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Decision

Matter of: Oklahoma State University

File: B-406865

Date: September 12, 2012

Andrew M. Ihrig, Esq., Oklahoma State University, for the protester.
G. Lindsay Simmons, Esq., J. Eric Whytsell, Esq., and Katie Calogero, Esq., Jackson Kelly PLLC, for the intervenor.
Jared D. Minsk, Esq., Department of the Air Force, for the agency.
Cherie J. Owen, Esq., Glenn G. Wolcott, and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of price evaluation is denied where the record indicates that the agency performed a reasonable analysis of offerors' prices.
2. Where agency conducted discussions with both protester and awardee, identifying specific flaws in each offeror's proposal, agency's discussion questions regarding particular flaws in awardee's proposal did not constitute preferential treatment.
3. Protest of alleged organizational conflicts of interest is denied where the protester has not identified any hard facts indicating the existence, or potential existence, of a conflict.

DECISION

Oklahoma State University (OSU), of Stillwater, Oklahoma, protests the award of a contract to Applied Research Associates, Inc. (ARA) under request for proposals (RFP) No. FA9200-11-R-0031, issued by the Department of the Air Force to produce joint munitions effectiveness manuals (JMEM) tools and related publications required by the Joint Technical Coordinating Group for Munitions Effectiveness (JTTCG/ME).¹ The protester challenges the agency's price evaluation, contends that

¹ The JTTCG/ME serves as the Department of Defense's focal point for munitions effectiveness information. Agency Report (AR) Tab 3, RFP at 70.

the agency engaged in preferential treatment of the awardee, and alleges that the awardee has an organizational conflict of interest.

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

BACKGROUND

The RFP, issued on June 22, 2011, sought a contractor to produce operational weaponeering software tools and electronic publications that will provide munitions effectiveness information for air-delivered and surface-delivered nonnuclear weapons against selected surface and airborne targets. These products will be used by the armed forces of the U.S., and U.S. allies, to plan operational missions, support training and tactics development, and to support force-level analyses. CO Statement at 1. The RFP provided for the award of an indefinite-delivery/indefinite-quantity contract with a maximum ceiling of \$66 million. Award was to be made to the offeror submitting the lowest priced technically acceptable proposal, and the solicitation expressly advised offerors that “no additional credit will be given for exceeding acceptability.” RFP at 149.

Consistent with providing for award on a lowest-priced-technically-acceptable basis, the solicitation established two factors: technical² and cost/price. Id. at 150. With regard to price, the solicitation established various labor categories, and required offerors to propose “a ceiling rate for each labor category in each year.”³ AR, Tab 4, RFP Amendments, at 42; see AR, Tab 4, RFP Amendments, at 18, 43. The ceiling labor rates were to be submitted on the “EGLIN-B001” Ceiling Rate Tables that were provided with the solicitation,⁴ and the solicitation stated: “rates in excess of the ceiling rates . . . are hereby made expressly unallowable.” Id. at 22.

The RFP stated that in evaluating cost/price the agency would consider completeness, price reasonableness, realism, and total evaluated price methodology. RFP at 152. With regard to reasonableness, the solicitation stated that offerors’ proposals would be reviewed for reasonableness using the price analysis techniques described in FAR § 15.404. AR, Tab 4, RFP Amendments, at 67. With regard to realism, the RFP stated:

² The technical factor had six subfactors: (1) software development and integration of weaponeering tools; (2) JMEM data generation, analysis, and methodology development; (3) JMEM understanding; (4) personnel qualifications and staffing plan; (5) relocation/phase-in plan; and (6) past performance. Id.

³ For each labor category, the solicitation established minimum qualifications and provided the estimated number of hours that could be required.

⁴ Eglin refers to Eglin Air Force Base in Florida.

