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# Decision

**Matter of:** OBXtek, Inc.

**File:** B-417880; B-417880.2; B-417881

**Date:** November 25, 2019

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## DIGEST

Protest challenging the agency's rejection of the protester's proposals as unacceptable is denied where the solicitations provided that offerors proposing compensation inadequate to attract and retain qualified personnel would be ineligible for award, and the agency reasonably concluded that the protester's proposed compensation was inadequate.

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## DECISION

OBXtek, Inc., a small business of Tysons Corner, Virginia, challenges the issuance of two task orders to Amyx, Inc., a small business of Reston, Virginia, under request for proposal (RFP) Nos. HT005019R0001 and HT005019R0002 issued by the Defense Health Agency under the General Services Administration's (GSA) One Acquisition Solution for Integrated Services (OASIS) multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract for contracting and program management support services and acquisition support services, respectively. The protester primarily alleges that the agency unreasonably rejected its proposals for failing to adequately justify its low proposed labor rates.

We deny the protests.

## BACKGROUND

The agency issued both RFPs in March of 2019 each contemplating a single award on a primarily fixed-price basis.<sup>1</sup> Memorandum of Law (MOL) at 2; see also Agency Report (AR), Tab 1, Contract Support RFP, at 32-42. The RFPs provided that proposals would be evaluated on the basis of three criteria: (1) technical; (2) past performance; and (3) price. AR, Tab 1, Contract Support RFP, at 99-100; AR, Tab 24, Acquisition Support RFP at 57-58. Of note, the RFPs established that the technical evaluation factor would be evaluated on a pass/fail basis. Id. The RFPs also indicated that award would be made on the basis of a tradeoff between past performance and price, with past performance being more important than price. Id.

Relevant to this protest, the RFPs contemplated that the successful contractor would provide services in several different geographical areas. MOL at 2. Specifically, both contracts contemplated significant numbers of staff performing services in the Washington, D.C., Metropolitan Area; Aurora, Colorado, and San Antonio, Texas.<sup>2</sup> Id. Related to this requirement, the solicitations included a “Labor Category Minimum Compensation Matrix” that provided hourly rates broken down by relevant labor category. AR, Tab 1, Contract Support RFP, at 96; AR, Tab 24, Acquisition Support RFP at 54. Offerors proposing an hourly rate for a given labor category or location that was below the rate identified in the minimum compensation matrix were required to provide a “justification showing evidence of why proposed compensation to workers is adequate to obtain and retain qualified workers.” Id. Further, the solicitations indicated that such justifications would be evaluated to determine whether the proposed compensation is adequate to obtain and retain qualified workers, and if the justifications were found to be inadequate, the offeror would be ineligible for award. AR, Tab 1, Contract Support RFP, at 101; AR, Tab 24, Acquisition Support RFP at 58-59.

The agency received several offers in response to the RFPs, including those from OBXtek and Amyx. MOL at 5. Of note, OBXtek’s offers included labor rates below the minimum rates for most labor categories, while Amyx proposed labor rates that met or exceeded those minimum rates. Id. at 5-6, 21-22. During its evaluation of the protester’s price proposals, the source selection authority (SSA) concluded that the protester proposed rates lower than the minimum rates for 10 of 13 positions (averaging approximately \$[DELETED] lower per year) in one proposal, and for 27 of 31 positions (averaging approximately \$[DELETED] lower per year) in the other proposal. See AR, Tab 8, Contract Support Award Decision Document at 31-32; AR, Tab 33, Acquisition Support Award Decision Document, at 32-33.

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<sup>1</sup> The protester’s proposals and the agency’s evaluations of them are substantially similar in both protested procurements in most relevant respects. Therefore, this decision will address them collectively, except where otherwise noted.

<sup>2</sup> Additionally, HT005019R0002 contemplated 2 employees providing services in Wright Patterson Air Force Base in Ohio. MOL at 2.

Having established that the protester's proposals included rates that were, in the main, below the minimum rates in the solicitations, the SSA then considered the protester's justifications for those rates. Id. Specifically, the SSA noted that the protester's justifications relied almost entirely on salary survey data rather than "real world" hiring and retention data, and that the salary survey data was too variable to provide a reliable baseline. Id. Further, the SSA noted that the protester had shown a less than acceptable fill rate on relevant past performance. Id. On the basis of this fact, coupled with the lack of real world examples, the SSA concluded that the protester's proposals had failed to justify their significantly lower proposed rates and were, accordingly, ineligible for award. Id. at 6. The agency issued the task orders to Amyx and this protest followed.<sup>3</sup> MOL at 5-6.

