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**Comptroller General
of the United States**

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

Decision

Matter of: Onyx-Technica, JV

File: B-412474; B-412474.2

Date: February 26, 2016

Zaminah Williams for the protester.

Kenneth B. Weckstein, Esq., and Tammy Hopkins, Esq., Brown Rudnick LLP, for NES Associates, LLC, an intervenor.

Colleen A. Eagan, Esq., and Mark B. Grebel, Esq., Defense Information Systems Agency, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency engaged in misleading discussions is denied where, although protester maintains that agency “directed” it to increase its proposed cost, the record shows that the agency afforded protester an opportunity either to raise or to substantiate its proposed cost, and protester exercised its business judgment in electing to raise its proposed cost.

2. Protest that agency failed to conduct adequate cost realism evaluation is denied where record shows that allegation is based solely on the difference between the protester’s and awardee’s cost, but underlying record establishes that agency performed an adequate cost realism evaluation.

DECISION

Onyx-Technica, JV (OT), of Columbia, Maryland, protests the issuance of a delivery order to NES Associates, LLC, of Alexandria, Virginia, under request for proposals (RFP) No. GSMETI00028.00, issued by the Defense Information Systems Agency for telecom engineering integration and architecture support services.¹ OT

¹ The task order at issue in this protest was competed under Federal Acquisition Regulation (FAR) part 16 among firms previously awarded multiple-award indefinite-delivery, indefinite-quantity contracts under the agency’s global information grid

(continued...)

maintains that the agency engaged in misleading discussions and performed an unreasonable cost realism evaluation.

We deny the protest.

BACKGROUND

The RFP contemplates the issuance of a cost-plus-fixed-fee task order on a best-value basis for a base year and two 1-year options, considering cost and one non-cost evaluation factor, technical/management approach. RFP at 3-4. The technical/management approach factor, deemed significantly more important than the cost factor, included three equally-weighted subfactors, two relating to how well the proposal responded to specifically-identified performance work statement (PWS) tasks, and one relating to how well the proposal demonstrated the offeror's management approach. Id. For cost evaluation purposes, the RFP advised that the agency would evaluate proposals for reasonableness, completeness and realism. RFP at 3-4.

The agency received six proposals in response to the RFP and, after evaluating the proposals, engaged in four rounds of discussions. COSF, at 10-25. At the conclusion of those discussions, the agency solicited and obtained final proposal revisions from all of the offerors. The agency evaluated the proposals and assigned identical ratings of acceptable to all six proposals under the technical/management approach factor, as well as under each subfactor, finding as well that none of the proposals reflected any strengths, weaknesses or deficiencies that would distinguish one from the other. Agency Report (AR), exh. 14, Price Negotiation Memorandum, at 8-9. The agency also evaluated all of the cost proposals and found all six to be complete, reasonable and realistic, and made only minor cost realism evaluation adjustments to three of the proposals. Id. at 6-7. Based on these evaluation results, the agency made award to NES, finding that its lowest-cost proposal represented the best value to the government. After being advised of the agency's source selection decision and requesting and receiving a debriefing, OT filed the subject protest in our Office.²

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services management engineering transition and implementation contract program. Contracting Officer's Statement of Facts (COSF) at 4. The value of the task order issued is in excess of \$10 million. Accordingly, our Office has jurisdiction to consider the protest. 10 U.S.C. § 2304c(e)(1)(B).

² OT pursued its protest without counsel. Consequently, we did not issue a protective order in this case and the agency prepared redacted versions of its report to our Office for the protester and the intervenor. We were provided a complete, unredacted version of the report that we reviewed in camera and we base the conclusions in the decision on our review of the complete record.

PROTEST

OT alleges that the agency engaged in misleading discussions with it. OT also argues that the agency failed to perform a proper cost realism evaluation. We discuss its allegations below.

Misleading Discussions

OT maintains that the agency engaged in misleading discussions with the firm. According to the protester, the agency asked a series of questions concerning its proposed cost that had the effect of essentially “directing” it to increase its proposed costs so that it became uncompetitive. OT speculates that the agency did not ask NES the same types of questions, and that the awardee was not similarly directed to increase its proposed cost.