For task order 0001,^[5] CLIN 4002, and CLIN 4003,^[6] the offeror's proposal will be reviewed [in accordance with] FAR 15.404-1(d) for cost realism to determine the extent to which it reflects the offeror's technical efforts, indicates a clear understanding of the solicitation requirements, and reflects a sound approach to satisfying those requirements. A Probable Cost (PC) will be calculated for CLIN 4002, and CLIN 4003 proposal(s) that contains any cost element or elements determined to be unrealistic and will be included as part of the final analysis. Cost information supporting a cost or number of hours judged to be unrealistic associated with Task Order 0001, CLIN 4002, and CLIN 4003 proposal(s) will be quantified by the Government evaluators, to the maximum extent practicable, and included in the Task Order 0001, CLIN 4002, and CLIN 4003 for each offer. **Note: As labor and indirect rates utilized in Task Order 0001 are derived from proposed ceiling rates established at ELGIN-B001, they are not subject to cost overruns and, thus, are exempted from this realism assessment. All other cost elements (hours, travel, material, etc.) remain subject to this realism assessment.**

AR, Tab 4, RFP Amendments, at 67-68 (emphasis in original).

Initial proposals were submitted in July 2011. OSU's initial proposal was rated unacceptable under four of the technical evaluation subfactors: (1) software development and integration of weaponeering tools; (2) personnel qualifications and staffing plan; (3) JMEM data generation, analysis, and methodology development; and (4) JMEM Understanding. AR, Tab 9, Initial Evaluation Briefing to SSA, at 14. With regard to OSU's initial cost/price proposal, the evaluators found that the hours proposed for Task Order 0001 were understated, and therefore concluded that the cost/price proposed for that portion of the work was unrealistic. AR, Tab 9, Initial Evaluation Briefing to SSA, at 84-85.

With regard to ARA's proposal, the evaluators found that ARA's cost accounting standards disclosure statement did not contain a cognizant federal agency official's determination that the disclosure statement was adequate, and identified other proposal errors that needed to be addressed before ARA's proposal could be considered complete and awardable. AR, Tab 9, Initial Evaluation Briefing to SSA, at 68, 79.

⁵ Task Order 0001 was a requirement to "incorporat[e] DoD standard targeting imagery and the No Strike List into the JWS [joint weaponeering system] product for viewing, weaponeering, and exporting to targeting customers." AR, Tab 3, RFP at 77.

⁶ CLINs 4002 and 4003 were relocation CLINs. *Id.* at 6.

Based on the agency's determination that a contract could not be awarded based on initial proposals, the agency opened discussions with the offerors on November 8, 2011, sending evaluation notices to the competitive range offerors. AR, Tab 9, Initial Evaluation Briefing to SSA, at 98. The agency sent OSU eight evaluation notices regarding flaws in the firm's technical approach, and five evaluation notices regarding the firm's cost/price proposal. Contracting Officer's Statement at 8; see AR, Tab 13, Initial Discussions with OSU, at 25-64. The agency sent seven evaluation notices to ARA, six of which addressed cost/price issues, and one concerning data rights. Contracting Officer's Statement at 8; see AR, Tab 14, Initial Discussions with ARA, at 21-34. One of the evaluation notices sent to ARA addressed the lack of a written determination regarding the adequacy of ARA's disclosure statement. Id. at 32.

Both offerors submitted their responses to the evaluation notices by the November 21 due date. With regard to its disclosure statement, ARA stated that it had submitted the required paperwork to the Defense Contract Audit Agency (DCAA) and was waiting for DCAA to conclude its review. AR, Tab 17, ARA Response to Initial Evaluation Notices, at 122. On December 13, DCAA informed the agency that it expected to finish its audit of ARA's disclosure statement by December 23. CO Statement at 10.

After evaluating the offerors' responses to the first round of discussions, the agency found that OSU's proposal remained technically unacceptable. The agency therefore held telephonic discussions with OSU on November 30. CO Statement at 10; see AR, Tab 24, Telephone Questions to OSU, at 1. OSU's responses to the telephonic discussions raised an additional question, which the agency asked OSU to address via another evaluation notice sent to OSU on December 19. CO Statement at 11; see AR, Tab 24, Telephone Questions to OSU, at 6. Among other things, the December 19 evaluation notice stated that, while OSU's total proposed manpower was now consistent with the agency's estimate for adequate manning levels in the aggregate, the allocation of personnel at [deleted] appeared to be insufficient. Therefore, the agency expressed concern as to whether OSU's proposal demonstrated a full understanding of the scope and nature of the contract. OSU was requested to provide a realistic allocation of resources and to further describe its staffing approach by January 3.

