



United States Government Accountability Office  
Washington, DC 20548

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## Decision

**Matter of:** Emergint Technologies, Inc.

**File:** B-407006

**Date:** October 18, 2012

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Daniel S. Herzfeld, Esq., Nicole Y. Beeler, Esq., and Clare M. Cavaliero, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.  
David P. Metzger, Esq., and Caitlin K. Cloonan, Esq., Arnold & Porter LLP, for DB Consulting Group, Inc., an intervenor.  
Scott C. Briles, Esq., Department of Health and Human Services, for the agency.  
Jennifer D. Westfall-McGrail, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest is sustained where solicitation for the issuance of a fixed-price time-and-materials task order did not provide for a price realism evaluation, yet the agency discounted the protester's lower price in its best value tradeoff decision based on its conclusion that the protester's low pricing posed performance risk and reflected a lack of understanding of the agency's requirements.
2. Protest of agency's technical evaluation is sustained where the record does not support weaknesses identified in the protester's proposal.

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### DECISION

Emergint Technologies, Inc., of Louisville, Kentucky, protests the issuance of a task order to DB Consulting Group, Inc., of Silver Spring, Maryland, under request for task order proposals (RFTOP) No. 2012-IM-0103, issued by the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services, for information services support for CDC's National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP) in Atlanta, Georgia.<sup>1</sup> The protester

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<sup>1</sup> The RFTOP was issued under CDC's information management services (CIMS) indefinite delivery/indefinite quantity contract No. 200-2010-37211.

argues that the evaluation of its proposal and the agency's source selection trade-off determination were unreasonable.

We sustain the protest.

## BACKGROUND

The RFTOP, which was issued on March 31, 2012, contemplated the issuance of a time-and-materials task order for a 5-year period (1 base, plus 4 option years). The solicitation provided for issuance of the order to the contractor whose proposal was considered most advantageous to the government, with technical factors to be considered more important than price in the selection decision. Technical factors were as follows: management plan (35 points); staffing plan (30); similar experience (15); technical approach (10); and transition/start up plan (10). RFTOP at 54.

The solicitation described the agency's projection of the initial mix of labor categories necessary to perform the tasks (based on the incumbent contractor's staffing), but advised that the number of contractor employees and the mix of labor categories might vary over the life of the task order and that offerors should "propose the solution that they determine to be most appropriate for the requirement." RFTOP at 3. Offerors were to provide fully-loaded labor rates for their proposed labor categories.<sup>2</sup> The solicitation encouraged offerors "to discount the maximum contract rate [set out in their underlying CIMS contract] to foster competition and maximize government value, as appropriate." RFTOP at 52. The only guidance furnished pertaining to the evaluation of price was that "[a] price analysis of the proposal may be conducted to determine the reasonableness of the offeror's price proposal." Id. at 57.

Three firms submitted proposals by the April 16 closing date. A technical evaluation panel (TEP) reviewed the proposals. The TEP compiled a consensus report, which assigned each proposal an overall score (derived by averaging the scores assigned by the individual evaluators) and summarized each proposal's strengths and weaknesses. There was no indication in the consensus report as to which, if any, of the strengths and/or weaknesses--and there were many of both in each

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<sup>2</sup> The price proposals were also to include travel, incidental equipment, other direct costs, and tables of government-site and contractor-site rates for other information management labor categories that might be ordered if the labor mix changed.

proposal--were considered significant.<sup>3</sup> Point scores for DB and Emergint's proposals were as follows:<sup>4</sup>

	<b>DB</b>	<b>Emergint</b>
Management Plan	29	26.6
Staffing Plan	29	25.3
Similar Experience	11.3	12.3
Technical Approach	9	7
Transition	10	8
<b>Overall</b>	<b>87.6</b>	<b>79.3</b>

Technical Panel Summary Report at 8-16.<sup>5</sup>

After the TEP completed its review of the technical proposals, the contracting officer forwarded the price proposals to the panel for review. The TEP calculated total evaluated prices of \$78,992,868 for DB and [deleted] for the protester. In its evaluation, the TEP noted the following concern pertaining to the protester's proposed labor rates:

We have some concerns that the rates for the [deleted] have been discounted to the point that they may have difficulty retaining incumbents or being able to successfully recruit highly qualified staff for those positions according to the skill sets required in the PWS [Performance Work Statement]. These categories total [deleted] of the level of effort which would translate to [deleted] of our staff being at risk for not taking positions with incumbent if the rates proposed be [sic] too low to maintain current staff.

