

Decision

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Matter of: Torrent Technologies, Inc.

File: B-419326; B-419326.2

Date: January 19, 2021

Michael J. Schaengold, Esq., Melissa Paige Prusock, Esq., Danielle K. Muenzfeld, Esq., and Brett A. Castellat, Esq., Greenberg Traurig LLP, for the protester.
Daniel R. Forman, Esq., Abigail T. Stokes, Esq., and Craig Barrett, Esq., Crowell & Moring LLP, for National Flood Services, LLC, the intervenor.
Rina Martinez, Esq., Department of Homeland Security, for the agency.
April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's price evaluation is denied where the record shows that the evaluation was reasonable and consistent with the terms of the solicitation and applicable procurement law and regulation; also, protest alleging that the agency waived an aspect of the pricing structure for the awardee is denied where there is no basis in the record to find that such a waiver occurred.
 2. Protest alleging that discussions with the protester were misleading with regard to price is denied where the discussions were consistent with applicable procurement law and regulation.
 3. Protest challenging the agency's evaluation of the awardee's proposal under the non-price factors is denied where the record shows that the evaluation was reasonable and consistent with the terms of the solicitation.
 4. Protest challenging the agency's best-value tradeoff decision is denied where the agency documented its basis for award to a lower-rated, lower-priced offeror and where the underlying evaluation was reasonable.
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DECISION

Torrent Technologies, Inc., of Overland Park, Kansas, protests the award of a contract to National Flood Services, LLC (NFS), of Kalispell, Montana, under request for proposals (RFP) No. 70FA6020R00000003, issued by the Department of Homeland Security, Federal Emergency Management Agency (FEMA), for flood insurance policy administration. The protester primarily challenges the agency's price evaluation, as well

as the conduct of discussions, the evaluation of the awardee's proposal under the non-price factors, and the best-value tradeoff decision.

We deny the protest.

BACKGROUND

The National Flood Insurance Program (NFIP), created by Congress through the National Flood Insurance Act of 1968 and as revised since then, makes federally-backed flood insurance available to eligible communities. Agency Report (AR), Tab E, Final RFP After Amendment 2 (RFP);¹ AR, Tab F, RFP Attachment A, Performance Work Statement (PWS) at 2-3. The NFIP is managed by FEMA and its Federal Insurance Mitigation Administration. The NFIP sells and administers flood insurance policies either through an arrangement with private "Write Your Own" insurance companies or, at issue here, through an "NFIP Direct" contractor.

On July 29, 2020, the agency issued the RFP pursuant to Federal Acquisition Regulation (FAR) part 12, acquisition of commercial items, and part 15, contracting by negotiation. See RFP; Contracting Officer's Statement at 2. The RFP contemplated the award of a single indefinite-delivery, indefinite-quantity (IDIQ) contract under which fixed-price and/or time-and-materials task orders would be issued. RFP at 52. The contract would be performed over a 1-year base period, four 1-year option periods, and a 6-month extension option, with a guaranteed minimum amount of \$10,000 and a maximum amount of \$165 million. *Id.* at 1-9.

The selected "NFIP Direct" contractor would be responsible for selling and servicing a subset of NFIP flood insurance policies characterized by the agency as "the highest risk," that is, "policies for properties deemed too high of a risk for flood damage to be profitable." Contracting Officer's Statement at 1; AR, Tab M, Acquisition Plan, July 28, 2020, at 4. The contractor would be responsible for administering approximately 650,000 of the 5,100,000 flood insurance policies active nationwide, but would also have to assume policies from "Write Your Own" insurance companies, should they leave the NFIP program or become defunct.² RFP at 46-47.

¹ The agency amended the RFP twice. All citations are to the Adobe PDF page numbers of the amended solicitation provided by the agency at Tab E and solicitation attachments at Tabs F-K of the agency report.

² The RFP explains that "FEMA envisions the NFIP Direct as the example and insurance industry leader for the entire NFIP," and that FEMA's Federal Insurance Mitigation Administration is "transforming the NFIP to update the products, processes, and procedures that support the program." PWS at 3. Among other things, the contractor "shall perform all actions necessary to, or incidental to, policy administration services for flood insurance policies in support of the NFIP Direct" and be responsible for "management, operation, maintenance, and quality assurance for the services." *Id.* at 4-5. The contractor will also "act as a laboratory for testing government initiatives

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The RFP established a two-phase advisory down-selection process, and provided for award on a best-value tradeoff basis considering four non-price factors and price. RFP at 55-56. The RFP further provided that all five of the phase 1 and phase 2 evaluation factors would be considered in making the award determination; the five factors would be considered in descending order of importance; the four non-price factors, combined, were more important than price; and, “[a]s the merits of the technical evaluation factors . . . become closer or even, price will become more important in the award determination.” *Id.* at 56.

