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Decision

Matter of: ViroMed Laboratories, Inc.

File: B-289959.7

Date: December 19, 2003

Thomas L. McGovern, III, Esq., and Michael J. Vernick, Esq., Hogan & Hartson, for the protester.

Walter F. Zenner, Esq., and Matthew H. Solomson, Esq., Arnold & Porter, for Center for Disease Control, an intervenor.

Maj. Robert B. Neill, and Jeffrey K. Reeds, Esq., Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In fixed-unit-price procurement, where record supports agency's evaluation of awardee's proposal as containing a "thorough, comprehensive plan" for performing the solicitation requirements, awardee's low proposed prices to perform two contract line items making up only a small portion of the total contract requirements did not require the agency to downgrade awardee's proposal with regard to understanding the scope of work.
2. In performing price realism analysis under fixed-unit-price procurement, agency has broad discretion regarding the nature and extent of the analysis it performs and, here, agency reasonably found awardee's price realistic where the total proposed prices of protester and awardee were very similar.
3. In establishing the scope of contracts to be considered in the agency's past performance evaluation, solicitation did not place a "premium" on prior performance of large government contracts at military facilities where the solicitation directed offerors to submit past performance information regarding "commercial and/or government contracts," advised offerors that the agency would consider contracts that were not "of the magnitude" being competed, and stating that the agency's past performance evaluation would be based on the agency's subjective consideration of "all relevant facts and circumstances."

DECISION

ViroMed Laboratories, Inc. protests the Department of the Army's award of a contract to the Center for Disease Detection (CDD) under request for proposals (RFP) No. DADA10-01-R-0009 to perform various laboratory testing and related services. ViroMed protests that the agency improperly evaluated CDD's and ViroMed's technical proposals as substantially equal, failed to perform a proper price realism analysis, and failed to properly evaluate the offerors' past performance.

We deny the protest.

BACKGROUND

This solicitation was issued by the U.S. Army Medical Command (MEDCOM) at Fort Sam Houston, Texas in May 2001, seeking fixed-unit-price proposals to perform various blood testing and related services for a base period and four 1-year option periods.¹ The solicitation provided that award would be based on the proposal offering the best value to the government and established the following evaluation factors: technical quality,² past/present performance, proficiency testing,³ financial capability and price. Agency Report, Tab C, at 2. The solicitation advised offerors

¹ This procurement is part of an ongoing Army program to test blood samples drawn from U.S. soldiers. Under the solicitation, the contractor is required to perform various laboratory tests with regard to the human immunodeficiency virus (HIV), measles antibody, human papillomavirus (HPV), varicella antibody, rubella antibody, and the mumps antibody. Agency Report, Tab F, at 1. The solicitation also requires that the contractor provide an automated system to create and store data files, and to securely transfer information to authorized facilities. *Id.* ViroMed was the incumbent contractor at the time the solicitation was issued, and has continued to perform the solicitation requirements during the nearly 2-year period that award has been delayed due to ViroMed's various protests and the agency's multiple corrective actions.

² Under the evaluation factor for assessing technical quality, the solicitation established the following equally weighted subfactors: understanding the scope of work, management capability, and quality control. Agency Report, Tab C, at 2.

³ With regard to this evaluation factor, the solicitation provided that offerors within the competitive range following oral presentations would be required to perform testing on two 20-specimen panels to demonstrate testing proficiency. Agency Report, Tab C, at 5-6. Evaluation of proposals regarding this factor was performed on a pass/fail basis.

that the combined non-price factors would be significantly more important than price. Id.

With regard to price, offerors were required to propose fixed unit prices for each of the contract line item numbers (CLINs) listed in the solicitation schedule.⁴ The solicitation listed estimated quantities for each CLIN,⁵ and total proposed prices were established by multiplying each offeror's fixed prices for each CLIN by the associated quantities for each contract period and summing the results.

Five proposals were submitted by the initial closing date in June 2001. ViroMed, CDD, and a third offeror made oral presentations to the agency in July.⁶ Following oral presentations CDD and ViroMed each performed proficiency panel testing on two 20-sample panels of specimens provided by the agency.⁷ The agency concluded that both offerors' performance regarding the sample test requirements was satisfactory. Agency Report, Tab P, at 3.

