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Decision

Matter of: ACTA, LLC

File: B-418352; B-418352.2

Date: March 17, 2020

Damien C. Specht, Esq., R. Locke Bell, Esq., and Alissandra D. Young, Esq., Morrison & Foerster LLP, for the protester.

Tod D. Stephens, Esq., Armstrong Teasdale LLP, for UNCOMN, LLC, the intervenor. Patricia S. Wiegman-Lenz, Esq., and Christopher M. Judge, Esq., Department of the Air Force, and Kenneth M. Roth, Esq., A.J. Koudelka, Esq., and Robert J. Depke, Esq., U.S. Transportation Command, for the agencies.

Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency unreasonably evaluated protester's price as unrealistic is denied where the majority of the protester's proposed labor rates were substantially below the prices proposed by other offerors, the government estimate, and the rates under the incumbent contract.
 2. Protester is not an interested party to challenge the evaluation of its technical proposal, or the awardee's past performance, where agency reasonably rejected protester for unrealistic pricing and protester does not allege that awardee should be evaluated as unacceptable under the non-price factors.
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DECISION

ACTA, LLC, of Torrance, California, protests the award of a contract to UNCOMN, LLC, of Scott Air Force Base, Illinois, under request for proposals (RFP) No.

HTC71119RD007, issued by the Department of the Air Force for enterprise architecture, enterprise data management, and information technology engineering services. ACTA asserts that the agency unreasonably concluded that ACTA submitted an unrealistic price proposal. ACTA also challenges the agency's evaluation of ACTA's technical proposal and UNCOMN's past performance.

We deny the protest.

BACKGROUND

The RFP, issued on May 16, 2019, and set aside for small businesses, provided for the award of an indefinite-delivery, indefinite-quantity contract with fixed-price and labor hour line items and a period of performance of five years. Agency Report (AR), Tab 62, Conformed RFP, at 1, 4, 16 and 33. The solicitation called for a two-phase evaluation. During phase one, the agency evaluated proposals on a pass/fail basis against the technical/management factor, demonstration of capability maturity model integration level II in the development and/or services model subfactor. Id. at 33. Those offerors that received a rating of pass under phase one, competed for award under phase two on a best-value tradeoff basis using the following factors: technical/management with subfactors for architecture-Department of Defense Air Force model, data management, and enterprise engineering support; past performance; and price. Id. at 33-34.

With respect to price, offerors were to include in their proposals attachment 7 to the solicitation, which was a pricing template that provided 26 labor categories and estimated hours for performance, and other direct costs. Id. at 31; see also Tab 7, RFP, Attach. 7, Pricing Template. The solicitation included education and experience requirements for the labor categories. AR, Tab 17, RFP, Attach. 8, Labor Category Descriptions. Offerors were required to propose fully burdened labor rates for each of the 26 labor categories for the government site and contractor site for each period of performance; these rates would be used as the ceiling labor rates for the pricing on future task orders. RFP at 31. Offerors were permitted to submit supporting documentation for their price proposal which was limited to two pages; the solicitation advised offerors that the agency would not review information which exceeded the two-page limit. Id. at 26-27. The solicitation provided that price would be evaluated for reasonableness, completeness, and realism. Id. at 37. With respect to realism, the solicitation specifically notified offerors that “[t]he realism analysis will review the offeror’s proposed labor rates to determine whether the proposed prices are realistic for the work to be performed. The Government may reject a proposal where the proposed prices are unreasonably high or low for the work to be performed.” Id. at 38.

Eleven offerors, to include ACTA, submitted proposals that were rated acceptable for phase one. Contracting Officer’s Statement (COS) at 11. Following the phase two evaluation, ACTA was rated acceptable for each of the technical management subfactors and received a substantial confidence rating for past performance. AR, Tab 78a, Source Selection Board Report, at 61; Tab 78b, Signed Source Selection Board Report, at 63. The agency concluded, however, that ACTA submitted a price proposal that was unrealistic and eliminated the firm from consideration for award. AR, Tab 78a, Source Selection Board Report, at 14; Tab 78b, Signed Source Selection Board Report, at 63.

The agency notified ACTA that its proposal was rejected because it was found unrealistic. AR, Tab 82, Notice of Elimination. ACTA requested a pre-award debriefing. After a debriefing, ACTA filed this protest.

DISCUSSION

ACTA protests that the price realism evaluation conducted by the agency was unreasonable and disparate, and the agency utilized a flawed independent government cost estimate (IGCE). Protest at 8-12; Comments and Supp. Protest at 7. ACTA also argues that the agency conducted a flawed evaluation of UNCOMN's past performance, unreasonably and disparately evaluated ACTA's technical proposal, and conducted a flawed best-value tradeoff. Protest at 12-19; Comments and Supp. Protest at 9-17. For the following reasons, we find no basis to sustain the protest. We address several arguments below.

