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Decision

Matter of: Ball Aerospace & Technologies Corporation

File: B-402148

Date: January 25, 2010

Thomas L. McGovern III, Esq., Andrew C. Ertley, Esq., and Edward C. Eich, Esq., Hogan & Hartson LLP, for the protester.

Steven W. DeGeorge, Esq., Herbert L. Raiche, Esq., for AT&T Services, Inc., an intervenor.

Lisa A. Dall, Esq., General Services Administration, for the agency.

Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of awardee's price and technical quotes is dismissed in part and denied in part where the protester did not timely challenge the terms of the solicitation prior to the time for receipt of initial quotations, and the evaluation was otherwise consistent with the evaluation scheme.

DECISION

Ball Aerospace & Technologies Corporation of Broomfield, Colorado, protests the issuance of a blanket purchase agreement (BPA) to AT&T Services, Inc. of Fairborn, Ohio, by the General Services Administration (GSA), on behalf of the Department of the Air Force, under request for quotations (RFQ) No. 366469 for support services for the National Air and Space Intelligence Center (NASIC), Counterspace Analysis Squadron. Ball argues that GSA's evaluation of AT&T's cost and technical quotes was flawed.

We dismiss in part and deny in part the protest.

BACKGROUND

The RFQ was issued on May 27, 2009, pursuant to Federal Acquisition Regulation (FAR) part 8.4, and was limited to vendors who have contracts under GSA Federal Supply Schedule (FSS) No. 871. The solicitation sought quotations to provide advisory and assistance support services for NASIC at Wright Patterson Air Force

Base, Ohio. The counterspace analysis program addresses the control and protection of U.S. space assets.

The RFQ anticipated issuance of a BPA with a 5-year ordering period. The RFQ stated that quotations would be evaluated on the basis of four evaluation factors: technical approach, management and staffing plan, past performance, and price. The three non-price factors were of equal importance, and, when combined, were “significantly more important than price.” RFQ § 6.3. The RFQ stated that NASIC anticipated issuing an initial order for fiscal year 2009 of approximately \$4-5 million, and the overall value of the BPA is anticipated to be \$45-90 million for the 5-year ordering period. RFQ § 5.1.8; Agency Report (AR) at 3.

The RFQ identified 10 contract line items (CLINs), representing two sets of five identical requirements to be performed at either the contractor facility (CLINs K01-K05) or the government facility (CLINs G01-G05). These five requirements are: project management, counterspace analysis support, counterspace modeling and analysis tool development, special project support, and travel. RFQ § 5.4.1.

CLINs K01, K02, G01, and G02 were to be priced on a “firm fixed price” basis, and required vendors to quote prices for a single full-time equivalent position (FTE) to perform the statement of work (SOW) requirements for that CLIN for 1 month; for evaluation purposes, the rate for this position was to be multiplied by 12 months. RFP § 5.4.1. CLINs K03, K04, G03, and G04 were to be priced on a “labor hour” basis, and required vendors to submit a single labor hour rate to perform the SOW requirements for that CLIN; for evaluation purposes, this single labor hour rate was to be multiplied by 1,920 hours per year—the amount of time for one FTE.¹ *Id.* The remaining two CLINs—K05 and G05—were for travel; vendors were instructed not to quote costs for these CLINs. The RFQ advised that the representative labor hour rate need not be the rate for a single labor category; instead it could be a composite of different labor categories. RFP § 6.2; RFP Question and Answer (Q&A) No. 14.

The RFQ stated that, for evaluation purposes, GSA would multiply the prices for each non-travel CLIN by a weighted factor. RFQ § 6.4. The total evaluated price for each vendor, therefore, would represent a blended price for 1 year’s FTE to perform all of the CLINs, over the 5 ordering years. The RFQ did not provide sample tasks or require vendors to identify the number of hours they estimated would be required to perform any of the SOW requirements. Instead, vendors were required only to provide pricing for the CLINs—meaning that each vendor would be evaluated on the basis of its unit pricing, alone.

