesthesia services provided by these CRNAs would be performed in the area of surgical anesthesia. RFP PWS at ¶ 1.1.1. CRNA services would be needed 24 hours a day, 7 days a week, including on holidays. Id. at ¶ 1.4. CRNAs could expect to be scheduled to work an average of 45 duty hours weekly; the RFP noted that the weekly work schedule could occasionally exceed 50 hours, and would fall in the range of 1,840 to 2,300 hours annually. Id.

Award was to be made to the offeror whose proposal provided the best value to the government, considering four factors: past performance, technical capabilities, compensation plan, and price. RFP at 57-58 (incorporating FAR § 52.212-2). The compensation plan factor was the most important factor, followed by the past performance and technical capabilities factors (which were equal in weight), and the least important factor, price. RFP at 58. Proposals were to be adjectivally rated under the past performance and technical capability factors, but the compensation plan factor evaluation would result only in an acceptable or unacceptable rating. RFP at 57-58.

The compensation plan evaluation was to assess whether the offeror's proposed compensation was "sufficient to attract and retain qualified healthcare providers based on market research." RFP at 58. Compensation plans were to be rated acceptable if, "[b]ased on . . . Contracting Office's market research," the proposed compensation was sufficient to attract and retain quality CRNAs. Id. Any proposal rated unacceptable for the compensation plan factor was to be unacceptable overall, and ineligible for award. RFP at 57-58. The RFP also incorporated FAR § 52.222-46, which generally provides for the agency to evaluate the realism of the offeror's compensation plan. RFP at 51-52.

Offerors were instructed to submit a compensation plan that both described the firm's plan in narrative form and included a sample compensation plan worksheet identifying the specific components of compensation. Id. The worksheet provided lines for the offerors to list a "direct annual salary," and a "direct labor monthly rate" (which was labeled as the annual salary divided by 12 months). RFP at 60. The worksheet then provided lines for the value of fringe benefits, including the federal Social Security and Medicare payroll tax, the federal and state unemployment payroll taxes, workers' compensation, health/life insurance, retirement plan, continuing medical education, and "other (specify)." Id. at 60-61.

Caduceus and APlus were among the firms that submitted proposals on May 10. In its compensation plan proposal, Caduceus described the market research it had

conducted to arrive at its compensation package. The firm stated that, for purposes of recruitment and retention, it had put together a package that was higher than the average salary for CRNAs for the SAMMC area. AR, Tab 6A, Caduceus Proposal vol. IV, at 2. The firm explained the basis for its compensation plan, and described general information about the fringe benefits it offered. Caduceus also provided its version of the RFP worksheet that shows an annual base pay of \$[DELETED],¹ and an additional “estimated overtime pay” of \$[DELETED], for a total of \$[DELETED]. Id. at 8. Caduceus also listed annual values for each fringe benefit identified in the worksheet, and a total annual value of fringe benefits of \$[DELETED], a portion of which was labeled as the value of paid time off for holidays, vacation, and sick leave. Id. Caduceus’s base pay, overtime, and fringe benefits totaled \$[DELETED] annually (thus, \$[DELETED] monthly). Id.

APlus’s proposal explained that the firm had subcontracted with OMV Medical to assist in providing CRNA staff, and noted that OMV had a current contract to supply CRNAs at Fort Sam Houston. AR, Tab 5, APlus Proposal vol. III, at 1-2. The firm’s compensation plan proposal briefly described its market research, and identified the basis for its proposed compensation. This included OMV’s experience supplying CRNAs to the Army. AR, Tab 5, APlus Proposal vol. IV, at 2. The compensation plan worksheet identified an annual base salary of \$[DELETED], which included (but did not separately value) time off for holidays and other paid time off. Id. at 1, 3. APlus then listed values for the fringe benefits specified by the agency worksheet. The amount on each line was less than \$10--in some cases far less--and none included the basis of the stated amount, such as whether it was an hourly rate or monthly rate. The retirement plan and continuing medical education lines had only blank lines with no values. The worksheet listed as the total monthly fringe benefits the amount of \$[DELETED], id. at 3, but it is not clear how this figure was derived. APlus’s compensation plan listed total monthly compensation of \$[DELETED] (thus, \$[DELETED] annually), id. at 2, significantly lower than that of Caduceus.

