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Decision

Matter of: The Bionetics Corporation

File: B-419727

Date: July 13, 2021

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Christopher Alwood, 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 failure to evaluate the awardee's professional compensation plan for realism in accordance with Federal Acquisition Regulation provision 52.222-46 is dismissed as untimely where the solicitation advised that the agency would not conduct a realism analysis of any kind and the protester did not challenge the terms of the solicitation until after the receipt of initial proposals.

2. Protest challenging the agency's failure to compare the awardee's proposed professional compensation to the incumbent contractor's employee compensation is sustained where the record does not demonstrate that the agency conducted an evaluation in accordance with the requirements of Federal Acquisition Regulation provision 52.222-46 despite the offerors having submitted professional compensation plans.

DECISION

The Bionetics Corporation, of Yorktown, Virginia, protests the award of a contract to AB International Services, LLC (ABIS), of Vienna, Virginia, under request for proposals (RFP) No. FA2263-20-R-0002, issued by the Department of the Air Force for metrology and technical writing services in support of the Air Force Metrology and Calibration

(AFMETCAL)¹ program. Agency Report (AR), Tab 4, Performance Work Statement (PWS) at 2; Contracting Officer's Statement (COS) at 2. The protester alleges that the agency failed to evaluate the awardee's proposed compensation plans in accordance with Federal Acquisition Regulation (FAR) provision 52.222-46 and the solicitation.

We sustain the protest.

BACKGROUND

On February 26, 2020, the Air Force issued the solicitation in accordance with the procedures under FAR part 15, seeking proposals to provide metrology and technical writing services, including the operation of the Air Force Primary Standards Laboratory (AFPSL) at the Central Ohio Aerospace and Technology Center in Heath, Ohio.² AR, Tab 3, RFP at 1; PWS at 2; COS at 3. The solicitation contemplated the award, on a best-value tradeoff basis, of a contract with fixed-price, fixed-price with incentive, and cost-reimbursement contract line items, for a 3-month base period and ten 1-year option periods. COS at 3; RFP at 3-46. The deadline for submission of proposals was March 31, 2020 at 2:00 p.m. RFP at 1.

The solicitation advised offerors that the agency would evaluate proposals considering price and two non-price factors, technical, and past performance. AR, Tab 21, RFP, Section M attach. at 3. The technical factor included five subfactors: staffing approach; recruitment, training, and retention; quality plan; calibration technical orders quality plan; and measurement area assurance. *Id.*

¹ The AFMETCAL program acquires and sustains precision measurement capabilities and operates a worldwide calibration network to help ensure Air Force systems and equipment are accurate, uniform, reliable, and safe. *Air Force Metrology and Calibration*, AIR FORCE LIFE CYCLE MGMT. CENTER, <https://www.afllcmc.af.mil/WELCOME/Organizations/Agile-Combat-Support-Directorate/Air-Force-Metrology-and-Calibration/> (last visited June 23, 2021).

² The Air Force Life Cycle Management Center website describes the AFPSL as:

the highest echelon metrology and calibration laboratory in the Air Force. It provides a critical link between the National Institute of Standards and Technology (NIST) and Air Force Base Precision Measurement Equipment Laboratories (PMELs) and houses a measurement capability in practically every measurement discipline . . . The AFPSL complex consists of laboratories with rigid environmental controls necessary for precise measurements.

AFMETCAL – Air Force Primary Standards Laboratory, AIR FORCE LIFE CYCLE MGMT. CENTER, <https://www.afllcmc.af.mil/WELCOME/Fact-Sheets/Display/Article/1935608/afmetcal-air-force-primary-standards-laboratory/> (last visited June 23, 2021).