¹ The protester suggests that despite the distinction in the RFQ, both types of CLINs are essentially fixed-price rates, with the units for the “firm fixed price” CLINs being 1 month, and the units for the “labor hour” CLINs being 1 hour.

The RFQ explained that individual orders would be negotiated with the vendor that receives the BPA. SOW § 17. For each order, the vendor and NASIC will determine the scope of work, labor categories to be used, and the number of hours or monthly FTEs required to perform the work. Id.

GSA received two quotes, from Ball and AT&T, by the closing date of July 9. As relevant here, each vendor provided in its quotation a list of all of the labor categories and rates for their respective FSS contracts, and indicated that discounts would apply for orders under the BPA. Both vendors then prepared price quotes based on composite FTEs, that is, the CLIN prices were based on a mix of different labor categories from the vendors' respective FSS contracts.

GSA convened separate technical and price teams to evaluate each vendor's quote. The agency's final evaluation of the vendors' quotes was as follows:

	BALL	AT&T
NON-PRICE FACTORS	GOOD/EXCELLENT	GOOD
Technical Approach	Good/Excellent	Acceptable
Management and Staffing Plan	Good	Acceptable/Good
Past Performance	Good/Excellent	Good/Excellent
EVALUATED PRICE	\$1,376,532	\$876,613

AR, Tab 4C, Award Decision, at 17.

The selection decision was made by the contracting officer (CO) who also served as the source selection authority. The CO noted that the "technical evaluation demonstrated a clear preference for Ball Aerospace as the favored contractor technically." Id. The CO concluded however, that despite Ball's higher technical rating, the difference in technical merit was not worth the 57 percent difference between the vendors' evaluated prices. Id.

GSA selected AT&T for award on September 22, and advised Ball of the award decision on September 25. Ball was provided a debriefing on October 6, and this protest followed.

DISCUSSION

Ball argues that GSA's evaluation of the vendors' price and technical quotes was flawed. As a preliminary matter, many of the challenges raised by the protester argue, in essence, that the price evaluation scheme set forth in the solicitation did not result in a meaningful evaluation of the likely cost to the government. As discussed below, we find that these arguments are untimely challenges to the terms of the solicitation, and merit dismissal. With regard to the other price and technical evaluation challenges--which timely address whether the evaluation was consistent

with the scheme set forth in the solicitation—we find no merit to these arguments and deny the protest.

Challenge to Evaluation Scheme

The protester argues that GSA's evaluation did not reasonably determine the likely costs to the government of each vendor's quotation because it did not consider the differing approaches each vendor took in preparing its price quotation. We find that this argument is a challenge to the terms of the solicitation, and was not timely raised.

Agencies must consider cost to the government in evaluating competitive proposals or quotes. 10 U.S.C. § 2305(a)(3)(A)(ii) (2000); AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 22; Health Servs. Int'l, Inc.; Apex Envtl., Inc., B-247433, B-247433.2, June 5, 1992, 92-1 CPD ¶ 493 at 3-4. Our Office has sustained pre-award challenges to the terms of solicitations that fail to provide for a meaningful comparison of offerors' proposed prices or costs. E.g. CW Gov't Travel, Inc.-Recon; CW Gov't Travel, Inc. et al., B-295530.2, July 25, 2005, 2005 CPD ¶ 139 (sustaining pre-award challenge to solicitation that did not require offerors to propose binding prices for an indefinite-delivery/indefinite-quantity contract).

In contrast, our Office has found that post-award challenges to an agency's cost or price evaluation scheme are not timely, if the challenged scheme was set forth in the solicitation, because a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial quotes or proposals must be filed before that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2009); e.g., General Dynamics-Ordnance & Tactical Sys., B-401658, B-401658.2, Oct. 26, 2009, 2009 CPD ¶ 217 at 6 (dismissing as untimely a post-award challenge to evaluation scheme that could produce a misleading result).

