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Decision

Matter of: MicroTechnologies, LLC

File: B-413091; B-413091.2

Date: August 11, 2016

Gregory S. Jacobs, Esq., Steven A. Pozefsky, Esq., and Erin L. Felix, Esq., Polsinelli PC, for the protester.

John S. Pachter, Esq., Jonathan D. Shaffer, Esq., and Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, for BTAS, Inc., the intervenor.

Lt. Col. Christine C. Piper, Michael J. Farr, Esq., Graeme S. Henderson, Esq., and Shandra J. Kotzun, Esq., Department of the Air Force, for the agency.

Jonathan L. Kang, Esq., and Kenneth E. Patton, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation of the awardee's proposed professional employee compensation plan is sustained where the evaluation was not adequately documented, the data relied upon by the agency did not provide a meaningful basis to evaluate the awardee's proposed compensation, and the agency acknowledges that it mistakenly relied upon incorrect data from a salary survey.

2. Protest that discussions with the protester were not meaningful because the agency did not inform the protester that its proposed price was higher than the awardee's is denied where the agency did not find the protester's proposed price to be unreasonable or otherwise unacceptable.

DECISION

MicroTechnologies, LLC, of Vienna, Virginia, a small business, protests the issuance of a task order to BTAS, Inc., of Beavercreek, Ohio, also a small business, by the Department of the Air Force under request for proposals (RFP) No. F1AF1C5223A001 for information technology support services. MicroTechnologies argues that the Air Force unreasonably evaluated BTAS's proposed professional compensation plan, and failed to conduct meaningful discussions with the protester.

We sustain the protest.

BACKGROUND

The solicitation was issued on November 29, 2015, and sought proposals to provide information technology services in support of the Air Force Personnel Operations Activity, which is located at Joint Base San Antonio in Randolph, Texas. The competition was limited to small business firms that hold a NETCENTS-2 indefinite-delivery, indefinite-quantity (ID/IQ) contract. Contracting Officer's Statement (COS) at 3. The RFP anticipated the issuance of a fixed-price task order with a transition period of 1 month, a base period of 11 months, and two 1-year options. RFP at 7.

The RFP provided for award to the offeror¹ that submitted a technically-acceptable proposal with the lowest price and a realistic employee compensation plan (ECP). RFP at 7. Offerors' proposals were to be evaluated for acceptability under the following technical evaluation subfactors: (1) staffing plan, (2) transition plan, and (3) quality control plan. Id. at 3-4. For the ECP evaluation, the solicitation stated that the plans "will be evaluated for realism," id. at 6, and directed offerors to submit their plans as follows:

The Offeror and first-tier subcontractors shall provide an Employee Compensation Plan (ECP) [in accordance with] FAR [(Federal Acquisition Regulation)] 52.222-46. The Offeror and first-tier subcontractors shall provide company policies and procedures that explain how employee salary is determined and the applicable fringe benefits such as holidays, healthcare, pension, 401K, etc. The Offeror and first-tier subcontractors shall support the ECP by providing unloaded labor rates² for each labor category proposed.

RFP at 4.

The Air Force received proposals from five offerors, including MicroTechnologies and BTAS, by the closing date of December 28. COS at 8. The agency found that all offerors' initial proposals were unacceptable under the technical evaluation factor. Id.; Agency Report (AR), Tab 13, Price Evaluation Memorandum and Award Decision (Award Decision), at 4. The agency conducted discussions with all five

¹ Although firms that compete for task and delivery orders under multiple award ID/IQ contracts are commonly referred to as "vendors," our decision uses the term "offeror" to be consistent with the record provided by the agency.

² The record, and our decision, uses the terms loaded/burdened and unloaded/unburdened labor rates interchangeably. All labor rates cited herein are hourly rates.

offerors and requested revised proposals. COS at 9; AR, Tab 13, Award Decision, at 4. The agency found that four of the revised proposals were acceptable under the technical evaluation factor. AR, Tab 13, Award Decision, at 5. The prices for those four proposals were as follows:

| Offeror | Price |
|-------------------|--------------|
| BTAS | \$13,189,663 |
| MicroTechnologies | \$18,025,128 |
| Offeror 3 | \$20,706,075 |
| Offeror 4 | \$21,506,408 |

AR, Tab 13, Award Decision, at 7.