After the agency evaluated proposals, the contracting officer made award to Caduceus on July 10. APlus and another offeror subsequently filed protests with our Office challenging the award decision. On August 6, the Army announced its intention to take corrective action by canceling the award to Caduceus, reevaluating the proposals of the protesters and the awardee, and making a new award decision. On August 8, our Office dismissed both protests as academic.

In preparation for the reevaluation, the Army completed a memorandum documenting its market research into the compensation of CRNAs.² AR, Tab 11,

¹ Amounts in our description of the compensation plans here have been rounded.

² The Army initially had compiled compensation research in late May 2013. AR, Tab 22, Compensation Research Memorandum (undated). In doing so, the agency
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CRNA Compensation Research Memo, Aug. 15, 2013, at 1. The Army observed that CRNAs generally practiced in a wide variety of medical settings, and worked within a variety of practice styles, such as independent practice, under medical supervision by an anesthesiologist, and in rural hospitals that are “staffed only by CRNAs.” Id. The Army concluded that at SAMMC, the only level 1 trauma center in the Department of Defense, the “high acuity” of patient needs and the requirement for CRNAs to practice independently would require a contractor to provide adequate compensation to recruit and retain a full staff of CRNAs under the contract. Id.

The memorandum then considered data from salary.com for CRNAs in the San Antonio area, and stated that the median salary appeared to reflect a CRNA providing non-specialized services, in contrast to the challenging requirements of working at SAMMC. Id. As a result, the memorandum stated that the agency determined that its salary ranges “should start at the 90th percentile mark” of CRNAs in the area. Id. The Army found that the 90th percentile mark would be a minimum annual base salary of \$168,332. After including the value of fringe benefits, the estimate was \$223,590 annually, which equated to \$18,632.50 monthly. Id. at 2.

The memorandum went on to consider an additional on-line source of compensation data. One listing, in Corpus Christi, Texas, included a salary range above the Army’s minimum standard for a position with an “acuity level [that] is not high,” and under which the CRNA would not be fully independent. Id. The second, in El Paso, Texas, had a posted annual salary range that included the standard, for CRNAs with some operating room duties, but no indication as to whether they had medical supervision. Id. The memorandum noted that El Paso was 500 miles away, but stated it was relevant as regional competition. Id.

Finally, the memorandum considered two contracts to provide CRNAs to SAMMC. The first was a sole-source contract to an Alaska Native Corporation-owned small business, under which the firm had “high fill rates and low turn-over,” and paid an hourly rate (with fringe) of \$[DELETED] (\$[DELETED] monthly), which the memorandum stated would represent an annual salary of \$246,297. Id. at 2-3. The second was a contract with OMV, APlus’ proposed subcontractor here, to provide five CRNAs. The memorandum stated that OMV’s contract had experienced high

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noted that SAMMC was a sufficiently unique practice environment for CRNAs that only the compensation of contractor-supplied CRNAs at SAMMC could be considered truly comparable, and attempting to draw conclusions from other sources was difficult. Id. at 3. The Army also prepared a government estimate which estimated CRNA compensation at \$115.38 per hour in the base year, or \$240,000 annually (using a 2,080 hour work year). AR, Tab 21, Independent Government Estimate, at 1.

turnover within the year, and difficulty filling positions.³ It also noted that for this contract (for the year at issue), OMV's proposed CRNA compensation was lower than that under the other contract. Id.