As discussed above, the RFQ stated that vendors would be evaluated on the basis of their quoted prices for the eight non-travel CLINs. The solicitation permitted vendors to quote composite rates, that is, the representative FTE could be comprised of numerous labor categories from the vendors' FSS contracts. The RFQ, however, did not require vendors to estimate the number of hours that would be required to perform the SOW requirements, nor did the RFQ require vendors to base their price quotes on any specific mix of hours for the labor categories. Instead, the solicitation directed vendors to provide an "average" of the labor category rates included in their price quote.² See RFP, Q&A No. 4.

² Ball and AT&T both provided estimates of the annual hours that might be required for each labor category. AR, Tab 2A, Ball Price Quote, at 17-56; Tab 3B, AT&T Price Quote, Basis of Estimate, at 1-5. While Ball based its price on a weighted average of
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Ball primarily contends that the agency's conclusion that AT&T's evaluated price was 57% lower than Ball's evaluated price is misleading because the comparison of the quoted prices does not take into account the types of labor categories selected by each vendor. Ball argues that simply comparing the vendors' evaluated prices leaves unexamined the relative quality of the labor categories quoted or the quoted labor mix, and thus does not take into account the possibility that one vendor might require more FTEs or labor hours than another to perform the same work. Ball specifically contends that its composite labor rates were comprised of a mix of labor categories that contained more senior and more highly-qualified personnel, as compared to AT&T. For this reason, Ball contends that, although its CLIN prices were higher, Ball would require fewer FTEs and/or fewer hours to perform the same work as compared to AT&T.

While we agree with Ball that the evaluation conducted by GSA does not account for differences in the quoted labor categories, the agency's price evaluation was clearly consistent with the scheme set forth in the solicitation. The plain language of the RFQ anticipated that vendors would be evaluated based solely on the CLIN prices quoted—that is, based on a simple average of all of the rates for the quoted labor categories, without regard to the number of FTEs or hours a vendor would need to perform a given task. Nor, for that matter, were any specific tasks identified, against which the agency could compare the vendor's quoted labor categories. In our view, contractors enter procurements such as this one at their own risk; where a protester fails to challenge an obviously flawed evaluation scheme prior to the time for receipt of initial quotations, we will dismiss a post-award challenge to the scheme as untimely. 4 C.F.R. § 21.2(a)(1).

We next turn to the remaining price and technical arguments raised by the protester, which we conclude are timely raised, but lack merit.

Price Evaluation

Ball raises several additional challenges to GSA's evaluation of the vendors' quoted prices—arguments that we think are timely because they challenge the agency's evaluation under the scheme set forth under the solicitation. With regard to one issue concerning the number of hours used to calculate AT&T's prices, GSA concedes that an error occurred; we agree with the agency, however, that this error was so small it did not likely prejudice the protester. With regard to the balance of the issues, we find no basis to sustain the protest.

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the labor categories according to the estimated hours, AT&T did not use its estimated hours in calculating its price, and instead used a simple average. Id.

First, Ball argues that the price evaluation failed to account for the fact that for CLIN 1K01, AT&T's price assumed that an FTE would work for [deleted] hours per year, instead of 1920 hours as required by the RFQ. The agency concedes this error, and acknowledges that correcting this error increases AT&T's price by [deleted] percent, and in turn decreases the difference between the vendor's prices from approximately 57 to [deleted] percent. AR at 13.

We do not think that this issue, standing alone, demonstrates that the protester was prejudiced by the agency's error. In this regard, our Office will not sustain a protest absent a showing of competitive prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see also, Statistica, Inc. v. Christopher, 102 F.3d 1577, 1681 (Fed. Cir. 1996). Although the RFQ stated that the non-price factors were "significantly more important" than price, we think that, in light of the rationale provided in the RFP given the 57 percent difference in the evaluated prices of the vendors, a reduction of the difference to approximately [deleted] percent does not reasonably show that Ball was prejudiced by GSA's error in evaluating the number of hours.