## DISCUSSION

The protester challenges the agency's evaluation in several respects. Specifically, the protester alleges that the agency erred in finding it ineligible for award because the agency relied on unstated evaluation criteria in conducting its price evaluation, and the agency unreasonably considered information related to its past performance in evaluating its price. Protester's Comments at 25-32, 37-47. In the alternative, the protester argues that its proposals offered adequate evidence justifying its labor rates and the agency's price analysis was unreasonable. Id. at 47-57. Further, the protester contends that the agency's past performance evaluation was unreasonable because, among other issues, the agency relied on incomplete or interim contractor performance assessment reporting system (CPARS) reports and did not actually review available final CPARS reports. Id. at 9-25. Finally, the protester alleges that the agency's best-value tradeoff was flawed because the underlying evaluation was also flawed.<sup>4</sup> Id. at 58-62.

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<sup>3</sup> The agency issued task orders under GSA's OASIS IDIQ contract in the amount of approximately \$57 million and \$48 million, respectively. Accordingly, the value of the task orders at issue exceeds \$10 million, and exceeds the threshold for GAO bid protest jurisdiction. 41 U.S.C. § 4106(f)(2).

<sup>4</sup> The protester also alleges that the agency conducted inadequate discussions because the protester was not given an opportunity to address the deficiencies in its proposal. Protester's Comments at 32-37. The agency did not conduct discussions in this procurement. The record reflects that the agency provided the protester an opportunity to respond to potentially adverse past performance information; the agency specifically did not permit the protester to revise its proposal. See AR, Tab 13, Communication Regarding Adverse Past Performance, at 6. We find the protester's argument that this exchange constituted discussions to be unconvincing. While the Federal Acquisition Regulation (FAR) explains that the policies of FAR subpart 15.3 are inapplicable to task order competitions, such as this procurement, when, as here, an agency conducts a task order competition as a negotiated procurement, our analysis regarding fairness, will, in large part, reflect the standards applicable to the negotiated procurements in

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Turning first to the agency's price evaluation, we note that our decisions have consistently concluded that where a solicitation provides that the government will assess the adequacy of professional compensation to ensure that offerors will be able to attract and retain employees, such an assessment is, in effect, a price realism analysis with respect to the offeror's proposed compensation. See, e.g., MicroTechnologies, LLC, B-413091.4, Feb. 3, 2017, 2017 CPD ¶ 48 at 6-8; Scope Infotech, Inc., B-414782.4, B-414782.5, Mar. 22, 2018, 2018 CPD ¶ 116 at 9,11. The nature and extent of a price realism analysis are generally within the sound exercise of the agency's discretion unless the agency commits itself to a particular methodology in the solicitation. See Legacy Mgmt. Solutions, LLC, B-299981.2, B-299981.4, Oct. 10, 2007, 2007 CPD ¶197 at 3. We will review an agency's price realism evaluation to determine whether it was reasonable and consistent with the solicitation requirements. Id.

#### Unstated Evaluation Criteria

The protester contends that the agency applied unstated criteria in its price evaluation by relying on a detailed price evaluation methodology outlined in an internal memorandum, yet none of the analytical criteria in that memorandum were disclosed in the solicitation. Protester's Comments at 25-32. The protester notes that the memorandum included five criteria and six sub-criteria none of which were described in the solicitation or otherwise provided to the offerors. Id. In particular, the protester contends that the agency penalized it for failing to include specific actual historical data about its compensation rates, turnover, and retention, but that nothing in the solicitation put offerors on notice that those were the specific data points the agency was seeking. Id. Accordingly, in the protester's view, the specific elements are sufficiently removed from the evaluation criteria stated in the solicitation that offerors could not have reasonably anticipated that their proposals would be evaluated on the basis of those criteria. Id.