The Air Force's evaluation of offerors' ECPs was based on the terms of FAR clause 52.222-46 which, as discussed in further detail below, requires offerors to propose realistic compensation for professional employees to ensure the "quality and stability of the work force to be employed on [a] contract." FAR clause 52.222-46(c). The agency's evaluation identified the labor categories proposed by each offeror that were subject to the Service Contract Act (SCA), and the professional labor categories that were exempt under the SCA. AR, Tab 13, Award Decision, at 9, 13, 16-17, 39. For the SCA-covered labor categories, the agency verified that the labor rates were above the SCA-mandated minimums. *Id.* at 9, 15, 18-19. For the professional labor categories, the agency compared each offeror's burdened labor rates to the incumbent contractor's rates.³ *Id.* at 9, 14, 17, 20. As discussed in further detail below, the burdened labor rates included salary and fringe benefits, and indirect costs such as overhead, fee/profit, and general and administrative (G&A).

For BTAS, the agency found that [DELETED] of the offeror's [DELETED] proposed burdened rates were lower than those of the incumbent contractor. *Id.* at 9. For that reason, the agency conducted two additional analyses which compared BTAS's proposed rates to those of the other three offerors with acceptable proposals, and to survey data for the local labor market from salary.com.⁴ *Id.* at 9-10. Based on these two analyses, the agency concluded that "the compensation levels proposed by BTAS for professional labor categories are realistic because they are higher or

³ The incumbent contractor, Lockheed Martin, was a large business and was therefore not eligible to compete for the task order. *See* AR, Tab 13, Award Decision, at 2.

⁴ Salary.com is a commercial service that tracks salary data for various labor positions throughout U.S. labor markets. *See* www.salary.com (last visited Aug. 2, 2016).

fall within the acceptable compensation levels for similar labor categories performing similar work in the same geographic performance area by the business companies similar in size.” Id. at 10-11. The agency also found the ECPs for MicroTechnologies, Offeror 3, and Offeror 4 were realistic. Id. at 16, 19, 21.

Based on these findings, the SSA selected BTAS’s proposal for issuance of the task order as the offeror that submitted the lowest-priced, technically-acceptable proposal with a realistic ECP. Id. at 23. The agency notified the offerors of the award decision on April 29. This protest followed.⁵

DISCUSSION

MicroTechnologies challenges the Air Force’s issuance of the task order to BTAS for two primary reasons: (1) the agency did not reasonably evaluate the realism of the awardee’s proposed ECP, and (2) the agency failed to conduct meaningful discussions with the protester regarding its proposed price. For the reasons discussed below, we sustain the protest regarding the agency’s evaluation of BTAS’s proposed ECP, and deny the protester’s arguments regarding discussions.⁶

The evaluation of an offeror’s proposal is a matter within the agency’s discretion. National Gov’t Servs., Inc., B-401063.2 et al., Jan. 30, 2012, 2012 CPD ¶ 59 at 5 (FAR part 15 negotiated procurement); Serco Inc., B-406061.1, B-406061.2, Feb. 1, 2012, 2012 CPD ¶ 61 at 9 (task order competition under FAR subpart 16.5). An offeror’s disagreement with the agency’s judgment, without more, is insufficient to establish that the agency acted unreasonably. STG, Inc., B-405101.3 et al., Jan. 12, 2012, 2012 CPD ¶ 48 at 7. While we will not substitute our judgment for

⁵ The awarded value of the task order at issue exceeds \$10 million. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award ID/IQ contracts. 10 U.S.C. § 2304(e)(1)(B).