Consensus Evaluation of Additional Questions--Emergint, Agency Report (AR), Tab 9. The evaluators also observed that the protester's total evaluated price was [deleted] lower than the government estimate.

After reviewing the evaluation results, the contracting officer consulted with the TEB chair, who furnished him with comments "regarding the variation in DB Consulting vs. Emergint that could justify the cost difference." Email from TEB Chair to Contracting Officer, June 5, 2012, AR, Tab 8. In her response, the TEB chair

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<sup>3</sup> For example, the evaluators identified 19 strengths and 8 weaknesses in both the protester's and the awardee's proposals under the management plan factor.

<sup>4</sup> The third proposal was determined to be technically unacceptable based on its overall point score and was not further considered.

<sup>5</sup> We recognize that there are slight discrepancies in the agency's calculations of the offerors' overall point scores.

identified the following 5 advantages to DB's proposal and 3 disadvantages to Emergint's proposal:

- DB's partnership with [deleted] is valuable because the need for [deleted] is greatly minimized. Also, because of their ability to capitalize on [deleted] of the explicit LOE [level of effort] for staffing, this also mitigates risk.
- DB's key staff has proven track records for managing [deleted] mandated by HHS for IT projects.
- DB's similar experience (#2--NASA) proves that they have successfully transitioned 110 incumbent staff--similar size to this task order without break in service.
- DB's relationship with staffing augmentation firms specializing in IT, life sciences and healthcare indicate being able to recruit highly qualified candidates for vacancies.
- DB's pricing proposal was comparable to [independent government cost estimate] indicating a realistic understanding of the specialized requirements outlined in the PWS.
- The panel has concerns that Emergint's rates for the [deleted] have been discounted to the point that they may have difficulty retaining incumbents or being able to successfully recruit highly qualified staff for those positions according to the skill sets required in the PWS. These categories total [deleted] of the level of effort which would translate to [deleted] of our staff being at risk for not taking positions with incumbent if the rates proposed be [sic] too low to maintain current staff. If this risk plays out, the need for knowledge transfer also creates additional risk to the successful transition and continuation of work.
- Emergint's pricing proposal is significantly lower than the [government estimate], indicating a lack of understanding of the specialized requirements outlined in the PWS.
- Emergint's key staff member proposed has a proven track record at NCCDPHP for [deleted] of IT projects.

Id. The contracting officer selected DB to perform the task order, noting that "[t]he cost advantage held by Emergint is outweighed by DB's technical superiority as shown [in the factors cited by the TEB chair] and in the consensus technical evaluation." Award Decision Memorandum, June 9, 2012, at 2-3, AR, Tab 4.

The protester received notification of the agency's decision on June 15 and, on the same day, requested a debriefing. The agency furnished a written debriefing on July 5, and Emergint protested to our Office on July 10.<sup>6</sup>

## DISCUSSION

The protester argues that the agency's evaluation of its proposal and best value tradeoff determination were unreasonable. Emergint first contends that the evaluators in effect performed a realism analysis of its proposed pricing by finding that some of its labor rates and its overall price were so low as to call into question its understanding of the solicitation's requirements and its ability to perform successfully. The protester argues that this was improper since the RFTOP did not provide for a realism evaluation. Emergint also argues that a number of the weaknesses identified with respect to its proposal were without a reasonable basis. As explained below, we agree with the protester with regard to both arguments.

### Price Realism

In response to the protester's price realism challenge, the agency maintains that it did not conduct a price realism analysis here because it did not adjust offerors' prices to determine the probable cost of their proposals. The agency's defense reflects a fundamental misunderstanding of what a price realism analysis entails. A price realism evaluation does not contemplate adjusting offerors' prices. As provided by regulation, and explained in our decisions, where, as here, a solicitation provides for the award of a fixed-price contract, the contracting agency may not adjust offerors' prices for purposes of evaluation. Federal Acquisition Regulation § 15.404-1(d)(3); Powersolv, Inc., B-402534, B-402534.2, June 1, 2010, 2010 CPD ¶ 206 at 12. Rather, a price realism evaluation involves an assessment of an offeror's low fixed price to determine whether the low price reflects a lack of understanding of contract requirements or risk inherent in its approach--precisely what the agency did here. Milani Constr. LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87 at 4.