In phase 1, the agency would consider two evaluation factors: corporate experience, and an authorization and certification factor. RFP at 45-48, 56-57. Offerors would be assigned a confidence rating for corporate experience based on their submission of a video presentation addressing questions provided in the RFP, and a pass/fail rating based on a written submission for the authorization and certification factor.³ Then, the agency would provide offerors with an advisory letter that would advise them whether to proceed to phase 2. The RFP noted that the purpose of the advisory letter was to minimize proposal development costs, and that offerors could elect to continue to phase 2 regardless of the advice received in the advisory letter. *Id.* at 47-48.

In phase 2, the agency would consider three evaluation factors: oral presentation, past performance, and price. RFP at 48-52, 57-58. Offerors would be assigned confidence ratings for the oral presentation, which was to be held virtually, and address three elements of equal importance (key personnel, technical/management approach, and on-the-spot questions); and past performance, which was to be based on a written submission discussing up to three past performance references for work started within the past three years. *Id.* at 48-51, 57-58.

With regard to price, the RFP established multiple contract line item numbers (CLINs) that were primarily fixed price.⁴ The RFP instructed offerors to complete the price

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that aim to enhance customer experience and better align the NFIP Direct with FEMA’s Strategic Plan” and the Federal Insurance Mitigation Administration. *Id.* at 5.

³ Specifically, the RFP required the offeror to provide proof of current authorization and certification of compliance for hosting any information technology (IT) solution or solutions on a government-only cloud hosting environment. RFP at 47, 57.

⁴ The agency explains that task orders to be issued under the contract will primarily be fixed-price orders. AR, Tab M, Acquisition Plan, July 28, 2020, at 14 (estimating that 90 percent of the work will be fixed-price); AR, Tab AM, Business Clearance Memorandum (BCM), Sept. 30, 2020, at 7 (estimating that 85 percent of the work will be fixed-price). With regard to the development of the RFP’s pricing structure, the agency considered that the “[a]cquisition history has shown that the use of fixed price for some areas of NFIP work did not allow for the needed flexibility to efficiently perform NFIP

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schedule in section B.3 of the RFP, which the agency would use to calculate and evaluate total evaluated price.⁵ RFP at 1-9, 51, 58. The RFP also instructed offerors to complete pricing worksheets attached to the RFP, which would be used to price future time-and-materials task orders in the areas of “customer experience” or “disaster field support.” *Id.* at 51, 58; AR, Tab H, RFP Attachment C, Customer Experience Pricing Sheet; AR, Tab I, RFP Attachment D, Disaster Field Support Pricing Sheet. The RFP provided that the agency would evaluate prices for completeness and reasonableness, and cautioned offerors against submitting unbalanced pricing. RFP at 58.

On or before the August 10 due date for receipt of proposals, the agency received phase 1 proposals from Torrent (the incumbent) and NFS.⁶ After the agency evaluated the proposals and sent advisory letters,⁷ both offerors elected to proceed to phase 2. On or before August 31, the agency received phase 2 proposals from Torrent and NFS. After the offerors delivered oral presentations, and the agency evaluated the proposals, the agency established a competitive range with both offerors and conducted discussions.⁸ During discussions, the agency also amended the RFP, as relevant here,

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support services as the requirement’s scope evolved and level of effort and timelines were identified in support of the NFIP’s mission needs.” AR, Tab M, Acquisition Plan, July 28, 2020, at 15. The agency also explains, as the protester notes, “the purpose of moving more costs into [] fixed[-]price CLINs, instead of including them as part of the per policy per month pricing or reimbursing the [contractor] for its costs, is to reduce the cost to the government of a significant increase in the number of policies in order to support FEMA’s goal of ‘doubl[ing] the number of structures covered by flood insurance by 2022.’” Memorandum of Law (MOL) at 10, *citing* Protest at 10 *and* PWS at 5.

⁵ The RFP provided that the agency would calculate total evaluated price as “the total amount proposed under completed Section B.3, excluding the transition CLINs . . . plus the extrapolated price to extend services for up to 6 additional months[.]” RFP at 58. The RFP further provided that the agency would calculate the 6-month extension option amount “by prorating the total price for Option Year-4 for six months of additional performance.” *Id.*

⁶ The agency also received a proposal from a third offeror, but it was late and, therefore, not considered. BCM at 5.

⁷ In the advisory letters, Torrent was advised to move to phase 2 and NFS was advised not to move to phase 2. Contracting Officer’s Statement at 10; AR, Tab V, Torrent Advisory Letter, Aug. 19, 2020; AR, Tab W, NFS Advisory Letter, Aug. 19, 2020.

