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Decision

Matter of: Cubic Applications, Inc.

File: B-411305; B-411305.2

Date: July 9, 2015

Paul F. Khoury, Esq., Tracye W. Howard, Esq., Nina S. Rustgi, Esq., and Laura Sherman, Esq., Wiley Rein LLP, for the protester.
Robert S. Metzger, Esq., and Lucas T. Hanback, Esq., Rogers Joseph O'Donnell, P.C., for Science Applications International Corporation, the intervenor.
Capt. Adam N. Olsen, Department of the Air Force, for the agency.
Robert T. Wu, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the agency unreasonably evaluated the protester's price proposal as exceptionally low and, as a result, conducted misleading discussions, is denied where the record shows the agency's evaluation was reasonable.
 2. Protest that the agency engaged in disparate treatment between the protester and the awardee is sustained where the record shows the agency evaluated the protester's optional labor rates as exceptionally low, but without reasonable explanation did not similarly evaluate as exceptionally low the awardee's lower-priced optional labor rates, and there is a reasonable possibility that the protester was prejudiced by the agency's actions.
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DECISION

Cubic Applications, Inc., of San Diego, California, protests the issuance of a task order to Science Applications International Corporation (SAIC), of McLean, Virginia, by the Department of the Air Force under request for proposals (RFP) No. FA4890-12-D-00XX-0065 for program security support services. Cubic argues that the Air Force improperly evaluated its proposal as exceptionally low in price, and conducted misleading discussions by informing the firm that its price was exceptionally low during several rounds of discussions. Cubic also argues that the agency disparately evaluated price proposals.

We deny the protest in part and sustain it in part.

BACKGROUND

The RFP, issued on September 16, 2014, sought proposals from holders of the Air Combat Command, Acquisition Management and Integration Center's Contracted Advisory and Assistance Services (CAAS) IV indefinite-delivery, indefinite-quantity (ID/IQ) contracts to perform various program security support services as outlined in the RFP's performance work statement (PWS).¹ RFP at 1,4. Contractors are to provide functional support required to fulfill the task order, including the required level of effort of 90 core and 19 optional full time equivalent (FTE) personnel with appropriate security clearances, as detailed in the PWS. Id. at 4.

Proposals were to be evaluated for technical acceptability and price, with award being made to the lowest-priced technically-acceptable offeror. Id. at 30-32. The technical factor includes two subfactors: (1) knowledge, skills and abilities, and (2) staffing plan and management approach. Id. at 32. Price proposals were to be evaluated to ensure awarded prices were reasonable. Id. at 32-33. Additionally, the RFP provides:

The government reserves the right to ask for additional information from technically acceptable offerors with proposed prices that appear exceptionally low. The Government plans on addressing any apparent exceptionally low prices by evaluating the offerors experience and/or capability in providing similar services at similar prices. An exceptionally or unrealistically low offer may pose an unacceptable risk to the Government and may be the reason to reject an offeror's proposal.

Id. at 33.

Seven proposals were received, including those from Cubic and SAIC. Agency Report (AR), exh. 13, Initial Abstract, at 1. After an initial evaluation, the agency found Cubic's proposal technically unacceptable under the staffing plan and management approach subfactor because it did not demonstrate the ability to provide qualified personnel to satisfy all PWS requirements. AR, exh. 14, Initial Proposal Analysis Report (PAR), at 7-8. The Air Force also identified four concerns with Cubic's price proposal, including that it offered exceptionally low proposed prices for core and optional FTEs for tasks [DELETED], [DELETED] and [DELETED]. Id. at 17-18.

¹ The estimated value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under multiple-award ID/IQ contracts. 10 U.S.C. § 2304c(e)(1)(B).

