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Decision

Matter of: ARES Technical Services Corporation

File: B-415081.2; B-415081.3

Date: May 8, 2018

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DIGEST

Protest challenging agency's evaluation of proposals is sustained where record shows that agency's evaluation failed to take several material considerations into account in arriving at its source selection decision.

DECISION

ARES Technical Services Corporation, of Greenbelt, Maryland, protests the award of a contract to Millennium Engineering and Integration Company (MEI) of Arlington, Virginia, under request for proposals (RFP) No. NNG16547352R, issued by the National Aeronautics and Space Administration (NASA) for safety and mission assurance services to be performed at the agency's Goddard Space Flight Center.¹ ARES argues that the agency miscalculated proposals and made an unreasonable source selection decision. ARES also alleges that MEI has an organizational conflict of interest (OCI) that the agency has inadequately addressed.

¹ The contract to be awarded under the current solicitation is called the safety and mission assurance services contract, which is a follow-on to a previous contract for these same services; throughout the record, the protested contract is referred to by the parties as the SMAS II contract.

We sustain the protest in part, deny it in part, and dismiss it in part.

BACKGROUND

The RFP contemplates the award, on a best-value tradeoff basis, of a cost-plus-award-fee type indefinite-delivery, indefinite-quantity contract for a 5-year ordering period.² Firms were advised that the agency would evaluate proposals considering cost and two non-cost evaluation factors, mission suitability and past performance, which were deemed, both individually and collectively, more important than cost; in addition, mission suitability was deemed more important than past performance. RFP at BATES 0091.³ The RFP further advised offerors that, within the mission suitability factor, there were two subfactors, technical approach and management approach, with management approach deemed more important than technical approach (management approach was worth up to 550 points while technical approach was worth up to 450 points).⁴ Id. at BATES 0095. Finally, the RFP provided that the agency would evaluate cost for realism and reasonableness.⁵ Id. at BATES 0095.

In response to the RFP, the agency received three proposals, and included the ARES and MEI proposals in the competitive range. The agency then conducted discussions with those offerors and solicited, obtained and evaluated final proposal revisions (FPRs).⁶ The agency evaluated each proposal as follows:

² The RFP provides for a 30-day phase-in period during which the successful offeror will perform on a fixed-price basis. All other task or delivery orders issued under the contract will be performed on a cost-reimbursement basis.

³ The agency assigned BATES numbers to the record. All citations in this decision are to those numbers.

⁴ The RFP provided that the offerors' past performance would be assigned adjectival ratings of very high level of confidence, high level of confidence, moderate level of confidence, low level of confidence, very low level of confidence, or neutral. RFP at BATES 0097-0098.

⁵ The RFP included a government pricing model (GPM). RFP Enclosure 4. The GPM specified all of the contemplated labor categories and number of hours for each labor category that the agency anticipates will be used during contract performance. Offerors were required to submit their proposed cost using the GPM. In effect, therefore, all firms proposed to perform using the same labor categories and hours.

⁶ ARES filed a protest in connection with the agency's initial award of a contract to MEI in August, 2017. The agency took voluntary corrective action in response to that protest before the deadline for submitting its report to our Office, principally in response to ARES' allegations of an OCI on the part of MEI. We dismissed the firm's initial protest as academic. B-415081, Aug. 30, 2017 (unpublished decision).

	Ares	MEI
Mission Suitability	745	778
Technical Approach	360	409
Management Approach	385	369
Past Performance	Very High	Very High
Proposed Cost	\$99,658,545	\$116,394,937
Probable Cost	\$103,732,807	\$112,092,785

Agency Report (AR), exh. 24, Presentation to Source Selection Authority (SSA) on FPRs, at BATES 3379, 3388. On the basis of these evaluation results, the agency made award to MEI, concluding that the firm's proposal represented the best value to the government. After learning of the agency's selection decision and requesting and receiving a debriefing, ARES filed the instant protest.