While it is within an agency's discretion to provide for a price realism analysis in awarding a fixed-price contract to assess understanding or risk, see FAR § 15.404-1(d)(3), offerors competing for such an award must be given reasonable notice that a business decision to submit low pricing will be considered as reflecting on their understanding or the risk associated with their proposals. Analytic

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<sup>6</sup> By letter of August 27, the agency advised our Office that pursuant to Federal Acquisition Regulation (FAR) §§ 33.104(c)(2) and (3), the head of the agency contracting activity had made a written finding that continued contract performance, notwithstanding the pending protest, was in the "best interest" of the government. Letter from agency counsel to GAO, Aug. 27, 2012.

Strategies, B-404840, May 5, 2011, 2011 CPD ¶ 99 at 2-3. Where there is no relevant evaluation criterion pertaining to price realism, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to perform successfully at its offered price. Flight Safety Servs. Corp., B-403831, B-403831.2, Dec. 9, 2010, 2010 CPD ¶ 294 at 5.

The RFTOP here did not furnish offerors with reasonable notice that the agency intended to perform a price realism analysis. The solicitation's price evaluation factor provided only for analysis of the "reasonableness" of offerors' pricing proposals--that is, whether the offeror's price was too high<sup>7</sup>--and the solicitation did not contain other language alerting offerors to the possibility that a decision to submit low pricing might be considered as reflecting on their understanding or ability to perform. Contrast Analytic Strategies, *supra*, (solicitation provided that proposed costs would be evaluated to determine whether they reflected a clear understanding of the requirements) and Flight Safety Servs. Corp., *supra*, (solicitation provided for rejection of "any proposal evaluated to be . . . unreasonably high or low in cost when compared to Government estimates, such that the proposal is deemed to reflect an inherent lack of competence or failure to comprehend the complexity and risks of the program").

Although the agency suggests that its evaluation of Emergint's price was proper in light of certain language in the solicitation, we disagree. Specifically, the agency cites to language under the staffing plan factor, instructing firms to furnish a description of the special benefits that they would offer incumbent staff as a recruiting incentive and to describe their approach for obtaining and retaining staff. Offerors, however, were not required to provide any pricing information in responding to this aspect of the solicitation or to in any way correlate it to their proposed pricing. Thus, we fail to see how this provision would have put offerors on notice of the agency's intention to perform a realism assessment of their labor rates or total evaluated price.

Similarly, the agency notes that under both the technical approach and management plan factors, offerors were instructed to demonstrate their understanding of the solicitation requirements. In context, however, this reference to "understanding" pertains to the narrative information presented in the offerors' technical proposals, and does not reasonably suggest that the agency would consider price realism in the source selection decision.

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<sup>7</sup> An agency's concern in making a price reasonableness determination focuses primarily on whether the offered prices are higher than warranted. McDonnell Douglas Corp., B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 at 9.

Because below cost prices are not inherently improper, when offerors are competing for award of a fixed-price contract, as explained above, they must be given reasonable notice that their business decision to submit a low-priced proposal can be considered in assessing their understanding or the risk associated with their proposal. See Milani Constr. LLC, supra, at 5. Since the agency failed to provide such notice, we agree with the protester that the agency improperly relied on an unstated evaluation factor in determining that the protester's proposed pricing was so low as to call into question its understanding of the solicitation requirements and its ability to perform.<sup>8</sup> Since the contracting officer's award decision clearly relies on these findings in his trade-off decision, we sustain the protest on this basis.