The agency established a competitive range and engaged in discussions with offerors in the competitive range, including SAIC and Cubic. AR, exh. 15, Competitive Range Memorandum, at 1; exh. 16, Cubic Initial Evaluation Notices. As relevant here, the agency informed Cubic of the following discussion topic:

Offeror's proposal appears to be exceptionally low and may pose an unacceptable risk to the Government. For example, the offeror's proposed pricing for Core and Optional FTEs for tasks [DELETED], [DELETED] and [DELETED] appears to be significantly understated compared to CAAS IV ceiling labor rates and the Government's market research results. This applies to all proposed labor categories (Core and Optional FTEs). Please provide example(s) of successful contract performance, of the same scope and magnitude of this effort including the ability to meet service summary thresholds for turnover and lapse rate for personnel, where your company has provided similar services at similar prices within the past 5 years. Please provide a revised pricing proposal, if necessary.

AR, exh. 16, Cubic Initial Evaluation Notices, at 5.

In its response, Cubic explained that it performed "extensive research on the appropriate compensation required to keep qualified personnel and meet the customer's mission objectives. We utilize salary survey data for skills and location areas where personnel will be placed, and research what compensation is being provided to other Cubic personnel already in the particular area." AR, exh. 17, Initial Cubic Evaluation Notice Response, at 8. The firm pointed to three other contracts to support its pricing methodology. *Id.* at 9-11. Cubic also revised its price proposal increasing its labor rates for core and optional FTEs for each identified PWS task. AR, exh. 19, Interim PAR, at 68.

The source selection evaluation board (SSEB) reevaluated Cubic's proposal in light of the firm's evaluation notice responses and found that the proposal continued to be unacceptable under the staffing plan and management approach subfactor. In this regard, the SSEB found that Cubic's "proposed staffing plan and management approach, combined with the proposed pricing, does not demonstrate the offeror's ability to recruit, hire and retain qualified personnel to meet all of the [RFP's] requirements." AR, exh. 18, SSEB Evaluation of Initial Cubic Evaluation Notice Responses, at 2. With respect to Cubic's price proposal, the SSEB acknowledged the information submitted by the firm, but also noted:

The offeror's revised proposed pricing still seems exceptionally low and may pose an unacceptable risk to the Government. . . . Cubic (and their teaming partner [DELETED]) is proposing to pay roughly the same salaries as the current contract salaries for PWS tasks [DELETED] and [DELETED] which comprise over [DELETED]%

([DELETED] of 89.5 Core FTEs) of the proposed Core FTEs. However, the current contract is experiencing significant lapse and turnover rate issues, and is not in compliance with the lapse and turnover rates requirements for [this RFP]. The offeror's revised low pricing seems to point to a lack of understanding of the current market conditions.

Id. at 10-11. The agency engaged in two additional rounds of discussions, each time expressing its concern that Cubic's proposal did not demonstrate its ability to recruit, hire and retain qualified personnel at the proposed labor rates or its ability to meet the PWS' threshold requirements for turnover and lapse rates. AR, exh. 21, Cubic Second Round Evaluation Notices, at 2; exh. 25, Cubic Final Proposal Revision Evaluation Notices, at 4. The record shows that Cubic increased its labor rates corresponding to the relevant PWS tasks after each round of discussions. AR, exh. 28b, Final PAR, at 20.

During the same relevant evaluation periods, the agency's evaluators did not identify to SAIC any issues with the firm's price being exceptionally low. The record shows that while SAIC's core FTE labor rates were for the large part significantly higher than Cubic's throughout the discussions, and more in line with the government's estimates, its optional FTE rates were substantially lower than the government's estimates and relatively close to those offered by Cubic for the same labor categories. Id. at 24. In fact, the record shows that Cubic's labor rates for the optional FTEs were substantially higher than those proposed by SAIC for some categories after the first round of discussions, and for most categories after the second round of discussions, but before the final proposal revisions. Id.