⁸ The agency explains that discussions were limited to written responses, as follows: “The contracting officer determined the submission of revised videos and conducting a [second] round of the oral presentation would not be practical or feasible since negotiations had to be completed within two (2) business days. Therefore, both offerors were given the same and even opportunity to address the discussion issues in writing.” BCM at 18. We also note that, in this regard, the agency explains that, “[d]ue to only

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to remove or modify certain CLINs and clarify the price evaluation factor. RFP at 1-9, 51, 58; Contracting Officer’s Statement at 10.

The agency requested and received final proposal revisions (FPRs) by September 18, and evaluated them as follows:

	Torrent	NFS
Corporate Experience	High Confidence	High Confidence
Authorization and Certification Factor	Pass	Pass
Oral Presentation	High Confidence	High Confidence
Past Performance	High Confidence	Some Confidence
Total Evaluated Price	\$90,589,559	\$27,075,352

BCM at 26.

The contracting officer, who also served as the source selection authority, concluded that NFS’s FPR was the most advantageous and presented the best value under the terms of the RFP. AR, Tab AN, Source Selection Decision Document (SSDD), Sept. 30, 2020, at 9-13; BCM at 2, 30-31, 33. While acknowledging Torrent’s “superior technical merit,” the contracting officer noted that NFS’s proposal was also highly rated under corporate experience (the most important factor) and oral presentation, but rated one level lower under past performance (the least important factor). SSDD at 10; BCM at 33. The contracting officer noted that NFS’s proposal “demonstrates a low risk of unsuccessful performance” and includes many strengths and benefits to the government, including the proposed use of NFS’s flood insurance processing system. SSDD at 12; BCM at 33.

Torrent’s price was found to be “unreasonably high”; in this regard, the contracting officer noted that Torrent’s total evaluated price was 234.58 percent higher than NFS’s, and that “[t]his extreme price premium for Torrent is not warranted” considering the non-price ratings and benefits of NFS’s proposal. BCM at 32-33; SSDD at 10. Ultimately, the contracting officer concluded, “NFS submitted a technically sound proposal with little to no need for government intervention for successful contract performance at a reasonable price.” SSDD at 13.

Torrent was subsequently notified of the agency’s award to NFS. After a debriefing, this protest followed.

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allowing written responses for discussion resubmissions in lieu of a new video submission, the [technical evaluation team] [p]anel decided to remove the deficiency that visual aids were not read out-loud in their entirety since NFS was not given the opportunity to address this issue during discussions.” *Id.* at 22.

DISCUSSION

Torrent challenges many aspects of the agency's source selection decision, including, but not limited to: the price evaluation; the evaluation of the awardee's proposal under the non-price factors; and the best-value tradeoff decision. Torrent also argues that the agency's discussions with Torrent were misleading. While we do not specifically address all of Torrent's arguments, we have fully considered all of them and find that they afford no basis on which to sustain the protest.

Price Evaluation

Torrent challenges the agency's price evaluation, raising various arguments in addition to or variations of those specifically discussed below. Torrent primarily contends that the agency's price reasonableness evaluation, and conclusion that Torrent's price was unreasonably high, was "irrational because it was based solely on the receipt of two extremely disparate offers." Protest at 8.

The manner and depth of an agency's price analysis is a matter committed to the discretion of the agency, which we will not disturb provided that it is reasonable and consistent with the solicitation's evaluation criteria and applicable procurement statutes and regulations. *TransAtlantic Lines, LLC*, B-411846.3, B-411846.4, May 18, 2016, 2016 CPD ¶ 148 at 7; *Federal Acquisition Servs. Alliant JV, LLC*, B-415406.2, B-415406.3, Apr. 11, 2018, 2018 CPD ¶ 139 at 11. It is a fundamental principle of federal procurement law that procuring agencies must condition the award of a contract upon a finding that the contract contains "fair and reasonable prices." FAR 15.402(a), 15.404-1(a); see *Crawford RealStreet Joint Venture*, B-415193.2, B-415193.3, Apr. 2, 2018, 2018 CPD ¶ 121 at 9.

The purpose of a price reasonableness analysis is to prevent the government from paying too high a price for a contract. *Crawford RealStreet Joint Venture, supra*. The FAR includes a non-exhaustive list of permitted price analysis techniques that ensure that the agency pays a fair and reasonable price. FAR 15.404-1. One of the techniques permitted by the FAR is a "[c]omparison of proposed prices received in response to the solicitation." FAR 15.404-1(b)(2)(i) (adding also that, "[n]ormally, adequate price competition establishes a fair and reasonable price").