On January 17, the agency concluded that OSU's proposal was technically acceptable. CO Statement at 11. However, both offerors' proposals still had outstanding issues related to price. On February 6, the Air Force sent an evaluation notice to OSU informing the firm that its price was considered to be unreasonably high. Among other things, the notice requested that "OSU should carefully consider lowering its price and explain why its price is reasonable." AR, Tab 28, Evaluation Notice to OSU Regarding Price Reasonableness, at 2. In response, the firm submitted additional documentation showing why it believed its prices were reasonable. AR, Tab 29, Response from OSU Regarding Price Reasonableness. For example, OSU stated, "In some cases . . . we chose to use a salary that was higher

than the average to ensure we were able to keep our top performers and maintain our quality product.”⁷ Id. at 2. The firm also slightly lowered its price, from \$58,118,071 to \$56,144,229. CO Statement at 10, 12. OSU submitted its response to this evaluation notice on February 8. On February 15, the Air Force was informed that ARA’s disclosure statement was deemed to be adequate. Id. at 13.

In its evaluation of revised proposals, the agency determined that both proposals were technically acceptable, but that OSU’s price of \$56,144,229 remained unreasonably high. AR, Tab 35, Pre-FPR Briefing, at 13, 84. ARA’s evaluated price of \$45,728,094 was considered to be complete, reasonable, and realistic. Id. at 71, 81. On April 30, the Air Force sent each offeror copies of the relevant briefing slides containing the above assessments and requested that final proposal revisions (FPRs) be submitted by May 3. AR, Tabs 36 & 37, Requests for FPRs. The agency also conducted a telephone conference with OSU on April 30, in which the contracting officer again informed OSU that its price was considered to be unreasonably high. AR, Tab 36, Notes of Teleconference with OSU, at 1.

Both offerors timely submitted FPRs. In its cover letter, OSU stated that the changes in its FPR were due solely to modification of the [deleted] rate. AR, Tab 39, OSU FPR, at 1.

The agency evaluated FPRs and concluded that both proposals were technically acceptable. ARA’s final evaluated price was \$45,577,247. AR, Tab 44, Final Decision Briefing to SSA, at 14. OSU’s final evaluated price was \$55,589,403. Id. The agency concluded that OSU’s cost/price remained unreasonably high. Id. at 23. Because ARA was determined to have the lowest priced technically acceptable proposal, the agency selected ARA for contract award. Id. at 29. This protest followed.

DISCUSSION

OSU essentially raises four protest grounds: (1) the agency improperly determined that ARA’s price was realistic; (2) the agency improperly determined that OSU’s price was unreasonable; (3) the agency improperly gave ARA preferential treatment in permitting it to resolve the issue with its disclosure statement; and (4) ARA was not eligible for award because it had an organizational conflict of interest. Protest at 2-6. As discussed below, we find no basis for sustaining the protest.

⁷ As noted above, the solicitation expressly advised offerors that “no additional credit will be given for exceeding [technical] acceptability.” AR, Tab 4, RFP Amendments, at 121.

Realism of Awardee's Cost/Price

OSU contends that "it will be impossible for ARA to fulfill the obligations of the contract at the cost offered." Protest at 2. More specifically, OSU challenges the realism of ARA's labor rates, maintaining that they are too low "to hire staff with the education and experience required to do the JMEM work."⁸ Id.