Shortly after oral presentations, two members of the agency's technical evaluation team (TET) made an unauthorized site visit to CDD's facility.⁸ Due to this visit, the contracting officer relieved the TET members of their duties and appointed a new TET in December 2001. Agency Report, Tab A, at 2. Thereafter, the new TET reviewed the videotapes of the oral presentations and prepared written discussion

⁴ The solicitation schedule contained the following CLINs: HIV initial screening tests, duplicate HIV tests, HIV Western Blot tests, blood donor confirmatory testing, measles antibody, HPV, varicella antibody, rubella antibody, mumps antibody, and automation support. Agency Report, Tab D, at 1-7.

⁵ HIV-related testing requirements constituted a significant majority of the solicitation's testing requirements. For example, the solicitation estimated that more than 530,000 HIV-related tests would be required during the base period, while only 830 blood bank confirmatory tests would be required. Agency Report, Tab D, at 2-7.

⁶ Two of the five offerors withdrew from the competition prior to oral presentations. The third offeror was determined to be outside the competitive range following oral presentations.

⁷ The solicitation provided that the panels were to be picked up by the contractor on July 11 and returned on July 16. Agency Report, Tab C, at 5. The solicitation also stated: "Test Panel results must be accompanied by a certification, signed by a laboratory supervisor, certifying that the administration of the prescribed tests were accomplished in the precise manner that the offeror would employ in the performance of this contract." Id.

⁸ CDD's facility is located within a few miles of the MEDCOM offices in San Antonio, Texas.

questions for ViroMed and CDD.⁹ ViroMed and CDD subsequently provided written responses to these discussion questions. Agency Report, Tabs, I, J, K. The agency also conducted oral discussions with both offerors. Agency Report, Tab A, at 2-3. Proposal revisions were submitted by both offerors in January 2002. Upon evaluation of these proposals, the agency found them to be substantially equal with regard to non-price factors, and determined that CDD's proposal offered the lowest price.¹⁰ Accordingly, CDD's proposal was selected for award on the basis of its lower proposed price.

Following a debriefing, ViroMed filed a protest with our Office in February 2002. Rather than submitting an agency report responding to ViroMed's protest, the contracting officer advised our Office, by letter dated March 19, 2002, that the agency intended to take various corrective actions, including: requesting CDD to re-present the omitted portion of its oral presentation, performing a new technical evaluation and a new past performance evaluation, and making a new source selection decision. Agency Report, Tab S. The contracting officer's corrective action letter further advised the offerors: "I do not anticipate a new round of discussions. Instead, the agency intends to rely upon the discussions held previously with the offerors." Id. ViroMed did not challenge any aspect of the agency's corrective actions.¹¹

Consistent with the agency's March 19 letter, the agency taped CDD's re-presentation of the portion of its earlier oral presentation that had not been recorded. Thereafter, the TET team re-evaluated the proposals, again concluding that the proposals were

⁹ In reviewing the videotape of CDD's oral presentation, the TET found that the tape contained an 18-minute gap, which appeared to have been caused by someone depressing the video recorder's "pause" button during CDD's presentation. Agency Report, Tab A, at 2. The agency's discussion questions sought information from CDD regarding solicitation requirements that had, apparently, been addressed during the 18-minute period the video recorder had not operated.

¹⁰ ViroMed's proposed price was \$21,994,203; CDD's proposed price was \$21,361,184, approximately 3 percent lower than ViroMed's. Agency Report, Tab P, at 3.

¹¹ As a result of the delay caused by the protest and the agency's corrective action, ViroMed, the incumbent contractor, continued to perform the solicitation requirements.

substantially equal with regard to non-price factors. The results of this evaluation were as follows:

	ViroMed	CDD
Technical Quality		
-Understanding of Work	Exceptional	Exceptional
-Management Capability	Exceptional	Exceptional
-Quality Control	Exceptional	Acceptable
Past Performance	Excellent	Excellent
Proficiency Panel Testing	Passed	Passed
Financial Capability	Sufficient	Sufficient
Price ¹²	\$17,809,189	\$16,855,623

Agency Report, Tabs O, P.