PROTEST

ARES challenges the agency's conclusion that MEI was eligible for award based on its contention that MEI has an organizational conflict of interest that has not adequately been addressed. ARES also raises a number of challenges to the agency's cost and technical evaluation of proposals, maintaining that the agency misevaluated proposals, and by extension, made an unreasonable source selection decision. We have considered all of ARES' challenges to the agency's actions and sustain its protest for the reasons discussed below. We deny the firm's remaining allegations, whether or not they are specifically discussed. We note at the outset that, in reviewing protests relating to an agency's evaluation of proposals, our Office does not independently evaluate proposals or substitute our judgment for that of the agency; rather we review the record to determine whether the agency's evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. L3 Unidyne, Inc., B-414902 et al., Oct. 16, 2017, 2017 CPD ¶ 317 at 3. While we will not substitute our judgment for that of the agency, we will sustain a protest where the agency's conclusions are inconsistent with the solicitation's evaluation criteria, inadequately documented, or not reasonably based. Id.

Organizational Conflict of Interest

ARES argues that MEI has an impaired objectivity type of OCI that has not adequately been addressed.⁷ In its prior protest, ARES maintained that performance under the

⁷ An impaired objectivity OCI arises where a firm's ability to render impartial advice to the government in connection with an evaluation of its own products or services, or those of a competitor, is impaired because of the firm's competing interests; typically such situations arise where, because of the nature of a firm's actual or potential work under one contract, it may be unable to provide objective judgments to the government under another contract. Federal Acquisition Regulation (FAR) § 9.505-3; Serco, Inc., B-404033, et al., Dec. 27, 2010, 2010 CPD ¶ 302 at 2.

currently-awarded contract could potentially involve MEI performing a review of work it or one of its subcontractors performed under other contracts. ARES therefore maintains that award to MEI was improper.

In response to ARES' earlier protest, the record shows that the agency performed a detailed investigation of possible OCIs on the part of both firms, and also solicited and obtained mitigation strategies from both. AR, exhs. 29, 30, OCI Exchanges with the Offerors. Based on the mitigation strategy submitted by MEI, the agency concluded that award to MEI would be unobjectionable, and therefore the agency affirmed its earlier selection decision.

In response to the agency's actions, ARES filed the current protest, maintaining (among other things) that MEI's mitigation strategy was inadequate to address its impaired objectivity OCI. The agency presented a detailed defense of its actions in its initial agency report, but subsequent to the submission of that report, the agency also executed a waiver of any residual OCI that MEI might have, notwithstanding its mitigation strategy. AR, exh. 41, OCI Analysis and Waiver. ARES challenges the reasonableness of the agency's waiver.

We dismiss this aspect of ARES' protest. Agencies properly may waive an OCI, provided that their waiver is executed in accordance with Federal Acquisition Regulation (FAR) § 9.503, which states as follows:

The agency head or a designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee. Agency heads shall not delegate waiver authority below the level of head of a contracting activity.

While our Office will review an agency's execution of an OCI waiver, our review is limited to consideration of whether the waiver complies with the requirements of the FAR, that is, whether it is in writing, sets forth the extent of the conflict, and is approved by the appropriate individual within the agency. AT&T Gov't. Solutions, Inc., B-407720, B-407720.2, Jan. 30, 2013, 2013 CPD ¶ 45 at 4; see also MCR Federal, LLC, B-401954.2, Aug. 17, 2010, 2010 CPD ¶ 196 at 5 (where a procurement decision--such as whether an OCI should be waived--is committed by statute or regulation to the discretion of agency officials, our Office will not make an independent determination of the matter).

Here, ARES does not argue that the agency's waiver is deficient under the terms of FAR § 9.503; indeed there is no dispute that the waiver is in writing, sets forth the extent of the potential OCI on MEI's part, and was signed by the agency's Assistant Administrator for Procurement, the individual authorized to execute such a waiver. Instead, ARES argues that the agency's decision to execute the waiver is inconsistent with internal NASA policy guidance. See AR, exh. 28, NASA Guide on Organizational Conflicts of Interest.

As an initial matter, compliance with internal agency guidance is not a matter subject to our review through the bid protest process. B&B Medical Services, Inc., B-407113.3, B-407113.4, June 24, 2013, 2013 CPD ¶ 162 at 6 n.6. In any event, compliance with such internal agency guidance is not one of the enumerated requirements of FAR § 9.503 to properly execute a waiver, and thus does not provide a basis for our Office to object to the agency's execution of the waiver here. In light of these considerations, we dismiss this aspect of the protest. AT&T Gov't. Solutions, Inc., supra.