Here, the RFP did not specify a method for the agency's price reasonableness evaluation, thereby allowing the agency to exercise its discretion. The record shows that, prior to discussions, the contracting officer considered the following:

Pursuant to FAR 15.404-1(b)(2)(i), price reasonableness was determined based on a comparison of proposed prices received in response to the solicitation. This was appropriate since (1) adequate competition was achieved and (2) comparison of proposed prices is one of the two preferred techniques for determining price reasonableness as stated in

FAR 15.404-1(b)(3). For this reason, a comparison of competitive proposed pricing was used to determine price reasonable[ness].

BCM at 10-11.

The record shows that the agency then evaluated the FPRs by calculating the total evaluated price in accordance with the terms of the solicitation;⁹ conducting a line-item by line-item comparison of the offerors' completed price schedules from section B.3 of the RFP; and considering the offerors' completed pricing worksheets, which were attached to the RFP and completed by the offerors. BCM at 31-33; AR, Tab AK, Price Comparison Spreadsheet; see *also* RFP at 1-9; AR, Tab H, RFP Attachment C, Customer Experience Pricing Sheet; AR, Tab I, RFP Attachment D, Disaster Field Support Pricing Sheet. The agency found and compared numerous differences between the offerors' proposals, noting first the varying degrees of differences between the proposed fixed-price amounts for each line item on the price schedules. For example, the agency explains:

Further comparison of the two offerors' proposed prices shows that the largest differences in pricing were two of the new monthly [] fixed[-]price CLINs--[one CLIN] for information technology (IT) hosting/operations and maintenance using contractor's IT systems[], for which Torrent proposed a

⁹ The record shows a \$74,758.30 difference between the price proposed by Torrent and calculated by the agency. BCM at 31 n.1; AR, Tab AK, Price Comparison Spreadsheet. The agency explains that Torrent's proposal contained several "erroneous calculations" and that, "[w]hile the agency was not required to fix the protester's faulty proposal, rather than eliminate Torrent from the competition, the agency used Torrent's proposed fixed rates and calculated the correct totals." BCM at 31 n.1; MOL at 6. In its comments, Torrent contends that the agency's evaluation of its and the awardee's proposals contains various alleged calculation errors. See Comments at 5 (arguing that the agency improperly increased Torrent's total evaluated price by \$74,512), *id.* at 6 (arguing that the agency should have been required to increase NFS's total evaluated price by \$89,880).

Even were we to agree with Torrent's calculations, Torrent has not established that these slight mathematical differences resulted in competitive prejudice given the approximately \$63 million difference in the total evaluated prices that were considered in the source selection decision. Competitive prejudice is an essential element of a 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 where flaws in the procurement have been shown. *Information Sys. and Networks Corp.*, B-415720.3, B-415720.4, Apr. 30, 2018, 2018 CPD ¶ 165 at 10; *The AEGIS Techs. Grp., Inc.*; *Wingbrace LLC*, B-412884 *et al.*, June 28, 2016, 2016 CPD ¶ 175 at 10-11.

669 [percent] higher price,¹⁰ and [another CLIN] for NFIP Direct call center operations, for which Torrent proposed a 612 [percent] higher price. These are areas of the CLIN mapping that is a deviation from the historical pricing of the contract, and a larger driver for the over 200 [percent] difference between Torrent and NFS[] across all performance periods.

MOL at 10 (internal citations omitted), *citing* AR, Tab AK, Price Comparison Spreadsheet *and* BCM at 32.

The agency also considered, for example: for the positions in one attached pricing worksheet, Torrent's proposed fully burdened labor rates were generally lower than NFS's, while on another attached pricing worksheet, Torrent's rates were generally higher; and the offerors proposed different rate increases over the option periods. BCM at 31-33; AR, Tab AK, Price Comparison Spreadsheet. The agency concluded that NFS's price was complete, fair, and reasonable, while Torrent's price was complete but, "in comparison with adequate competition," unreasonably high. BCM at 32.

On this record, the agency's price reasonableness evaluation, and its conclusion that Torrent's price was unreasonably high, was unobjectionable. While Torrent correctly observes that "[t]he existence of multiple offers, by itself, is not sufficient to determine whether prices are reasonable or unreasonable," that is not the sole basis for the agency's determination here. Protest at 8, *citing Technatomy Corp.*, B-414672.5, Oct. 10, 2018, 2018 CPD ¶ 353 at 14 *and Cognosante, LLC*, B-417111 *et al.*, Feb. 21, 2019, 2019 CPD ¶ 93 at 5-6. The evaluation here, as discussed above, appears consistent with the terms of the solicitation and applicable procurement law and regulation. FAR 15.404-1(b)(2)(i); *Cognosante, LLC, supra*, at 6 (sustaining protest where "[t]he record here does not demonstrate that the [agency] performed any assessment or comparison of final proposal prices" and "was based solely on the presence of multiple offers").