We find no merit to this aspect of OT’s protest. The regulations concerning discussions under FAR part 15, which pertain to negotiated procurements, do not, as a general rule, govern task and delivery order competitions conducted under FAR part 16, such as the procurement for the task order here. P3I, Inc.; Quantech Serv’s., Inc., B-405563.4, et al, Aug. 6, 2015, 2015 CPD ¶ 333 at 13. FAR § 16.505 does not establish specific requirements for discussions in a task order competition; nonetheless, when exchanges with the agency occur in task order competitions, they must be fair and not misleading. P3I, Inc.; Quantech Serv’s., Inc., supra. In our decisions discussing an agency’s obligations in conducting discussions under FAR part 15, we have held that an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency’s concerns, or misinform the offeror concerning a problem with its proposal or about the government’s requirements. Refinery Assocs. of Texas, Inc., B-410911.2, Mar. 18, 2015, 2015 CPD ¶ 116 at 6.

The record here shows that OT was asked a variety of questions during discussions. In some instances, OT was provided the opportunity either to explain how the questioned element was realistic to perform the requirement, or was advised to make a change to its proposal in response to the agency’s concern. For example, OT was asked the following discussion question relating to its proposed level of effort to perform a particular task:

The offeror did not propose sufficient labor hours to perform PWS [performance work statement] 6.9 based on the level of effort required for this task. The offeror did not identify an approach or other efficiency that would result in successful performance for those tasks based on its proposed labor hours. Request the offeror clearly propose sufficient labor categories and labor hours to meet the

requirements of the PWS or identify an approach or efficiency that would support proposing fewer labor hours.

AR, exh. 3A2, OT Discussions, Round 1, Technical Discussion Question No. 2 (emphasis supplied). Simply stated, in these instances, OT was afforded a choice either of making a change to its proposal (in the above example, to increase its level of effort for a particular task) or making no change, and instead providing the agency with an adequate rationale for the basis of its proposed approach. An offeror's conclusion that it has failed to persuade an agency of the basis for its proposed staffing levels does not prevent the offeror from maintaining and further supporting its position in further written submissions; OT exercised its business judgment in electing to change its proposed level of effort rather than offer the agency a further explanation for its proposed approach. P3I, Inc.; Quantech Serv's., Inc., supra. at 15.

In other instances, OT was asked to provide substantiating documentation that initially was lacking in its proposal to support its proposed cost. For example, OT was provided the following discussion question in connection with its proposed direct labor rates:

Clearly explain, in detail, how both Onyx and Technica determined its proposed Direct Labor rates and provide documentation to support the Direct Labor rates proposed. Documentation for Direct Labor rates could be payroll records for current personnel to be used for this effort or copies of salary surveys for personnel to be hired.

AR, exh. 3A3, OT Discussions, Round 1, Cost Discussion Question No. 1. Simply stated, nothing about this discussion question directed or required OT to increase its proposed cost. Rather, the firm was asked either to substantiate the basis for its proposed cost, or to revise it; OT, in its business judgment, elected to increase its proposed cost rather than provide the agency with additional substantiating information.³

³ Similarly, the record reflects instances where OT was requested either to provide supplemental rationale for some of its proposed direct labor rates, or to update those rates to more realistic rates where the agency was not satisfied with the firm's initial response. For example, the agency sent this follow-up discussion question to OT in connection with several identified labor categories: "Request the offeror either update the proposed base labor rates for the questioned labor categories to a more realistic base labor rate or clearly explain, in detail along with supporting documentation, why the proposed base labor rates are realistic." AR, exh. 9A7, OT Discussions, Round 4, Cost Discussion Question N. 3. Once again, OT elected as a matter of its business judgment to increase its proposed direct labor rates rather than to offer further explanation to demonstrate the realism of its proposed rates.

Finally, OT's speculation that NES was not similarly asked about its proposed cost is not borne out by the record. Both NES and OT were asked similar questions relating to the adequacy of their proposed level of effort; the composition of their proposed labor mix; the realism of their proposed direct labor rates; and the realism of their proposed indirect cost rates. COSF at 10-25.⁴ Each firm responded to the agency's discussion questions using their respective informed business judgment. We therefore deny this aspect of OT's protest.