Evaluation of the MEI Technical Proposal

ARES argues that, in providing the agency with an OCI mitigation strategy, MEI effectively made changes to its technical approach that the agency never considered in connection with its evaluation of the awardee's proposal. The record shows that MEI and one of its proposed subcontractors, [deleted], have been performing a contract called the omnibus multidiscipline engineering services (OMES II) contract, which requires them to provide engineering services to the agency. The record shows that there is the possibility that, in performing the SMAS II requirement, MEI, or its subcontractor, could be required to review the engineering work provided under the OMES II contract, thus creating the possibility of an impaired objectivity OCI.⁸

The record shows that, in order to mitigate the possibility of an OCI arising as a consequence of its work on the OMES II contract, MEI stated that it would divest itself of all future work under the OMES II contract, and in addition, provided the agency with the following mitigation strategy:

When SMAS II task orders are awarded, Millennium [MEI] will assess all task orders to determine if there are requirements to review/approve any OMES II products, and if so, to determine whether the task orders are to review products that may have been developed by Millennium employees under OMES II. Using this information, we will not assign review/approval of any previously developed Millennium products on OMES II to Millennium or [deleted] employees working on SMAS II. Millennium will assign these tasks to other teammate employees, and those employees will coordinate all activities directly with the NASA task manager, and Millennium leadership will not participate in that coordination.

⁸ ARES identified a second contract, the NASA safety office contract (NSOC) that it maintains also presents a similar impaired objectivity type OCI. The record shows, however, that the agency investigated the possibility that performing the current requirement could present opportunities to review work performed by MEI under the NSOC, and concluded that such an opportunity would not arise because review of all of the work under that contract either has been completed, or will be performed by NASA employees rather than contractor personnel. AR, exh. 41, OCI Analysis and Waiver, at BATES 4539-4540.

AR, exh. 30, OCI Exchange with MEI, at BATES 3983.⁹ The record also shows that MEI stated that it would use physical and electronic firewalls to limit access to data among teaming members where the work being performed could give rise to a possible OCI, id. at 3972, and the agency's contracting officer stated that she would ensure that any OCI plan incorporated into the MEI contract would include such firewall provisions. AR, exh. 31, SMAS II Corrective Action and OCI Analysis Memorandum, at BATES 4035.

ARES notes that, in contrast to these arrangements, MEI's proposal specifically provided that its program manager would have overarching authority over all contract matters, including the management and assignment of work among subcontractors, and that he is designated as the single point of interface with the agency. See AR, exh. 17 MEI Mission Suitability Proposal at BATES 2410-2420. ARES also points out that the MEI technical approach relies on a [deleted] responsible for contract performance. Id. ARES notes as well that the MEI technical solution relies on use of a suite of software and communications tools called [deleted] a "single architecture" for the dissemination and flow of information among all members of the MEI team. See e.g., Id. at 2406.

ARES argues that MEI's mitigation strategy--which specifically contemplates the assignment of work directly to a subcontractor that will be responsible for execution and management of the task at issue without any involvement of MEI's personnel or resources, and also contemplates using firewalled electronic information sharing protocols--is directly inconsistent with its proposed technical approach. ARES argues that the agency never gave any consideration to the effect MEI's mitigation strategy would have on the success of its technical approach. ARES also notes that the agency's technical evaluation of the two firms' proposals shows that they were close under the mission suitability evaluation factor, with ARES' proposal being assigned a total score of 745 points compared to the 788 points assigned to the MEI proposal. The protester therefore argues that the agency's technical evaluation is unreasonable because it never took into consideration MEI's mitigation strategy.

We sustain this aspect of the protest. Agencies are required to consider the effect that a firm's OCI mitigation measures have on its technical approach, and whether or not such OCI mitigation measures either directly contradict a firm's proposed technical approach, or otherwise call into question the agency's original evaluation conclusions concerning the merit of a firm's proposed approach. Meridian Corp., B-246330.4, Sept. 7, 1993, 93-2 CPD ¶ 129 at 5.

First, and perhaps most important, there is nothing in the contemporaneous record to show that the agency evaluated the impact of MEI's mitigation strategy on its technical

⁹ MEI further stated that it would not assign any SMAS II work to [deleted] unless it determined that there was no possible OCI, and sought and obtained the concurrence of the SMAS II contracting officer in its conclusion. AR, exh. 30, Exchange with MEI, at BATES 3985.

approach. The agency completed its evaluation of technical proposals well before MEI submitted its mitigation strategy, and there is nothing in the record to show either that the agency evaluators meaningfully considered the impact of MEI's mitigation strategy, or that any conclusions reached by the evaluators were provided to the SSA. See AR, exh. 24, Presentation to the SSA Regarding Final Proposal Revisions, July 7, 2017.