Price Realism

ACTA protests that the agency unreasonably concluded that its price proposal was unrealistic. First, ACTA asserts that the agency used an unreasonable IGCE against which to compare its proposed labor rates because in preparing the estimate, the agency relied on rates from the General Services Administration (GSA) 8(a) Streamlined Technology Application Resources for Services (STARS) II multiple-award contract, which is also a vehicle for Small Business Administration (SBA) 8(a) contracts. Comments and Supp. Protest at 7. ACTA further complains that the agency used an average of rates proposed by vendors on the GSA 8(a) STARS II contract, and thus did not consider that many of ACTA's rates are higher than those rates on contracts of some of the 8(a) STARS firms. Id. at 8.

ACTA similarly asserts that the agency unreasonably compared its proposed rates to the historical rates paid. ACTA asserts that the historical rates are from the incumbent contract which is an SBA 8(a) business development set-aside contract, while the current solicitation is set aside for small businesses. Comments and Supp. Protest at 2, 5. According to ACTA, 8(a) firms have different cost structures than larger small businesses. Id. ACTA speculates that the other offerors who responded to the solicitation have higher rates because they relied on public information about the agency's current spending on the 8(a) incumbent contract. Id. at 2. ACTA also asserts that the rates were higher on the incumbent contract because that contract was half the size of the present contract, and burdened by substantially higher indirect costs and fees. Id.

Finally, ACTA asserts that the narrative it included with its price proposal provided ample support for its labor rates. Protest at 9-10. In this regard, ACTA explains that its subcontractor was the incumbent contractor so ACTA has access to the incumbent workforce. Id. at 8-9. ACTA further explains that the agency did not have any concerns with ACTA's technical approach, and rejected its proposal as unrealistically priced based on its proposed labor rates without considering its technical approach, its understanding of the solicitation requirements, or the risk that might result from its lower rates. Id. According to ACTA, if the agency had considered its technical approach it

would have concluded that its proposed rates were more than sufficient to meet its approach. Id.

Where a fixed-price contract, including a fixed-rate contract such as this one, is to be awarded, a solicitation may provide for a price realism analysis for such purposes as measuring an offeror's understanding of the solicitation requirements and assessing the risk inherent in an offeror's proposal. Legacy Mgmt. Solutions, LLC, B-299981.2, B-299981.4, Oct. 10, 2007, 2007 CPD ¶ 197 at 3. The Federal Acquisition Regulation (FAR) identifies a number of price analysis techniques that may be used to determine whether prices are reasonable and realistic, including comparison of the prices received with each other, with historical prices paid, and with the government estimate. FAR §§ 15.404-1(b)(2)(i), (ii), and (v). The nature and extent of a realism analysis ultimately are matters within the sound exercise of the agency's discretion, unless the agency commits itself to a particular methodology in the solicitation. Legacy Mgmt. Solutions, LLC, supra. We will review an agency's price realism evaluation only to determine whether it was reasonable and consistent with the solicitation requirements. Id.

As relevant to this protest, prior to issuing the solicitation, the agency established an overall independent government estimate of \$193,968,235, based on its estimates of the fully burdened labor rates for each labor category. AR, Tab 6, IGCE. The agency developed the fully burdened labor rates for its estimate utilizing GSA published prices for the GSA 8(a) STARS II multiple-award contract, and historical prices paid under the incumbent contract. Id.; Supp. COS/Memorandum of Law (MOL) at 6. Also, as relevant to this protest, the agency received 11 proposals in response to the solicitation, with total evaluated prices as follows:

Offeror	Total Evaluated Price
ACTA	\$ 87,809,236
Offeror 2	\$143,316,370
Offeror 3	\$149,386,094
Offeror 4	\$182,178,289
Offeror 5	\$126,088,080
Offeror 6	\$138,940,908
Offeror 7	\$161,436,710
Offeror 8	\$163,546,527
UNCOMN	\$137,862,774
Offeror 10	\$189,330,016
Offeror 11	\$143,993,463

AR, Tab 81, Source Selection Decision Document, at 3.

In conducting its price realism evaluation of ACTA's proposal, the agency compared ACTA's proposed rates against the IGCE and the rates developed for that estimate. AR, Tab 77b, Cost Price Evaluation Realism. ACTA's overall evaluated price (\$87,809,236) was 50 percent lower than the overall IGCE (\$193,968,235), with labor rates that were between 25 and 196 percent lower than the rates in the IGCE. AR,

Tab 75b, Cost Price Evaluation, at 15. The agency also compared ACTA's proposed rates to the rates paid under the current contract. AR, Tab 77b, Cost Price Evaluation Realism. On average ACTA's rates were **[DELETED]** percent lower than the historical rates paid. AR, Tab 75b, Cost Price Evaluation, at 15.