In reevaluating proposals, the contracting officer recounted the market research described above. She stated that, considering that the average CRNA in the area did not provide the same level of services as those required for this contract, the top 10 percent of pay for the local area was determined to be a fair representation of what would be minimally necessary to recruit and retain qualified candidates for this contract. AR, Tab 17A, Source Selection Decision, at 12. Taking all of the market research into account, the contracting officer stated that the agency determined that any rate offered to a CRNA lower than \$116 per hour, or \$18,560 per month (with fringe), would "increase the likel[ih]ood of low performance and high turnover rates."⁴ Id. Proposed compensation that failed to meet that threshold "will be considered unacceptable." Id. The evaluation then considered each firm's total monthly compensation (base and fringe) and concluded that Caduceus met the minimum rate and was therefore acceptable, while APlus/OMV had not met the minimum rate and was unacceptable on that basis. Id. at 13.

The reevaluation resulted in the following ratings for APlus and Caduceus:

	Past Performance	Technical Capability	Compensation Plan	Price (millions)
APlus	Limited Confidence	Acceptable	Unacceptable	Not evaluated ⁵
Caduceus	Substantial Confidence	Outstanding	Acceptable	\$20.5

AR, Tab 17A, Source Selection Decision, at 2, 5, 12-13; Protest at 12.

On September 6, the contracting officer awarded the contract to Caduceus as the only firm whose proposal was acceptable. This protest followed.

³ During corrective action, the Army communicated with APlus to ask it to respond to adverse past performance information concerning this contract, and considered the firm's response in its evaluation. AR, Tab 12, E-mail from Army Contract Specialist to APlus, Aug. 28, 2013, at 1; Tab 17A, Source Selection Decision, at 2-4.

⁴ The Army calculated hourly figures by assuming an employee would be paid for 1,920 hours annually, divided by 12 months, or 160 hours per month.

⁵ The Army did not evaluate APlus under the price factor because its compensation plan was unacceptable, making the proposal ineligible for award. APlus states that its total price was significantly lower, at \$16.9 million. Protest at 12.

ANALYSIS

APlus argues first that the Army overstated its needs and used unreliable market research to establish an evaluation standard that proposals were required to offer to pay CRNAs the equivalent of at least the 90th percentile of the range of compensation in the San Antonio area. Apart from that, APlus argues that its compensation plan proposal was misevaluated as unacceptable, and that Caduceus's compensation could only be deemed acceptable through unequal treatment.⁶

Basis for Evaluation Standard

APlus challenges the Army's establishment of its minimum compensation rate, arguing that the estimate is based on incomplete and unreliable data. APlus disputes the usefulness of each of the Army's market research sources. As examples, APlus maintains that the Army relied on data from a sole-source contract at SAMMC, that the data from APlus's own subcontractor's contract at SAMMC should be discounted because another contractor "poached" its employees, and that other data is flawed because it was not adjusted to reflect the exact circumstances of the CRNAs required here. Using such unreliable data, APlus argues, the Army created an unreliable estimate for use in the compensation plan evaluation. Protest at 14; Comments at 16-17; Supplemental Comments at 6-7.

The determination of a contracting agency's needs and the best method of accommodating them are matters primarily within the agency's discretion. Systems Application & Techs., Inc., B-270672, Apr. 8, 1996, 96-1 CPD ¶ 182 at 3. Where an agency uses an estimate to evaluate proposals, our Office will review challenges to the government estimate for reasonableness. Baltimore Gas & Elec. Co., B-406057 et al., Feb. 1, 2012, 2012 CPD ¶ 34 at 6. An agency is not required to disclose its estimate in the solicitation, but the estimate must be a reasonable application of the agency's judgment. See Aerostat Servs. P'ship, B-244939.2, Jan. 15, 1992, 92-1 CPD ¶ 71 at 4 (manning model). A protester's disagreement with an agency's basis for developing a government estimate provides no basis to sustain a protest. IP Network Solutions, Inc., et al., B-408232 et al., July 25, 2013, 2013 CPD ¶ 187 at 10.

The protester's numerous challenges to individual elements of the agency's market research do not establish that the Army acted unreasonably in calculating a minimum compensation level for use in evaluating compensation plans. An estimate

⁶ Since we conclude that the Army reasonably evaluated APlus's compensation plan as unacceptable, making its proposal ineligible for award, we need not reach its allegations concerning the technical and past performance evaluations.

is just that, an estimate; there is no requirement for an estimate to be exact. The record shows that the Army itself recognized that some of the data obtained during its market research contained shortcomings, some of which are pointed out by the protester, but the record also explains that it was these shortcomings that led the Army to rely on a variety of sources. AR, Tab 17A, Source Selection Decision, at 10-12.