⁶ MicroTechnologies also raises other collateral arguments. Although we do not address every argument in detail, we have reviewed each issue and find no additional bases to sustain the protest. For example, the protester argues that the agency failed to reasonably evaluate the realism of BTAS’s overall price and labor rates. Protester’s Comments (June 13, 2016) at 10-12. Aside from the ECP clause, however, the RFP did not provide for the evaluation of the realism of offerors’ proposed prices. For this reason, it would have been improper for the agency to perform a price realism analysis in addition to the ECP evaluation. See J.A. Farrington Janitorial Servs., B-296875, Oct. 18, 2005, 2005 CPD ¶ 187 at 4; Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 4-6.

that of the agency, we will question the agency's conclusions where they are inconsistent with the solicitation criteria and applicable procurement statutes and regulations, undocumented, or not reasonably based. Public Commc'ns Servs., Inc., B-400058, B-400058.3, July 18, 2008, 2009 CPD ¶ 154 at 17.

In reviewing an agency's evaluation, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties' arguments, explanations, and any hearing testimony. Remington Arms Co., Inc., B-297374, B-297374.2, Jan. 12, 2006, 2006 CPD ¶ 32 at 10. While we accord greater weight to contemporaneous source selection materials as opposed to judgments made in response to protest contentions, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions--so long as those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16 (citing Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15).

Evaluation of Professional Compensation

MicroTechnologies argues that the Air Force unreasonably concluded that BTAS's proposed ECP was realistic. The protester raises four primary arguments: (1) the agency's analysis was improperly limited to BTAS's professional labor categories; (2) the agency basis for "mapping"⁷ BTAS's proposed labor categories to those proposed by the other offerors was not adequately documented; (3) the agency improperly relied upon comparisons of offerors' proposed fully-burdened rates, and therefore did not have a reasonable basis to evaluate the realism of the awardee's proposed compensation and fringe rates, as required by FAR clause 52.222-46, and (4) the agency's comparison of BTAS's proposed labor rates to a salary.com survey was unreasonable because the agency evaluator mistakenly used the wrong data, resulting in a comparison of dissimilar rates. For the reasons discussed below, we find no merit to the protester's first argument, but agree that with the protester's other three arguments and sustain the protest on these bases.

The RFP required offerors to propose ECPs in accordance with FAR clause 52.222-46. RFP at 4. This FAR clause states as follows:

⁷ As used herein, and as discussed further below, the term mapping refers to the agency's finding that a labor category proposed by one offeror is comparable to a category proposed by another offeror based on the nature of the work to be performed and the requirements for the position. See AR, Tab 13, Award Decision, at 10; Supp. Agency Response (July 26, 2016) at 3.

(a) Recompensation of service contracts may in some cases result in lowering the compensation (salaries and fringe benefits) paid or furnished professional employees. This lowering can be detrimental in obtaining the quality of professional services needed for adequate contract performance. It is therefore in the Government's best interest that professional employees, as defined in 29 CFR 541, be properly and fairly compensated. As part of their proposals, offerors will submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract. The Government will evaluate the plan to assure that it reflects a sound management approach and understanding of the contract requirements. This evaluation will include an assessment of the offeror's ability to provide uninterrupted high-quality work. The professional compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation. Supporting information will include data, such as recognized national and regional compensation surveys and studies of professional, public and private organizations, used in establishing the total compensation structure.

* * * * *

(c) The Government is concerned with the quality and stability of the work force to be employed on this contract. Professional compensation that is unrealistically low or not in reasonable relationship to the various job categories, since it may impair the Contractor's ability to attract and retain competent professional service employees, may be viewed as evidence of failure to comprehend the complexity of the contract requirements.

(d) Failure to comply with these provisions may constitute sufficient cause to justify rejection of a proposal.

RFP clause 52.222-46 (emphasis added).

As our Office has held, the purpose of a review of compensation for professional employees under FAR clause 52.222-46 is to evaluate whether offerors will obtain and keep the quality of professional services needed for adequate contract performance, and to evaluate whether offerors understand the nature of the work to be performed. ELS Inc., B-283236, B-283236.2, Oct. 25, 1999, 99-2 CPD ¶ 92 at 10-11. In the context of fixed-price labor-hour contracts, our Office has held that this FAR clause anticipates an evaluation of whether an awardee understands the contract requirements, and has proposed a compensation plan appropriate for those requirements--in effect, a price realism evaluation regarding an offeror's

proposed compensation. See Apptis Inc., B-403249, B-403249.3, Sept. 30, 2010, 2010 CPD ¶ 237 at 9. The depth of an agency's price realism analysis is a matter within the sound exercise of the agency's discretion. Navistar Def., LLC; BAE Sys., Tactical Vehicles Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 CPD ¶ 258 at 17. In reviewing protests challenging price realism evaluations, our focus is on whether the agency acted reasonably and in a manner consistent with the solicitation's requirements. General Dynamics One Source, LLC; Unisys Corp., B-400340.5, B-400340.6, Jan. 20, 2010, 2010 CPD ¶ 45 at 9.