As shown, the only difference in the adjectival ratings assigned to the two proposals occurred under the quality control subfactor. Although the TET rated ViroMed's proposal "exceptional" and CDD's proposal "acceptable" under this subfactor, the team also stated:

Both ViroMed and CDD show a solid [quality control] plan. There are no qualitative differences that would substantiate favoring one vendor

¹² In performing the various corrective actions discussed throughout this decision, the agency's price evaluations appear to assume that the contract performance period automatically decreased to reflect the delay in contract award caused by ViroMed's various protests and the agency corrective actions. Accordingly, although none of the agency's corrective actions included a request for revised price proposals, ViroMed's and CDD's evaluated prices decline under each re-evaluation. Since the solicitation was never amended to reflect a shorter contract performance period, this approach may not have been justified. However, the record is clear--and ViroMed does not dispute--that CDD's proposal offers the lowest price under all of the performance scenarios, including, most significantly, the full performance period stated in the solicitation. In light of our determination, discussed below, that the agency reasonably evaluated ViroMed's and CDD's technical proposals as substantially equal, along with the fact that CDD's proposal was properly evaluated as offering the lower price with regard to any of the evaluated contract performance periods, ViroMed was not prejudiced by the agency's approach. Further, in response to the agency's various corrective actions, ViroMed has never filed a protest asserting that the agency should, additionally, amend the solicitation to reflect a shorter performance period.

over the other. . . . [B]oth are equally suited to perform the proposed testing.

Agency Report, Tab O, at 1.

Upon reviewing both offerors' proposals, the contracting officer similarly concluded there was no substantive basis to differentiate between ViroMed's and CDD's quality control plans, stating:

Both offerors' [quality control] plans completely fulfill the requirements of the solicitation. ViroMed received the higher rating of Exceptional only because it provided more detail than did CDD. Therefore, I do not identify any substantive differences between the proposals and the offerors' ability to successfully perform with respect to this subfactor. Thus, I find that CDD's and ViroMed's proposals are substantially equal with respect to [quality control].

Agency Report, Tab P, at 3.

Overall, the contracting officer concluded that the two proposals were substantially equal with regard to the combined non-price factors and, in July 2002, again selected CDD's proposal for award based on its lower proposed price. Agency Report, Tab P, at 4.

In August 2002, ViroMed filed another protest challenging the source selection decision. In September 2002, following receipt of the agency's report responding to its August protest, ViroMed filed a supplemental protest. In November 2002, our Office conducted a hearing to address various issues raised in ViroMed's August and September 2002 protests, including ViroMed's assertion that CDD's proposal failed to comply with certain solicitation requirements regarding Federal Drug Administration (FDA) licensing and/or registration. Following the hearing, the agency advised our Office and the offerors that it was, again, taking corrective action, specifically stating that it would:

(a) Require proof of FDA blood bank certification from both offerors;¹³ and

¹³ The agency concluded that neither ViroMed nor CDD had previously provided adequate documentation to the agency regarding the solicitation's FDA licensing/registration requirements. Agency Report, Tabs AM, AN.

(b) Re-evaluate the existing final price proposal from both offerors. The re-evaluation shall be based on the existing final proposals.

Agency Report, Tab AI.

Consistent with the agency's stated corrective action, the agency thereafter sought additional information from both ViroMed and CDD regarding each offeror's compliance with the solicitation provisions regarding FDA licensing/registration.¹⁴ Following receipt of additional information from both offerors, the agency determined that both proposals met the solicitation requirements and, in May 2003, again selected CDD's proposal for award based on a determination that the proposals were substantially equal and that CDD proposed a lower price.

On June 2, 2003, ViroMed filed another protest, alleging, among other things, that the agency's price evaluation contained a mathematical error.¹⁵ By letter dated July 9, the agency acknowledged that its price evaluation erroneously included a double counting of one CLIN and also reflected certain "clerical errors." Agency Report,

¹⁴ Again, the delay caused by ViroMed's protest and agency corrective action resulted in ViroMed's continued performance of the solicitation requirements.