In addition, the agency compared ACTA's proposed price and its proposed burdened labor rates to the proposed prices and averaged fully burdened labor rates of the other offerors that responded to the solicitation. AR, Tab 77b, Cost Price Evaluation Realism. ACTA's proposed rates were below the average rate proposed by all offerors. Id. ACTA proposed the lowest labor rate for 20 out of the 26 labor categories for the government site and 18 of the 26 categories for the contractor site, for a total of 38 out of 52 labor categories. AR, Tab 75b, Cost Price Evaluation at 16; Supp. COS/MOL at 5 n.3. For these labor categories ACTA's rates were between 2 and 45 percent lower than the rates proposed by the other offerors. Id. For the remaining six labor categories where ACTA did not offer the lowest rate, of the eleven offerors, ACTA's rates were the second to the fifth lowest. Id. ACTA's proposed total cost was \$40 million lower than the second lowest offeror (\$126,088,080.60). Id. at 6. The agency determined that 77 percent of ACTA's labor rates were unrealistically low for the work to be performed. Id. at 16. The agency rejected ACTA's proposal because, as noted in the solicitation, unrealistically low prices introduce unnecessary risk to the government in successful performance, and execution of the tasks to be performed. Id. at 16.

We find that the agency reasonably found that ACTA proposed an unrealistically low price. First, we find nothing improper in the agency using the STARS II contract which is an 8(a) contract, or the incumbent contract which is also an 8(a) contract, to develop its rates for the government estimate or to compare with ACTA's rates.¹ As the agency notes, 8(a) firms and small businesses must meet the same small business size standards. Supp. COS/MOL at 7. Further, ACTA has provided no information to support its contention that the use of these contracts was unreasonable because 8(a)

¹ ACTA also asserts that there are multiple reasons its labor rates are lower than historical rates. First, asserts ACTA, the awardee UNCOMN (who was a subcontractor on the incumbent contract), is not on ACTA's team. Protest at 11. According to ACTA, UNCOMN is known to apply uncharacteristically high indirect wrap rates. Id. ACTA explains that the indirect rates used to develop its proposal are significantly lower than the indirect rates used to develop the proposal of one of ACTA's subcontractors, which was the incumbent six years ago. Id. ACTA additionally asserts that it developed its rates using a fee of only **[DELETED]** percent compared to the incumbent's historical fee of **[DELETED]** percent. Id. ACTA argues that the FAR recognizes that historical rates may not provide a good basis for comparison where there has been a significant time lapse between the last acquisition and the present one and the terms or terms/conditions have changed significantly. Id. Finally, ACTA asserts that it has learned from experience on this exact program. Id. None of this information, however, was in its proposal with the exception of its ability to use incumbent expertise and employees. See AR, Tab 68, ACTA Revised Cost Narrative.

small businesses typically charge higher direct labor rates. In this regard, as ACTA states in its protest, some of its labor rates are in fact higher than the 8(a) rates. Comments and Supp. Protest at 8 (stating that ACTA proposed a rate for the systems administrator category that is higher than three known rates on the 8(a) STARS II contract for that labor category).

In addition, the fact that the government used the average labor rates for multiple 8(a) STARS II task orders to compute its government estimate does not make the estimate unreasonable. While, as ACTA asserts, some of the task orders have labor rates that are lower than the average rate, some of the rates are also higher than the average rate. ACTA's position seems to be that the agency should have compared its proposed rates against the higher rates, rather than against the average rates. ACTA, however, has provided no explanation as to why this would be a more reasonable approach to conducting the price realism analysis.²

In any case, even if we concluded that the government estimate was unreasonable, or that the agency should not have relied on the incumbent 8(a) contract as a basis of comparison, the FAR provides that in performing a price realism analysis an agency may compare prices received in response to the solicitation. FAR § 15.404-1(b)(2)(i). ACTA complains that it was improper for the agency to simply compare the proposed burdened rates against each other without considering its technical approach, its understanding of the solicitation requirements, or the risk that might result from its lower rates. However, where, as here, a solicitation includes the labor categories, and hours that offerors are required to use to prepare their proposals, the agency may reasonably perform its price realism analysis by determining if the proposed rates are realistic without additional analysis. See Legacy Management Solutions, LLC, supra, at 3; see also Engility Corporation, B-413120.3, et al., Feb. 14, 2017, 2017 CPD ¶ 70 at 23

² To support its position that it was prejudiced by the agency's use of the average of all the labor rates in the GSA 8(a) STARS II contract, for each labor category ACTA states that:

[t]he absurdity that stems from the . . .flawed IGCE is best illustrated in the example of the Systems Administrator labor category. There, the IGCE employed a government-site rate of \$79.08, while the average rate from the 8(a) STARS II was \$77.75, and some firms on 8(a) STARS II provide that labor category for as little as \$54.75. . . . ACTA proposed a rate of **[DELETED]**, higher than **[DELETED]** known rates on the 8(a) STARS II contract for that labor category.

