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Decision

Matter of: Odyssey Systems Consulting Group, Ltd.

File: B-412519; B-412519.2

Date: March 11, 2016

J. Scott Hommer, III, Esq., Keir X. Bancroft, Esq., Nathaniel S. Canfield, Esq., and Michael T. Francel, Esq., Venable LLP, for the protester.

Jonathan J. Frankel, Esq., Craig LaChance, Esq., Karla J. Letsche, Esq. and Brett J. Sander, Esq., Frankel PLLC, and Patricia H. Wittie, Esq., Wittie Law, PLLC, for P E Systems, Inc., the intervenor.

Maj. Jason R. Smith, Department of the Air Force, for the agency.

Stephanie B. Magnell, Esq., and Jennifer Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the agency failed to conduct a required price realism analysis is dismissed as untimely, where any ambiguity as to scope of realism analysis contemplated was patent and was resolved prior to the initial deadline for submission of proposals.

2. Protest alleging misleading discussions and a flawed evaluation is denied where the protester is unable to demonstrate that it was prejudiced by the agency's actions.

DECISION

Odyssey Systems Consulting Group, Ltd., of Wakefield, Massachusetts, a small business, protests the issuance of a task order¹ to P E Systems, Inc., of Fairfax, Virginia, also a small business, under request for task order proposals (RFTOP) No. GS00Q-14-O-ADSXXX-TOA001, which was issued by the Department of the Air Force, for acquisition and sustainment services. Odyssey challenges the Air

¹ The awarded 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 orders under multiple-award indefinite-delivery, indefinite-quantity contracts. 10 U.S.C. § 2304c(e)(1)(B).

Force's evaluation of its proposal, alleging that the agency failed to conduct a required price realism analysis, engaged in misleading discussions, and performed a flawed technical evaluation.

We dismiss the protest in part and deny the protest in part.

BACKGROUND

The Air Force issued the RFTOP on October 29, 2014, as a small business set-aside under the General Services Administration's One Acquisition Solution for Integrated Services Small Business Pool 6 Indefinite Delivery/Indefinite Quantity contract. RFTOP, Attach. 1, at 1. The solicitation contemplated issuance of a fixed-price level-of-effort task order,² consisting of a one-month initial transition period, one base year, and four option years. RFTOP at 1.

Proposals were to be evaluated on three factors: price, technical, and past performance. RFTOP, Attach. 2, at 1. The solicitation provided for award on a best-value basis according to a scheme that prioritized price and past performance. Id. Proposals would be first ranked by price, with the five lowest-priced proposals evaluated for technical acceptability. Id. Should any of the first five be found unacceptable, evaluations of higher-priced proposals would continue until the agency had five technically-acceptable proposals. Id. The Air Force would evaluate the prices of the five technically-acceptable proposals for balance, fairness and reasonableness. Id. at 2. Then, starting with the lowest-priced offeror with a technically-acceptable proposal and reasonable pricing, the agency would evaluate past performance, intending to conclude the evaluation once an offeror received a past performance rating of "substantial confidence." Id. Under the RFTOP, this offeror's proposal would "represent[] the best value to the Government."³ Id.

The technical evaluation factor included three subfactors: technical capabilities, management capabilities, and an organizational conflict of interest mitigation plan. RFTOP, Attach. 1, at 7. As part of the management capabilities subfactor, offerors were advised that their compensation plans for executives and professionals would be "evaluated to determine if the compensation level proposed is unrealistically low or not in reasonable relationship to the various labor categories." Id., Attach. 2, Evaluation Method and Criteria, § 1.3.4.2.1.

² The task order also allowed the Air Force to purchase additional service hours under a labor hour surge provision and included cost reimbursable line items for travel and other direct costs. RFTOP, Attach. 1, at 1.

³ The RFTOP included provisions for award in scenarios where no offeror with a technically-acceptable proposal and reasonable pricing received a past performance rating of substantial confidence, none of which are relevant here.