As noted above, the RFP advised offerors that the agency would not perform a realism assessment regarding the offerors' proposed labor and indirect rates because the proposed rates were "ceiling rates," and any costs incurred due to rates in excess of the proposed rates were specifically designated as "unallowable." AR, Tab 4, RFP Amendments, at 22, 68. Given the solicitation's clear statement that the agency was not required to perform a realism assessment of the proposed labor rates, the protester's assertion that such analysis was required fails to state a valid basis of protest and is dismissed. In any event, the record establishes that the agency did, in fact, perform an adequate realism analysis.

An agency is not generally required to perform price realism analysis with regard to fixed-rate proposals, since the risk of loss in such situations is on the contractor, see Health Net Fed. Servs., LLC, B-401652.3, B-401652.5, Nov. 4, 2009, 2009 CPD ¶ 220 at 19; nonetheless, an agency may choose to perform such analysis. In instances where price analysis is performed, the FAR contemplates various price analysis techniques, including the comparison of proposed prices to each other, to an independent government estimate, and to competitive published price lists. FAR § 15.404-1(b)(2); C.L. Price & Assocs., Inc., B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3; Comprehensive Health Servs., Inc., B-310553, Dec. 27, 2007, 2008 CPD ¶ 9 at 8. Further, we have found an agency's realism analysis regarding labor rates to be reasonable where the agency relied on information obtained from internet websites. Science Applications Int'l Corp., B-406460, B-406460.2, June 7, 2012, 2012 CPD ¶ 181 at 3-4; AdvanceMed Corp.; TrustSolutions, LLC, B-404910.4 et al., Jan. 17, 2012, 2012 CPD ¶ 25 at 16-17.

Here, the record shows that the agency first compared ARA's prices to those offered by OSU. AR, Tab 41, Comparative Analysis of Offerors, at 7; AR, Tab 43, Price Competition Memorandum, at 7; see FAR § 15.404-1(b)(2)(i) (comparison of

⁸ The purpose of a price reasonableness review is to determine whether the prices offered are too high, as opposed to too low. Beyel Brothers, Inc., B-406640, B-406640.2, July 18, 2012, 2012 CPD ¶ 211 at 4. Arguments, such as the one raised by OSU here, that an agency did not perform an appropriate analysis to determine whether prices are too low such that there may be a risk of poor performance, concern price realism. Id.; C.L. Price & Assocs., Inc., B-403476.2, Jan. 7, 2011, 2011 CPD ¶ 16 at 3.

proposed prices received in response to the solicitation). The agency also compared ARA's labor rates to those in comparable GSA Federal Supply Schedule contracts. AR, Tab 43, Price Competition Memorandum, at 7; see FAR § 15.404-1(b)(2)(iv) (comparison with competitive published price lists). Next, the agency compared ARA's price to the independent government cost estimate. AR, Tab 41, Comparative Analysis of Offerors, at 9; see FAR § 15.404-1(b)(2)(v) (comparison with independent government cost estimates). Finally, the agency compared ARA's direct labor rates with those listed on an internet website, salary.com, and specifically considered instances in which ARA's rates were lower than those in this database.⁹ See FAR § 15.404-1(b)(2)(iv) (comparison with competitive published price lists).

On this record, we find no basis to question the agency's determination that ARA's price was realistic. The mere fact that OSU believes that other price analysis techniques, such as comparison to OSU's own historical prices, would have been more accurate (or more beneficial to OSU) does not establish that the agency's price analysis was unreasonable. Accordingly, although the solicitation specifically stated that the agency would not perform a realism assessment regarding the offerors' labor rates, the agency nevertheless performed such an assessment, and we find the agency's conclusions in that regard to be reasonable.¹⁰

Disclosure Statement

Next, OSU claims that the agency improperly gave ARA preferential treatment in permitting it to resolve the issue regarding the firm's cost accounting standards disclosure statement. As set forth above, the awardee's disclosure statement initially did not contain the required determination that the statement was adequate. After determining that the initial proposals submitted by OSU and ARA were both ineligible for award, the agency determined that discussions were necessary. As a part of its discussions with ARA, the agency requested that ARA provide the relevant

⁹ For example, the agency found that the proposed rates for some administrative positions were lower than the rates in the salary.com database, but determined that this would have "an insubstantial impact" on the execution of the contract in that the differences were not significant and related primarily to lower level administrative positions. AR, Tab 41, Comparative Analysis of Offerors, at 9.