The agency would evaluate the proposed approach under each of the technical subfactors and assign each an adjectival rating of outstanding, good, acceptable, marginal, or unacceptable. *Id.* at 3-4. The agency would also evaluate the technical risk under each subfactor and assign an adjectival rating of low, moderate, high, or unacceptable. *Id.* at 4. Each offeror's past performance would be evaluated to ascertain the offeror's probability of meeting the solicitation requirements and would be assigned an adjectival rating of substantial, satisfactory, limited, no, or unknown confidence. *Id.* at 5-6. With regard to price, the solicitation provided that the agency would evaluate proposals for completeness, reasonableness, unbalanced pricing, and total evaluated price. *Id.* at 8. The RFP provided that the technical factor was significantly more important than the combined past performance and price factors. *Id.* at 3. Also, the past performance factor was more important than the price factor. *Id.*

As relevant here, FAR provision 52.222-46, Evaluation of Compensation for Professional Employees, was incorporated into the solicitation under section M, Evaluation Factors for Award. RFP at 123. FAR provision 52.222-46 states:

As a part of their proposals, offerors will submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract. The Government will evaluate the plan to assure that it reflects a sound management approach and understanding of the contract requirements. This evaluation will include an assessment of the offeror's ability to provide uninterrupted high-quality work. The professional compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation.

* * *

[P]roposals envisioning compensation levels lower than those of predecessor contractors for the same work will be evaluated on the basis of maintaining program continuity, uninterrupted high-quality work, and availability of required competent professional service employees.

FAR 52.222-46(a), (b).

Outside of this language, the solicitation did not specify submission requirements for total compensation plans, or how they would be evaluated. However, the solicitation instructed offerors to provide, as part of their price proposals "[a]ll data relating to the proposed price, including all required supporting documentation." AR, Tab 18, RFP, Section L attach. at 10. Notably, the solicitation's price proposal submission instructions advised offerors that the agency would not conduct a price realism analysis. *Id.* The solicitation also advised offerors that when evaluating proposals under the price factor, the agency would "not be conducting a realism analysis of any kind." AR, Tab 21, RFP, Section M attach. at 8.

The Air Force received five timely proposals in response to the solicitation, including from Bionetics and ABIS. COS at 12. After evaluating initial proposals, the agency established a competitive range of all five offerors and entered into discussions. *Id.* at 13. Upon the conclusion of discussions, the agency requested final proposal revisions. *Id.* at 16.

The agency evaluated Bionetics’s and ABIS’s final proposals as follows:³

	Bionetics	ABIS
Technical		
Staffing Approach	Acceptable	Acceptable
Recruitment, Training, and Retention	Good	Good
Quality Plan	Acceptable	Acceptable
Calibration Technical Orders Quality Plan	Acceptable	Acceptable
Measurement Area Assistance	Outstanding	Good
Past Performance	Substantial Confidence	Substantial Confidence
Total Evaluated Price	\$209,812,407	\$177,655,292

AR, Tab 66, SSDD at 8-17; COS at 17-20.

The Source Selection Authority (SSA) concluded that ABIS’s proposal represented the best value to the government. AR, Tab 66, SSDD at 19. The SSA found that while Bionetics’s proposal was slightly more highly rated under both the technical and past performance factors, the advantages of Bionetics’s proposal when compared to ABIS’s did not justify an 18 percent, or \$32 million, price premium. *Id.* Bionetics requested a debriefing, which was held between March 22 and March 31, 2021, and this protest followed. COS at 22-23.

DISCUSSION

Bionetics argues that the agency’s evaluation was flawed because the Air Force failed to evaluate ABIS’s compensation plan in accordance with FAR provision 52.222-46, which was incorporated into the solicitation.⁴ Protest at 13-14; Comments at 2-5. In

³ The agency assigned both proposals low technical risk ratings under each subfactor. AR, Tab 66, Source Selection Decision Document (SSDD) at 8-17.

⁴ Bionetics also contends that the agency improperly evaluated proposals under the technical and past performance factors, that the agency conducted misleading and unequal discussions, and that the agency’s best-value decision was unreasonable. Protest at 9-20; Comments at 2-18. With the exception of the allegation discussed in this decision, we have considered all of Bionetics’s allegations and find none provides a basis to sustain a protest. Bionetics also alleged that ABIS engaged in an

this regard, Bionetics contends that, despite language in the solicitation advising offerors that the agency would not conduct any realism analysis, the agency was required to evaluate professional compensation to determine whether ABIS's proposal indicated a lack of understanding of the requirements. Comments at 4-5. Bionetics also contends that the agency failed to compare ABIS's proposed professional compensation to the incumbent contractor's, as required by FAR provision 52.222-46. Comments at 3.