Torrent also presents at least two alternative arguments concerning the agency's price reasonableness evaluation. As one alternative, Torrent contends that the agency should have instead used its IGCE to evaluate price reasonableness, as the IGCE was considerably higher than the ultimate award price. Torrent points out that the agency prepared an IGCE, used the IGCE to establish the contract maximum, and revised the IGCE during the procurement. In this regard, Torrent argues that the agency has presented "irrational reasons to abandon the revised IGCE as a data point for evaluating price reasonableness." Comments at 9.

The agency explains that, "[a]lthough an IGCE was developed prior to the release of the RFP, its primary purpose was to assist with the development of a maximum

¹⁰ We note that Torrent acknowledges that these CLINs have "a significant impact on Torrent's total evaluated price" and, further, "substantially exceed the revised IGCE [independent government cost estimate]." Comments at 22.

amount/ceiling for the IDIQ contract.” MOL at 7; Contracting Officer’s Statement at 11. The record shows that, prior to discussions, the contracting officer considered and declined to use an IGCE to evaluate price reasonableness as follows:

The contracting officer [] determined that comparison of the proposed pricing to the IGCE would not result in an accurate assessment of price reasonableness. The [contracting officer] determined the IGCE to be unreliable and not an accurate method for determining price reasonableness for this procurement since: (1) it is 44.07% higher than the average total (evaluated) proposed price of the offerors and (2) is not based on historical pricing. No relevant historical pricing is available since the subject solicitation introduced a new pricing structure. For at least the past 10 years pricing was based on a fixed price per policy per month for all required policy administration. The new pricing structure includes separate CLINs for pricing of services that were previously included in the fixed price per policy.

BCM at 11. The contracting officer also explains that the program office was requested “on multiple occasions” to revise the IGCE, because the initial IGCE did not match the new pricing structure contemplated by the RFP. The contracting officer also explains that he did not receive a revised IGCE until after discussions were completed.¹¹ Contracting Officer’s Statement at 11.

Indeed, Torrent acknowledges that the RFP includes “additional new requirements that are not part of Torrent’s incumbent contract” and “the CLIN structure is different for this procurement than past [] contracts.” Protest at 9; Comments at 11. Moreover, the FAR does not require the use of an IGCE in evaluating price; as noted above, the FAR includes a non-exhaustive list of permitted price analysis techniques. FAR 15.404-1. On this record, we find no basis to question the agency’s discretion in deciding not to use the IGCE in its price-reasonableness analysis.

As another alternative argument, Torrent contends that the agency failed to identify NFS’s “extremely low price” as an “outlier.” Comments at 11 (noting a “substantial difference” between NFS’s total evaluated price and the IGCE); Protest at 15 (characterizing NFS’s total evaluated price as “extraordinarily low compared to Torrent’s total evaluated price” and “extremely low compared to the obligated amount . . . under the incumbent [c]ontract”). Torrent further argues that the agency “failed to properly assess the very high risk associated with NFS’[s] extraordinarily low prices and its impact on NFS’[s] performance.” Protest at 15.

Torrent’s complaints about NFS’s lower price are essentially that the agency should have performed a price realism analysis. Arguments that an agency did not perform an

¹¹ The amount of the revised IGCE was \$75,976,833. AR, Tab AJ, Revised IGCE, Sept. 20, 2020, at 3.

appropriate analysis to determine whether prices are too low, such that there may be a risk of poor performance, concern price realism. See *Cyberdata Techs., Inc.*, B-417084, Feb. 6, 2019, 2019 CPD ¶ 34 at 5, citing *NJVC, LLC*, B-410035, B-410035.2, Oct. 15, 2014, 2014 CPD ¶ 307 at 8. While an agency may conduct a price realism analysis in awarding a fixed-price or time-and-materials task order for the limited purposes of assessing whether an offeror's low price reflects a lack of technical understanding or risk, offerors must be advised that the agency will conduct such an analysis. See *PricewaterhouseCoopers Public Sector LLP*, B-415129.3, July 31, 2018, 2018 CPD ¶ 272 at 2. Absent a solicitation provision so advising offerors, agencies are neither required nor permitted to conduct a price realism analysis in awarding a fixed-price or time-and-materials task order. See *id.* Because Torrent's contention that the agency should have conducted further analysis into, and assessed the risks of, NFS's lower price is based on requiring an analysis that the RFP here did not permit, Torrent's argument does not state legally sufficient grounds of protest and is dismissed. 4 C.F.R. § 21.1(f).

Finally, in its supplemental protest, Torrent alleges that the agency "improperly relaxed material RFP terms only for NFS" with regard to price--specifically, the agency allowed only NFS to propose that certain costs be reimbursed under the time-and-materials work as opposed to being priced under the fixed-price work. Supp. Protest at 2.