Next, the protester argues that for the labor-hour CLINs, the agency failed to adjust the awardee's quoted price. AT&T's technical quote stated that it would make all labor categories under its FSS contract available for order by the agency under the BPA, but based its price on a smaller subset of the full list of FSS contract rates. The protester argues that the agency should have calculated AT&T's quoted price to reflect all of the labor categories in the vendor's FSS contract, which would have resulted in a higher price.³ We disagree.

The RFQ stated that if "multiple labor categories and rates are used to fulfill a specific CLIN, the average of the rates for that CLIN will be used for the purpose of establishing the total evaluated price." RFQ, Q&A No. 14. Ball argues, therefore, that if a vendor's quote made its entire schedule available for ordering by NASIC, then every labor category should be included in the average price for the CLINs.

In its technical quote, AT&T stated that it would make all of the labor categories under its FSS contract available for ordering under the BPA. The awardee added that although it was offering all of the labor categories, it had identified for purposes of the quotation a subset of labor categories that it believed would mostly likely be used to satisfy the requirements of the SOW. AR, Tab 3C, AT&T Technical Quote, at 22. The awardee then listed the subset of positions listed in its price quote, indicating how each SOW requirement would be staffed. AT&T's price quote also stated that, if issued the BPA, "we will offer all of the labor categories in our [FSS

³ As discussed above, both vendors' quotes contained a list of all of the labor categories and rates for their respective FSS contracts.

contract] for task orders under the BPA. This will allow the Government maximum flexibility to obtain services as required.” AR, Tab 3B, AT&T Price Quote, at 1. In its price quote, AT&T’s CLIN prices were based on 17 of the 56 labor categories in the vendor’s FSS contract. Id., Basis of Estimate, at 1-5.

Ball, however, made similar statements and assumptions in its price quote. For the labor hour CLINs, Ball stated that “[t]he scope provided in the SOW and RFQ was not in sufficient detail to develop a convergent basis of estimate for all possible activities for this CLINs, requiring assumptions that may not generate a reliable Labor Hour price to be utilized for all requirements.”⁴ AR, Tab 2A, Ball Price Quote, at 2. For this reason, Ball stated that the labor hour CLIN prices were “for evaluation purposes only,” and that Ball expected that “the customer will use the complete [FSS contract for] purchases of CLINs XXX3 and XXX4 to give flexibility in execution of the Task Orders throughout the life of the BPA.” Id. Although Ball’s price quote stated that all of the 118 labor categories under its FSS contract would be available for ordering, the protester included all of the categories for the contractor-site CLINs, but only 16 labor categories for the government-site CLINs.⁵ Id. at 13-15.

We think the record here shows that while both vendors intended to allow the government to place orders using all of the labor categories from their respective FSS contracts, they also based their price quotes (i.e., their composite rates for a single labor hour) on their own judgments as to which labor categories the government would most likely use for the orders. On this record, we find no merit to the protester’s argument that the agency should have evaluated the prices for all the labor categories under AT&T’s FSS contract, because neither vendor appears to have assumed that the RFQ required its quote to list for evaluation—and the agency to consider—every rate in its respective FSS contract.⁶

⁴ For the fixed-price monthly FTE CLINs, Ball stated that its price quote was based on “the information provided and Ball’s assessment of requirements as defined in our Technical offer,” but also stated that “[i]f actual requirements deviate from what was anticipated and used in developing the price during the proposal phase, adjustments in price may be required.” Id.

⁵ The protester contends that it excluded the majority of its rates from the government-site CLINs because the rates were negotiated for a different geographic region than the government site for this BPA, as well as other certain other categories, based on the vendor’s belief that the government would not wish to order these categories. Protester’s Comments on Supp. AR, at 17. Nonetheless, the protester acknowledges that its quote stated that the government could place orders using all of the vendor’s FSS labor categories. See Protester’s Response to GAO Questions, Jan. 12, 2010, at 2.