Cost Realism Evaluation

OT argues that the agency failed to conduct a reasonable cost realism evaluation. According to the protester, if the agency had conducted a reasonable evaluation, it would have concluded that NES had proposed unrealistic labor rates. The basis for OT's allegation is the fact that NES's proposed cost was lower than its proposed cost. OT reasons that, since the agency questioned the realism of its proposed labor rates during discussions, it should necessarily also have questioned the realism of NES's proposed rates.

We find no merit to this aspect of OT's protest. When an agency evaluates a proposal for the award of a cost-reimbursement contract or task order, 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. FAR §§ 15.305(a)(1); 15.404-1(d); see Exelis Systems Corp., B-407673, et al., Jan 22, 2013, 2013 CPD ¶ 54 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). When conducting a cost realism analysis, agencies are required to consider the realism of a firm's proposed costs in light of its unique technical approach. Metro Mach., Corp., B-402567, B-402567.2, June 3, 2010, 2010 CPD ¶ 132 at 6. The pertinent inquiry is not whether an offeror's proposed costs resemble another offeror's proposed costs, but, rather, whether its proposed costs are adequate in light of its unique technical approach. Id.

The record shows that there were two principal drivers of the cost difference between OT and NES. First, NES had significantly lower overhead costs. The record shows that the agency considered the realism of NES's overhead rate, and found no basis to object to the rate as proposed. In this connection, the record shows that NES's overhead rate was the same as the overhead rate that had been

⁴ The Contracting Officer's Statement of Facts includes a side-by-side comparison of the discussion questions asked of both firms. This summary discussion accurately reflects the contents of the underlying record. AR, exhs. 2-10, Agency Discussion Questions to Both Offerors.

provisionally approved by the Defense Contract Audit Agency. AR, exh. 13, Cost Evaluation Report, at 23; AR, exh. 11A7b-5, DCAA Provisional Approval Letter Included with NES's Final Proposal Revision.

Second, NES had subcontractor costs that were substantially lower than OT's subcontractor costs. The record shows that NES used a business strategy in connection with its subcontractors (we do not discuss the specifics of that business strategy) that allowed it to significantly lower its subcontractor costs, and the agency had no basis to object to NES's proposed subcontractor costs. AR, exh. 13, Cost Evaluation Report, at 23-24.

The record shows that the cost differences between NES and OT attributable to these two cost elements comprise approximately 83 percent of the cost premium associated with the OT proposal. See Agency Legal Memorandum at 60. The record also shows that the agency considered the realism of NES's proposed costs in these two areas and had no basis to make an upward adjustment to NES's evaluated cost for these two elements. We therefore deny this aspect of OT's protest.

As a final matter, OT objects to the fact that the agency established a range for evaluating the realism of the offerors' proposed base labor rates. According to the protester, this was improper because it resulted in the mechanical application of a range of base labor rates for evaluation purposes that did not take into consideration the offerors' unique technical approaches.

The record shows that the agency averaged the base labor rates proposed by all offerors (and in some instances used actual rates that were being billed to the agency for these same services) and then established a range, based on these figures, that was 25 percent above and below the average/actual rate. AR, exh. 13, Cost Evaluation Report, at 22-23, 25-26. The agency only used these ranges where an offeror failed to provide actual payroll data to the agency.⁵

The agency then used these base labor rate ranges to assess the realism of the offerors' proposed base labor rates where those rates were not derived from actual salary data. Significantly, however, the agency made no cost realism evaluation adjustments to the offerors' proposed base labor rates where those rates fell outside of the range established by the agency. Instead, the agency used this analysis to generate discussion questions that were sent to the offerors. AR, exh.

⁵In the case of NES, a substantial proportion of its base labor rates were derived from actual salary data rather than from salary survey data. AR, exh. 11A7b-1, NES Final Proposal Revision, Employee Listing With Salaries.

13, Cost Evaluation Report, at 23, 26. The record shows that, with respect to OT, the agency made no cost realism evaluation adjustments to its final proposed cost. Id. at 25. We therefore have no basis to object to the agency's actions for this reason.

The protest is denied.

Susan A. Poling
General Counsel