The RFP provides for two areas of time-and-materials work--"customer experience" or "disaster field support"--that both reference the same various categories of reimbursement, including direct materials, supplies, incidental services, and other direct costs (ODC). RFP at 22; AR, Tab H, RFP Attachment C, Customer Experience Pricing Sheet; AR, Tab I, RFP Attachment D, Disaster Field Support Pricing Sheet. Torrent's contention is based on its comparison of the following sections from the RFP and the awarded contract:

(D) Other Costs. Unless listed below, other direct and indirect costs will not be reimbursed.

(1) Other Direct Costs. The Government will reimburse the Contractor on the basis of actual cost for the following . . . : *travel costs, mailing, and postage.*

Supp. Protest at 2-3, citing RFP at 22 (emphasis added by the protester).

(D) Other Costs. Unless listed below, other direct and indirect costs will not be reimbursed.

(1) Other Direct Costs. The Government will reimburse the Contractor on the basis of actual cost for the following . . . : *travel costs and ODCs.*

Supp. Protest at 3, citing AR, Tab AR, Contract, Sept. 30, 2020, at 21 (emphasis added by the protester).

Based on this comparison, Torrent contends that, “[s]olely for NFS, however, FEMA materially and improperly changed this clause to provide for its reimbursement for ‘travel costs and ODCs’” and that “a change of this magnitude is material, particularly with respect to price.” Supp. Protest at 3 (emphasis added by the protester).

Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided. *Seaboard Elecs. Co.*, B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115 at 3-4. It is a fundamental principle of government procurement that competition must be conducted on an equal basis; that is, offerors must be treated equally and provided with a common basis for the preparation of their proposals. *Systems Mgmt., Inc.; Qualimetrics, Inc.*, B-287032.3, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85 at 8.

Here, the agency explains that the discrepancy in contract payment terms was an “unintentional change.” Supp. MOL at 3. The contract specialist states that “she unintentionally typed in different text in this ODC fill-in when she drafted the contract and first realized the error when being told of Torrent’s supplemental protest.” Supp. MOL at 4; AR, Tab BC, Contract Specialist’s Declaration, Dec. 10, 2020. The contracting officer also states that he was not aware of the “scrivener’s error” before Torrent filed its supplemental protest, and that he intends to modify the fill-in back to the language in the RFP once the contract performance stay is lifted. Supp. MOL at 4; Supp. Contracting Officer’s Statement, Dec. 10, 2020, at 27. Moreover, both the contract specialist and the contracting officer confirm that no additional discussions with the awardee occurred, nor was NFS provided an opportunity to submit a revised proposal in response to this “unintentional change.” Supp. Contracting Officer’s Statement at 28; AR, Tab BC, Contract Specialist’s Declaration, Dec. 10, 2020, at 3.

The agency thus asserts that “FEMA’s requirement never changed, payment terms for ODCs were not intentionally waived, and therefore, the drafting error had no effect on the selection decision.” Supp. MOL at 4. While Torrent contends that “FEMA’s explanation for the contract’s changed term is implausible” and urges our Office to further “assess the credibility of the relevant FEMA officials,” Protester’s Supp. Comments at 7, we find no basis to question the agency’s explanation here.

Similarly, Torrent argues that the face of NFS’s proposal further supports its allegation that NFS improperly assumed that rent could be reimbursed under the time-and-materials work. Supp. Protest at 4, *citing* AR, Tab AI, NFS Phase 2 Price FPR, Sept. 18, 2020, at 15 (“NFS’s price is based upon the following assumptions . . . other expenses such as travel, rent, etc., that would be paid as a pass through cost under the time and materials part of the contract”).

In answer, the agency explains that NFS’s proposal did not state that these costs would be treated as ODCs under the time-and-materials work. Supp. MOL at 5; *see also* Intervenor’s Supp. Comments at 6 (“NFS[s] proposal does not state that these costs will be treated as ODCs, but instead merely notifies FEMA that NFS interpreted these

costs as allowable under the [time-and-materials] CLIN terms”). Moreover, the contracting officer explains that he considered and found NFS’s pricing assumption acceptable and consistent with the RFP.¹² Supp. Contracting Officer’s Statement at 28. We agree.

In sum, under these circumstances, where the agency has acknowledged an administrative error and commits to correcting the error, there is no basis for our Office to conclude that the agency improperly relaxed a material RFP requirement or treated offerors unequally. We find no basis to sustain Torrent’s protest.

Discussions

The protester also argues that the agency’s discussions with Torrent were misleading and not meaningful because, among other things, “they were not tailored to Torrent’s proposal” and “failed to emphasize the magnitude of the price difference between the awardee and Torrent.” Protest at 16. Torrent argues that the agency “failed to convey, in any meaningful way, the magnitude of the disparity in prices” and “failed to address the underlying cause of [the protester’s] unreasonable pricing.” Comments at 22, *citing Creative Info. Tech., Inc.*, B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110 at 8.