As discussed above, the Air Force's evaluation of BTAS's ECP found that the burdened labor rates for [DELETED] of the awardee's [DELETED] proposed labor categories were lower than those of comparable categories for the incumbent contractor. AR, Tab 13, Award Decision, at 9. Specifically, the [DELETED] labor categories were between [DELETED] percent and [DELETED] percent lower than the incumbent's rates. Id. Based on this finding, the agency performed two additional analyses that examined the realism of the rates for the awardee's [DELETED] professional categories. Id. at 9-10. The first analysis mapped the awardee's [DELETED] professional labor categories to comparable labor categories proposed by the three other offerors that submitted acceptable proposals, and then compared the burdened labor rates for those categories. Id. at 10.

The second analysis compared the awardee's burdened labor rates to rates for comparable labor categories identified from salary.com. Id. The agency concluded that the analyses demonstrated that although "BTAS[s] compensation levels for professional labor categories are lower than the current contractor's compensation levels[] BTAS[s] proposed labor rates are not unduly low based on the above comparable market data analysis." Id. at 12. For these reasons, the agency stated that "it is believed that the offeror will be able to provide uninterrupted high-quality work, as well as recruit and retain necessary workforce." Id.

Evaluation of Professional Labor Categories

MicroTechnologies first argues that the Air Force's evaluation of BTAS's ECP was unreasonable because the agency considered only the [DELETED] labor categories that the agency identified as professional, i.e., exempt under the SCA, and did not consider the remaining [DELETED] labor categories. The protester argues that this analysis was improper because the solicitation stated that the agency would evaluate employee compensation, and did not specifically state that the evaluation would be limited to professional labor categories. In this regard, the protester notes that the RFP stated that "[t]he Offeror and first-tier subcontractors shall support the ECP by providing unloaded labor rates for each labor category proposed." RFP at 4.

The Air Force argues that it properly limited the evaluation to professional labor categories because the RFP provided that offerors were required to propose an

“Employee Compensation Plan (ECP) [in accordance with] FAR 52.222-46.” See Memorandum of Law (MOL) at 5; RFP at 4. This FAR clause is titled “Evaluation of Compensation for Professional Employees,” and specifically provides that it is “in the Government’s best interest that professional employees, as defined in 29 CFR 541, be properly and fairly compensated.” FAR clause 52.222-46(1). As our Office has recognized, this clause applies only to evaluation of professional employees. People’s Accident Info. Serv., Inc. d/b/a Securit, B-404211, Jan. 18, 2011, 2012 CPD ¶ 82 at 5 (protest alleging that the agency did not evaluate proposals in accordance with FAR clause 52.222-46, which was incorporated into the solicitation, was dismissed because the solicitation did not include any professional labor categories).

The protester does not argue that the agency’s categorization of BTAS’s proposed labor categories as professional was unreasonable or inconsistent with the requirements of 29 C.F.R. subpart 541.3; rather, the protester argues that the RFP’s language regarding the ECP evaluation did not specify that the agency would consider only professional employees. In effect, the protester argues that the general direction in the RFP to “provid[e] unloaded labor rates for each labor category proposed,” RFP at 4, meant that the agency intended to apply the provisions of the Evaluation of Compensation for Professional Employees clause to both professional and non-professional labor categories.