¹⁵ In its June 2, 2003 protest, ViroMed, for the first time, asserted that CDD's proposal failed to comply with the solicitation requirement to submit a certification with the proficiency panel testing performed by the offerors in July 2001. As noted above, the solicitation required that the test panel results "must be accompanied by a certification . . . that the administration of the prescribed tests were accomplished in the precise manner that the offeror would employ in the performance of this contract." Agency Report, Tab C, at 6. In its June 2, 2003 protest, ViroMed maintains that CDD could not possibly have complied with this certification requirement since CDD's proposal expressly provided that CDD intended to perform the vast majority of the contract's testing requirements using [deleted] system that CDD had not installed, or even acquired, at the time the July 2001 proficiency panel tests were performed. See Agency Report, Tab AD, at 3 (letter from CDD to the agency stating, "The first of our [deleted] systems will be installed on or about the second week of September 2001.") However, ViroMed's counsel, who were admitted to the protective order for this protest, received all of the information discussed above in the September 2002 agency report that responded to ViroMed's August 2002 protest. Accordingly, to comply with our Bid Protest Regulations regarding timely submission of protest issues, ViroMed was required to identify CDD's alleged failure to comply with the certification requirement no later than 10 days after receiving the September 2002 agency report. Bid Protest Regulations, 4 C.F.R. 21.2(a)(2) (2003). Since ViroMed failed to do so, this matter is not timely raised, and we will not further consider it.

Tab 702. The agency stated that it intended to reevaluate the offerors' existing final price proposals and make a new source selection decision.¹⁶ Id. On August 14, the agency again selected CDD's proposal for award based on a determination that the proposals were technically equal and that CDD proposed the lower price.¹⁷ Agency Report, Tab 706. This protest followed.

DISCUSSION

ViroMed first challenges the contracting officer's conclusion that CDD's and ViroMed's proposals were substantially equal with regard to technical quality, primarily arguing that CDD's understanding of the work and its proposed quality control plan could not reasonably have been evaluated as equal to the incumbent ViroMed's understanding of the work and its proposed quality control plan.

Regarding the evaluation of technical proposals, it is not the function of this Office to evaluate technical proposals de novo; rather, in reviewing a protest against an allegedly improper technical evaluation, we will examine the record only to determine whether the agency's judgment was reasonable and consistent with the solicitation's stated evaluation factors and applicable statutes and regulations. J & E Assocs., Inc., B-278187, Jan. 5, 1998, 98-1 CPD ¶ 42 at 2-3. The protester's disagreement with the agency's judgment does not render the evaluation unreasonable. ESCO, Inc., B-225565, Apr. 29, 1987, 87-1 CPD ¶ 450 at 7.

Here, the solicitation provided that, with regard to understanding of the work, offerors must "[p]rovide a detailed implementation plan describing the strategy for providing timely, effective, and complete start-up," as well as an "outline [of] the

¹⁶ Once again, the delay resulted in an extension of ViroMed's ongoing performance of the solicitation requirements.

¹⁷ On July 24, ViroMed submitted a request that our Office recommend reimbursement of the costs ViroMed has incurred in filing and pursuing its various protests. To the extent ViroMed is requesting reimbursement for costs incurred in response to any protest other than the June 2, 2003 protest, the request is not timely and will not be further addressed. 4 C.F.R. § 21.8. With regard to the agency's correction of mathematical/clerical errors in its calculation of ViroMed's price, the record is now clear that CDD was the lower priced offeror both before and after correction of the errors; thus, ViroMed's identification of this matter in its protest, notwithstanding the agency's decision to take corrective action, was not material to the source selection decision. Accordingly, we do not view ViroMed's protest regarding this issue as being clearly meritorious, which is a prerequisite to our recommendation of cost reimbursement. See, e.g., KENROB & Assocs., Inc.—Costs, B-291573.7, Apr. 25, 2003, 2003 CPD ¶ 99. On this record, we decline to recommend reimbursement of ViroMed's protest costs.

general plan of work [the offeror] plans to follow describing methodologies to be employed [in meeting the performance requirements].” Agency Report, Tab C, at 6-7.