Comments and Supp. Protest at 8. What ACTA fails to disclose, however, is that there are more than 200 rates for the systems administrator labor category, many of which are much higher than the rate the government used in its estimate, and ACTA's proposed rate. See AR, Tab 6, IGCE, GSA Tab, Row 40. ACTA also fails to point to any other labor categories where its proposed rate is higher than the GSA average rates for contractors with a GSA 8(a) STARS II contract.

(where solicitation does not provide for a unique technical approach and dictates labor categories and hours, agency's cost realism analysis need not consider offerors' technical approach).

Given that ACTA proposed the lowest labor rates for 20 out of the 26 labor categories for the government site and 18 out of 26 categories for the contractor site, for a total of 38 out of 52 labor categories, the rates were between 2 and 45 percent lower than the other offerors, and ACTA's proposed total cost was \$40 million lower than the second lowest offeror, we find no basis to question the agency's conclusion that ACTA's proposal was unrealistically priced.³

Unequal Treatment

ACTA protests that in performing its price realism analysis the agency did not treat ACTA and UNCOMN equally. Comments and Supp. Protest at 9. ACTA specifically complains that UNCOMN's proposed labor rates are unrealistic for at least one labor category. According to ACTA, the agency either improperly failed to recognize this, or awarded the contract to UNCOMN despite the unrealistic rate. Id. ACTA argues that since it was eliminated from the competition for unrealistic rates, UNCOMN should also have been rejected for unrealistic rates.

We disagree. ACTA was eliminated from the competition because its rates were unrealistic for 77 percent of the labor categories. The fact that UNCOMN proposed one category that could be considered unrealistic and was not eliminated from the competition does not demonstrate unequal treatment. See HP Enterprise Services, LLC; Aon National Flood Services, B-413697 et al., January 17, 2017, 2017 CPD ¶ 26 at 6. As the agency notes, ACTA's overall price was more than 40 percent less than the average overall price, \$40 million less than the next lowest-priced proposal, and contained the lowest labor rates for 20 out of 26 labor categories. In contrast, UNCOMN's proposal was the third lowest priced-proposal, its overall price was within 10 percent of the fourth through seventh lowest-priced proposals, and contained the lowest labor rate for only 2 labor categories. Supp. COS/MOL at 10.

³ In its protest ACTA cited information from its cost narrative that was beyond the two-page limit imposed by the solicitation, and therefore was not considered when the agency performed its price realism analysis. In its comments on the agency report, ACTA cited information from the price narrative that was included on the first two pages. This information, however, was general. It states that the rates are consistent with industry standards and validated through labor surveys. It provides no explanation, however, of why its rates are so much lower than the incumbent rates, or what any specific survey showed for any particular labor category. AR, Tab 68, ACTA Revised Cost Narrative, at 4.

Technical/Past Performance Evaluation

ACTA protests that the agency ignored strengths in, and unreasonably assigned weaknesses to, its technical proposal, and evaluated UNCOMN's proposal with strengths, but did not give ACTA credit for the same strengths in its proposal. ACTA further complains that the agency unreasonably evaluated UNCOMN's past performance.

ACTA is not an interested party to raise these challenges. In order for a protest to be considered by our Office, a protester must be an interested party, which means that it must have a direct economic interest in the resolution of a protest issue.

4 C.F.R. §§ 21.0(a)(1), 21.1(a). A protester is generally an interested party to challenge a proposal evaluation where there is a reasonable possibility that the protester's proposal would be in line for selection if its protest were sustained. Executive Protective Sec. Serv., Inc., B-299954.3, Oct. 22, 2007, 2007 CPD ¶ 190 at 3 n.3.

While ACTA complains that it should have received strengths similar to the strengths awarded to UNCOMN, ACTA does not assert that UNCOMN should have been rated technically unacceptable. Similarly, ACTA asserts that UNCOMN should not have been rated substantial confidence for past performance, but does not assert that UNCOMN should have been rated unacceptable for past performance.⁴ Since ACTA is ineligible for award, and there is no basis to conclude that UNCOMN (the only offeror found eligible for award) was also ineligible for award, ACTA is not an interested party to protest the evaluation of its or UNCOMN's proposal under the technical and past performance factors. Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 9.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁴ In its protest, ACTA argued that the agency failed to consider UNCOMN's negative past performance on the incumbent contract. The agency substantively responded to this issue in its report. ACTA did not address the agency's response in its comments, thus, abandoning the issue. Zolon PCS, LLC, B-417930, Nov. 18, 2019, 2019 CPD ¶ 389 at 3.