In addition, to the extent the agency presented the SSA with materials relating to an evaluation of proposals in the wake of MEI outlining its mitigation strategy, those materials make no mention either of the particulars of MEI's mitigation strategy, or the possible impact of that strategy on the agency's evaluation of MEI's technical approach. AR, exh. 33, Presentation to the SSA on Corrective Action, December 20, 2017. While the record also includes the contracting officer's analysis of both offerors' OCI mitigation strategies, that document does not give any consideration to the possible impact of their respective mitigation strategies on their technical approaches, except to state, without elaboration, that she verified for both offerors that their proposed OCI resolutions were consistent with the entirety of their SMAS II proposals. AR, exh. 31, SMAS II Corrective Action Analysis Memorandum, at BATES 4035.

The agency's contracting officer makes various claims in response to ARES' protest on this issue. First, she contends that she met with the agency's cost and technical evaluators concerning this question. Second, she maintains that she and the evaluators assessed the impact of MEI's mitigation strategy on its proposal. However, there simply is no documentation in the contemporaneous record to support these claims. See Contracting Officer's Supplemental Statement of Facts, March 19, 2018. In the absence of such contemporaneous evidence, we have no basis to conclude that the agency gave reasoned consideration to the impact of MEI's mitigation strategy on its technical approach. L3 Unidyne, Inc., supra. In addition, there is nothing in the record to show that the SSA was aware of the fact that MEI's mitigation strategy could have had an impact on its technical approach, or that he meaningfully gave consideration to such a potential impact in making his source selection decision in the wake of MEI's mitigation strategy being presented to the agency. AR, exh. 34, Addendum to the Source Selection Statement. Under these circumstances, we sustain this aspect of the protest.¹⁰

¹⁰ In a related allegation, ARES maintains that the agency engaged in what it characterizes as "unilateral discussions" with MEI in connection with obtaining the firm's mitigation strategy, which was provided to the agency after the submission of FPRs. The record shows that both firms were afforded an opportunity to provide the agency with materials relating to their respective OCI mitigation strategies after the submission of FPRs; both firms submitted such materials; and both firms committed to segregating one or more of their respective teammates from working on certain task orders in an effort to mitigate any OCI concerns, arrangements not previously included in their respective proposals. AR, exhs. 29, 30, Exchanges with the Offerors Relating to possible OCIs. In effect, therefore, both firms were afforded an opportunity to provide the agency with information in responding to the agency's OCI concerns. Under these

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Evaluation of the MEI Cost Proposal

ARES protests the agency's evaluation of the MEI cost proposal, maintaining that the agency unreasonably made certain downward adjustments to the MEI proposal in arriving at its most probable cost estimate for the awardee. The record shows that, in arriving at its most probable cost for MEI, the agency made downward adjustments to a number of MEI's proposed direct labor rates, and also made downward adjustments to MEI's indirect costs to conform those costs to the downward adjustments made to MEI's direct labor costs. In total, NASA reduced MEI's direct labor costs by \$[deleted], and its indirect costs by \$[deleted], for a total reduction in its most probable cost of \$4,302,152. AR, exh. 32, Final Cost Evaluation Report at BATES 4041. The record further shows that the basis for the agency's adjustments was its conclusion that, because MEI proposed to hire [deleted] percent of the incumbent staff, it would incur direct labor costs that were less than what the firm proposed. *Id.* at BATES 4043. The agency therefore adjusted selected MEI direct labor rates to the actual rates currently being paid under the incumbent contract. *Id.* ARES argues that the agency's actions were unreasonable, and that it should have used MEI's proposed direct labor rates in arriving at its most probable cost estimate for MEI.