The total prices submitted by Cubic and SAIC over the several rounds of discussions was as follows:

	Cubic	SAIC
Initial Evaluated Price	\$(DELETED)	\$(DELETED)
First Round Discussions Price	\$(DELETED)	\$(DELETED)
Interim Evaluated Price	\$(DELETED)	\$(DELETED)
Final Evaluated Price	\$63,194,448.13	\$58,227,541.20

Id. at 28; Contracting Officer's Statement at 11.

Cubic's technical proposal was ultimately rated acceptable after final proposal revisions. AR, exh. 28b, Final PAR, at 29. However, SAIC was selected for award as the lowest-priced, technically acceptable offeror. This protest followed.

DISCUSSION

Cubic first argues that the agency unreasonably evaluated the firm's proposal and, as a result, engaged in misleading discussions when it informed Cubic that its proposed labor rates were exceptionally low. Protest at 7-9. In this regard, Cubic argues that the agency improperly evaluated its interim evaluated price of \$[DELETED] million as exceptionally low when SAIC's awarded price was \$58.2 million, or "a mere 2 percent higher." Protest at 8.

Where a solicitation contemplates the award of a fixed-price contract, an agency may provide in the solicitation, as it did here, for the use of a price realism analysis for the purpose of evaluating whether an offeror can realistically perform its technical solution at the fixed price proposed in order to assess the risk inherent in an offeror's proposed approach. DynCorp Int'l LLC, B-407762.3, June 7, 2013, 2013 CPD ¶ 160 at 8-9; Triad Int'l Maint. Corp., B-408374, Sept. 5, 2013, 2013 CPD ¶ 208 at 8. The nature and extent of such a price realism analysis ultimately are matters within the sound exercise of the agency's discretion, and our review of such an evaluation is limited to determining whether it was reasonable and consistent with the solicitation's evaluation criteria. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 4-5.

The record shows that the agency conducted a price realism analysis of offerors' proposals using both historical data and government estimates as a comparison against proposed prices. For instance, the agency observed that the average hourly labor rate for this work was historically about \$[DELETED] per FTE. However, at this rate, the agency observed significant performance issues such as low retention and high turnover rates for qualified personnel. AR, exh. 14a, Initial PAR, at 15. The agency estimated an average hourly labor rate of about \$[DELETED] per FTE as the lowest average labor rate for a contractor to effectively recruit, hire and retain qualified personnel with the complex security and special access requirements, as well as to be able to ensure compliance with the PWS thresholds for turnover and lapse rate for personnel. Id. The agency also utilized an average loaded labor rate of \$[DELETED] in the evaluation, based on its market research. AR, exh. 19, Interim PAR, at 68. Finally, the agency utilized an independent cost estimate (ICE) of \$[DELETED] million derived from historical CAAS VI labor rates. AR, exh. 3, ICE, at 5; exh. 14a, Initial PAR, at 15; exh. 28b, Final PAR, at 17. However, the agency noted that, historically, CAAS IV task orders have been competitively awarded at [DELETED] savings over the ICE or predecessor award amount. AR, exh. 28b, Final PAR at 17.

Preliminarily, Cubic does not challenge the reasonableness of the agency's use of average labor rates as a matter of substance, nor the specific labor rate amounts used by the agency in its evaluation. Thus, we are provided no basis to conclude that the agency's metrics used to evaluate proposals were unreasonable. Instead,

the protester challenges the agency's mechanical use of these metrics as minimum benchmarks without considering an offerors' unique technical approach and what Cubic argues is the agency's singular focus on the offerors' average labor rates as a proxy for determining whether the offeror could effectively recruit, hire, and retain qualified personnel. Protester's Comments at 4.

Contrary to Cubic's contention, the record shows that the agency did consider the firm's technical approach in its assessment of the realism of its proposed labor rates. For instance, after Cubic submitted its response to the agency's first round of discussions, the agency recognized that the response partially addressed the government's concerns by showing that the firm had performed two other contracts that appeared to meet the PWS' lapse and turnover rates.² AR, exh. 19, Interim PAR, at 21. However, the evaluators noted that the examples did not provide adequate detail to support the firm's capability to provide services similar in scope and magnitude to the instant requirement. Id. at 21-22. The record establishes that the agency considered the firm's technical approach in assessing Cubic's proposed labor rates.