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FAR part 15. FAR § 16.505(b)(1)(ii); Technatomy Corp., B-411583, Sept. 4, 2015, 2015 CPD ¶ 282 at 7. For example, our decisions have relied on the criteria in FAR part 15 that distinguish between clarifications and discussions in assessing the fairness of exchanges in FAR part 16 procurements. See, e.g., SigNet Techs., Inc., B-417335, B-417335.2, May 28, 2019, 2019 CPD ¶ 202 at 3-5; SOC LLC, B-415460.2, B-415460.3, Jan. 8, 2018, 2018 CPD ¶ 20 at 7. Here, the relevant portion of FAR part 15 indicates that an exchange which provides an offeror the opportunity to respond to adverse past performance information to which it has not yet had an opportunity to respond is an example of a clarification, not discussions. FAR § 15.306(a)(2). Thus, we conclude that the exchange was a clarification, and the protester's arguments concerning the conduct of discussions are without merit.

First, we do not agree that the agency's areas of consideration could not be anticipated from the criteria announced in the solicitation. As noted above, the RFP required offerors proposing labor rates below the minimums set in the solicitation to provide evidence justifying that they would be able to attract and retain qualified staff at those rates. AR, Tab 1, Contract Support RFP, at 101; AR, Tab 24, Acquisition Support RFP at 58-59. Whether an offeror has historically been able to attract and retain staff at its low proposed rates is a logical basis of consideration since this type of information provides strong evidence that the proposed rates are appropriate.<sup>5</sup> In fact, the protester's own proposals provided high-level information about its company-wide fill rates and turnover in its price proposal, undercutting the protester's argument that it could not have anticipated that historical data would be relevant to the price evaluation. See, e.g., AR, Tab 38, Protester's Acquisition Support Price Proposal, at 6.

Second, the protester appears to misunderstand the applicable standard in this context. As noted above, the nature and extent of a price realism analysis are generally within the sound exercise of the agency's discretion unless the agency commits itself to a particular methodology in the solicitation. See Legacy Mgmt. Solutions, LLC, supra. Our decisions have not generally required agencies to disclose their specific methods of price analysis in the solicitation so long as the methods employed are reasonable. See, e.g., U.S. Electroynamics, Inc., B-414678, Aug. 1, 2017, 2017 CPD ¶ 252 at 7 (agency's use of an undisclosed price analysis methodology did not represent an unstated evaluation criterion because there is no requirement that an agency disclose its intent to use a specific methodology in the solicitation). Because the agency was not required to disclose its methods of price analysis,<sup>6</sup> and the agency's chosen methodology appears to provide a reasonable basis for assessing whether proposed rates will be adequate to attract and retain qualified candidates--that is to say whether the rates are realistic--this protest ground is denied.

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<sup>5</sup> For offerors with rates below the minimum rates, the agency's price evaluation consisted of the following steps: (1) determine the number of labor categories for which an offeror proposed rates below the minimum; (2) determine the difference between the minimum hourly rate and the proposed hourly rate for each position; (3) consider whether the proposal offered actual current hourly rates being paid for similar positions in similar geographic areas, fill rates, turnover data, or other "real world" pay and retention data; (4) consider whether the proposal included any other data establishing the adequacy of the rates to include a discussion of the method used by the offeror to set the proposed rates; and (5) consider the preceding elements holistically to assess whether the justification is adequate to attract and retain qualified staff. See AR, Tab 17, Memorandum for the Record: Contract and Acquisition Support Compensation Plan Market Research and Analysis, at 1-3.

<sup>6</sup> As an aside, we note that the RFP, as discussed above, merely stated that the agency would assess the offeror's justifications, but announced no methodology whatsoever. See AR, Tab 1, Contract Support RFP, at 101; AR, Tab 24, Acquisition Support RFP at 58-59.

## Consideration of Past Performance Information in the Price Evaluation

The protester additionally argues that the agency erred by considering the protester's fill rate on one of its prior contracts in evaluating its price. Protester's Comments at 25-32. Specifically, the agency's price evaluation considered that the protester had maintained a "less than acceptable fill rate on relevant past performance," which underscored the agency's conclusion that the proposed rates were not adequate. Id. at 26 (citing AR, Tab 8, at 32; and AR, Tab 33, at 33). First, the protester argues that the agency erred in considering this information because the past performance information was outdated and inaccurate. Id. at 29-32. Second, the protester contends that, because this information was also considered negatively in the past performance portion of the evaluation, this represents an impermissible double counting or exaggeration of the significance of the past performance evaluation factor. Id.