Discussions, when conducted, must identify proposal deficiencies and significant weaknesses and should discuss other aspects that reasonably could be addressed in order to materially enhance the offeror’s potential for receiving award. FAR 15.306(d)(3); *Serco Inc.*, B-405280, Oct. 12, 2011, 2011 CPD ¶ 237 at 11. When an agency engages in discussions with an offeror, the discussions must be “meaningful,” that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. See FAR 15.306(d)(3); *Southeastern Kidney Council*, B-412538, Mar. 17, 2016, 2016 CPD ¶ 90 at 4. Agencies, however, are not required to “spoon-feed” an offeror during discussions by identifying every possible area where a proposal might be improved or suggesting alternative approaches. *Vizada Inc.*, B-405251 *et al.*, Oct. 5, 2011, 2011 CPD ¶ 235 at 11. Where an agency elects to conduct discussions with an offeror concerning price, it is not required to advise the

¹² In addition, the agency and intervenor point out that Torrent’s proposal as well included the same assumption for one of the two areas of time-and-materials work. Supp. MOL at 7, *citing* AR, Tab AG, Torrent Phase 2 Price FPR, Sept. 18, 2020, at 29 (“Torrent considers ‘[m]aterials’ to include items such as but not limited to . . . office rent . . . [which] will be submitted as disaster field support expenses for payment”); Intervenor’s Supp. Comments at 6. Notwithstanding the fact that the RFP includes one set of reimbursement clauses applicable to both areas of time-and-materials work, Torrent withdrew its allegations with regard to one area (disaster field support), but maintained its challenges to the other area (customer experience). Protester’s Supp. Comments at 10 n.6. We note that the contracting officer explains that he also considered, and found acceptable, Torrent’s pricing assumption. Supp. Contracting Officer’s Statement at 28.

offeror of the specific areas where its price or cost is too high or to provide a specific price that the offeror must meet; simply advising the offeror that its price is too high is sufficient. *Northstate Heavy Equip. Rental*, B-416821, Dec. 19, 2018, 2018 CPD ¶ 430 at 6.

The record shows that, in its discussions letter, the agency informed Torrent that “your proposed price under Factor 5 [Price] is also included as a discussion issue since your pricing is unreasonably high and not considered to be fair and reasonable.” AR, Tab AB, Torrent Discussions Letter, Sept. 16, 2020, at 2. The agency further informed Torrent: “The government has found your business proposal to be incomplete and unreasonable based on unpriced CLINs and a high evaluated price that is not fair and reasonable[,]” and “Torrent deviated from Section B.3 [of the RFP] and did not price all CLINs.” *Id.* at 4.

In our view, the agency more than met its obligation to conduct meaningful discussions with Torrent regarding its price. *Northstate Heavy Equip. Rental, supra; Creative Info. Tech., Inc., supra*, at 7 (sustaining protest on the issue of meaningful discussions where the agency advised the protester “merely that its total price appeared ‘overstated’” and noting “the unique circumstances of [that] case”). We agree with the agency that it “was not required to give Torrent the magnitude of the price difference with its competitor.” MOL at 16.

In defense of its assertion that the discussions about price were not meaningful, Torrent points out that even prior to discussions, the record shows that agency personnel noted “there is substantial uncertainty if Torrent will make the needed price reductions to be considered fair and reasonable” and, “[t]o be competitive, Torrent will have to submit a significant price reduction.” Comments at 21, *citing* BCM at 13. The agency’s perception on the effectiveness of discussions, however, did not obligate the agency to further assist Torrent in revising its price. *See, e.g., Space Sys./Loral LLC*, B-413131, Aug. 22, 2016, 2016 CPD ¶ 242 at 11 (denying protest where, while the agency internally documented its concerns as to whether the protester would be able to provide sufficient justification for its proposed costs, the agency reasonably informed the protester and adequately led the protester into the area of its proposal requiring revision). Under these circumstances, we deny Torrent’s protest that the discussions were misleading and not meaningful.

As an additional matter, Torrent raises, for the first time in its comments on the agency report, an additional argument that the agency’s discussions were unequal. Specifically, the protester asserts that the agency “discussed pricing for specific CLINs with NFS^[13] but did not do so with Torrent.” Comments at 24; *id.* at 20, *citing* AR,

¹³ We note that these were the transition CLINs, which the agency states were “intentionally excluded from the total evaluated price to neutralize the competitive advantage of the incumbent who will have no or limited transition-in expenses.” Contracting Officer’s Statement at 15; BCM at 11; *see also* RFP at 58.