Even if the protester’s interpretation of the RFP were reasonable, it would at best establish a conflict between the RFP’s direction to provide unloaded rates for each labor category, and the plain language of FAR clause 52.222-46, which provides for evaluation of only professional labor categories--upon which the agency’s evaluation relied. Such a conflict would give rise to an ambiguity in the solicitation. Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8 (an ambiguity exists where two or more reasonable interpretations of the solicitation are possible). However, we conclude that any such conflict is obvious, and therefore constituted a patent ambiguity that should have been challenged prior to the time for receipt of initial proposals. See Allied Tech. Grp. Inc., B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 9 n.10 (solicitation provisions in direct conflict demonstrate a patent ambiguity). For this reason, we conclude that even if the protester’s interpretation of the RFP were reasonable, such a challenge based on that interpretation is an untimely challenge to a solicitation ambiguity which we will not consider further. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1).

Mapping of Comparable Labor Categories

Next, MicroTechnologies argues that the Air Force’s evaluation of BTAS’s ECP was unreasonable with regard to the [DELETED] professional labor categories proposed by the awardee and how they were “mapped” to the labor categories proposed by the other offerors for purposes of comparison. We agree.

As discussed above, the agency concluded that the awardee's proposed professional labor categories were lower than the incumbent's comparable rates, and concluded that additional analyses were required. AR, Tab 13, Award Decision, at 9. The agency mapped the awardee's [DELETED] professional labor categories to those of MicroTechnologies, Offeror 3, and Offeror 4, and then compared the rates. Id. at 10. The agency found that the awardee's rates were between the highest and lowest rates proposed by the other offerors for [DELETED] of [DELETED] categories, and were lower than all other offerors for [DELETED] categories. Id.

MicroTechnologies argues that the Air Force did not explain the basis for its conclusion that the rates proposed by BTAS were properly mapped to those of the other offerors. The protester argues that for two labor categories, [DELETED] and [DELETED], the agency's mapping relied upon labor categories from other offerors with a wide range of rates--from \$[DELETED] to \$[DELETED] for the first labor category, and from \$[DELETED] to \$[DELETED] for the second labor category. See AR, Tab 13, Award Decision, at 9-10. The protester argues that the wide range of rates demonstrates that the agency did not have a reasonable basis to conclude that the labor categories were comparable. Our Office requested that the Air Force provide a supplemental briefing that explained how the agency's mapping analysis concluded that the labor categories identified in the ECP evaluation were comparable.

The Air Force's response to our request for information included a chart detailing the two BTAS professional labor categories at issue in this dispute--i.e., [DELETED]--and the so-called comparable categories used by other offerors. Supp. Agency Response (July 26, 2016) at 5. The agency explained that it concluded these categories were comparable using a mapping analysis that considered the "labor category descriptions, required education, required experience, certifications, security clearances, and other defining characteristics of the labor categories." Supp. Agency Response (July 26, 2016) at 3. As the protester notes, however, the agency's response to our request for information substituted new labor categories and provided new information that was not found in the contemporaneous mapping analysis prepared at the time of award. The changes between the contemporaneous analysis, and the response prepared during the course of the protest are identified in bold in the chart below:

| BTAS Labor Category | Mapping in Award Decision | Mapping in Supp. Agency Response (July 26, 2016) |
|----------------------------|----------------------------------|---|
| [DELETED] | MicroTechnologies: [DELETED] | MicroTechnologies: [DELETED] |
| | Offeror 3: [DELETED] | Offeror 3: [DELETED] |
| | Offeror 4: [DELETED] | Offeror 4: [DELETED] |
| [DELETED] | MicroTechnologies: [DELETED] | MicroTechnologies: [DELETED] |
| | Offeror 3: [DELETED] | Offeror 3: [DELETED] |
| | Offeror 4: [DELETED] | Offeror 4: [DELETED] |

Id. at 5.

As the chart above shows, the Air Force’s response to our Office’s questions cited three new labor categories not found in the contemporaneous evaluation that supported the award decision: (1) Offeror 3 - [DELETED], (2) Offeror 4 - [DELETED], and (3) Offeror 4 - [DELETED].⁸ The agency did not explain the basis for these changes. Further, neither the agency’s response to our Office’s questions, nor the contemporaneous record in the award decision, shows the rates for these new positions.