The record also shows that, while the evaluators acknowledged Cubic's discussion responses, they continued to express concern because the salaries proposed by Cubic were roughly the same as those used by [DELETED], the incumbent on the predecessor contract, which experienced significant lapse and turnover rate issues at those rates. Id. at 22. We are provided no basis to question the reasonableness of the agency's concern in this regard. Moreover, the record shows that Cubic's proposed labor rates for PWS sections [DELETED], [DELETED], and [DELETED] were substantially lower than the metrics used by the agency in its price realism analysis. Considering the record as a whole, we have no basis to question the agency's determination that Cubic's rates were exceptionally low.³

² The record reflects that Cubic's responses resolved the agency's concerns over aspects of the firm's price proposal, such as transition costs, use of certain labor categories and lack of differentiation between optional and core FTE rates for various locations in Cubic's initial proposal. AR, exh. 14, Initial PAR, at 17.

³ The agency's evaluation identifies a limited number of Cubic's labor rates as exceptionally low even when they exceeded the agency's own minimum metrics. For instance, at least [DELETED] of Cubic's optional labor rates exceeded the \$[DELETED] per hour average labor rate identified by the agency as the lowest average labor rate for a contractor to effectively recruit, hire and retain qualified personnel. AR, exh. 14a, Initial PAR, at 15; exh. 28b, Final PAR, at 20. The record does not explain why the agency continued to identify these rates as exceptionally low even though they exceeded the agency's own metrics. AR, exh. 25, FPR Evaluation Notices, at 4. Notwithstanding these isolated examples, however, the record as a whole shows that the evaluation of Cubic's price proposal was reasonable.

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Cubic next argues that the agency engaged in unequal treatment in that prior to submitting final proposal revisions its average labor rate was only \$[DELETED] lower than SAIC's average labor rate, yet the agency did not find SAIC's labor rates to be exceptionally low. Protester's Comments at 9. The protester also asserts that SAIC's optional FTE labor rates were generally significantly lower than its own optional FTE labor rates, but only Cubic's labor rates were found to be exceptionally low. Protester's Supp. Comments at 7.

In reviewing an agency's evaluation, we will not reevaluate proposals, but will examine the record to ensure that it was reasonable and in accordance with the stated evaluation criteria and applicable procurement statutes and regulations. PMC Solutions, Inc., B-310732, Jan. 22, 2008, 2008 CPD ¶ 20 at 2. It is a fundamental principle of federal procurement law that a contracting agency must treat all offerors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. Rockwell Elec. Commerce Corp., B-286201 et al., Dec. 14, 2000, 2001 CPD ¶ 65 at 5. The record shows that the agency treated Cubic and SAIC disparately in the evaluation of price proposals.

Our Office requested and received supplemental briefings from the parties on the issue of whether the agency treated Cubic and SAIC disparately in conducting its price realism evaluation, particularly with respect to both offerors' optional FTE labor rates. As noted above, the optional FTE positions comprised 19 of the 109 FTE positions contemplated by the RFP. The agency argued that there was no disparate treatment with respect to each offerors' optional FTE labor rates because SAIC's proposal, unlike Cubic's was found to be technically acceptable. Agency Response at 3, 6. In other words, the agency determined that SAIC's proposed optional FTE labor rates were not exceptionally low because the rates were supported by the firm's technically acceptable staffing plan and management approach. Id. at 3. In contrast, the agency argues that it found Cubic's similar labor rates to be exceptionally low because its technical proposal was found to be technically unacceptable. Id. at 3-6.