The protester's argument that the agency relied on outdated CPARS information in this context is not supported by the record. While the SSA's award decisions merely reference a failure to maintain fill rates "on relevant past performance," the agency credibly argues that it was primarily concerned with the fill rate on a current contract for staffing and technical acquisition services support for the Air Force. See MOL at 5-6; AR, Tab 8, Contract Support Award Decision Document at 31-32; AR, Tab 33, Acquisition Support Award Decision Document, at 32-33. The agency considered this past performance effort to be highly relevant to the instant procurements because it involved similar work for another Department of Defense component in a similar geographic area. Id. at 8-10. On that effort, the record suggests that the protester has never met the contract's required staffing fill rate.<sup>7</sup> See AR, Tab 13, Communication Regarding Adverse Past Performance at 1.

The protester does not suggest, either in its response to the agency concerning the negative past performance information or in its pleadings, that it actually met the required fill rate on that contract or that the agency considered outdated information with respect to that contract. Rather, the protester alleges, with respect to a different past performance effort, that the agency considered an interim CPARS report rather than an available final CPARS in its evaluation. Protester's Comments at 10-14. However, the negative performance issues identified in the interim CPARS report to which the protester objects relate primarily to issues with deliverables, management, and regulatory compliance rather than staffing fill rate. See, e.g., AR, Tab 33, Acquisition Support Award Decision Document, at 21-22. Thus, it does not appear that the agency relied on that information in its price evaluation and any alleged error in the agency's consideration of interim CPARS information is not relevant to the agency's price evaluation. See Protester's Comments at 10-14; see, generally, AR, Tab 12, Protester's CPARS.

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<sup>7</sup> The contract required a 95 percent fill rate, while the protester's fill rate has not exceeded 91 percent and has, at times, been lower than 80 percent. See AR, Tab 13, Communication Regarding Adverse Past Performance at 1, 14.

Similarly without merit is the protester's argument that the agency's consideration of its fill rate for a past performance reference represents an impermissible double counting or exaggeration of its past performance. Our decisions are clear that an agency may properly consider an element of a proposal under more than one evaluation criterion where the element is relevant and reasonably related to each criterion under which it is considered. See UNICCO Gov't Servs., Inc., B-409111 et al., Jan. 23, 2014, 2014 CPD ¶ 55 at 11 n.6. Here, the protester's ability to attract and retain staff on another very similar contract in one of the same geographic regions in which it would need to hire for these procurements is reasonably relevant to the realism of the protester's proposed compensation approach.

While the protester suggests that the information was not reliable because the protester could have adopted a different approach to compensation in these proposals than it has under existing contract efforts, the protester's price proposals suggest precisely the opposite. Protester's Comments at 30-31; AR, Tab 38, Protester's Acquisition Support Price Proposal at 6. Specifically, the protester's price proposals state that "[o]nce the salaries were established based on [Economic Research Institute] data we validated that they were comparable to salaries for current employees providing the same services," and that "OBXtek has used this type of salary review and validation to provide realistic and competitive pricing on our current contracts." See, e.g., AR, Tab 38, Protester's Acquisition Support Price Proposal at 6. Accordingly, we see no basis to conclude that the agency erred in its consideration of the protester's fill rates in assessing the realism of its proposed compensation.

#### Reasonableness of Price Evaluation

Finally, the protester contends that the agency's price evaluation was unreasonable in several respects. Protester's Comments at 47-56. For example, the protester alleges that the agency erred by unreasonably insisting on actual historical compensation data, and declining to accept the protester's reliance on salary survey data from the Economic Research Institute (ERI), Payscale, and Glassdoor. Id. Additionally, the protester suggests that the agency erred in evaluating its fringe benefits by comparing them to benefits provided to federal civil service employees, which are in general more generous than those provided in the private sector.<sup>8</sup> Id. at 56-57.

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<sup>8</sup> The protester made several additional arguments concerning the agency's price evaluation. While we do not address them all in this decision, we have considered them and conclude they do not provide a basis to sustain the protest. For example, the protester contends that the agency did not evaluate proposals equally because the agency performed no analysis to determine whether the awardee's compensation was too low to attract and retain qualified personnel, and therefore did not consider the fact that, for example, the awardee provided no information about its proposed fringe benefits in its proposals. Protester's Comment at 57-58. As noted above, a professional compensation analysis is a price realism analysis, and, absent a

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We find these arguments unpersuasive. With respect to the protester's argument concerning salary survey data, this amounts to simple disagreement with the agency's judgment. Even accepting the protester's contention that various employers (to include, in some cases, agencies of the federal government) rely on salary surveys from ERI to determine acceptable wage rates, that does not compel the agency to rely on those numbers in this case. Protester's Comments at 52-53. Here, the government developed the minimum wage rate matrix using the federal general schedule as a baseline. See AR, Tab 17, Memorandum for the Record: Contract and Acquisition Support Compensation Plan Market Research and Analysis, at 1-2. The government chose that benchmark because the solicitations outlined qualifications for many of the positions that included significant prior federal service. Id. Accordingly, general schedule wage rates, in the agency's view, reflected a reasonable baseline for compensation for qualified personnel. Id.