Agencies are required to adequately document their evaluations, and, where an agency fails to do so, it runs the risk that our Office will be unable to determine whether the agency’s evaluation was reasonable. DKW Commc’ns, Inc., B-411182, B-411182.2, June 9, 2015, 2015 CPD ¶ 178 at 9. Additionally, where an agency’s response to a protest relies on new post-hoc analyses and does not explain why the new analyses are consistent with the contemporaneous record, we similarly cannot find the evaluation reasonable. Boeing Sikorsky Aircraft Support, supra. Here, in light of the agency’s failure to provide documentation showing the basis for its contemporaneous evaluation, and the agency’s unsupported substitution of a new evaluation, we cannot find the agency’s evaluation to be reasonable.

⁸ It is not clear from the Air Force’s response whether the labor categories cited for Offeror 4 regarding the first labor category are the same: “[DELETED]” vs. “[DELETED].” See Supp. Agency Response (July 26, 2016) at 5. In light of the clear differences between the titles of the other two labor categories cited above, and the absence of an explanation for these differences from the agency, we need not resolve whether this difference reflects different labor categories.

Evaluation of Burdened Labor Rates

Next, MicroTechnologies argues that the Air Force's evaluation of BTAS's ECP relied upon an improper comparison of offerors' proposed burdened rates, rather than a comparison of their proposed compensation and fringe benefits, as required by FAR clause 52.222-46. The protester contends that the agency's use of burdened rates to evaluate the awardee's ECP was improper because the burdened rates include cost elements unrelated to compensation and fringe benefits. We agree.

As discussed above, FAR clause 52.222-46 requires offerors to "submit a total compensation plan setting forth salaries and fringe benefits proposed for the professional employees who will work under the contract." FAR clause 52.222-46(a). The clause states that "[t]he professional compensation proposed will be considered in terms of its impact upon recruiting and retention, its realism, and its consistency with a total plan for compensation." Id.

The RFP required offerors to identify their unburdened rates. RFP at 4. BTAS provided annual salary and "approximate value-fringe benefit" information for all of its proposed labor categories. AR, Tab 7, BTAS Revised Price Proposal, at 6. With regard to the comparison of BTAS's and the other offerors' rates, the record shows that the agency relied upon burdened rates. AR, Tab 13, Award Decision, at 10. Although the agency does not provide documentation that explains the components of each offeror's fully-burdened rates, they were presumably cost elements such as, in the case of MicroTechnologies, salaries, fringe, overhead, G&A, and fee/profit. See AR, Tab 8, MicroTechnologies Initial Proposal, at 30. MicroTechnologies argues that because the burdened rates reflect the overall amount to be paid by the government to the contractor for an hour of labor, the burdened rates do not show the actual compensation and fringe benefits to be paid to the employee.

Our Office's decisions have not specifically addressed the issue raised by the protester here: whether agencies may rely upon burdened labor rates for purposes of assessing whether the proposed compensation and fringe benefits for professional employees is realistic in connection with FAR clause 52.222-46. The Air Force argues that its evaluation reasonably relied upon the overall burdened rates for its evaluation of professional compensation, and contends that the decisions of our Office endorse this evaluation. See MOL at 7-8 (citing Apptis Inc., supra; ENMAX Corp., B-281965, May 12, 1999, 99-1 CPD ¶ 102; The Centech Grp., Inc., B-278715, B-278715.2, Mar. 5, 1998, 98-1 CPD ¶ 108). For the reasons discussed below, we do not agree with the agency.

Our Office has held that where a solicitation expressly provides that offerors shall provide only burdened labor rates, and advised that those rates would be compared to Bureau of Labor Standards rates, there is no basis to sustain a protest challenging the agency's reliance on the burdened rates for purposes of assessing

the realism of professional compensation under FAR clause 52.222-46. See ENMAX Corp., supra, at 9-10. In essence, our decision in ENMAX Corp. held that the protester had no basis to expect the agency would perform any analysis other than what was set forth in the solicitation. See id. In other decisions, we have held that consideration of burdened rates was reasonable where the protester challenged only the realism of the burdened rates, and did not argue that consideration of the burdened rates was unreasonable. See Apptis Inc., supra, at 10-11.⁹

Where our Office has specifically addressed the issue of burdened and unburdened labor rates, we have held that challenges to an agency's reliance on burdened rates in the evaluation of professional compensation did not provide a basis to sustain a protest where the agency also considered salary and fringe rate information. See Signal Corp., B-275502.3, B-275502.4, July 6, 1998, 98-2 CPD ¶ 86 at 9 n.13; BE, Inc.; PAI Corp., B-277978, B-277978.2, Dec. 16, 1997, 98-1 CPD ¶ 80 at 3-4; DIGICON Corp., B-275060, B-275060.2, Jan. 21, 1997, 97-1 CPD ¶ 64 at 5.