The agency received six proposals by the initial due date of December 19 and included five of them in the competitive range. Agency Report (AR), Tab 28, Source Selection Decision Document (SSDD), at 1. The Air Force issued evaluation notices (ENs) to each competitive range offeror. Id. at 2, 25. On June 18, 2015, the solicitation was revised to remove a contractor facilities requirement and was reopened to other potential offerors in Small Business Pool 6; one additional offer was received. Id. at 25. Final proposals were due by August 5. Id. at 26. The Air Force ordered the final proposals by price and evaluated them for technical acceptability as follows:

Offeror	Technical Rating	Final Price
Offeror 1	Unacceptable	Not evaluated ⁴
P E Systems	Acceptable	\$113,322,243.29
Odyssey	Unacceptable ⁵	Not evaluated
Offeror 4	Acceptable	\$135,830,722.52
Offeror 5	Acceptable	\$136,504,372.32
Offeror 6	Acceptable	\$151,038,764.13

AR, Tab 27, Price Competition Memorandum, at 2-3, 6-7.

The Air Force evaluated the prices of the four technically-acceptable proposals and found all four to be fair, reasonable and balanced. AR, Tab 27, Price Competition Memorandum, at 6. The Air Force then evaluated the past performance of the four offerors, beginning with P E Systems as the lowest-priced offeror with a technically-acceptable proposal. Id. at 7. Concluding that P E Systems merited a past performance rating of substantial confidence, the Air Force determined that P E Systems' proposal presented the best value to the agency under the terms of the solicitation and did not further evaluate the past performance of the other higher-priced offerors with technically-acceptable proposals. Id.

⁴ Because the Air Force concluded that the final proposals of Offeror 1 and Odyssey were not technically acceptable, their final proposed prices were not evaluated. Id.

⁵ Evaluating proposals under section 1.3.4.2.1 of the RFTOP, Attachment 2, Evaluation Method and Criteria, the Air Force concluded that Odyssey's final proposed compensation was deficient because "[f]our of the salary compensation plans provided [by Odyssey's subcontractors] were found to be unrealistically low (39 labor categories were at least 15% to 50% below Government market research data)." AR, Tab 28, SSDD, at 8. In contrast, the Air Force found that P E System's proposed compensation plan was acceptable. Id. at 11.

The Air Force made award to P E Systems and, on November 30, provided Odyssey with a debriefing, which was followed by questions from Odyssey. The Air Force provided its final response to Odyssey's questions on December 2. Contracting Officer (CO) Statement at 12; AR, Tab 29, Odyssey Debriefing Slides. This protest followed on December 4. CO Statement at 12.

DISCUSSION

Odyssey alleges that the Air Force failed to conduct a required price realism analysis. Next, the protester claims that the Air Force's discussions were misleading, such that it was induced to raise its price to an uncompetitive level. Finally, Odyssey disputes the conclusion that its proposal was technically unacceptable, arguing that the agency improperly evaluated Odyssey's proposed staffing.⁶ For the reasons below, the protest is dismissed in part and denied in part.

Price Realism

Odyssey alleges that the RFTOP's instruction to offerors required the agency to conduct a price realism analysis of total prices and that the agency failed to undertake this analysis. Protester's Comments & Supp. Protest, Jan. 14, 2016, at 10, citing RFTOP, Attach. 1, Instructions to Offerors, § 4.1.3 ("The burden of proof for credibility of proposed prices rests with the offeror."). The protester alleges in this connection that P E Systems' low evaluated price resulted from its application of unrealistically low overhead and profit rates to its compensation rates. Id. at 7, n.2.