In evaluating CDD’s proposal regarding these solicitation requirements, the agency considered all of the information CDD provided during its oral presentation, as well as CDD’s responses to the agency’s discussion questions, concluding:

CDD’s rating [of exceptional] was based on the presentation of a thorough, comprehensive plan detailing their proposal for initial start up and general plan of work. [CDD] demonstrated a clear understanding of the requirement. This organization is staffed with key personnel having extensive experience in the area of large volume STD [sexually transmitted disease] testing and the security and storage of specimens. Substantial information was provided evidencing the scope of work is well within CDD’s capacity and capability. The plan presented is logical, realistic and well thought out. When implemented a seamless and timely transition is anticipated.

Agency Report, Tab P, at 1-2.

Nothing in ViroMed’s protest identifies any portion of CDD’s oral presentation or its written responses to the agency’s discussion questions that reflects a lack of understanding regarding the solicitation requirements. More specifically, other than ViroMed’s allegations regarding price realism, discussed below, ViroMed’s protest offers no basis to question the agency’s conclusions that CDD’s proposal contained a “thorough, comprehensive [performance] plan,” that CDD’s organization was “staffed with key personnel having extensive experience,” and that CDD’s proposed approach was “logical, realistic and well thought out.”¹⁸

¹⁸ Similarly, nothing in ViroMed’s protest provides a basis for challenging the agency’s assessment that, although ViroMed’s quality control plan contained greater detail, there was nothing in its plan making it substantively superior to CDD’s quality control plan. In this regard, the solicitation required that offerors “[p]rovide an overview of your methodology of identifying, resolving, and preventing quality assurance problems to include documentation, record maintenance and reporting of quality related problems.” Agency Report, Tab C, at 7. As noted above, the agency concluded that both offerors’ quality control plans “completely fulfilled the solicitation requirements.” Agency Report, Tab P, at 3. ViroMed’s protest fails to identify any portion of CDD’s plan that fails to meet the solicitation requirements, nor does it identify any aspect of its own plan that substantively meets or exceeds the solicitation requirements in a manner beneficial to the agency. Accordingly, we find no basis to question the agency’s determination that both quality control plans were substantively equal.

Although ViroMed asserts that the agency's evaluation of technical quality was unreasonable, its criticisms in this regard rely entirely on the assertion that CDD offered unrealistically low prices. Further, ViroMed's assertions do not address CDD's total proposed price—which is very close to ViroMed's; rather, ViroMed's arguments focus on only two CLINs—one requiring blood bank confirmatory testing and one requiring automation support—which constitute only a small portion of the overall contract requirements.¹⁹ In short, ViroMed maintains that CDD's fixed-price proposal to perform these two CLINs at a price lower than the level of costs ViroMed anticipates it will incur in performing these functions required the agency to conclude that CDD did not understand the contract requirements. We disagree.

Based on our review of the complete protest record, including the tapes of CDD's oral presentations and CDD's written responses to the agency's discussion questions, and taking into consideration the relatively small portion of the total contract requirements that these two CLINs represent, we find no basis to question the reasonableness of the agency's assessment regarding CDD's understanding of the contract requirements and its conclusion that the two proposals were substantially equal with regard to technical quality.

To the extent ViroMed's protest asserts that, in evaluating the CDD's proposed price in this fixed-unit-price procurement, the agency was required to evaluate the individual elements of that price in much the same manner it would perform a cost realism analysis under a cost-reimbursement contract, ViroMed's protest is without merit. Where, as here, an RFP contemplates the award of a fixed-price contract and the solicitation provides that the agency will consider the price realism of the proposals it receives, the nature and extent of agency's analysis are matters within the agency's sound discretion, and our review of such an evaluation is limited to determining whether it was reasonable and consistent with the provisions of the solicitation. Rodgers Travel, Inc., B-291785, Mar. 12, 2003, 2003 CPD ¶ 60 at 4; Star Mountain, Inc., B-285883, Oct. 25, 2000, 2000 CPD ¶ 189 at 2.