We conclude that none of the decisions by our Office stand for the proposition argued by the agency: that where an agency includes FAR clause 52.222-46 and requests unburdened rates, the agency may base its evaluation of professional compensation on burdened labor rates that do not provide insight into the actual salary and fringe benefits to be paid to those employees. RFP at 4. Because the burdened rates evaluated by the agency included cost elements that are not provided to employees in the form of salary or benefits, the use of burdened rates could have led to a misleading conclusion regarding the realism of the awardee's professional compensation.¹⁰ On this record, we cannot conclude that the agency's evaluation was reasonable.

⁹ Additionally, although our decision in The Centech Grp., Inc. noted that the solicitation there included FAR clause 52.222-46, our decision of the merits of the cost realism evaluation did not separately address the evaluation of professional compensation under that clause. See The Centech Grp., Inc., supra, at 5-7.

¹⁰ The Air Force did not provide information concerning the breakdown of BTAS's burdened labor rates, but provided a revised price proposal showing the offeror's salary and fringe benefit information. AR, Tab 7, BTAS Revised Price Proposal, at 6. The agency did not provide the price proposals of the other offerors in its response to the protest.

Mistake Regarding Salary.com Data

MicroTechnologies argues that the Air Force's comparison of BTAS's proposed labor rates to survey data from salary.com was flawed because the analysis resulted in comparison of dissimilar elements. We agree.

The salary.com survey data cited by the agency reflected "comparable labor categories with similar labor category descriptions and associate compensation levels for these labor categories paid by other employers in the place of anticipated performance, [Texas] (salary.com).” AR, Tab 13, Award Decision, at 10. The agency's analysis found that BTAS's proposed burdened rates for the [DELETED] professional labor categories were [DELETED] percent higher, respectively, than comparable labor category rates in the salary.com survey data. Id. In response to the protest, however, the Air Force concedes that the comparison was flawed because the agency's price evaluator "inadvertently used the Salary.com unburdened median annual salary amounts in making that comparison" to BTAS's burdened rates. Supp. Agency Response (July 26, 2016) at 8. The agency explained the price evaluator's error as follows: "[The evaluator] believed Salary.com's 'salary' tab represented the annual 'burdened' salary. In fact, the 'salary' tab was Salary.com's unburdened median salary." Id.

As the protester notes, this flawed comparison was not an "apples to apples" comparison of BTAS's proposed compensation to the salary.com compensation survey data. Instead, it resulted in a comparison of BTAS's proposed salary, fringe, and indirect costs (e.g., fee/profit, overhead, G&A) to the salary.com compensation survey data that reflected only salary information. For example, the agency's contemporaneous analysis found that BTAS's proposed burdened rate for the [DELETED] labor category was \$[DELETED], which was [DELETED] percent higher than the \$[DELETED] rate identified in the salary.com survey. AR, Tab 13, Award Decision, at 10. The agency's response to our Office's questions stated that inclusion of salary, bonus, and benefits yields a salary.com rate of \$[DELETED]-- which shows that BTAS's proposed rate is [DELETED] percent lower, rather than [DELETED] percent higher than the survey data. Supp. Agency Response (July 26, 2016) at 7. This comparison, however, is further flawed as it continues to compare the burdened rate for BTAS to salary.com survey data that do not include indirect costs such as overhead and G&A.¹¹ For these reasons, we find the agency's evaluation unreasonable.

¹¹ MicroTechnologies contends that a comparison of BTAS's and the salary.com survey data for unburdened rates (i.e., the data relied upon by the agency) shows that BTAS's rates were [DELETED] higher, [DELETED] and [DELETED] percent lower than the survey data. Protester's Comments (June 13, 2016) at 5. The agency did not specifically dispute these calculations. We do not find that the protester's calculations are necessarily the correct basis for evaluating the realism
(continued...)