⁶ In this regard, the record appears to show that neither vendor quoted a truly “fixed price” for the CLINs, as both stated that the CLIN prices were for evaluation
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Next, Ball contends that the agency failed to conduct a price realism evaluation to calculate the probable cost to the government. In essence, the protester argues that, regardless of the price evaluation set forth in the RFQ, a separate price realism analysis would have shown that the cost to the government of providing these services would be higher than AT&T's evaluated price. As discussed below, however, the protester confuses the type of analysis required for price realism with the requirements for a cost realism analysis.⁷

Agencies are only required to perform a cost realism analysis when the solicitation anticipates the award of a cost-reimbursement contract. In contrast, where an RFP contemplates the award of a fixed-price contract, or a fixed-price portion of a contract, an agency may, as here, provide in the solicitation for the use of a price realism analysis for the limited purpose of measuring an offeror's understanding of the requirements or to assess the risk inherent in an offeror's proposal or quote. Puglia Eng'g of California, Inc., B-297413 et al., Jan. 20, 2006, 2006 CPD ¶ 33 at 6. Although the FAR does not use the term "price realism," it states that cost realism analysis may be used to evaluate fixed-price proposals for purposes of assessing proposal risk, but not for the purpose of adjusting an offeror's evaluated price. FAR § 15.404-1(d)(3); see also IBM Corp., B-299504, B-299504.2, June 4, 2007, 2008 CPD ¶ 64 at 11.

The RFQ stated that quotes "that are unrealistic in terms of technical and management commitment or unrealistically low in price will be deemed reflective of an inherent lack of management and technical competence or indicative of failure to comprehend the complexity and risk of the contract requirements." RFQ § 5.4.4. Ball argues that the agency should have conducted a price realism evaluation, because such an evaluation would have shown that the cost to the government under AT&T's quote would have been higher than the evaluated price as calculated under the RFQ's evaluation scheme.

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purposes only and that, despite the labor categories listed in their price quotes, the full list of labor categories would in fact be available for ordering under the BPA.

⁷ The RFQ did not state that the agency would perform a cost realism analysis. The protester contends that both types of CLINs here should be regarded as time-and-materials CLINs, and that the agency should have performed some kind of cost realism evaluation. However, there is no requirement that an agency conduct a cost realism analysis for a solicitation that provides for the award of a time-and-materials contract with fixed-price burdened labor rates, in the absence of a solicitation provision requiring such an analysis. Resource Consultants, Inc., B-290163, B-290163.2, June 7, 2002, 2002 CPD ¶ 94 at n.1; General Atomics, B-287348, B-287348.2, June 11, 2001, 2001 CPD ¶ 169 at 7.

As discussed above, however, a price realism evaluation is conducted for the purpose of measuring a vendor's understanding of the contract requirements or to assess the risk inherent in a vendor's proposal or quote—not for the purpose of determining the probable cost to the government.⁸ Id. Moreover, a price realism analysis does not permit the agency to adjust a vendor's quoted price based on the results of the analysis—which is essentially what the protester contends the agency should have done here in evaluating probable cost to the government. FAR § 15.404-1(d)(3). On this record, we find no basis to sustain the protest.

Technical Evaluation

Ball argues that GSA's evaluation of AT&T's technical quote was flawed. As discussed below, we find no merit to these arguments. The evaluation of a vendor's proposal or quote is a matter within the agency's discretion. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13. In reviewing a protest against an agency's evaluation, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. A protester's mere disagreement with the agency's judgment in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. VT Griffin Servs., Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

First, the protester argues that the evaluation of AT&T's technical quote was flawed because the evaluators were unaware that AT&T had proposed to perform the contract utilizing all of the labor categories under its FSS contract, but had based its price on a smaller subset of labor categories. In this regard, GSA states that the technical evaluators did not have access to the vendors' price quotes. AR at 3-4. Ball contends that the technical evaluation was unreasonable because the evaluators may have based their evaluation of AT&T on the merit of quoting the full list of labor categories in its FSS contract, without knowing which categories were actually listed in the price quote, and the relative weights for each category—that is, the ratio of higher-skilled to lower-skilled categories quoted. We disagree.