Here, the agency considered various aspects of both offerors' proposed prices, including a comparison of the two offerors' total proposed prices. On the facts presented here, including the relatively minor portion of both offerors' total proposed prices that the disputed CLINs represent, and the fact that the offerors' total proposed prices were within 2 to 3 percent of each other, we find no merit in ViroMed's assertion that the agency's price analysis was materially flawed.

¹⁹ Specifically, the solicitation contemplated a total of 830 blood bank tests per year, which constitutes less than 1 percent of the total testing requirements. Further, the fixed prices offered by both ViroMed's and CDD's proposals to perform the solicitation's automation support requirements constitute a minimal portion of their total proposed prices.

ViroMed next protests that the agency improperly evaluated CDD's and ViroMed's proposals with regard to past performance. Specifically, ViroMed maintains that the solicitation "plainly placed a premium on an offeror's experience performing large government contracts, especially those performed for military treatment facilities," Protest at 16, and that the agency failed to apply this stated criterion in its evaluation of CDD's past performance. In short, ViroMed asserts that, as the incumbent contractor, it had greater experience in performing large government contracts at military facilities and that any determination that CDD's past performance for purposes of performing this contract was equal to that of ViroMed's was unreasonable. We disagree.

Contrary to ViroMed's assertion regarding the stated evaluation criteria, the solicitation did not "place a premium" on performance of large government contracts performed at military facilities for purposes of evaluating past performance. Rather, in the instructions regarding the type of past performance information to provide, the solicitation directed that offerors "[d]escribe all similar commercial and/or government contracts and subcontracts awarded or performed during the past 3 years." Agency Report, Tab C, at 4. Similarly, the solicitation stated, "If you do not have any government experience, or none of the magnitude set forth in this solicitation, then private sector contracts for similar services which you consider relevant compared with the services required by this solicitation may be submitted." *Id.* at 5. Finally, the solicitation stated that "[e]valuation of past and present performance will often be quite subject[ive] based on consideration of all relevant facts and circumstances. It will include a determination of the offeror's commitment to customer satisfaction." *Id.* at 2. Thus, it is clear the solicitation expressly advised offerors that, in evaluating past performance, performance of both commercial and government contracts would be considered; further, offerors were clearly advised that contracts that were not "of the magnitude" of this contract would be considered; finally, offerors were advised that the agency's evaluation would not be narrowly constrained as ViroMed suggests but, rather, would reflect consideration of all relevant facts and circumstances.

In performing the past performance evaluation here, the record clearly shows that the agency contacted multiple references regarding CDD's past performance. Agency Report, Tab AC. Every one of the references provided positive information regarding CDD's past performance. *Id.* For example, with regard to a contract with Nebraska's Department of Health and Human Services, under which CDD performs more than [deleted] HIV tests annually, the reference stated that "CDD's performance was excellent" and that he "would not hesitate recommending CDD for award." *Id.* at 1. Similarly, with regard to a contract with the Pennsylvania Department of Health, under which CDD processes more than [deleted] tests annually, the reference stated that "[a]ll tasks specified in the contract are carried out exactly as directed by contract specifications." *Id.* at 1-2. Finally, regarding a contract with the federal Centers for Disease Control and Prevention, the reference stated that CDD's staff "exhibited a spirit of teamwork uncommon in most

workplaces,” and that she “would recommend CDD to anyone in need of this service.” Id. at 2.

In short, as discussed above, we reject ViroMed’s assertion that the solicitation’s evaluation criteria regarding past performance required the agency to place a “premium” on past performance of large government contracts at military facilities. Further, as discussed above, the agency’s evaluation record fully supports the agency’s assessment that CDD’s past performance reasonably warranted an “excellent” rating. Accordingly, ViroMed’s protest to the contrary is without merit.

Finally, ViroMed’s protest raised various other issues including the assertion that the agency was required to advise ViroMed during discussions that its price was too high and that CDD’s price proposal was materially unbalanced. We have considered all of ViroMed’s allegations and conclude that none provide a basis for sustaining the protest.

The protest is denied.

Anthony H. Gamboa
General Counsel