In sum, the record shows that the Air Force's evaluation of BTAS's ECP relied on a mapping of labor categories that was not adequately documented, was based on an unreasonable comparison of offerors' burdened labor rates, and relied upon an admitted error in comparing the awardee's burdened labor rates to unburdened labor rates in a salary survey. Based on these flaws, we conclude that the agency's evaluation was unreasonable and sustain the protest.

Misleading Discussions

Finally, MicroTechnologies argues that the Air Force failed to provide it with an opportunity for meaningful discussions. Specifically, the protester argues that the agency misled it during discussions by failing to advise the protester that its proposed price was higher than the awardee's proposed price. We find no basis to sustain the protest.

The regulations concerning discussions under FAR part 15, which pertain to negotiated procurements, do not, as a general rule, govern task and delivery order competitions conducted under FAR subpart 16.5, such as the procurement here. See NCI Info. Sys. Inc., B-405589, Nov. 23, 2011, 2011 CPD ¶ 269 at 9. In this regard, FAR § 16.505 does not establish specific requirements for discussions in a task order competition; nonetheless, when exchanges with the agency occur in task order competitions, they must be fair and not misleading. CGI Fed. Inc., B-403570 et al., Nov. 5, 2010, 2011 CPD ¶ 32 at 9. In analogous decisions under FAR part 15, we have held that an agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency's actual concerns, or otherwise misinform the offeror concerning a problem with its proposal. Refinery Assocs. of Texas, Inc., B-410911.2, Mar. 18, 2015, 2015 CPD ¶ 116 at 6.

Our Office has also held, in analogous decisions regarding FAR part 15 procurements, that where an offeror's price is high in comparison to competitors' prices or the government estimate, the agency may, but is not required to, address the matter during discussions. IAP World Servs., Inc., B-297084, Nov. 1, 2005, 2005 CPD ¶ 199 at 4. That is, there is no requirement that an agency inform an offeror during discussions that its price may be too high where the offeror's price is

(...continued)

of the awardee's proposed ECP. For example, the protester's analysis relies solely on the compensation amounts, and does not appear to include fringe benefits. Nonetheless, we agree with the protester that the agency's analysis does not reflect an "apples to apples" comparison that could support finding BTAS's proposed ECP realistic.

not considered excessive or unreasonable. Southeastern Kidney Council, B-412538, Mar. 17, 2016, 2016 CPD ¶ 90 at 4. Thus, if an offeror's price is not so high as to be unreasonable and unacceptable for contract award, the agency reasonably may conduct discussions without advising the offeror that its prices are not competitive. IAP World Servs., Inc., supra.

Here, MicroTechnologies argues that the Air Force failed to provide for meaningful discussions because the agency did not specifically advise the protester that its price was higher than BTAS's. The protester contends that because the RFP provided for award to the offeror that submitted the lowest-priced, technically-acceptable proposal, the agency was obligated to advise the protester that its price was not the lowest. As discussed above, however, our Office has held that agencies have no such obligation. The record here does not show that the agency considered the protester's price to be excessive or unreasonable. As such, the agency was under no obligation to inform the protester that its price was high in comparison to the price proposed by BTAS. See Southeastern Kidney Council, supra. We therefore deny this protest argument.

CONCLUSION AND RECOMMENDATION

For the reasons discussed above, we conclude that the Air Force's evaluation of BTAS's ECP was unreasonable. We further conclude that MicroTechnologies was prejudiced by this evaluation. Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest. SunGard Data Sys., Inc., B-410025, Oct. 10, 2014, 2014 CPD ¶ 304 at 7-8. Here, the protester submitted the second lowest-priced, technically-acceptable proposal. Because a reasonable ECP evaluation could have resulted in the rejection of BTAS's proposal, we find that the protester was prejudiced because it would be the next offeror in line for award.

We recommend that the Air Force conduct and document a new ECP evaluation, consistent with our decision. We further recommend that, upon the completion of a new ECP evaluation, the agency prepare a new source selection decision. We also recommend that the agency reimburse the protester's reasonable costs associated with filing and pursuing its protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

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