¹⁰ Since we find no basis to question the agency's determination that ARA's price was realistic, OSU's assertion that its own price was not unreasonably high is academic since, even if we agreed, OSU would still not be in line for award. While we do not generally address academic issues, we note here that OSU's justification for proposing higher rates was that it wanted "to keep [its] top performers," notwithstanding the solicitation's express direction that "no additional credit will be given for exceeding [technical] acceptability." See AR, Tab 29, Response from OSU Regarding Price Reasonableness, at 2; AR, Tab 4, RFP Amendments, at 121.

federal agency official's written determination regarding the adequacy of the firm's disclosure statement. AR, Tab 12, Initial Evaluation Notices for ARA, at 5. OSU contends that the agency's decision to allow ARA to resolve this matter evidences preferential treatment of the awardee.

In conducting discussions, offerors must be afforded equal opportunities to address the portions of their proposals that require revision, explanation, or amplification. Unisys Corp., B-406326 et al., Apr. 18, 2012, 2012 CPD ¶ 153 at 5. Nonetheless, the requirement for equal treatment does not mean that discussions with offerors must, or should, be identical. Id. To the contrary, discussions must be tailored to each offeror's own proposal. Federal Acquisition Regulation (FAR) §§ 15.306(d)(1), (e)(1); WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6. Further, for discussions to be meaningful, an agency is required to identify deficiencies in an offeror's proposal. FAR § 15.306(d)(3).

Here, the agency maintains, and we agree, that the Air Force treated both offerors fairly and equally during discussions by leading both offerors to submit additional documentation and information that would address the evaluated flaws in their respective proposals. As set forth above, the agency sent OSU eight evaluation notices regarding flaws in the firm's technical approach, and five evaluation notices regarding the firm's cost/price proposal. Contracting Officer's Statement at 5; see AR, Tab 13, Initial Discussions with OSU, at 25-64. The agency sent seven evaluation notices to ARA, six of which addressed cost/price issues, and one concerning data rights. AR, Tab 14, Initial Discussions with ARA, at 21-34. One of the evaluation notices sent to ARA addressed the lack of a written determination regarding the adequacy of ARA's disclosure statement. Id. at 32. In response, ARA stated that it had submitted the required paperwork to DCMA and was waiting for DCMA to conclude its review. AR, Tab 17, ARA Response to Initial Evaluation Notices, at 122. Based on our review of the record, we conclude that both offerors were afforded equal opportunities to address the portions of their proposals that required revision, explanation, or amplification. Accordingly, we find nothing improper in the agency's decision to allow ARA to address flaws in its proposal, including the disclosure statement requirements.¹¹

¹¹ Similarly, OSU asserts that the agency improperly delayed the award to provide preferential treatment to ARA. Protest at 4-5. We find this allegation equally without merit. The agency opened discussions with the offerors via letters on November 8, 2011 and conducted ongoing discussions with OSU until February 3, 2012. AR at 21. On February 15, DCMA reported to the agency that ARA's disclosure statement was deemed to be adequate. The record here does not support the protester's contention that the agency delayed award of the contract to afford preferential treatment to ARA. Rather, it appears that the agency worked diligently to assist both offerors in addressing the evaluated flaws in their proposals.

Organizational Conflicts of Interest

Finally, the protester contends that ARA has an organizational conflict of interest (OCI) which renders it ineligible for award. Protest at 5; Protester's Comments at 2. In this regard, OSU contends that the agency "has developed a sole source relationship with ARA to the exclusion of other contractors," and that "[i]t is because of these sole source, non-competitive, high-priced relationships that ARA was able to offer unreasonably low prices for the JMEM contract." Protest at 5 (citing several sole source contracts awarded to ARA); see Protester's Comments at 2-4.