However, Cubic responds that the contemporaneous evaluation documents show that the agency labeled Cubic's price as exceptionally low because of its labor rates, not its technical proposal, and that the unacceptable rating assigned to the protester's technical proposal was directly related to its proposed price. Protester's Response at 5. Our review of the record leads us to agree. While the agency now argues that Cubic was not found to be technically unacceptable because of its rates, but because "Cubic had failed to adequately explain how it would recruit, hire and retain qualified people to fill the core FTE requirements," Agency Response at

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6, it is clear from the record that the basis of the agency's concern under the technical factor was not just Cubic's approach to perform the contract, but its approach to perform at the rates proposed.

In this regard, the record shows that Cubic's technically unacceptable rating was driven by the agency's evaluation of the firm's pricing. As noted above, the SSEB found Cubic's proposal to be unacceptable under the staffing plan and management approach subfactor because its "proposed staffing plan and management approach, combined with the proposed pricing, does not demonstrate the offeror's ability to recruit, hire and retain qualified personnel to meet all of the [RFP's] requirements." AR, exh. 18, SSEB Evaluation of Initial Cubic Evaluation Notice Responses, at 2; see also exh. 19a, Interim PAR, at 18 (requesting revised staffing plan, management approach and pricing proposal, to adequately demonstrate Cubic's ability to recruit hire and retain qualified personnel), id. at 21 (noting that while the protester has shown it is capable of performing successfully based on demonstrated experience, its pricing still seems exceptionally low due to a comparison of its proposed rates to those used by [DELETED] on the predecessor contract). It was not until Cubic's final proposal revision, where the firm significantly increased its proposed salaries and compensation options, that the evaluators found the firm's proposal to be technically acceptable. AR, exh. 28b, Final PAR, at 8.

With respect to the evaluation of SAIC's similarly low optional FTE rates, the record shows that, in the initial evaluation, the agency found that SAIC's proposed pricing was "more in line" with the government's historical pricing and required level of effort than other offerors such as Cubic. AR, exh. 14a, Initial PAR, at 20. In both the interim and final evaluations, SAIC's price evaluation contains the comment, "[a]lthough some of the proposed labor rates are below the Government market research labor rate, the offeror's technical proposal supported the offeror's ability to attract and retain qualified personnel for the duration of the contract performance." AR, exh. 19a, Interim PAR, at 71; exh. 28b, Final PAR, at 23. There is no additional specific information in the record discussing the agency's evaluation of the realism of SAIC's proposed prices, including optional FTE labor rates. Moreover, there is no other explanation in the record as to why SAIC's optional FTE labor rates were not found to be similarly low, as with Cubic's rates.

Our Office gave the agency the opportunity to provide further explanation for its evaluation in this regard. As noted above, the agency states that it determined that SAIC's proposed optional FTE labor rates were not exceptionally low because the rates were supported by the firm's technically acceptable staffing plan and management approach. Agency Response at 3. However, the portion of SAIC's technical proposal that was produced to our Office can best be described as discussing a general approach to performance, but not SAIC's experience or capability to perform at the specific labor rates proposed, and in particular the optional FTE labor rates. See generally AR, exh. 41, SAIC Technical Proposal. Consequently, the fact that SAIC was found to be technically acceptable does not

address performance risk associated with the specific rates proposed by SAIC, which is properly considered under the agency's price realism analysis.

The agency further explains that Cubic and SAIC used two different [DELETED] rates, and the fact that the government did not require offerors to provide a breakdown of the way in which they arrived at their labor rates prevented an "apples to apples" comparison. Declaration of Contracting Officer at 2. As a result, according to the agency, its price realism evaluation was actually targeted at the offerors' total overall evaluated prices, and not labor rates. Id. While it may be the case that the agency was initially focused on overall evaluated prices, as discussed above, both Cubic's technical evaluation and price evaluation were focused on the firm's core and optional FTE labor rates. Moreover, the agency utilized an ICE of \$[DELETED] million, but additionally noted that a contract could be competitively awarded at [DELETED] savings over the ICE or predecessor award amount. AR, exh. 19a, Interim PAR, at 65; exh. 28b, Final PAR, at 17. Both the Interim PAR and Final PAR ascribe some significance to proposals being within [DELETED] percent of the agency's IGE, and Cubic's price fell into this range after the second round of discussions.⁴ Thus, the record reflects that Cubic's overall price was realistic by the agency's own standard, which is evidenced by the agency's continued focus on Cubic's specific labor rates, and not its overall price.