Tab AC, NFS Discussions Letter, Sept. 16, 2020, at 4. Torrent did not, however, raise this argument in a timely manner. During the course of the protest, Torrent requested, and was granted, an extension for filing its comments, which did not extend the deadline for raising any new basis of protest that was first learned from the agency report. While Torrent filed a separate, timely supplemental protest, the supplemental protest did not include this new argument. In accordance with the extension that was granted for filing comments, Torrent filed its comments on the agency report 12 days after it received the agency report. Because Torrent first raised this allegation about unequal discussions in those comments, filed more than 10 days after receiving the agency report, the argument is dismissed as untimely. 4 C.F.R. § 21.2(a)(2).

Evaluation of Non-Price Factors

Torrent also protests the agency's evaluation of the awardee's proposal under three of the non-price factors: corporate experience, oral presentation, and past performance. As a representative example, Torrent challenges the agency's assignment of a "high confidence" rating to NFS under the oral presentation factor. Specifically, Torrent alleges that the agency failed to consider that "NFS has proposed untested and risky solutions for its technical/management approach." Protest at 18-19.

In reviewing a protest challenging an agency's evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency's discretion. Rather, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. *Computer World Servs. Corp.*, B-410513, B-410513.2, Dec. 31, 2014, 2015 CPD ¶ 21 at 6. A protester's disagreement with the agency's judgment, without more, is insufficient to establish that the agency acted unreasonably. *Vertex Aerospace, LLC*, B-417065, B-417065.2, Feb. 5, 2019, 2019 CPD ¶ 75 at 8.

As noted above, the oral presentation evaluation factor included three equally weighted elements, one of which was technical/management approach. RFP at 57. The RFP provided that "[c]onsideration will be given to the benefits and performance risks of the technical and management approach as presented in the oral presentation to complete the work specified in the PWS including but not limited to (1) demonstrated subject matter expertise, (2) effective coordination with stakeholders, (3) effective use of proposed technological solutions, and (4) approaches they will use to improve the policyholder customer experience." *Id.*

The agency explains that, "during its oral presentation, [NFS] demonstrated the dashboards and portals of Trident," the awardee's flood insurance processing system. MOL at 22. The technical evaluation team assessed a "strength/benefit" for NFS as follows:

NFS demonstrated their capacity to provide a system, Trident, that offers an effective use of proposed technological advances to handle automated

items. The dashboards and portals showed a user friendly and customer centric approach to the day to day business processes when servicing customers and agents. The use of Trident can fulfill the steady need for data and reports and support the utilization of various programming as outlined in PWS Objective 7.12 [design, implement, and provide metric reporting to continuously improve the customer experience].

AR, Tab AL, Final Conformed Technical Consensus Report, Sept. 30, 2020, at 44; see also BCM at 29; PWS at 18. In the best-value tradeoff decision, the contracting officer also noted this aspect of NFS's proposal as a benefit. SSDD at 12; BCM at 33.

While Torrent continues to allege that NFS's Trident system is "new and untested at the scale required for the [c]ontract[.]" Comments at 26, the agency argues that Torrent's protest is "based solely on the narrow and highly speculative assertion that NFS's Trident system is a risk." MOL at 22. On this record, we find no basis to question the agency's evaluation, and Torrent's disagreement with the agency's judgment does not provide a basis to sustain its protest.

Best-Value Tradeoff Decision

Finally, Torrent contends that the agency's best-value decision was defective because it was based on alleged evaluation errors. Protest at 20-21; Comments at 28-30. We conclude that the agency's evaluation and source selection decision were reasonable and in accordance with the terms of the solicitation. Here, the record shows that the agency documented the decision to award to a lower-rated, lower-priced offeror, reasonably considering, among other things: Torrent's "superior technical merit"; NFS's high rating under the corporate experience (the most important factor) and oral presentation factors; NFS's lower rating under the past performance factor (the least important factor); the "low risk of unsuccessful performance" and the many strengths and benefits presented by NFS's proposal; and the conclusion that "[t]his extreme price premium for Torrent is not warranted[.]" considering the non-price ratings and benefits of NFS's proposal. SSDD at 9-13; BCM at 31-33.

Ultimately, the contracting officer concluded, "NFS submitted a technically sound proposal with little to no need for government intervention for successful contract performance at a reasonable price." SSDD at 13. As a result of the agency's reasonable conclusions here, this allegation is also denied. *AECOM Mgmt. Servs., Inc.*, B-417639.2, B-417639.3, Sept. 16, 2019, 2019 CPD ¶ 322 at 15, citing *Laboratory*

Corp. of America, B-414896.3, B-414896.4, July 13, 2018, 2018 CPD ¶ 264 at 12-13 (agency's best-value tradeoff decision is unobjectionable where all of the protester's evaluation challenges are denied).

The protest is denied.

Thomas H. Armstrong
General Counsel