On the other hand, the record reflects that the Army was concerned that the contractor had to have a plan to compensate its CRNAs sufficiently well so that staff turnover would be rare. The record also shows that the Army's experience under two recent contracts at SAMMC supported its view of the need to pay CRNAs at the high end of the range of pay within the local market.⁷ The contractor with high fill rates and low turnover paid compensation consistent with the agency's view that using the top ten percent of CRNA earners as a minimum standard would be a fair representation of what would be minimally necessary to recruit and retain qualified candidates here. In contrast, the contractor offering lower compensation (the firm proposed as APlus's subcontractor here) had experienced high turnover rates, with some of the departing employees citing compensation as a significant issue. In our view, these facts provided a reasonable basis for the Army to establish its minimally acceptable hourly and monthly rates, notwithstanding their imprecision, as a standard against which to evaluate the offerors' compensation plans.⁸

APlus's arguments with respect to the most relevant sources relied on by the Army in determining its standard--the current contracts providing CRNAs--are unavailing. Whether or not the contract to one firm was awarded on a sole-source basis, the record shows that its rate of compensation resulted in high fill rates and low

⁷ The performance standard in the RFP required 95 percent of positions to be filled, and a turnover rate of "no more than one (1) per person, per year." RFP at 29. In our view, the services of CRNAs are obviously related to human life and safety. When issues of human life and safety are involved, our Office affords greater discretion to the agency's use of heightened standards for the evaluation of proposals. Austin Co., B-291482, Jan. 7, 2003, 2003 CPD ¶ 41 at 4-5.

⁸ APlus's argument that it was improper for the Army not to disclose its standard has no merit. As noted above, this Office has held that an agency is not required to disclose in the solicitation the estimate that it uses to evaluate proposals. See Aerostat Servs. P'ship, supra, at 4. Additionally, the RFP expressly notified offerors that the assessment of whether a compensation plan was acceptable would be "Based on . . . Contracting Office's market research," RFP at 58, but did not state either the results of that research or a compensation estimate. We see no error in the omission of the government estimate from the RFP, and further, we regard this aspect of APlus's argument as an untimely challenge to the terms of the RFP. See 4 C.F.R. § 21.2(a) (2013).

turnover. The protester's complaint that the turnover problems experienced by its subcontractor were caused by "poaching" of its employees also does not show that the agency's evaluation was unreasonable. It is not uncommon for qualified personnel to be hired away from another contractor, and one safeguard against such actions is having an attractive compensation plan in place. The record shows that compensation issues were at least one reason for OMV's retention problems. See generally Protester's Comments at 11 (acknowledging that OMV lost four of its CRNAs between September and November 2012 to a contractor offering higher pay and the ability to convert the position to federal employment); AR, Tab 14, APlus Past Performance Response, at 10-12 (resignation notices from CRNAs to OMV), 19-20 (Letters from OMV to CRNAs proposing "[DELETED]"% reduction in your current billing rate"), 24 (CRNA e-mail to OMV complaining of uncompetitive pay).

Unequal Treatment

APlus argues that the contemporaneous record fails to document any analysis of the details of either firm's compensation plan and that, when properly analyzed, the plans bear no significant differences, making their different ratings the result of allegedly unequal treatment. Among other things, APlus notes that its compensation plan listed pay including holidays and paid time off. APlus argues that an equal comparison of its proposal to Caduceus's can be achieved by subtracting the value of those hours from its annual pay, which APlus calculates as \$[DELETED], meaning that both firms offered base pay of \$[DELETED]. APlus Supplemental Argument, Dec. 16, 2013, at 2 n.1. APlus further argues that Caduceus's proposal failed to explain the firm's inclusion of an estimated overtime payment of \$[DELETED], and therefore the overtime value should be disregarded.