This provision of the FAR states that the "[r]ecompetition of service contracts may in some cases result in lowering the compensation (salaries and fringe benefits) paid or furnished professional employees." FAR 52.222-46(a). The provision explains that "[t]he Government is concerned with the quality *and stability* of the work force to be employed on this contract" and a lowering of compensation can be detrimental to, and impair, a contractor's "ability to attract *and retain*" professional service employees. FAR 52.222-46(a), (c) (emphasis added). Accordingly, the provision requires the agency to evaluate each offeror's ability to provide uninterrupted, high-quality work, considering "its impact upon recruiting, and retention, its realism, and its consistency with a total plan for compensation." FAR 52.222-46(a). The provision specifies that the agency will evaluate proposals with "compensation levels lower than those of predecessor contractors . . . on the basis of maintaining program continuity," among other considerations. FAR 52.222-46(b).

Our Office has stated that the purpose of a review of compensation for professional employees is to evaluate each offeror's ability to provide uninterrupted, high-quality work, considering the realism of the proposed professional compensation and its impact upon recruiting and retention. *L-3 Nat'l Sec. Sols., Inc.*, B-411045, B-411045.2, Apr. 30, 2015, 2016 CPD ¶ 233 at 7. In the context of a fixed-price contract, our Office has explained that FAR provision 52.222-46 anticipates an evaluation of whether an awardee understands the contract requirements and has proposed a compensation plan appropriate for those requirements; in effect, a price realism evaluation regarding an offeror's proposed compensation. *Id.* at 7-8.

In addition to this price realism analysis, our Office has explained that, in recompetitions, FAR provision 52.222-46(b) requires the agency to compare the awardee's proposed professional compensation to the incumbent contractor's. *SURVICE Eng'g Co., LLC*, B-414519, July 5, 2017, 2017 CPD ¶ 237 at 5-6; FAR 52.222-46. If the agency determines the awardee's proposal envisions lower compensation levels compared to the incumbent contractor, then the agency must further evaluate the awardee's proposed compensation plan on the basis of maintaining program continuity, among other considerations. *Id.* In short, our Office has identified two required analyses that the agency must perform under FAR provision 52.222-46, one based on the price realism of the compensation plan and the other considering

impermissible "bait and switch" of proposed personnel in key positions, but later withdrew this allegation. Protest at 18-19; Comments at 1.

whether the compensation plan will allow for program continuity through the retention of professional contractor employees.⁵

Here, the agency does not argue that it performed either of the analyses required by FAR provision 52.222-46. See Memorandum of Law (MOL) at 12-17. Rather, the agency argues that Bionetics's allegation is untimely because the solicitation's language advising offerors that the agency would not conduct any kind of realism analysis created a patent ambiguity with the requirements of FAR provision 52.222-46, which Bionetics failed to protest prior to the time for receipt of initial proposals. MOL at 13-16. We agree with the agency to the extent the protester is arguing the agency should have performed a realism analysis under FAR provision 52.222-46.

Where a protester and agency disagree about the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. *Argus Int'l Risk Servs., LLC*, B-411682, B-411682.2, Sept. 25, 2015, 2015 CPD ¶ 303 at 5. A patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error, while a latent ambiguity is more subtle. *Id.*

The solicitation explicitly advised offerors that the agency would "not be conducting a realism analysis of any kind." AR, Tab 21, RFP, Section M Attach. at 8. However, FAR

⁵ Our prior interpretations of the requirements of FAR provision 52.222-46 are consistent with the analysis of the United States Court of Appeals for the Federal Circuit regarding the predecessor of FAR provision 52.222-46. The predecessor of FAR provision 52.222-46 at issue in *OMV Medical Inc.*, like the current provision, required that compensation for professional employees would be reviewed to ensure the offeror understood the work to be performed and demonstrated the ability to obtain and keep suitably qualified personnel. See *OMV Medical, Inc. v. United States*, 219 F.3d 1337, 1339 (Fed. Cir. 2000). The predecessor provision also explained that proposals with compensation levels lower than those of predecessor contractors would be evaluated on the basis of maintaining program continuity and uninterrupted high-quality work. *Id.* The Court explained that this language in the predecessor of FAR provision 52.222-46 requires an agency to make two separate determinations:

- (1) a determination of whether each offeror's compensation package was generally consistent with the salaries being paid by the incumbent contractor; and
- (2) a determination of whether each offeror's compensation plan was realistic, *i.e.*, whether it indicated that the offeror understood the scope of work.

OMV Medical, Inc. v. United States, 219 F.3d 1337, 1343 (Fed. Cir. 2000).

provision 52.222-46, which was incorporated into the solicitation, explicitly requires the evaluation of the realism of proposed professional compensation. See RFP at 123. On this record, we find that, to the extent there was any ambiguity in the underlying solicitation as to whether the agency intended to conduct a realism analysis under FAR provision 52.222-46, such an ambiguity was patent. Where a patent ambiguity in a solicitation is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent challenge to the meaning of the solicitation term. 4 C.F.R. § 21.2(a)(1); *Simont S.p.A.*, B-400481, Oct. 1, 2008, 2008 CPD ¶ 179 at 4.

Bionetics also contends that the agency should still be required to perform the realism analysis on ABIS's proposed professional compensation because FAR section 22.1103 required the insertion of FAR provision 52.222-46 into the solicitation, and that the agency was therefore without authority to forego the analysis.⁶ Comments at 4. We disagree. Our timeliness rules specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals or quotations be filed before that time. 4 C.F.R. § 21.2(a)(1). While we agree with the protester that the agency's disavowal of its obligation to conduct the realism analysis of the proposed professional compensation likely violates FAR section 22.1103, such a challenge should have been raised prior to the time for receipt of initial proposals.

Accordingly, we dismiss Bionetics's allegation that the agency was required--and failed--to evaluate the proposed professional compensation to determine whether ABIS's proposal indicated a lack of understanding of the requirements, *i.e.* whether the proposed professional compensation was realistic, as an untimely challenge to the terms of the solicitation. However, we disagree with the agency that the solicitation language that it would not conduct any realism analysis created a patent ambiguity with regard to the non-realism evaluation requirements of FAR provision 52.222-46.

As noted above, FAR provision 52.222-46(b) requires, as a threshold matter, that an agency compare the incumbent professional compensation to proposed professional compensation. FAR 52.222-46(b). This comparison allows the agency to determine whether a proposal "envision[s] compensation levels lower than those of [the] predecessor contractor" and should accordingly be subject to additional evaluation. *Id.* Our Office has sustained protests for failure to conduct such a comparison. *SURVICE Eng'g Co., LLC, supra* at 7 (sustaining protest where RFP incorporated FAR provision 52.222-46 and the agency failed to compare compensation plans of the awardee and incumbent contractor); *see also Wackenhut Int'l, Inc.*, B-286193, Dec. 11, 2000, 2001 CPD ¶ 8 at 7 (sustaining protest where RFP language contemplated reviewing compensation plans in comparison to current wages and the agency failed to perform

⁶ Section 22.1103 requires that FAR provision 52.222-46 be inserted into "solicitations for negotiated contracts when the contract amount is expected to exceed \$750,000 and services are to be provided which will require meaningful numbers of professional employees." FAR 22.1103.

such a review). Here, the agency does not allege, and the record does not reflect, that the agency compared ABIS's labor rates to those paid to incumbent personnel.