The SSA noted that the three salary surveys furnished by the protester provided a very wide range of results for single positions, and individual surveys provided very divergent results between positions, suggesting either that the survey data were not reliable for these positions or that the referenced positions were not comparable.<sup>9</sup> See AR, Tab 8, Contract Support Award Decision Document at 31-32; AR, Tab 33, Acquisition Support Award Decision Document, at 32-33. In short, the agency was not confident that the wages outlined in the salary surveys were actually reflective of the compensation required to attract and retain qualified staff in the absence of evidence that the protester had actually hired and retained staff at those rates in the past. Id. While the protester noted that it had a [DELETED] percent fill rate company-wide and a [DELETED] percent retention rate company-wide, the agency found the fill rate information to be too general

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solicitation provision advising offerors that the agency intends to conduct a price realism analysis, agencies are neither required nor permitted to conduct such an analysis in awarding a fixed-price contract, such as this one. See National Disability Rights Network, Inc., B-413528, Nov. 16, 2016, 2016 CPD ¶ 333 at 9. In this case, the solicitations were clear that the agency would analyze compensation only where the offeror proposed hourly rates lower than the minimum rates provided in the solicitation. AR, Tab 1, Contract Support RFP, at 101; AR, Tab 24, Acquisition Support RFP at 58-59. The protester does not contest that the awardee proposed rates meeting or exceeding the provided minimum rates, and, accordingly, the agency was neither required nor permitted to perform a price realism analysis on the awardee's proposal in this case. This argument is, therefore, without merit.

<sup>9</sup> For example, on one of the contracts the three surveys showed an average difference from the solicitation's minimum rates of -[DELETED], -[DELETED], and -[DELETED] per year, respectively. AR, Tab 33, Acquisition Support Award Decision Document, at 32-33. However, on the same contract, the survey that the protester used to set its proposed rates ranged across positions from [DELETED] higher to [DELETED] lower than the minimum rates. Id.



to be meaningful, especially in light of the protester's known unacceptable fill rate on another similar contract, as discussed above. Id. On this record, we cannot conclude that the agency was unreasonable in concluding that the protester's justifications were inadequate to establish that it could attract and retain qualified staff at its proposed rates.

Similarly, we find the protester's arguments concerning the agency's evaluation of fringe benefits to be unpersuasive. The protester's price proposals noted that its fringe benefits were part of its retention strategy and would help it to attract and retain staff at its lower proposed rates. See, e.g., AR, Tab 38, Protester's Acquisition Support Price Proposal, at 8-9. The agency concluded that, in the absence of real world hiring and retention data, the protester's benefits appeared to be comparable to (or worse than) benefits a similarly situated federal government employee would receive, and those benefits were paired with a significantly lower salary. See MOL at 13; AR, Tab 8, Contract Support Award Decision Document at 32; AR, Tab 33, Acquisition Support Award Decision Document, at 33. Given the agency's judgment that the potential applicant pool for many of the positions would be, to some extent, limited to current or former federal employees, it is entirely reasonable for the agency to consider the fact that the protester was not only offering lower wages, but did not offset those lower wages with more generous fringe benefits than potential qualified employees would currently receive.

Because we conclude that the agency reasonably found the protester's justifications for its lower compensation rates to be inadequate, we have no basis to question the agency's conclusion that the protester's proposal was unawardable. Accordingly, we need not reach the protester's other arguments concerning the agency's past performance evaluation or the best-value tradeoff, because even if we were to agree with the protester that the agency erred in those respects, the protester was not competitively prejudiced thereby. See Bashen Corp., B-412032.2, Dec. 3, 2015, 2015 CPD ¶ 381 at 4 n.2 (protester cannot show competitive prejudice where agency reasonably found protester otherwise ineligible for award).

The protest is denied.

Thomas H. Armstrong  
General Counsel