The FAR requires that contracting officials avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent an unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.504(a), 9.505. The responsibility for determining whether an actual or apparent conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency. Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. The situations in which OCIs arise, as described in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to information, and impaired objectivity. Organizational Strategies, Inc., B-406155, Feb. 17, 2012, 2012 CPD ¶ 100 at 5.

We review the reasonableness of a contracting officer's OCI investigation and, where an agency has given meaningful consideration to whether a significant conflict of interest exists, we will not substitute our judgment for the agency's, absent clear evidence that the agency's conclusion is unreasonable. See TeleCommunication Sys. Inc., B-404496.3, Oct. 26, 2011, 2011 CPD ¶ 229 at 3-4; PCCP Constructors, JV; Bechtel Infrastructure Corp., B-405036 et al., Aug. 4, 2011, 2011 CPD ¶ 156 at 17. A protester must identify hard facts that indicate the existence or potential existence of a conflict; mere inference or suspicion of an actual or potential conflict is not enough. TeleCommunication Sys. Inc., supra, at 3; see Turner Constr. Co., Inc. v. United States, 645 F.3d 1377, 1387 (Fed. Cir. 2011); PAI Corp. v. United States, 614 F.3d 1347, 1352 (Fed. Cir. 2010). The identification of conflicts of interest are fact-specific inquiries that require the exercise of considerable discretion. Axiom Res. Mgmt., Inc. v. United States, 564 F.3d 1374, 1382 (Fed. Cir. 2009).

Here, the record reflects that, upon receipt of OSU's protest, the agency performed an investigation of the protester's allegations and an analysis of any potential conflicts of interest. AR at 23. For example, OSU alleged that the source selection evaluation team (SSET) lead had been the program manager for another contract being performed by ARA involving [deleted]. Protest at 5. The Air Force interviewed agency employees who were involved in solicitation drafting to determine whether any non-governmental personnel had any influence in the drafting of the RFP, and concluded they had not. AR, Tab 47, OCI Evaluation at 1-2. The agency further determined that the SSET lead had left [deleted] position as [deleted] prior to

[deleted] involvement in evaluating proposals here.¹² The agency also investigated the possibility of unequal access to information. The agency's investigation showed that Air Force employees took precautions to prevent the disclosure of source selection sensitive information. Id. at 4. For example, evaluators met in a secured vault to conduct meetings and prepare documents. Only computers not connected to any networks were used, and all electronic documents were stored on a portable computer drive that was secured in a locked container that only team members could access. Id. The agency's interviews and investigation indicated that no outside parties were able to obtain source selection sensitive information. Id.

Although the protester's assertions of OCIs are vague and difficult to categorize,¹³ the record here indicates that the agency performed a thorough investigation of OSU's allegations and reasonably concluded that no OCI's were apparent. In this regard, OSU has failed to identify hard facts that indicate the existence, or potential existence, of a conflict and OSU's mere inferences and speculation are insufficient to sustain the protest. Accordingly, this protest ground is denied.¹⁴

The protest is dismissed in part and denied in part.

Lynn H. Gibson
General Counsel

¹² The agency also notes, and we agree, that the mere fact that an agency evaluator served as a program manager on another project performed by one of the offerors does not create a conflict of interest. AR at 24.

¹³ For example, the protester characterizes its unsupported allegations of bias, bad faith, and preferential treatment as "conflicts of interest."

¹⁴ In its protest submissions, OSU has raised arguments in addition to, or variations of, those specifically discussed above. For example, OSU protests the "process used by the Air Force to apply redaction to the original AF documents," complaining that the process of preparing redacted versions of documents "appears not to be reviewed by anyone in the chain of command," which OSU claims leads to "unmanaged redaction and a lackluster review of the bid process/protest as a whole." Protester's Comments at 10-11. OSU's allegations regarding the agency's redaction of what it believes to be source selection sensitive information from the public versions of documents fails to state a valid basis for protest. We have considered all of OSU's various arguments and allegations and find no basis to sustain the protest.