The Air Force argues that the RFTOP provided only for a limited realism analysis of proposed professional salaries, which the agency did conduct. Supp. Memorandum of Law (MOL), Jan. 26, 2016, at 5. The Air Force contends that it evaluated proposals in accordance with the RFTOP's provision that proposed compensation would be evaluated in accordance with Federal Acquisition Regulation clause 52.222-46--Evaluation of Compensation for Professional Employees in order to "determine if the compensation level proposed is unrealistically low or not in reasonable relationship to the various labor categories." Id. at 4, citing RFTOP, Attach. 2, Evaluation Method and Criteria, § 1.3.4.2.1.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. NCS Techs., Inc., B-406306.3, Sept. 17, 2012, 2012 CPD ¶ 259 at 4. An ambiguity exists where two or more reasonable

⁶ Odyssey also alleged that the Air Force evaluated proposals unequally and engaged in unequal discussions, but later withdrew these protest grounds. Protester's Comments & Supp. Protest, Jan. 14, 2016, at 2 n.1.

interpretations of the terms or specifications of the solicitation are possible. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. Id.

The solicitation instructed offerors, that, with respect to price, “[p]roposals should be sufficiently detailed to demonstrate their fairness and reasonableness. The burden of proof for credibility of proposed prices rests with the offeror.” RFTOP, Attach. 1, Instructions to Offerors, § 4.1.3. As to price evaluation criteria, the RFTOP provided only that “[p]rice will be evaluated for balance, fairness, and reasonableness.” RFTOP, Attach. 2, Evaluation Criteria, § 1.3.1. Prior to the initial deadline for proposals, a potential offeror, quoting the latter sentence, asked the agency: “Could the Government provide insight as to why realism is not included in the price evaluation . . . ?” RFTOP, Questions & Answers (Q&A), Amend. 1, Question 4a. On December 8, the Air Force responded that it would evaluate a portion, but not all, of the pricing for realism. Id., Answer 4a (“The Government will evaluate offerors['] proposed Executive/Professional Compensation Plan (as stated in Evaluation Method and Criteria [section] 1.3.4.2.1) to determine if the compensation level proposed is unrealistically low or not in reasonable relationship to the various labor categories.”).

On this record, we find that, to the extent there was any ambiguity in the underlying solicitation as to the scope of the price realism analysis contemplated, it was resolved prior to the date set for receipt of initial proposals. The question identified the issue and the Air Force’s December 8 response is unambiguous. Moreover, any ambiguity as to the scope of the intended realism analysis was patent, and a patent ambiguity must be protested prior to the next closing time for the submission of proposals in order to be considered timely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 11. Where a patent ambiguity is not challenged prior to submission of solicitation responses, we will not consider subsequent untimely arguments asserting the protester’s own interpretation of the ambiguous provisions. Marine Grp. Boat Works, LLC, B-404277, B-404277.2, Jan. 19, 2011, 2011 CPD ¶ 23 at 4; Kellogg Brown & Root, Inc., B-291769, B-291769.2, Mar. 24, 2003, 2003 CPD ¶ 96 at 8; Bank of Am., B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137 at 10.

Given that the ambiguity, if any, was patent, Odyssey was required to protest such ambiguity prior to December 16, the date set for submission of proposals. Odyssey’s failure to do so renders its protest untimely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(1).

Allegations of Misleading Discussions and a Flawed Evaluation

Odyssey alleges that, as a result of the agency's flawed ENs, it was misled into "increas[ing] both its proposed level of staffing and its salary compensation levels."⁷ Protest at 9. The protester claims that, as a result of the agency's communication, it raised its proposed price from approximately \$[DELETED] million to approximately \$134 million.⁸ *Id.* at 16. Odyssey further alleges that the agency unreasonably found Odyssey's final staffing plan to be technically unacceptable, when Odyssey had responded to the EN by significantly increasing its proposed staffing. *Id.* at 14. The intervenor argues, however, that Odyssey cannot demonstrate that it was prejudiced, because Odyssey's initial pricing remains higher than P E Systems' final evaluated price. Intervenor's Comments, Jan. 14, 2016, at 1-2.

Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that, but for the agency's actions it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6.

⁷ Odyssey received an EN regarding its below-market compensation, as follows:

Four (4) of the salary compensation plans you provided (Odyssey, Flaherty Technical Services, Alion, and IPT Associates) were evaluated and found to be unrealistically low. In addition, no salary compensation was provided for the Program Manager and Deputy Program Manager labor categories, as required. Although your compensation plans state you have consulted national and regional market standards, most salaries are far below Government market research data for most labor categories (39 are at least 15% to 50% below Government market research data; see attached spreadsheet for labor categories). . . . Your compensation plan may not provide uninterrupted high-quality work. It will have a negative impact upon recruiting and retention.

AR, Tab 17, Odyssey ENs, at 5

⁸ In its protest, Odyssey states that its "final proposed price was \$134,352,689.50." Protest at 9. However, Odyssey's proposal unambiguously states that its "total proposed price" is \$129,976,444.77. AR, Tab 10, Odyssey's Revised Pricing Sheets at 5, 11, 17, 23, 29. The discrepancy does not impact this protest.

The table below summarizes Odyssey’s initial and final proposed prices as compared with P E Systems’ final price:

Offeror	Initial Price	Initial FTEs	Final Price	Final FTEs
Odyssey	\$(DELETED)	[DELETED]	\$129,976,444.77	178.125
P E Systems			\$113,322,243.29	187.625

AR, Tab 7, Odyssey’s Initial Proposal at 34; Tab 9, Odyssey’s Revised Technical Proposal at 35; Tab 10, Odyssey’s Revised Pricing Sheets at 5; Tab 14, P E Systems’ Revised Technical Proposal at 10; Tab 27, Price Competition Memorandum, at 2.

The above table shows that, even without the allegedly misleading discussions,⁹ Odyssey’s price would still have been higher than P E Systems’ price.¹⁰ Thus, as the higher-priced offeror, even if Odyssey’s initial proposal had been found technically acceptable, Odyssey would still not be in line for award.¹¹ Given these facts, the protester has failed to show that it was prejudiced by the content of the agency’s discussions.

Odyssey also alleges that the Air Force unreasonably concluded that Odyssey’s proposed staffing plan was technically unacceptable. Protest at 12-13. For the reasons set forth above, Odyssey again cannot show that it was prejudiced by the alleged evaluation error. Both Odyssey’s initial and final proposed prices were higher than the final proposed price of P E Systems. Therefore, even if the Air Force reevaluated Odyssey’s proposal and found it to be technically acceptable, and even if Odyssey had not modified its price after discussions, Odyssey’s proposed price would remain higher than that of P E Systems. On this record, we

⁹ Odyssey’s initial proposal contained a provision responding to the solicitation’s facilities requirement, which was later deleted from the solicitation. AR, Tab 7, Odyssey Initial Proposal, at 13; Tab 5, Amend. 04, June 18, 2015, at 2 (deleting sections 4.2.1.2.3 and subsection 4.2.1.2.3.1). In this protest, Odyssey does not discuss whether removal of the facilities requirement from the solicitation affected its price, and thus we do not consider it here.

¹⁰ Odyssey alleges only that discussions were misleading, not unequal. See n.6, supra. The chart shows that P E Systems proposed more FTEs at a lower cost.

¹¹ Odyssey did not challenge the agency’s realism evaluation of P E Systems’ compensation, alleging only that P E Systems’ profit and overhead rates were too low. Protester’s Comments & Supp. Protest, Jan. 14, 2016, at 7, n.2 (P E Systems “was able to propose higher staffing levels yet lower pricing than Odyssey almost entirely by virtue of its unrealistically . . . low overhead and profit rates.”).

have no basis to find that, but for the agency's actions, the protester would have had a substantial chance of receiving the award.

We dismiss the protest in part and deny the protest in part.

Susan A. Poling
General Counsel