### Technical Evaluation

The protester also challenges the agency's evaluation of its technical proposal, arguing that many of the weaknesses identified by the evaluators were based on an incomplete or incorrect reading of the proposal. As discussed below, we agree with the protester that a number of the disputed weaknesses lacked a reasonable basis.<sup>9</sup>

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<sup>8</sup> The protester also disputes the agency's conclusions pertaining to the realism of its labor rates and overall price. According to protester, "[t]o date, CDC has awarded Emergint [deleted] task orders under the CIMS contract where Emergint has used [deleted]," and "[n]one of the risks that CDC posits in its evaluation have affected Emergint's performance, which CDC has found to be exceptional." Protester's Comments, Aug. 20, 2012, at 9 n.3. The agency did not respond to this argument, nor did it explain the analysis that the evaluators performed in concluding [deleted] difficulty retaining incumbent employees and recruiting qualified staff. Thus, to the extent the solicitation in fact provided for an assessment of the offerors' labor rates for understanding or risk, we have no basis to conclude that the evaluation performed by the agency was reasonable. In this regard, we note that the agency did not have any insight regarding the composition of the protester's fully-loaded labor rates, or those of any other offeror. Moreover, for three of the four labor rates identified by the agency as being too low, the difference between the government-estimated labor rates and the protester's rates was only a few dollars, and for the fourth category, the awardee's rates were also significantly below the government's estimated labor rate.

<sup>9</sup> We recognize that the addressed weaknesses represent only a portion of the weaknesses identified by the evaluators; however, even if their correction were to result in an increase in Emergint's technical score of only a few points, the record here suggests that those few points could have a material impact on the trade-off determination.

In reviewing protests challenging an agency's evaluation, our Office will not reevaluate proposals; rather, we will review the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation. Unisys Corp., B-406326 et al., Apr. 18, 2012, 2012 CPD ¶ 153 at 8.

Among the weaknesses that the protester disputes are the following:

- Indicate they will provide Tech Writer/Documentation Specialist that can [deleted] and this is not with scope of this task order. (Technical approach)
- Required description of benefits to incumbent staff which was requirement of this section, deferred until another section. No statement of approach to obtain and/or replace qualified staff. (Management plan)
- Statement [deleted] assumes they are PMing projects on this task order. That indicates an erroneous assumption and lack of understanding. They are not responsible for project plans under this TO. (Management plan)
- There is no indication [if] [deleted] will be charges so not clear if government will be responsible. (Management plan)
- Ability to quickly obtain staff appears weak as it relies on [deleted]. (Staffing plan)
- Approach to conflict resolution is included only as an Appendix, not part of technical proposal which was requirement of PWS. (Technical approach)
- Resolution Management process not included in Technical Proposal as instruction indicated but instead included as an Appendix. (Technical approach)
- Conflict management approach is detached from technical proposal. (Management plan)

Technical Panel Summary Report, at 13-15.

With regard to the first weakness, one of the categories of support staff that the contractor was to provide was Technical Writer/Documentation Specialist. In describing its technical approach, the protester stated that it would provide experienced technical writers to help develop and maintain a variety of document types [deleted]. Protester's Technical Proposal at 3. As noted above, the evaluators identified as a weakness the protester's inclusion of [deleted] on the list of documents with which its technical writers might assist on the grounds that developing [deleted] plans was not within the scope of the task order. In this connection, the contracting officer asserts that "there are numerous pages of tasks listed for the Tech Writer/Documentation Specialist, and none of them are for [deleted]." Contracting Officer's Statement at 5.

The protester directly rebuts the contracting officer's assertion by pointing to several places in the RFTOP where [deleted] is included in the description of the duties to be performed by a Technical Writer/Documentation Specialist. For example, the RFTOP describes the duties of the above position as including [deleted]. (Emphasis added.) Accordingly, we agree with the protester that this assessment of a weakness in its proposal lacks a reasonable basis.

With regard to the second weakness, the protester points out that contrary to the evaluators' assertion, the RFTOP did not require offerors to furnish a description of the benefits to be provided incumbent staff as part of their management plans; rather, that information was to be furnished as part of their staffing plans. See RFTOP at 56 (offerors' description of their staffing plans should include "[a] description of any special benefits to incumbents as recruiting incentive as well as overall benefits package for all employees"). Along the same lines, the RFTOP instructed offerors to provide a description of their approach to obtaining and/or replacing qualified staffing resources as part of their staffing--as opposed to their management--plans. To the extent the agency argues that what the evaluators really meant was that Emergint had not described its methodology for attracting incumbent staffing (which, per the RFTOP at 55, was to be included in offerors' management plans), the record does not support this position either. The record reflects that Emergint included a description of its approach to attracting incumbent staffers in its management plan. See Protester's Technical Proposal at 6 (approach to attracting incumbent staffing includes [deleted].) Thus, we also find this weakness to be unsupported.