The evaluation of an offeror's proposal is a matter largely within the agency's discretion. Frontline Healthcare Workers Safety Found., Ltd., B-402380, Mar. 22, 2010, 2010 CPD ¶ 91 at 5. In reviewing a protest that challenges an agency's evaluation of proposals, our Office will not reevaluate the proposals; rather, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Ocean Servs., LLC, B-406087, B-406087.2, Feb. 2, 2012, 2012 CPD ¶ 62 at 5. It is a fundamental principle of government procurement that competitions must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. Continental RPVs, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 8. However, where a protest alleges unequal treatment in a technical evaluation, it must show that the differences in ratings did not stem from differences between the offeror's proposals. See Northrop Grumman Sys. Corp., B-406411, B-406411.2, May 25, 2012, 2012 CPD ¶ 164 at 8. APlus has not made this showing.

The Army argues that the two compensation plans are, in fact, very different. In particular, the Army maintains that while Caduceus's plan was thorough, and

justified its claim that it offered attractive fringe benefits, APlus's plan was fundamentally flawed. The Army points out that APlus's plan contains "nonsensical" amounts for each of the basic benefits lines--far below what the firm will incur for payroll taxes, workers' compensation, and a fully company-paid health plan. APlus's plan did not indicate that the firm would provide any contribution to employee retirement or continuing education costs. Finally, APlus's plan identified a trivial bonus plan, which the firm itself valued at only one dollar a month. Army Supplemental Argument, Dec. 16, 2013, at 3-4.

We find that the record supports the Army's position. Based on our review of the record, a comparison of the two compensation plans here reveals stark differences. Even assuming the two firms may pay a similar base amount (if APlus removes an amount for paid time off from its base pay and places it as a fringe benefit)⁹, significant differences remain. In particular, APlus's plan fails to show that the firm understands the cost of any of the basic payroll items required by the RFP compensation plan worksheet. Additionally, in contrast to Caduceus's plan, APlus's plan showed no employer contribution to retirement or continuing education, and showed a bonus plan of negligible value. APlus's plan also failed to show the basis for its stated monthly fringe benefit value--we cannot ascertain any relationship between this figure and the individual components of the firm's fringe benefits.

The record shows that Caduceus's plan was, for the most part, thorough and detailed in explaining how it planned to offer an attractive benefits package. Although the plan did not explain the firm's approach to paying overtime compensation, it identified overtime as an element of the firm's compensation plan, and listed its estimated value in the worksheet. Given the RFP's statement that CRNAs would be required to work on holidays and would incur more than 40 hours per week, we think that the Army could reasonably find Caduceus's compensation plan acceptable, even without an explanation of how overtime would be calculated.¹⁰ Caduceus's description of its fringe benefits is also internally consistent, and supports the proposal's assertions that it was an attractive package.

⁹ This calculation does not change the fact that Caduceus's proposed amount for paid time off, listed as a fringe benefit, is significantly higher than the amount that APlus claims is included in its direct rate. The Army considered compensation plans based on the both base rates and fringe benefits.

¹⁰ Notably, the RFP required offerors to price the services based on a monthly number of CRNAs, so a contractor's plan to pay its employees overtime (such as when required to perform more than 40 hours of service weekly, as the RFP provided) thus would not increase or be expected to increase the contract price. APlus's proposal is silent as to its plan for overtime pay.

In short, while the agency's contemporaneous analysis did not go into as much detail as it might have,¹¹ the contemporaneous record supports the reasonableness of the agency's ultimate findings. The record does not support APlus's claim that the offerors' compensation plans were similar, so there is no basis to conclude that it was unreasonable for the Army to find Caduceus's plan acceptable and APlus's plan unacceptable. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 13-14.

The protest is denied.

Susan A. Poling
General Counsel

¹¹ To the extent that the Army's arguments go beyond the reasoning stated in the contemporaneous record, our Office will not limit our review to contemporaneous evidence, but will consider all the information provided, including a party's arguments and explanations. See Serco, Inc., B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216 at 7. 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 as long as 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. The Army's explanation meets this standard.