We sustain this aspect of ARES' protest. When an agency evaluates a proposal for the award of a cost-reimbursement contract, an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR §§ 15.305(a)(1), 15.404-1(d); Bart & Assocs., B-407996.5 *et al.*, Jan. 5, 2015, 2015 CPD ¶ 61 at 12. Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. Litton Sys., Inc., Amecom Division, B-275807.2, Apr. 16, 1997, 97-1 CPD ¶ 170 at 5. The FAR does contemplate the possibility of making downward adjustments to an offeror's proposed cost, FAR § 15.404-1(d)(2)(ii).¹¹ However, any such adjustment must necessarily withstand logical scrutiny.

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circumstances, there is no basis for our Office to conclude that ARES was prejudiced by the agency's actions. General Dynamics Information Technology, Inc., B-414387, B-414387.2, May 30, 2017, 2017 CPD ¶ 176 at 8 (competitive prejudice is an essential element of every viable protest, and where none is shown or otherwise evident from the record, we will not sustain a protest, even if the agency's actions arguably were improper).

¹¹ For example, in Research Analysis & Maintenance, Inc., B-410570.6, B-410570.7, July 22, 2015, 2015 CPD ¶ 239 at 12 n.7, the agency made a downward adjustment to an offeror's proposed cost because the offeror erroneously applied a "plug" amount three times rather than just once.

On the record before us, we conclude that the agency's downward adjustment to MEI's direct labor rates does not withstand logical scrutiny, and was therefore unreasonable. By extension, the agency's downward adjustment to MEI's indirect cost to account for the change in its evaluated direct labor costs also was unreasonable.

The record shows that MEI's initial proposal included [deleted] direct labor rates that the agency identified as higher than the incumbent rates under the predecessor contract. AR, exh. 8, Presentation to the SSA on Initial Proposals, at BATES 1251. In evaluating MEI's initial proposal, the record shows that, for these [deleted] labor rates, the agency made a downward cost adjustment to MEI's evaluated cost using the incumbent direct labor rates to arrive at MEI's evaluated cost. Id. The agency then engaged in discussions with MEI, and in the course of those discussions, specifically identified the [deleted] direct labor rates in question. AR, exh. 11, Correspondence with MEI Regarding Discussions, at BATES 1497. In addition, the agency provided MEI with specific information relating to the percentage by which its proposed rates varied from the rates used by the agency in its most probable cost evaluation. Id.

In responding to the agency's discussion questions, the record shows that MEI actually increased its proposed rates in [deleted] of the [deleted] labor categories identified by the agency as high. AR, exh. 32, Final Cost Evaluation Report at BATES 4039. In the remaining [deleted] labor categories, MEI made some reductions, but those reductions did not necessarily correspond to the percentages by which MEI's proposed rates were identified as high by the agency.¹² As to those remaining [deleted] categories, the record shows that the agency adjusted MEI's proposed direct rates downward still further in [deleted] of the [deleted] categories, notwithstanding MEI's proposed reduction in those direct rates. Id. The record also shows that MEI's technical proposal represented that MEI was offering a total compensation package designed to attract, motivate and retain key engineering talent--the principal types of employees to be used to perform the contract. AR, exh. 17, MEI FPR, at BATES 2471.

The record thus demonstrates that, notwithstanding the agency's advice during discussions, MEI elected to propose compensation that was higher than the amounts suggested by the agency as adequate. We therefore conclude that MEI intended, as a matter of its business strategy, to offer rates of compensation that it thought would be adequate to attract the incumbent workforce, rather than simply to match the incumbent direct rates, as the agency's evaluation concluded. We therefore find that it was unreasonable for the agency to make the downward cost adjustments to MEI's proposal for evaluation purposes, and sustain the protest on this basis as well.

RECOMMENDATION

¹² For example, the agency advised MEI that its proposed rate for [deleted] was between [deleted] and [deleted] percent high. In response to that advice during discussions, MEI reduced its proposed rate for [deleted], but by less than [deleted] percent. AR, exh. 32, Final Cost Evaluation Report at BATES 4039.

In light of the foregoing discussion, we conclude that the agency miscalculated the MEI proposal. We also conclude that those evaluation errors could have affected the agency's source selection decision, given the closeness of the technical ratings assigned by the agency, the comparative equality of their respective past performance evaluations, and the cost advantage enjoyed by ARES. We recommend that the agency reevaluate proposals and make a new source selection decision that is consistent with this decision. Finally, we recommend that the agency reimburse ARES the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d). ARES's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained in part, denied in part, and dismissed in part.

Thomas H. Armstrong
General Counsel