With regard to the third weakness, the agency concedes that the finding was in error, but argues that the protester was not prejudiced by the finding. In this regard, the agency contends that the TEB chairperson, who identified the weakness, increased the score that she assigned the protester's proposal under the management plan factor by 5 points after the consensus meeting to correct for the erroneous finding. Contracting Officer's Statement at 5. This argument is not supported by the underlying record. While there is some indication in the record that one of the evaluators increased the score s/he assigned Emergint's proposal under the management factor after the consensus meeting (i.e., the scores originally assigned by the evaluators, when averaged, do not equal the consensus score), there is nothing in the contemporaneous record establishing that it was the TEB chairperson who revised her scoring, or that any change made in scoring was to correct for this error. Moreover, the weakness was carried through in the final consensus report that was reviewed by the contracting officer. Technical Evaluation Summary Report at 14. In sum, we do not agree with the agency that the protester suffered no prejudice as a result of the erroneous finding.

With regard to the fourth weakness, Emergint's proposal directly contradicts the agency's finding that the protester did not clearly address whether the government would be responsible for [deleted]. Specifically, Emergint's proposal described its

organizational structure, including [deleted], in section 2.1 of its technical proposal and specifically provided that [deleted]. Protester's Technical Proposal at 5. Similarly, with regard to the fifth weakness, Emergint's proposed approach to recruiting staff did not rely exclusively on [deleted], as the agency's finding implies; rather, the protester's proposal described its [deleted] in its proposal, and then stated that its [deleted]. Id. at 14. Based on this record, we agree with the protester that neither weakness was reasonable.

Finally, with regard to the last three weaknesses, the protester argues that it provided descriptions of its conflict resolution, issue resolution, and conflict management processes in its technical proposal, and that it provided more detailed diagrams of all three processes in an appendix, as permitted by the terms of the RFP. In response, the agency maintains that while the solicitation instructed offerors that they could include supporting documents, including graphics and tabular content, in appendices--where they would not be counted against the 15-page limit on technical proposals--the RFP clearly stated that "the graphs and tables should only be used for supplemental information" and offerors "should not use graphs and tables as the majority of the proposal text." RFTOP at 51. According to the agency, Emergint's inclusion of the diagrams, which provided the majority of its description of the above processes, in an appendix rather than in the text of its proposal permitted the protester to exceed the limitation on the length of technical proposals, which was unfair to other offerors.

We are not persuaded by the agency's argument that considering the information in the appendices to the protester's proposal would have been unfair. As pointed out by the protester, DB also included significant information required to be provided as part of its technical proposal, *i.e.*, a description of its employee benefits package, in an appendix, and the evaluators did not identify this as a weakness. Thus, contrary to the agency's position, the evaluators acted unfairly when they considered the content of the appendices to DB's proposal in their evaluation, while failing to consider the content of the appendices to Emergint's proposal.<sup>10</sup>

Based on our conclusion that some of the evaluators' technical findings, which provided the basis for their point scoring of the protester's proposal, were unreasonable, and our conclusion that the evaluators improperly conducted a

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<sup>10</sup> Because we sustain Emergint's protest of the evaluation of its technical proposal based on the above findings, we do not address in this decision all of the other weaknesses that the protester disputes, given that the record was less clear on these issues. Accordingly, we recommend that in performing its reevaluation of the protester's proposal, the agency review all of its findings of weakness for reasonableness, which are not otherwise discussed in this decision.

realism analysis of the protester's proposed pricing, which the contracting officer relied on in making his trade-off determination, we sustain the protest.<sup>11</sup>

## RECOMMENDATION

We recommend that the agency reevaluate the protester's proposal and make a new price/technical trade-off decision. If, as a result, the protester is selected for award, DB's order should be terminated and an order should be issued to the protester. Alternatively, if the agency decides that consideration of the realism of offerors' proposed prices is necessary, it should amend the RFTOP to so indicate, allow submission of revised proposals, reevaluate the proposals received, and make a new source selection decision. We also recommend that the agency reimburse the protester for the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2012). The protester's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Lynn H. Gibson  
General Counsel

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<sup>11</sup> The protester also raised several arguments pertaining to the evaluation of the performance record of its proposed project manager and of DB's experience. While we do not discuss these arguments in detail, we considered them and find that they do not provide a basis to sustain Emergint's protest.