In any event, even after giving the agency repeated opportunities to explain its evaluation, we conclude that there is insufficient information in the record for our Office to determine that the agency's price realism evaluation of SAIC's proposed optional FTE labor rates was reasonable. As discussed, while SAIC's core FTE labor rates were significantly higher than those proposed by Cubic and are more in line with the price evaluation metrics utilized by the agency in its evaluation, SAIC's optional FTE labor rates are substantially lower than both the agency's own metrics and Cubic's proposed rates at various points in the evaluation. The contemporaneous record does not address this issue. Given the detail in the agency's price evaluation of Cubic, it would be reasonable to expect the agency's record to reflect such consideration for SAIC.⁵

⁴ The degree of significance the agency ascribed is not clear from the record because it heavily redacted this portion of the record.

⁵ As discussed earlier, the price realism evaluation set forth in the RFP permitted the agency to request additional information from offerors with proposed prices that appear exceptionally low. RFP at 33. The agency would then address any apparent exceptionally low prices by evaluating the offerors experience and/or capability in providing similar services at similar prices. Id. Thus, the evaluation scheme implies that prices would be evaluated to determine if they were apparently exceptionally low, which was then resolved by evaluating the offeror's experience or capability. The record shows such an evaluation occurred with respect to Cubic's

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Moreover, the agency's post-protest documentation does not explain why certain of SAIC's labor rates were not found to be exceptionally low because the agency instead argues that it only focused on overall evaluated prices. The record shows that while this may have been the focus for SAIC's price evaluation, it was not the case for Cubic's. Absent a reasonable explanation for why SAIC's apparently exceptionally low rates were not found to be exceptionally low by the agency, we cannot conclude that the agency's evaluation was reasonable. Therefore, on this record, we must agree with Cubic that there was disparate treatment of offerors with respect to the agency's price evaluation.

We finally address the issue of prejudice, which is an element of every viable protest. See Bannum, Inc., B-408838, Dec. 11, 2013, 2013 CPD ¶ 288 at 4. At our Office's request, the parties briefed the specific issue of whether Cubic could show prejudice if the agency conducted unequal evaluations of the offerors' optional FTE labor rates. The parties extensively briefed what might have happened had Cubic and SAIC been treated equally with respect to the price evaluation. Taking into account these arguments, we cannot say what the award decision might have been had the agency conducted a reasonable price evaluation. In such circumstances, we resolve any doubts regarding prejudice in favor of a protester since a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. See Kellogg, Brown & Root Servs., Inc.--Recon., B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5. Accordingly, we conclude that Cubic has established the requisite competitive prejudice to prevail in a bid protest.

RECOMMENDATION

We recommend that the Air Force conduct a new price realism evaluation and, if necessary, reopen discussions. If the agency reopens discussions, it should request and review revised proposals, evaluate those submissions consistent with the terms of the solicitation, and, in any event, make a new source selection decision. In the event a proposal other than SAIC's is found to represent the best value to the government, SAIC's contract should be terminated and the contract awarded to the successful offeror in accordance with the terms of the RFP. We also recommend that the agency reimburse Cubic for its costs of filing and pursuing its protest challenging the award to SAIC, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1). Cubic's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the Air Force within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

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proposal, but not SAIC's proposal, particularly with respect to the firm's proposed optional FTE labor rates.

The protest is denied in part and sustained in part.

Susan A. Poling
General Counsel