⁸ Ball does not contend, for example, that AT&T's quoted prices are themselves too low, *i.e.*, that the quoted CLIN prices are unrealistically low for the labor categories identified by AT&T to perform the work. Instead, the protester argues that the lower labor rates quoted by AT&T are reflective of lower-skilled or lower-qualified personnel, which will ultimately require more FTEs or hours to perform the work, and thereby increase the cost to the government. As discussed above, we do not think that the evaluation scheme set forth in the RFQ anticipated the kind of evaluation that Ball believes that the agency should have conducted.

As discussed above, both vendors proposed to make all of the labor categories under their FSS contracts available for ordering under the BPA, but neither vendor included every labor category in its CLIN pricing. Moreover, as also discussed above, the RFQ did not require vendors to quote weighted averages for the CLIN prices, and AT&T did not do so. Thus, although AT&T's technical quote did not address—and the evaluators did not consider—the ratio of higher-skilled to lower-skilled labor categories, such a ratio was neither required to be identified nor relied upon by the awardee in its price quote.

Moreover, while AT&T's technical quote stated that all labor categories would be available for ordering under the BPA, the awardee also stated that, for purposes of its quote, it had identified the labor categories that it viewed most likely to be ordered by the government. AR, Tab 3C, AT&T Technical Quote, at 22-23. Although AT&T's technical quote does not exactly correspond to its price quote with regard to the individual SOW requirements, all of the positions listed in the technical quote were listed in the price quote summaries for each CLIN. Compare AR, Tab 3C, AT&T Technical Quote, at 23 with Tab 3B, AT&T Price Quote, Basis of Estimate, at 1, 4-5. Thus, contrary to the protester's argument, all of the positions specifically listed in AT&T's technical quote were included in its price quote (albeit on an unweighted basis).⁹

Next, Ball argues that AT&T proposed to make the government responsible for training its workforce, in contrary to the requirements of the SOW. The SOW stated that the vendor is solely responsible for training its own personnel, and bars the vendor from billing the government for such training. SOW § 9.3.1. The protester cites the following statement in the awardee's quote as indicating that AT&T intends to make the government responsible for training: “[AT&T's staffing approach] allows us, in coordination with [NASIC] leadership to identify and train a core group of Counterspace experts to act as mentors to help guide and train new Counterspace analysts as they come on board.” AR, Tab 3.C, AT&T Technical Quote, at 22. We do not think that this statement states that AT&T will make the government responsible for training. Instead, we think that the statement indicates that AT&T will coordinate its training efforts with NASIC—a significantly different approach than assuming that the government will provide the required training. To the extent that

⁹ Ball also argues that the awardee failed to “map” its technical quote to its price quote, that is provide a separate illustration of the relationship between its technical and price quotes, and how each relates to the SOW requirements. The protester acknowledges, however, that mapping was not a requirement of the RFQ, but merely something that vendors were “encouraged” to provide. See RFQ, Q&A No. 19; Protesters Comments on AR at 17.

the protester contends that the agency's evaluation unreasonably failed to interpret AT&T's quote as requiring government training of vendor personnel, we disagree.

The protest is dismissed in part and denied in part.¹⁰

Lynn H. Gibson
Acting General Counsel

¹⁰ Ball raises other collateral arguments. For example, the protester contends that GSA unreasonably found that AT&T's quoted prices were reasonable because certain of the individual labor categories on AT&T's FSS contract that were used to establish a CLIN price had lower prices than the overall CLIN price. The RFQ stated, however, that an overall CLIN price must represent the average of all of the labor category rates--necessarily meaning that some rates would be higher and some lower than the overall average. We have reviewed all of the arguments raised in the protest, and find that none has merit.