Alternatively, the agency argues that it could not have conducted the evaluation contemplated by FAR provision 52.222-46 because the solicitation "did not require offerors to submit professional compensation plans or unburdened rates for professional employees." MOL at 16-17 (*citing Arch Systems, LLC; KEN Consulting, Inc.*, B-415262, Dec 12, 2017, 2017 CPD ¶ 379); COS at 28. The agency's reliance on *Arch Systems* is misplaced. In *Arch Systems*, the solicitation incorporated FAR provision 52.222-46, but otherwise⁷ did not expressly require the submission of compensation plans or unburdened labor rates. *Arch Systems, supra* at 9. Rather, the solicitation specifically required the submission of fixed unit prices. *Id.* More importantly, in *Arch Systems* offerors did not submit compensation plans or unburdened labor rates. *Id.* Accordingly, our Office denied the protest that the agency failed to evaluate professional compensation under FAR provision 52.222-46 because the agency did not have the information it would need to conduct the evaluation required by the FAR provision. *Id.*

Here, unlike the required submission of fixed unit prices in *Arch Systems*, the solicitation did not specify how offerors were to provide compensation information other than requiring "[a]ll data relating to the proposed price, including all required supporting documentation." AR, Tab 18, RFP, Section L attach. at 10. Both Bionetics and ABIS, however, provided the Air Force with proposed unburdened labor rates and fringe benefits. AR, Tab 28, Bionetics Price Proposal at 19-20, 26-29; AR, Tab 36, ABIS Price Proposal at 20-22, 31-80. As set forth above, while any assertion that this information should have been used to perform a realism assessment constitutes an untimely raised challenge to a patent ambiguity in the solicitation, the Air Force was not absolved of its ongoing obligation to perform the other analyses identified in the FAR provision.

Specifically, our Office has sustained protests where a solicitation includes the FAR provision at 52.222-46 and the agency's evaluation ignored the compensation information the offerors provided in their proposals. See *Inquiries, Inc.*, B-417415.2, Dec. 30, 2019, 2020 CPD ¶ 54 at 20-21 (RFP did not specify what compensation information to provide and offerors provided salary ranges that the agency did not consider); see also *MicroTechnologies, LLC*, B-413091, B-413091.2, Aug. 11, 2016, 2016 CPD ¶ 219 at 12 (solicitation requested unburdened labor rates but agency only evaluated burdened labor rates). In light of the above, we conclude that the Air Force failed to undertake the other non-realism analyses mandated by FAR provision 52.222-46, and improperly ignored the unburdened labor rates and fringe benefits information provided in these proposals.

⁷ With regard to the solicitation's omission of an express requirement for offerors to submit unburdened labor rates or compensation plans, we note that FAR provision 52.222-46 states "[a]s a part of their proposals, offerors will submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract." FAR 52.222-46(a).

As a result, the record does not demonstrate that the Air Force compared ABIS's proposed salaries to incumbent salaries, a necessary step to determine whether the proposed salaries are lower than the incumbent salaries, as required by the FAR provision. Accordingly, we find that the agency failed to reasonably evaluate whether ABIS offered "lowered compensation for essentially the same professional work" as envisioned by FAR provision 52.222-46. *SURVICE Eng'g Co., LLC, supra* at 7 (citing *L-3 Nat'l Sec. Sols., Inc., supra*, at 9).

Despite this finding, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *Raytheon Co.*, B-409651, B-409651.2, July 9, 2014, 2014 CPD ¶ 207 at 17. We resolve any doubts regarding prejudice in favor of a protester. *Intelsat Gen. Corp.*, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 19-20. Here, had the Air Force properly evaluated ABIS's proposed compensation plan under FAR provision 52.222-46, it is possible that, if ABIS offered a decrease in compensation for incumbent employees, the agency may have found sufficient risk in ABIS's proposal to result in Bionetics's proposal being the best value to the government. Thus, we find that there is a reasonable possibility of prejudice to Bionetics, and on this basis, we sustain the protest.

RECOMMENDATION

We recommend that the agency re-evaluate offerors' proposed compensation plans in accordance with FAR provision 52.222-46. We further recommend that the agency perform a new best-value tradeoff analysis and, if an offeror other than ABIS is selected, we recommend that the agency terminate the award to ABIS for the convenience of the government and make a new award. Finally, we recommend that the agency reimburse Bionetics its costs associated with filing and pursuing these protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. *Id* at § 21.8(f).

The protest is sustained.

Thomas H. Armstrong
General Counsel